



CRIMINAL MISCELLANY

Practice & Procedure

VOLUME - 2

Published by
Bihar Judicial Academy





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BJA INTRODUCTION

Bihar Judicial Academy has been established on the recommendations of the Shetty Commission in order to impart training, inter alia, to Judicial Officers of the State for improving judicial administration and matters incidental thereto. The Bihar Judicial Officers Training Institute, now the 'Bihar Judicial Academy', was established in the year 2003. It has since been regularly organizing and conducting various educational / training programmes to enhance the professional and judicial capability of Judicial Officers and staff attached with the Court System of this State.

The New Campus of Bihar Judicial Academy is situated in an area of about 5 acres comprising Lecture Halls, Tutorial Halls, Conference Hall, Auditorium, Library, Judges' Hostel with 155 Hostel rooms for the participants and research scholars, V.I.P. Rooms and Suits, residential block, parking space, gardens etc.



Criminal Miscellany

Practice & Procedure
(In Two Volumes)

VOLUME - 2



Published by
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Justice
N. V. Ramana
Chief Justice of India

MESSAGE

It gives me immense pleasure to congratulate the Bihar Judicial Academy, and all its members, officers and contributors, on having published the handbook named "Criminal Miscellany".

Criminal jurisprudence has numerous areas which are nascent in India and require extensive research, comparative analysis and rigorous academic treatment to ensure stability and growth in the same. As William Arthur Ward said, "Curiosity is the wick in the candle of learning".

I encourage each and every contributor to this endeavor, in publication of such a comprehensive study on diverging topics in criminal law, especially in the middle of these trying times. I hope this flame of curiosity and learning continues, and more such enlightening and resourceful articles and publication are curated in times to come.

N. V. Ramana
(N. V. Ramana)



Justice
A. M. Khanwilkar
Judge
Supreme Court of India

MESSAGE

In these times of the ongoing pandemic, we have witnessed some unprecedented challenges. With imposition of a nationwide lockdown, daily lives of large number of citizens were affected. Judiciary was no exception to that. In its initial phase, the lockdown had led to slowing down of working of courts pan India.

As Dalai Lama once said, *"Whenever there is a challenge, there is also an opportunity to face it, to demonstrate and develop our will and determination."*

I congratulate Bihar Judicial Academy, who took this thoughtful initiative and converted the challenge posed by the contemporary situation into an opportunity, by encouraging the Judicial Officers of Bihar to utilize the time to research and articulate their work concerning topics of Criminal Laws.

This initiative of Bihar Judicial Academy, inevitably, provided opportunity to the Judicial Officers to refresh their knowledge and enhance forensic skills. That helped in keeping them motivated in the testing times when they were unable to discharge their regular judicial work, despite willing to do so.

I applaud the sincere efforts put in by the Judicial Officers who had voluntarily taken up the task of writing well researched treatises on the selected topics, which will not only be useful for the author, but also to others as a ready reckoner, for future reference.

I also commend the efforts of the Bihar Judicial Academy in compiling the papers written by the Judicial Officers in the form of a handbook, which is bound to encourage them to continue to write on other topics.

I wish all the best to the Bihar Judicial Academy, the Chairman and the Judicial Officers of Bihar for their future endeavours.



(A. M. Khanwilkar)



**Dr Justice
D. Y. Chandrachud**
Judge
Supreme Court of India

MESSAGE

My Dear Colleagues at the Bench,

I am delighted to pen this message in appreciation of your commendable endeavour. In the midst of a massive public health crisis, it is a challenge to retain a semblance of normalcy and routine. It is remarkable that my brothers and sisters at the bench took this disruption in their stride and put together a compilation with their learnings on diverse areas of criminal procedure. The duty of a judge is well-served on a robust foundation of experience, not just of their own- but of the entire judicial fraternity which bolsters knowledge and institutional development through channels such as these.

In these unprecedented times, irrespective of the nature of the emergency- public health, national or financial, the judiciary always has to be alive to issues of personal liberty. It is my firm belief that every judge, at the District Court, the High Court or the Supreme Court, can maintain their independence only by demonstrating a firm commitment to the rights and liberties of a citizen, against the might of the state. For any judge to do so, a robust command over the nitty-gritties of criminal law and awareness of the breadth of their powers, are critical. Some anecdotes of habeas corpus petitions from the emergency era are particularly illuminating. A flagrant abuse of state power was noticed at the time, especially in cases of preventive detention. The fear among the citizenry was also shared by judges who were suppressed and subject to punitive transfers. In spite of

the overwhelming pressure from the executive, judges- particularly from the High Courts, found creative ways to ensure relief to the detenus. Even if bail could not be granted, some aspects of the detenus' lives were preserved by ensuring reading material, access to home food and sufficient visitors. Granville Austin, in his scholarly works on the Indian Constitution, recounted one such example where the court set the date of hearing of two different petitioners who were married on the same day, so that they were able to meet in the Bombay High Court. These reliefs could not have been structured without adequate practical knowledge of remands and discretionary powers.

In times of peace or crisis, a judge's foremost duty is to protect the life and liberty of a person, which is subject to the gravest threat during the criminal trial. A judge must necessarily be adept at all aspects of their duty to ensure the rights of persons, even for the smallest of functions- like summoning a witness, which is a critical cog in the criminal justice machinery. I am impressed by the scope of this compilation which traverses various stages and functions of the criminal process and communicates through accessible language that is grounded in experience. In the spirit of our continuing education, I would also urge my fellow judges to reflect and pen their thoughts on their experiences with criminal justice dispensation over the virtual forums, in this last year. Integrating our pre-existing systems with technology is the future of our justice system and the rights of all stakeholders could be well preserved by critical inputs from judicial officers. I look forward to perusing future publications from the Bihar Judicial Academy,

Best Wishes

Dhananjaya Chandrachud
[Dr Justice Dhananjaya Y. Chandrachud]



Justice
Sanjay Kishan Kaul
Judge
Supreme Court of India

MESSAGE

"Laws are a dead letter without courts to expound and define their true meaning and operation."—Alexander Hamilton

The objective and independent interpretation of the law is one of the courts' foremost duties. Without such interpretation, the gap between the letter of the law and justice cannot be bridged. This exercise takes on a more challenging form in the field of criminal law. While interpreting criminal law, a judge has to maintain a very fine balance between the rights of the accused and the wellbeing of society at large. Criminal procedure is to be seen both, as a shield - to protect those victimized - and also a sword - to hold perpetrators to account. This complex task has to be undertaken with utmost care and caution, and also with the stark awareness that often these penal laws can be utilized by those in power to silence voices; or can be circumvented by those with capital.

Judges have to stand in the way of such misuse of the law, and for that they have to be well versed not only with what the law says, but how it has been interpreted - and how it has to be applied. Each judge, from the Magistrate's Court to the Supreme Court, bears the responsibility of protecting the liberty of the one accused, and providing to the one victimized.

This thoughtful handbook, *Criminal Miscellany - Practice and Procedure* will be a critical instrument in the toolbox of judicial officers tasked with this herculean challenge. Unlike other textbook, it does not merely survey the sections of the

existing criminal laws, but tackles core issues that arise in the practice of criminal law from the Bench's perspective. It connects the letter of the law with precedents and with the best procedure to be adopted in order to operationalize criminal procedure in an optimum manner. I glean from this comprehensive compilation of 52 essays a set of legal and scholarly arguments and intimations.

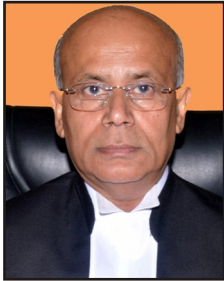
Addressing *inter alia* the important fundamentals of remand of the accused, bail as a right versus bail on merits, production of the accused; emerging issues of assessing electronic and forensic evidence, compensation schemes for victims and in-camera trials, each section painstakingly reconstructs the legal position. Through its detailed yet concise treatment of these topics, the book will be both, a guiding light for those new to the Bench as well as a ready reference for experienced judges.

I congratulate the Bihar Judicial Academy for fostering, supporting and putting together this volume, and especially appreciate the judicial officers who, alongside grappling with the challenges of the pandemic and virtual courts, managed to put careful consideration and time into this handbook. I am certain that this will be a glowing addition to the libraries of many and set the right precedent for academic rigour in our Judicial Academies.



Sanjay Kishan Kaul

New Delhi



**Justice
Navin Sinha**
Judge
Supreme Court of India

MESSAGE

Dear Brother Singh,

I have glanced through the "Criminal Miscellany" prepared by the Bihar State Judicial Academy to enhance the legal skills and acumen of Judicial Officers. It is quite elaborate, informative and also provides guidance. I am very sure it will be immensely helpful to the Judicial Officers, especially the new entrants and even to refresh the thinking and doubts of the experienced.

The efforts put in by the Judicial Officers in contributing articles is indeed commendable. Such articles prepared by Judicial Officers not only are beneficial to the institution, but it also enhances the knowledge, skill, confidence and morale of the Judicial Officer himself who undoubtedly has to put in large research in preparing the article. Ultimately, it aids in dispensation of justice. It also motivates other Judicial Officers by example. Furthermore, it constitutes very good training material.

The initiative taken by the Academy under your guidance has to be appreciated, and I am sure that the Academy will organise more such events and programs to bring out the hidden talents of the Judicial Officers in the Bihar Judicial Service, which is best epitomised by the logo of the Academy quoting 'Tom Hopkins'. Incidentally, I may mention that the quote was my contribution as the Chairman of the Academy on the launch of the website of the Academy.

With warm regards

Your sincerely.


(Navin Sinha)



**Justice
Indira Banerjee**
Judge
Supreme Court of India

MESSAGE

I congratulate the Bihar Judicial Academy for bringing out, "Criminal Miscellany: Practice and Procedure", a comprehensive ready reckoner, which covers the entire gamut of the law of criminal procedure succinctly, in a simple and lucid style.

I have cursorily perused the two volume publication, covering over 50 topics, ranging from First Information Reports and Complaints to the disposal of criminal cases, including criminal trial and sentencing principles. The work exhaustively covers the nitty-gritty of criminal procedural law including remand, bail, the securing of attendance and other core issues. Unlike usual handbooks, this publication does not simply extract and paraphrase the provision of statutes. The law has been well analysed with notable precedents. The discussion on trial and recording and appreciation of oral evidence, particularly the evidence of the child witness, the deaf and dumb witness, etc., the challenges of electronic evidence, the nuances in the law relating to confessions, dying declarations, expert opinions etc. as also relatively modern issues such as DNA analysis, Narco analysis, brain mapping and the like, makes this publication unique.

The publication will be a valuable addition to any law library and be of immense use to Judges of all Courts dealing with criminal matters, be it the Court of the Judicial Magistrate, the Session Court, the High Court or the Supreme Court, as also to students of law and lawyers, not only in Bihar, but all over the country.

Kudos to the initiators, exponents and the contributories of this two-volume work for their exemplary achievement in difficult time, when all attention was focused on coping with the challenges posed by the global Covid-19 pandemic, which had gripped our country. The publication is "worth its weight in gold" for the training of newly appointed Judicial officers as well as other crusaders of equal justice, attached to the authorities constituted under the Legal Services Authorities Act, 1987, zealously striving, whether as Counsel or as Amicus Curiae, to uphold the non-negotiable Fundamental Rights to Equality, Life and Personal Liberty, amongst other, specially of the marginalized and under-privileged sections of the society. The publication will certainly help enhance judicial excellence and expedite delivery of justice, so that the guilty are within a reasonable time frame, punished and the innocent are not arbitrarily deprived of freedom, or denied fair trial.

I wish the publication a grand success.



(Indira Banerjee)



**Justice
Vineet Saran**
Judge
Supreme Court of India

MESSAGE

It is heartening to know that Bihar Judicial Academy is contemplating to publish a handbook on Criminal Law, titled as "Criminal Miscellany".

It is extremely noteworthy that the judicial officers of the Bihar Judicial Academy used the lockdown period and came out with a very useful and informative work, which is the best example of turning bane into boon.

I have no doubt that this handbook will be immensely helpful for legal fraternity and will surely enhance their legal acumen. I congratulate the entire team for their sincere efforts in bringing out this handbook in an impressive manner and wish them all success in their future endeavour.


(Vineet Saran)



**Justice
Hemant Gupta**
Judge
Supreme Court of India

MESSAGE

The initiative of the Bihar Judicial Academy in publishing a handbook of Criminal Law called "Criminal Miscellany" is laudable. Accessible literature on criminal law is necessary to create awareness in the legal fraternity and general public alike though this Hand Book is designed particularly for the Judicial Officers.

Criminal Law in India requires reading of different laws in conjunction with each other. To top it, there are numerous new laws enacted and existing laws amended. Developing a concise handbook for easy reference by the judicial officers will be instrumental in saving time. Keeping up with changes in law and even recalling many judicial pronouncements is extremely important for Judicial Officers, this is where handbooks become of vital importance. A well drafted handbook can become an important piece of literature in a lawyer's arsenal. Legal education is an everlasting process, no matter how many years one spends in this profession, every day is a day to learn something new or recall something old.

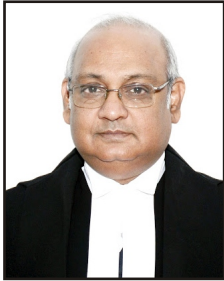
It is a matter of pride that the Bihar Judicial Academy has put in the time to collate vast information and present it in an easily accessible format. The efforts of the members of the Bihar Judicial Academy will ultimately be beneficial to the entire legal fraternity.

Initiatives such as these ensure that the knowledge of law is consistently updated and kept in line with the objective of judicial academies of encouraging excellence in legal education.

I congratulate the Bihar Judicial Academy particularly the young energetic judicial officers who have developed this Hand Book. I hope that this would be used by the Judicial Officers in the Country as problems faced by them are common. I would like to add a caveat. The Judicial Officers should continue to update their legal knowledge and this Hand Book be taken as first step to administer justice to the thousand of suffering humanity who have faith in the administration of justice in our country.



(Hemant Gupta)



Justice
Dinesh Maheshwari
Judge
Supreme Court of India

MESSAGE

The pandemic and the measures taken to deal with the challenges thrown by it have indeed brought about a host of changes in the way we are now interacting with the environment, nature and, of course, with each other. The year 2020 has already redefined several of our ways of life and, even when the current likelihood of second wave is ringing alarm bells, humanity has come together to battle this virus while finding new ways to ensure sustenance as also growth. The norms of precautions and cautions have never stopped the equations of motion; we have found and shall keep on exploring new ways to study, play, plan and work. In this very sequence, Indian Judiciary, with its avowed objective of ensuring justice to all, has been tirelessly working to evolve the means and methods so that, even when people may not be accessible, justice remains so. We have rushed to make sure that the doors of Courts remain open, even when people need to shut theirs.

When attending on any challenging task, our officers of subordinate judiciary, obviously, deserve a special mention who not only form the foundation of the entire framework but who also incessantly attend on their duties with sheer dedication and commitment.

In the given backdrop, it has been a matter of immense satisfaction to learn that, even when the initial phases of this pandemic forced several callings to hunker down, the Bihar Judicial Academy made constructive use of time and endeavoured to up-skill their Judicial Officers by encouraging them to contribute write-ups on variegated topics pertaining to criminal justice delivery system. This

initiative by the Bihar Judicial Academy has resulted in as many as fifty-two insightfully detailed and delectably presented articles and research papers which are now proposed to be published as "Criminal Miscellany" in two volumes.

Having glanced through the compilation proposed to be published, I wholeheartedly compliment the learned Judicial Officers who have enriched themselves while preparing these articles/papers on mundane as also exotic areas of their own concern; and who have shared their hard work for the benefit of the other members of fraternity. This Miscellany, carrying wide range of topics on the law of criminal procedure and significant sub-topics related with taking and appreciating evidence, I am sure, shall be of immense utility for all the role-players in criminal justice delivery system.

I would not only anticipate this publication to be a great success but would add on to wish that this Miscellany be the foundation stone for many more utility publications of the like nature by the Bihar Judicial Academy.



(Dinesh Maheshwari)



**Justice
Sanjiv Khanna**
Judge
Supreme Court of India

MESSAGE

At the outset, I commend the Judicial Officers of Bihar for transforming times of *adversity*, such as this pandemic, into an *opportunity* for learning and sharing their wisdom with others. One thing that COVID-19 has impressed on us is the unceasing need for the legal fraternity to adapt, reform, and re-invent—and so must our knowledge base with the transient times. It was a pleasure to learn that the Officers have sought to refresh and enrich their skill through rigorous research, and robust communication – two pivotal aspects of our profession.

In any profession, and particularly in the legal realm, learning from peers – in the form of experiential channels of conferences, seminars, and court proceedings, as well as by means of sustained academic engagement – cannot be emphasised enough. When I ponder over the importance of continued learning and, more so, of gathering insight from varied sources, I am reminded of a verse from the Mahabharata which states that a fourth of our learning comes from the teacher, a fourth gathered with our own intelligence, another quarter of knowledge is obtained from peers, and the last portion is derived from time.

A robust peer-group is a catalyst for self-improvement. The spirit of competition that it instils propels us to polish our intelligence, awareness, and skills, and also prevents a sense of complacency from taking over. It affords us an opportunity to revise and rectify our notions and practices. It gives us an insight into how others think and grapple with the quandaries of law and society, in turn, teaching us the

best practices of the profession. Needless to say, sustained learning inculcates in us a sense of humility. And lastly, it also ensures that we preserve the much-glorified dynamism of the legal profession and do not fall into the depths of stagnation.

Academic literature of such value is a reflection of the traditions of Nalanda and Vikramshila, and this publication would further illuminate the same. I congratulate the Bihar Judicial Academy for taking the initiative to publish this handbook. I am certain it will encourage our judicial officers to further contribute to legal scholarship, and contribute in the development of a more erudite, zealous and humble professional community.



(Sanjiv Khanna)



**Justice
Surya Kant**
Judge
Supreme Court of India

MESSAGE

I am delighted to know about the proposed hand book - "*Criminal Miscellany*", comprising articles authored by as many as fifty two Judicial officers of the State of Bihar. This comprehensive project in the middle of a devastating global pandemic, is an apt embodiment of the need of continuing legal education and the importance of good legal writing.

The hand book appears to be an absorbing work which collates both the existing jurisprudence surrounding various procedural aspects of criminal law and hopefully also explores the contemporary debates surrounding the rising role of electronic evidence and medical testimony.

Though the articles compiled in this hand book might be predominantly based upon the procedure and practice prevailing within the State of Bihar, yet the lessons gleaned in this compendium would no doubt be of tremendous use for the practitioners and students of law alike, throughout India.

This is the most opportune time to motivate the writers on the importance of art of legal writing. Of all the stakeholders within the legal system, legal writing is most critical for the judges. Unlike advocates and parties - who can rely upon oral advocacy, writing is the sole method of public communication for adjudicators. Words which might sound appropriate when spoken or mentally visualised often appear very different when penned down. Besides, a reader is a far more

intimidating critique than a listener, as he can read, re-read and analyse the written words with a toothcomb.

The language of the law, and particularly of judgements - must be accessible to litigants, and should communicate the point effectively. Judges must be consistent, holistic, and balanced in their writing - even at the cost of being monotonous.

The extensive efforts gone into the writing of this miscellany will surely enhance predictability, discipline and order. The present project would thus go a long way in nurturing the research and critical thinking capabilities of our judges, and must rightly be lauded.



(Surya Kant)



**Justice
Aniruddha Bose**
Judge
Supreme Court of India

MESSAGE

The publication of the handbook on Criminal Law by the Bihar Judicial Academy is a welcome step and I am sure this would be of great help to the Judicial Officers not only of the State of Bihar, but of other States and Union territories of our country as well. The handbook has been structured well and covers the procedural aspects of criminal jurisprudence exhaustively. The individual contributors of this volume and the Academy as the institution who have produced the same deserve commendation for this unique and innovative work. I hope there would be more works of this nature covering other areas of law from the Academy.



(Aniruddha Bose)



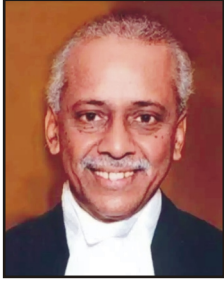
Justice
S. Ravindra Bhat
Judge
Supreme Court of India

MESSAGE

I have briefly glanced at the "Criminal Miscellany Practice and Procedure" published by the Bihar Judicial Academy. The title "Criminal Miscellany", to my mind, is misleading because the contents are completely comprehensive of the sheer breadth of the book's content. I notice that the work covers 52 distinct topics—comprehending almost all subjects of Criminal Procedure which are of common material significance to Judge entrusted with jurisdiction over the subject matter. Apart from the entire life cycle of a criminal proceeding—starting with the lodging of the FIR and ending with the judgement, other useful topics, such as procedure for electronic evidence, expert evidence, narco analysis, DNA tests, significance of expert evidence, evidentiary value with respect to the deposition of child witnesses, Court's powers under Section 165 Evidence Act, sentencing principles and other topics of special interest are dealt with.

I am confident that this two volume work will be of immense use to Judges and lawyers not only in Bihar but all over the country and would be a readily available reference material. I would wish the publication all the success.

(S. Ravindra Bhat)



Justice
V. Ramasubramanian
Judge
Supreme Court of India

MESSAGE

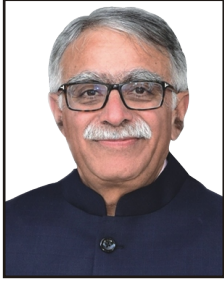
I am happy to see that the Judicial Officers of Bihar and the Bihar Judicial Academy have made good use of the lockdown to come up with the handbook "***Criminal Miscellany***". A look at the variety of topics on which the Judicial Officers have contributed articles and the contents of these articles show the prowess of the Judicial Officers and their academic bent of mind.

Life is a continuous process of learning. As Will Durant put it, "*education is the progressive discovery of one's own ignorance.*" Such a realisation is a must for everyone and more particularly for Judicial Officers.

I am happy that under the stewardship of the Chief Justice Mr. Sanjay Karol and the Chairman of the Board of Governors of the Bihar Judicial Academy, a fruitful exercise was undertaken by the Judicial Officers under the able guidance of the Hon'ble Judges of the High Court.

I congratulate everyone of them for this great endeavour.

(V. Ramasubramanian)



**Justice
Sanjay Karol**
Chief Justice
Patna High Court

MESSAGE

Knowledge is not a cloistered virtue; its object and beauty lie in its spread. It gives me immense pleasure to pen down this message to publish "Criminal Miscellany: Practice and Procedure" by the Bihar Judicial Academy, Patna. My compliments and accolades to Brother Justice Ashwani Kumar Singh, the sole architect of this enterprise.

Non-compliance with substantive and procedural laws has failed justice more often than not. The justice delivery system contemplated under India's Constitution and, more specifically, Article 39-A, should be not only just, fair, transparent but totally in accordance and in compliance with the rule of law. There are copious amounts of literature about the relationship between the rule of law and its relationship with substantive and procedural law. Still, as noted jurist Jeremy Waldron puts it, it is distressing how little attention is paid to the 'procedural aspects' of the rule of law instead of its substantive nature.

In the pursuit of justice, a common man is often left dazed and confused by the need to successfully navigate the various procedures laid down, before the aims and object expressed in the substantive law are achieved. The picture is no less good, even with the persons associated with the justice delivery system. It is with this attempt to simplify and explain with clarity, in a step by step manner, a big endeavour in the right direction stands taken by Brother Justice Ashwani Kumar

Singh, currently holding a dual charge of the Bihar Judicial Academy and the Juvenile Justice Secretariat of the Patna High Court.

The previous year on account of Pandemic COVID-19 has posed challenges and restrictions on one and all. To put this document together while dealing with the unique challenges that we have been facing is commendable. The Criminal Miscellany-Practice and Procedure is a document that may be used as a blue print for other laws and make access to justice a reality for all, as provided for in our Constitution. Only when we will take continued strides towards legal awareness will we be able to fully embrace the spirit of our founding document.

The Bihar Judicial Academy and the Juvenile Justice Secretariat to the Patna High Court have my heartiest congratulations for completing this mammoth task.



(Sanjay Karol)



**Justice
Ashwani Kumar Singh**

Judge
Patna High Court-cum-
Executive Chairman
Bihar State Legal Services Authority
Budh Marg, Patna

FOREWORD

The outbreak of the COVID-19 pandemic has shaken the entire globe with uncertainty looming large and has begotten unforeseen challenges and disquieting disturbances hugely disrupting our daily lives. It has led to a huge loss of human life worldwide and has presented an unprecedented challenge to the humanity.

The judiciary could not be an exception. Since the announcement of the national lockdown, the number of functional courts in our country was reduced to a minimum to deal with only urgent matters. Needless to say, the cascading effect caused by the pandemic and the consequent lockdown posed an arduous challenge to the judicial officers of the Bihar Judiciary as they were compelled to part with their daily routine of dispensing justice from the courtrooms. However, it also provided an opportunity to the judicial system to equip itself with modern tools and techniques and use them for rendering justice as far as it was practicable.

Albert Einstein rightly said, "In the middle of every difficulty lies opportunity". The 'Criminal Miscellany – Practice & Procedure' in two volumes is a befitting example to vindicate what Einstein had said decades ago.

This pandemic has taught us all that mass hysteria, distress, loneliness and anxiety promote negativity, paranoia and fear, which could potentially be even more detrimental in the long run than the virus itself. In order to positively channelise these emotional reactions an idea had come in my mind of engaging judicial

officers in academic activities in addition to their daily court work so that they could worry less about things that were out of their control and shift their energies to what they could collectively create. In this regard, I also discussed with two judicial officers posted in the Patna High Court Registry namely Mr. Arun Kumar Jha, Registrar(Appointment) and Mr. Suvash Chandra Sharma, Additional Registrar, Juvenile Justice Secretariat, Patna High Court.

It was decided to invite articles from judicial officers willing to conduct in-depth research on various issues related to criminal law. Within a week, the topics were finalized and both these officers of registry had started interacting with the judicial officers posted in different judgeships for submissions of the articles on the topics assigned to them. Accordingly, all the topics were distributed amongst the willing judicial officers of different cadres posted at various places. This is how the journey of this 'Criminal Miscellany- Practice & Procedure' started. The judicial officers who took up the task of authoring submitted the articles in June 2020 and July 2020. The articles so submitted were noticed to be of immense utility in day to day functioning of not only the judicial officers but also to the lawyers, law students and litigants. Hence, an informal decision was taken to publish these articles in the form of a book that would serve as a guide and be of interest to all the stakeholders including the students of law.

Thereafter, a suggestion came from Mr. Suvash Chandra Sharma to get these articles scanned for plagiarism to ensure that they were original works before proceeding for its publication and offering it for public consumption. Accepting his suggestion, I requested the then Chairman of the Bihar Judicial Academy, Brother Justice Shivaji Pandey to utilize the facility available with the academy for obtaining a license of an authenticated plagiarism checker. As usual, his Lordship responded promptly by directing the Academy to immediately procure the software to verify the originality of the submissions. The articles were scanned for plagiarism and, thereafter, the reports were shared with the respective authors to cite appropriate references in their work, wherever required. By the end of January 2021, we had received the final drafts of the articles which were again reviewed.

With the change of time, I came to be nominated as Chairman of the Academy when I had the opportunity to discuss these developments with Hon'ble the Chief Justice, Mr. Sanjay Karol, for his guidance. His Lordship displayed keen interest,

encouraged the entire exercise and suggested posting of notice on the website of the Bihar Judicial Academy calling the judicial officers to submit articles on any of the shortlisted topics. Accordingly, the same was done and positively responded by two young probationer judicial officers. Subsequently, the issue of publication of the articles in the form of book was placed before the Board of Governors of the Bihar Judicial Academy, where it was unanimously approved. I pause here to express my deep gratitude to Hon'ble the Chief Justice who was kind enough to immediately approve the idea of publication of these articles in the form of a handbook and this 'Criminal Miscellany- Practice & Procedure' was sent for publication.

The contents of this handbook are under fifty-two heads relating to criminal trial and other incidental practice and procedure related to it. Under criminal law, the criminal proceedings are set in motion either by the institution of a First Information Report before police or by filing a criminal complaint case before a judicial magistrate. The topics were therefore selected starting from the summoning of an accused, their appearance, remand, bail, connotations of proper search and seizure, the release of property, sanction for prosecution, cognizance, dying declaration, test identification parade, confessions, the relevance of inquest and post-mortem report, framing of charge & discharge, disposal of cases without a full trial, methods of recording evidence, the conception of legal evidence, the jurisprudence of circumstantial evidence, expert's evidence, ocular evidence, sufficiency and quality of evidence, electronic evidence and its mode of proof, appreciation of evidence, the relevance of conduct of an accused during trial, non-examination of important witnesses and its consequences, presumptions in a criminal trial, aspects relating to 311 Cr. P.C and 319 of Cr. P.C., issues relating to criminal assault against women, scheme of compensation, sentencing policy etc.

When the book took its final shape, we perceived that there are still some untouched topics in criminal law that can be supplemented here. Therefore, we will use our best endeavours in the future to introduce the third volume of this 'Criminal Miscellany', wherein we will try to include those topics which could not be included in these two volumes.

During the preparation of both the volumes of this 'Criminal Miscellany- Practice & Procedure' the officers of Registry namely Mr. Arun Kumar Jha, Registrar

(Appointment); Mr. Suvash Chandra Sharma, Additional Registrar, Juvenile Justice Secretariat, Patna High Court and the Officers on Special Duty (OSDs) posted in the High Court namely Mr. Akshay Kumar Singh, Mr. Md. Rustam, Ms. Namita Singh and Mr. Saurabh Singh, Research Officer, Juvenile Justice Secretariat have extended their unwavering support. Besides them, the Officers of the Directorate of the Bihar Judicial Academy namely Mr. Jitendra Kumar, Former Director and Presently District & Sessions Judge, Gaya; Mr. Ankur Gupta, Deputy Director, Ms. Seema Kumari, Assistant Director (Research & Training) and Ms. Saba Alam, Assistant Director (Research & Training) have also co-operated to their best, especially for proofreading these articles. I am thankful to all these officers for bringing the idea of this handbook into a reality. My special thanks to all the judicial officers who submitted their articles during the lockdown period with minimum resources, giving their best to this project.

I firmly believe that this effort of the judicial officers of Bihar will facilitate peer to peer knowledge sharing and motivate them in future to take up assignments that would allow them to address complex legal issues and academic debates existing on such issues while enhancing their legal understanding.

Thank You!



Ashwani Kumar Singh



**Justice
Vikash Jain**
Judge
Patna High Court-cum-
Chairman
Bihar Judicial Academy

MESSAGE

“The life of the law has not been logic: it has been experience.”

- Oliver Wendell Holmes, Jr., Justice of the United States Supreme Court

These words of wisdom by Justice Holmes spoken nearly a century and a half ago, ring true even today, in fact more so than ever before, due to the unprecedented situation of the pandemic we are faced with now. The law, as we know, is constantly evolving and adapting to the changes over time, and, as its guardians, we must not be restricted by cold logic alone, rather we must use our lived experience to ensure justice is delivered to all who seek it. The judiciary must fulfil its role as one of the pillars of democracy. This mandate has been given to the institution by the “Paramount Parchment”, as Justice Krishna Iyer famously referred to our Constitution.

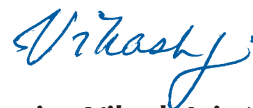
Changes in the law evolving from the experiences of no less than 52 judicial officers from various District Courts in Bihar have been encapsulated in this two-volume set entitled “Criminal Miscellany” running into over 1600 pages. This set of tomes is not just a random collection of articles, but one which enshrines knowledge gleaned over years of study, debate and learning. The thoughtful and well-curated selection touches upon almost all the aspects of criminal law, with special emphasis on criminal trial and ancillary proceedings. The process of criminal trials, beginning with the filing of a First Information Report or a criminal complaint, and leading up to the final disposal of the matter including sentencing

and compensation, has been duly incorporated. Having gone through the Criminal Miscellany the reader will emerge with a sense of deep fulfilment at having gained valuable knowledge and would come away much the wiser.

This comprehensive work will have great practical impact, serving as a beacon to guide judicial officers in discharge of their duty of dispensing justice. It will also, without doubt, serve as an indispensable ready reckoner for information about the stages of criminal trial, and as such, an invaluable resource for all those interested in the niceties of criminal procedural jurisprudence. Thus, it is bound to appeal to a large cross-section of the legal fraternity including judges, judicial officers, lawyers, academicians, researchers and law students alike. The compendium shall surely create a tremendous impact in the field of criminal jurisprudence.

All credit for conceptualising and bringing out the Criminal Miscellany unreservedly goes to Brother Justice Ashwani Kumar Singh, my predecessor as Chairman of the Judicial Academy and the driving force behind this project. His single minded determination and flawless execution of this vision has made this endeavour a grand success. The Judicial Officers who have eagerly contributed the articles, putting complete mind and soul into their work, deserve praise.

In conclusion, I quote the words of Lord Denning, "A country can put up with laws that are harsh or unfair so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness : but a country cannot long tolerate a legal system which does not give a fair trial". I do believe that not only are the laws fair and the judges just in our country, but also that our legal system gives a fair trial. The Criminal Miscellany goes a long way in strengthening this belief.



(Justice Vikash Jain)



**Justice
A. P. Sahi**
Director
National Judicial Academy

MESSAGE

Encouraging people to express themselves is to provide an opportunity to them to engage in a dialogue. The inevitable result is the shaping of ideas and shaving off of prejudices which is a step towards excellence and improvement of the quality of human life. The attempts made through this method in the manifestation of this "Criminal Miscellany" is an illustration of how success can be strengthened through improvisations and a better understanding of the system. It is said that there are too many slips between the trial lip and the appellate cup arising out of the shortfalls in investigations, the gap between direct evidence and oral testimony, the unwanted contradictions, the missing links and the tardy rigmaroles posed as obstructions by the members of the legal profession and then finally the conclusions drawn by the court amidst such diversions. Lack of infrastructure, expertise, adequate training and improper assessment are also attributes that delay the dispensation of justice. Non-cooperation of witnesses and a lethargic casual approach diminishes effectiveness qualitatively. On the other hand alert minds at all levels reduce the burden of procedural hiccups and the practical cognitive approach smoothenes the process. A realistic outlook assists the power of reasoning to adopt a pragmatic view to realize the goal of justice.

This understanding of the system from different point of view helps in shedding off pretense, prejudices and ignorance because of the unique methodology deployed by obtaining independent opinion from across the judiciary on a voluntary willing basis. The consolidated views individually expresses a rainbow with many commonalities but with different impacts and reactions. Some of the suggestions

are rare and some are revolutionary. The system of getting together food for thought is unique as it will go a long way to keep one abreast of contemporary views for a better visionary approach for the future. It is the droplets that fill the urn. Even small ideas change civilization. The tool of imagination, coupled with experience can display a canvas of original ideas and that is what is evident from this beautiful anthology of practical legalistic thoughts.

The learning and experience of the Judicial Officers from the entire State Judiciary represented through 52 topics are illustrative of the qualitative contents thereof and also reflect the keen legal acumen of some of the best officers of the State. The meticulously detailed deliberations are a wonderful almanac for Judges and Lawyers alike so that none of them miss the finer points of trials covering criminal trials as proceedings involving civil disputes with criminal implication. It also boosts the confidence of officers engaged in this onerous job.

When I came to know of this unconventional method of collecting and collating views, I was also reminded of the importance of the procedure of trials and its impact on the proceedings, but more importantly the need to get feed-backs through staff meetings and meaningful inspections. An illustration of immaculate trial procedure is the case of Ajmal Kasab, that was complimented by the apex court reported in 2012(9) scc Page 1.

I take this opportunity to congratulate Justice Ashwani Kumar Singh and his entire team who mooted this idea and motivated young Judges of the subordinate judiciary to share their views so elaborately covering some substantial areas of procedure and short comings to be remedied through suggested ways.

I hope that this monumental compilation will be a source of judicial strength for all officers and the work shall be well received by all concerned to be preserved for posterity.


(Justice A. P. Sahi)



Jitendra Kumar
District & Sessions Judge,
Gaya
Former Director,
Bihar Judicial Academy

MESSAGE

District Judiciary is the backbone of our judicial system. The edifice of the administration of justice rests upon the shoulders of the district courts as most of the cases stand closed at their level with only few people affording to move higher and appellate courts.

Here it would be pertinent to quote legendary Justice V. R. Krishna Iyer who said, "The vast masses of the people cannot reach the highest court nor have easy access to the legislators. It is the court, the trial court, into which the common man can walk and seek justice. It is the trial court which dispenses justice to the little Indian and so, in the administration of justice, functionally speaking, pragmatic importance rests with the trial court. . ."

As such, there is onerous responsibility upon the District Judiciary to provide justice to the teeming millions by protecting their life, liberty, property and all other rights as granted and guaranteed by our constitution and the law of the land and such responsibility can get discharged only when the cases are not only "disposed of" but "decided" timely and qualitatively despite challenges of huge pendency of the cases.

The present handbook on Criminal Trial, namely, "Criminal Miscellany : Practice & Procedure", is a humble effort to provide timely and quality justice to the people. It is a compilation of the write-ups contributed by judicial officers of the state covering various facets of criminal trial with in-depth analysis of the statutory provisions and citation of various relevant case laws. I hope the handbook would contribute to the robust functioning of the district courts and prove to be an efficacious tool into the hands of the judicial officers to deliver timely and quality justice to the needy.

All the articles of the book have been written during the lockdown period arising out of the Covid-19 Pandemic. Hon'ble Mr. Justice Ashwani Kumar Singh, Judge of Patna High Court and Former Chairman of the Academy mooted the idea of the book for private circulation to utilize the time of the judicial officers and strengthen the district judiciary. His lordship kept the willing judicial officers motivating, inspiring and guiding throughout the period to complete their articles with quality and substance. The idea of the book was fully supported by Hon'ble the Chief Justice, Mr. Justice Sanjay Karol and all other Hon'ble judges of Patna High Court including Hon'ble Mr. Justice Vikash jain, Judge of Patna High Court and presently Chairman of the Academy in the interest of district judiciary. My sincere gratitude to their lordships.

With regards.



(Jitendra Kumar)



Alok Kumar Pandey
Director
Bihar Judicial Academy
Gaighat, Patna

MESSAGE

धीरज, धर्म, मित्र अरु नारी । आपद काल परखिए चारी ।

The Covid-19 pandemic put to test the resilience of our Judicial system. When the life of the people was hit by Covid -19 pandemic, our Judicial system quickly adapted itself to ensure that the pandemic does not deprive the people of access to Justice. *Criminal Miscellany: Practice and Procedure* was one of the ways by which Bihar Judicial Academy, under the guidance of Hon'ble Patna High Court, tapped the potential of judicial officers of the state by inviting them to research on 52 topics covering diverse aspects of criminal trial.

The Academy is a melting pot where ideas converge and experiences are shared. In this process the seminal contributions of distinguished authors which were curated in *Criminal Miscellany : Practice and Procedure* will forever act as pole star for travelers in pursuit of knowledge. The seminal contributions are embodiment of erudition, experience and energy.

I am reminded of Gurudev Rabindranath Tagore's quote "Faith is the bird that fills the light and sings when dawn is still dark." The pandemic which stirred unbearable pain from plain to plateau could not deter the Pen, human courage and indomitable will of mankind. The active participation of judicial officers in preparing criminal miscellany during Covid period is a classical example of this indomitable spirit.

Once Pablo Picasso said, "I am always doing that which I cannot do, in order that I may learn how to do it." A director of an Academic institution is always duty bound to learn the ropes, and in the process he becomes a weaver, a charioteer. This handbook presented me with an opportunity to play this role to the best of my

capabilities for which I am thankful to all the officers who have contributed their write-ups for the book. The comprehensively discussed topics will immensely benefit all judicial officers in their discharge of duty.

The last spurt in a sprint is the most vital. I will be forever indebted to Hon'ble Mr. Justice Vikash Jain, Judge Patna High Court cum Chairman Bihar Judicial Academy for graciously taking forward the task of giving final shape to the book and for guiding me in its publication.

I would also like to express my sincere gratitude to Hon'ble Mr. Justice Ashwani Kumar Singh, Judge, Patna High Court cum Former Chairman, Bihar Judicial Academy who conceptualized the idea of the book and motivated the officers to contribute to this seminal work. His Lordship was gracious enough to recommend that the Handbook be made available to all the stakeholders, be it Judicial officers, Advocate or common man. His Lordship personally guided everyone involved in the publication of the book at every step for which we will be eternally grateful.

This endeavour could not have been made a reality without the constant support and blessings of Hon'ble Mr. Justice Sanjay Karol, Chief Justice Patna High Court cum patron in Chief, Bihar Judicial Academy. We were also blessed with guidance of all the Hon'ble Judges of Patna High Court in publication of this book for which we are indebted to Their Lordships.

We have been privileged enough that our humble endeavour was blessed by the thoughtful message of Hon'ble Mr. Justice NV Ramana, The Chief Justice of India. His Lordship's message has turned this book into a legacy to be cherished forever.

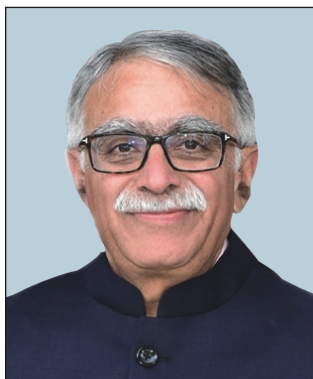
We are highly obliged to Hon'ble judges of Supreme Court-, Hon'ble. Mr. Justice A. M. Khanwilkar, Hon'ble Mr. Justice DY Chandrachud, Hon'ble Mr. Justice Sanjay Kishan Kaul, Hon'ble Mr. Justice Navin Sinha, Hon'ble Justice Ms. Indira Banerjee, Hon'ble Mr. Justice Vineet Saran, Hon'ble Mr. Justice Hemant Gupta, Hon'ble Mr. Justice Dinesh Maheshwari, Hon'ble Mr. Justice Sanjiv Khanna, Hon'ble Mr. Justice Surya Kant, Hon'ble Mr. Justice Aniruddha Bose, Hon'ble Mr. Justice S. Ravindra Bhat and Hon'ble Mr. Justice V. Ramasubramanian for their precious messages. I am also thankful to Hon'ble Mr. Justice Sanjay Karol, the Chief Justice, Patna High Court, for blessing us with his encouraging message. I also extend my gratitude to Hon'ble Mr. Justice Ashwani Kumar Singh for his enlightening foreword, covering the journey of Criminal Miscellany from inception to publication. I also extend my regards and gratitude to Hon'ble the

Chairman of Bihar Judicial Academy, Hon'ble Mr. Justice Vikash Jain for His Lordship's magnanimous words in the form of message. Hon'ble former Director of National Judicial Academy, Hon'ble Mr. Justice Amreshwar Pratap Sahi, former Chief Justice of Patna High Court and Madras High Court has also blessed us by his Lordships's message. The messages and forewords of Their Lordships would go a long way to motivate and inspire the Bihar Judicial Academy and Judicial Officers of the state to come up with further works of similar nature. The messages and the foreword are an invaluable addition to the book and I am sure they would be cherished by the readers for their illuminating and enlightening content.

My sincere thanks also goes to my predecessor Shri Jitendra Kumar, District Judge Gaya and former director of Bihar Judicial academy. My sincere and special thanks also goes to all the judicial officers who have written their articles to the benefits of their fellow judicial officers and the people at large. The editorial board specially constituted for publication of the Handbook also deserves thanks and appreciation for editing and proofreading the articles. I also thank the staff of the Academy for their contribution in their own way.

Thanks & Regards


(Alok Kumar Pandey)



**Hon'ble Mr. Justice
Sanjay Karol**
Chief Justice, Patna High Court



**Hon'ble Mr. Justice
Ashwani Kumar Singh**
Judge, Patna High Court



**Hon'ble Mr. Justice
Vikash Jain**
Judge, Patna High Court



**Hon'ble Mr. Justice
Ahsanuddin Amanullah**
Judge, Patna High Court



**Hon'ble Mr. Justice
Rajendra Kumar Mishra**
Judge, Patna High Court



**Hon'ble Mr. Justice
Chakradhari Sharan Singh**
Judge, Patna High Court



**Hon'ble Mr. Justice
Prabhat Kumar Jha**
Judge, Patna High Court



**Hon'ble Mr. Justice
Ashutosh Kumar**
Judge, Patna High Court



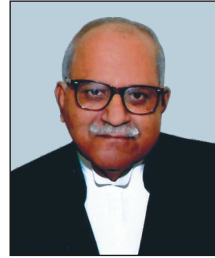
**Hon'ble Mr. Justice
Sudhir Singh**
Judge, Patna High Court



**Hon'ble Mr. Justice
Birendra Kumar**
Judge, Patna High Court



**Hon'ble Mr. Justice
Arvind Srivastava**
Judge, Patna High Court



**Hon'ble Mr. Justice
Anil Kumar Upadhyay**
Judge, Patna High Court



**Hon'ble Mr. Justice
Rajeev Ranjan Prasad**
Judge, Patna High Court



**Hon'ble Mr. Justice
Sanjay Kumar**
Judge, Patna High Court



**Hon'ble Mr. Justice
Madhuresh Prasad**
Judge, Patna High Court



**Hon'ble Mr. Justice
Mohit Kumar Shah**
Judge, Patna High Court



**Hon'ble Mr. Justice
Anjani Kumar Sharan**
Judge, Patna High Court



**Hon'ble Mr. Justice
Anil Kumar Sinha**
Judge, Patna High Court



**Hon'ble Mr. Justice
Prabhat Kumar Singh**
Judge, Patna High Court



**Hon'ble Mr. Justice
Partha Sarthy**
Judge, Patna High Court



*Knowledge is Supreme treasure
among all wealths*

न चोरहार्यम् न च राजहार्यम्,
न भ्रातृभाज्यम् न च भारकारि।
व्यये कृते वर्धते एव नित्यम्,
विद्याधनं सर्वधन प्रधानम् ॥

सुभाषितानी

*Neither thief can steal supreme bliss i.e knowledge,
Nor Sovereign power can confiscate the same.
Neither it is divisible, nor same is burdensome.
It gets augmented regularly with sharing.
Knowledge is supreme treasure among all wealths.*

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Ms. Rachna Srivastava, Additional District & Sessions Judge, Muzaffarpur.

Topic No. – 17

Significance of medical evidence vis a vis Ocular Testimony.

By
Sri Suman Kr. Diwakar,
Additional District & Sessions Judge,
Chapra.

Sri Suman Kr. Diwakar,
Additional District & Sessions Judge, Chapra.

Topic : Significance of medical evidence vis a vis Ocular Testimony.

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Significance of Medical Evidence Vis-a-Vis Ocular Testimony

ABSTRACT

“As a hunter tracks a wounded beast to its liar by its drop of blood, so let a king track crime to justice by closed searched food”. [Manu’s Law Code, about 2000 A.D]

The low conviction rate, increasing trend of witnesses becoming hostile and defective investigation have again ignited a debate as to the importance of medical evidence in the criminal justice administration system. The nature of medical evidence being corroborative and the impossibility of a witness to tell truth in the dock have put the judges' in a fix. Legislative supremacy of ocular evidence over medical evidence is another area that sometimes tend to render injustice to the stakeholders of the justice delivery system. So the case with the civil justice administration system where medical evidence plays a vital role in a dispute involving a claim of compensation, proving the will, etc. A herculean question remains to us that whether medical evidence is fit enough to rely on blind eyes given the fact that the source from where it is originated is not flawless.

Stephen when authored the Indian Evidence Act, 1872 was right of the view that eye witness testimony is the best evidence. Then, he might have presumption as to possession of a high degree of ethics by an individual. But today, the ethical value in an individual has gone down. it is an open secret that a witness intending to give testimony in the court of law is first well trained by his counsel for what to speak in the court and at this juncture, the truth of narrating correct fact in reference to any incident is compromised and the task of the Judges becomes difficult.

With the advancement of science and technology, criminals have adopted new methods and techniques for committing an offence. At the same time, advances in forensic science have made the detection of crime scientifically feasible. But admissibility of medical evidence is questioned now and then. However, despite having several flaws in terms of lack of trained manpower, the sensitivity of the professional preparing medico-legal report, state of the art infrastructure, and the possibility of manipulation, the medical evidence has not lost its light in the eyes of the Judges. it continues to carry great importance and has the guts to outweigh the ocular evidence, especially, in crime against the human body and it has all potential to indicate the true reason for death and enable the law to grab the real culprit.

In the aforesaid background, I shall be examining the significance of Medical Evidence against ocular evidence with its basic understanding and tenet with reference to the Criminal administration of justice. Further, I shall try to highlight statutory provisions coupled with recent judicial precedent covering the issues of medical evidence and ocular evidence and answering conflicts between the two. Further, I will also be addressing the question as to which is the best evidence either medical or ocular, or whether this is misconceived notion? As a matter of fact,

these two kinds of pieces of evidence have their own importance in their own periphery and the Judges should use both incoherences coupled with their judgemental skills to administer justice.

Keywords: Expert Opinion, Testimony, eye witness, Indian Evidence Act, Cr. P.C, C.P.C, Post Mortem, Medico-Legal report, DNA, Investigation, injury, direct evidence, etc.

Introduction

The term evidence has different meanings in law and medicine. In law, evidence is material or testimony which is admissible to the court. In medicine, it refers to data obtained through scientific investigation. The quality of such evidence is defined by the scientific methodology employed in the investigation. In law, complex rules restrict the type of evidence that may be presented to the court. These rules aim to exclude evidence which may be unreliable, irrelevant or misleading and include evidence which has the maximum probability of being the truth.

Every judicial proceeding has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused. If the proceeding is civil the object is to ascertain some right of property or of status or the right of one party and the liability of other to some form of relief.

In majority of criminal cases, there is medical evidence. It is evidence of an expert. it is relevant U/s 45 of the Indian Evidence Act. Section 45 of the said Act reads that when the court has to form an opinion upon a foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in question as to identity of handwriting or finger impressions are relevant facts. Such persons are called as experts. Knowledge of medical field is the knowledge of science and therefore, medical evidence is relevant U/s. 45 of the said Act.

i. Doctor as an expert and a common witness:

A medical witness acts both as a common as well as an expert witness. Common witness is a witness who testified to facts, which he has actually observed himself. When the medical witness is called upon to testify to facts observed by him, he acts as a common witness. A medical witness acts as a common witness when he testifies on the preamble of his report, which gives the date, time and place of examination, and the names of the individual, if any, who identify the person or dead body examined and the alleged history given. The medical man acts as an expert when he testifies on the observation and opinion given in his report.

ii. Medical opinion and its value:

The opinion of physician and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent, the effect of disease or of physical injuries upon the body or mind, as well as in what manner or by what kind of instruments

they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death, the cause, symptoms and peculiarities of a disease, and whether it would be likely to cause death, the probable future consequences of an injury, when consequences anticipated are such as in the ordinary course of events may be reasonably expected to happen, and are not merely speculative or possible. While it is improper to ask a physician how wounds or injuries were actually given, as this would be trespassing upon the province of the jury, he may be asked by what kinds of weapons wounds of a given description might be caused, or whether wounds of a given character were caused before or after death.

A medical witness called as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him. Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.

iii. Ocular Evidence

The ocular evidence is one which eye accounted of the witness as to manner of incident. It is treated to be the best evidence but not always if not corroborated by other materials on record. A witness who gives testimony to facts seen by him is called an eye witness, an eye witness is a person who saw the act, fact or transaction to which he testifies. An eye witness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the event occurred will be prevented from testifying, regardless of whether he or she was the only eyewitness to the occurrence. Identification of an accused in Court by an “Eye witness” is a serious matter and the chances of a false identification are very high. Where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. “It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs”.

ADMISSIBILITY OF WITNESS

The Halsbury’s Laws of India classified witnesses into different categories viz;

4. Eye witnesses,
5. Natural witnesses,
6. Chance witnesses,
7. Official witnesses,
8. Sole witnesses,

9. Injured witnesses,
10. Independent witnesses,
11. Interested, related and partisan witnesses,
12. Inimical witnesses,
13. Trap witnesses,
14. Rustic witnesses,
15. Child witnesses,
16. Hostile witnesses,

In the aforesaid background, it is always the creditworthiness of witness and quality of evidence testified by him ensures admissibility of ocular evidence. There is always debate as to facts that if there is contradiction between medical evidence and ocular evidence which should prevail. The Constitutional Court has time and again settled the issue. The Hon'ble Orissa High Court in case of **Kedar Behara v State, 1993 Cri.L.J.378 (Ori.)** observed as follows: "It is trite that where the eyewitnesses account is found credible and trustworthy, medical opinion pointed to alternative possibilities is not accepted as conclusive."

The Hon'ble Apex Court in case of **State of U.P. vs Harban 1998 (3) JT 443: (1998) 6 SCC 50**, observed as follows: "In a conflict between the eyewitness account and medical evidence, the testimony of the eyewitness has to be preferred unless the medical evidence is so conclusive as to rule out even the possibility of truth in the eyewitness version".

In the case reported in **Stephen Seneviratne V King, AIR 1936 PC 289: 37 Cri LJ 963** at pages 298 and 299, it is observed that: "In order to discredit the positive evidence it should be clear and decisive. If the evidence of doctor is vague it cannot be used to discredit the positive evidence"

In the case reported in **Thakur V State, AIR 1955 All 189 : 1955 Cri.L.J.473**, it is observed that: "when there is a conflict with medical evidence and the oral testimony of the witness the evidence can be assessed only in two ways. A court can either believe the witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of medical evidence. The first method can be applied only in those cases where the oral evidence is above approach and creates confidence. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing the evidence is the second method. (Injuries less and minor, accused many). Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the

manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.”

If the evidence of the witness for the prosecution is totally inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. (**Ram Narain v. State of Punjab**, AIR 1975 SC 1727: 1975 Cr.L.J. 1500: 1975 SCC (Cri) 571; **Amar Singh v. State of Punjab**, AIR 1987 SC 826: (1987) 1 SCC 679: 1987 Cr.L.J. 706). Where the prosecution witness stated that all the accused persons were armed with deadly weapons viz. Sua Barchi. Kulhari (axe), Dang (Cudgel) and Kirpan, and gave repeated blows with their respective weapons to the deceased and many of the blows fell on the ribs, and abdomen of the deceased, but in the post-mortem examination no injury was found on the ribs and abdomen of the deceased, not a single incised wound was found on the body of the deceased, and only abrasions, contusions and fractures were found, it was held that if the oral evidence were to be accepted there would be incised wounds all over the body of the deceased. Thus, there was apparent irreconcilable inconsistency between the oral and the medical evidence. The Supreme Court acquitted all the accused persons charged for murder. (**Amar Singh v. State of Punjab**, AIR 1987 SC 826: 1987 Cr.L.J. 706: (1987) 1 SCC 679). Where there is glaring conflict between medical and oral evidence, the prosecution case must fail. (**Awadhesh v. State of M.P.**, AIR 1988 SC 1158: 1988 Cr.L.J. 1154, **Mohd. Habib v. State**, 1988 CC Cases 401 (HC)(DB).

Unless the medical evidence completely rules out the prosecution story, the oral evidence if otherwise reliable cannot be rejected (**Vahula Bhusan v. State of Tamil Nadu**, (1989) 1 SCJ 255, **State of U.P. v. Krishna Gopal**, AIR 1988 SC 2154: 1989 Cr.L.J. 288; **Thakur Singh v. State of Bihar**, 1988 Pat. LOR 302 (DB); See also **Dharamvir v. State**, 1989 All. L.J. 454(OB); **Awadhesh v. State of M.P.** AIR 1988 SC 1158: 1988 Cr.L.J. 1154). Where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility, which should not be adversely prejudged making any other evidence, including medical evidence as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent improbabilities. (**State of U.P. v. Krishna Gopal**, AIR 1988 SC 2154). The medical officer stated that the injuries found on the body of the deceased could be the result of either two shots or even more than two shots, but the evidence of eyewitnesses clearly showed that there were two shots. The Supreme Court held that there was no inconsistency between the medical evidence and the ocular evidence and the inconsistency deposed by the medical officer was merely a probability and it was not fatal to the prosecution case. (**Maghar**

Singh v. State: of Punjab, (1987) 2 SCC 642). In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. (**Mohinder Singh v. State, AIR 1953 SC 415; 1953 Cr.L.J. 1761**). In that case it was found doubtful whether the injuries which were attributed to the accused were caused by a gun or a rifle. It seemed more likely that they were caused by a rifle than a gun and yet the case of the prosecution was that the accused was armed with a gun and in his examination it was definitely put to him that he was armed with the gun. The Supreme Court held that it was only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the accused were caused by a gun or a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a fire arm used at such a close range as was suggested in the evidence.

Limitations and problems of Medical Evidence:

There are many instances where court decisions contrary to popular expert opinion on issues like bone cut, rape, burns, age, consent, dying declaration, *compos mentis*, etc. have been delivered. The expert witness is often expected to provide clear ‘yes or no’ unambiguous answers to questions where there is profound uncertainty within the field of inquiry. The medical witness may find the process as intensely frustrating, confusing and unrewarding experience. This approach to problem solving is alien to most medical practitioners. Expert witnesses may only be permitted to present part of their evidence and this may result in an incomplete or distorted version of the truth as they see it. This system is not based on a concept of ‘absolute truth’ in a scientific sense but rather on satisfaction ‘beyond reasonable doubt’ that the legal elements of a crime have been established. Opposing medical expert witnesses may have minor points of disagreement, which may be construed as major differences of opinion when this is not the case. Cross-examination by its nature usually involves direct challenge of the witness and may at times be quite an aggressive process with direct personal attack not uncommon. This sort of combative approach to problem solving is obviously foreign to most doctors, some of whom would be rarely challenged, let alone attacked, in the course of their professional lives. An expert witness may be confronted with seemingly simple terms which are defined by various laws of which the majority of expert witnesses will be unaware. The rules of evidence limit what the expert witness may say. Expert witnesses are often chosen and retained on the basis of what they will say and how they will say it rather than on any scientific or professional merit. Partisan selection of expert witnesses maximizes potential for bias and inaccurate expert testimony. There is a natural bias to do something serviceable for those who employ you and adequately remunerate you; with the consequence of being paid agents. The pressure of the adversary system often forces the experts to the limits of his expertise. Often the litigants’ case becomes the expert’s cause. Experts may feel like they themselves are on trial. Especially for medical expert witnesses there is always a difference

between the expertise of undergraduates and the postgraduates in a specific subject; and the courts should be sensitive to these issues, and the opinion should be given due weightage and respect. There must be some sort of additional safeguard to make the medical evidence more reliable in the eyes of judges like a) Medical evidence should be supported by substantial documentary evidence including photos, videos and radiographs. b) Even in cases of re-examination and referred opinion cases, in case of any difference of opinion from the initial report, a definite opinion with a supporting basis should be provided. Further the courts may believe and rely on that opinion which is tallying with the eyewitness account and discard the opinion of other expert on this ground alone. Expert opinion should be considered in the same light as clinical medicine and as such subject to same rules of negligence. c) Statutes need to be amended so that breaches of the expert's duty of objectivity would constitute professional misconduct. d) There is a need for the accreditation of expert witnesses and making them accountable for their conduct during court appearance. An expert's report and the further evidence must give questioning of witnesses. The adversarial system being followed in India is based on the philosophy that the true facts of a given situation, and hence justice, will emerge if the parties to a court action act as adversaries rather than cooperative participants. Each side vigorously advances its own version of the facts, an impartial third person or group of persons (judges) will sift out the truth.

Conclusion:

In the light of the discussions as above, it may be safely concluded that medical evidence is very significant in criminal administration of justice though still hold status of corroborative evidence rather conclusive. However, there is nothing absolute even in case of ocular evidence. All ocular evidence is not taken as gospel truth by the court of law. It is quality and creditworthiness of ocular evidence which enable the court to take a call on its admissibility for the purpose of conviction or acquittal. Finally, the following points may be summed up as to medical and ocular evidence:

- (a) The medical opinion has great bearing and is of great assistance in the trial of criminal cases. It greatly helps the prosecution in establishing its case by soliciting corroboration from it by showing that the injuries could have been caused by the alleged weapon of offence by the accused persons in the manner alleged. The accused persons with the assistance of medical evidence try to demolish the prosecution story by showing that the injuries could not have been caused by the alleged weapon of offence or the death could not have occurred in the manner alleged by the prosecution.
- (b) The medical opinion is merely of advisory nature. It is based on the observations made by the medical officer of the body of the injured and the corpse after the occurrence has taken place. In certain ways, medical opinion can be said to be direct evidence as by the colour of the injuries, the presence/absence of rigor mortis in the corpse, the presence of the tattooing marks, state of nature of the food digested/semi-

digested/or undigested noted by the medical officer immediately after the incident. The time of the occurrence, is determined.

- (c) Since witnesses are the eyes and ears of justice, the oral evidence has primacy over the medical evidence. If the oral testimony of the witnesses is found reliable, creditworthy and inspires confidence, the oral evidence has to be believed, it cannot be rejected on hypothetical medical evidence.

6. The medical opinion pointing to alternative possibilities cannot be accepted as conclusive. Unless the medical evidence completely rules out the prosecution story, the oral evidence if otherwise reliable cannot be rejected.

7. The medical officer being an expert witness, his testimony has to be assigned great importance. However, there is no irrebutable presumption that a medical officer is always a witness of truth, his testimony has to be evaluated and appreciated like the testimony of any other ordinary witness.

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Topic No. – 18

Testimony and accuracy of Eyewitness vis a vis expert witness with special reference to evidentiary value of the following expert's opinion : Ballistic Expert Opinion; Dog Tracking; Footprint; Handwriting expert; Tape Recorded Evidence; Brain Mapping; Narco Analysis; DNA test

By
Sri Pranaw Shankar,
Bihar Superior Judicial Service
Secretary,
District Legal Services Authority, Aurangabad.

Sri Pranaw Shankar,
Secretary,
District Legal Services Authority, Aurangabad.

Topic : Testimony and accuracy of Eyewitness *vis a vis* expert witness with special reference to evidentiary value of the following expert's opinion : Ballistic Expert Opinion; Dog Tracking; Fingerprint; Handwriting expert; Tape Recorded Evidence; Brain Mapping; Narco Analysis; DNA test

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**Testimony and accuracy of eye witness vis a vis expert witness
with special reference to evidentiary value of the following
expert's opinion. Ballistic expert opinion; dog tracking; footprint;
handwriting expert; tape recorded evidence; brain mapping;
Narco analysis; DNA test; Doctor's opinion.**

*Each age has a predilection for a mode of proof. The Christian Middle ages had a preference for the ordeal and oath. The ancien regime developed the document and the confession involving torture. Our age has predilection for expert evidence. Certainly the confession, testimony, the document, or the oath continue to be used, but the means of proof which attracts attention, responds to our expectation and arouses discussion is expert evidence.**

1. Introduction and Eye-Witnesses

Facts lie at the foundation of the law, for, *ex facto just oritur* – the law arises out of the fact. The basic work of the court involves finding the existence or non-existence of the facts and declaring the rights based on them.¹ And, the facts are to be supplied to the courts / judicial tribunals through the testimony of the witness. So, the whole edifice of the legal system is built on the bedrock of witnesses' testimony. Noted Jurist, Bentham couldn't have been more succinct when he stated: Witnesses are ears and eyes of Justice. With the advent of proper social order and civilization, we have had a justice system. All known civilizations, starting from Egyptian civilization to the Romans and the Hammurabi's, each had their distinct system of resolving disputes but the role of witnesses remained central in all of them, albeit, in differing form. Times since immemorial, political commentators have harped upon the importance of eye-witnesses.

Closely related to the eye-witnesses are another set of witnesses, now termed variously as experts, or expert-witness or a third party, who have dominated the legal scheme. These experts, appearing as witnesses, help the court form an opinion on subjects that require technical or special knowledge. In ancient times, the sages used to advise the kings on matters of law, and the medical experts on the point of injury, etc. the same has continued till date.

The law has historically been reluctant to allow an ordinary witness to depose on his opinion from the facts observed. Thus, there was and, arguably still is, a general rule that a lay-witness deposes only what he or she has directly observed with his senses. With the increasing complexity of the matter coming before the judicial bodies, it is essential that the tribunals/courts do have the support of the expert's opinion, so that the court may form an adequate opinion on any issue. But at times the distinction between the opinion evidence and factual evidence is often blurred.

* E. Jeuland, quoted in *Introduciton of The Judicial Assessment of Expert Evidence*, Deirdre Dwyer, Cambridge University Press 2008

1. (Woodroffe and Amir Ali, 20th Edition 2017)

The legal systems though have accorded primacy to the testimony of the eye-witnesses and have relegated their testimony to the status of “best evidence” but the role and importance of the opinion of experts can hardly be downplayed. With the advent of science and modern technology and their use in the investigation of cases, the importance of expert testimony has increased many-folds. The interplay between the expert's evidence and the eyewitness is the subject matter of the paper.

1.1. What is Evidence?

Evidence Act covers the adjectival branch of Law as distinguished from the substantive and procedural branches of law. The Evidence Act lays down the method and the proof by which the substantive laws can be proved. As per Phipson on Evidence, 18th Edition, *The providence of the law of Evidence is therefore twofold, i.e. to lay down rules as to what matter is or is not admissible to establish facts in dispute, and as to how such matter may be placed before the court.*

Phipson (*supra*) defines evidence as *In a real sense evidence is that which may be placed before the Court so that it may decide the issues of fact. He further says, Evidence, in the first sense means the testimony, whether oral, documentary, or real, which may be legally received to prove or disprove some fact in dispute. In the second sense, it means the content of the testimony.*

Dean Wigmore has defined evidence as *“Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal to produce a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.”*²

The evidence Act 1872, defines the term “Evidence” in section 3 as:

"Evidence".-"Evidence" means and includes—(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) [all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

If we look at the definition of the term evidence under the Evidence Act, materials such as confession, or statement made by an accused, statement under section 313 of the CrPC, demeanor of the witness, result of the local inspection, etc are not “Evidence” under the Evidence Act, though they fall under the term “matters” referred in the definition of the term “proved”.³

The Indian Evidence Act, 1872 is the umbrella law that applies to all the substantive laws, including civil, criminal, and revenue laws within India. A look at the heading of the Act shows that the Law was meant to consolidate, define and amend the laws relating to the evidence Act. The purpose of the Evidence Act is to ensure that the trial takes in all its fairness, and the truth is ascertained through accurate fact-finding. The Act has some rules that allow sufficient discretion as regards its admissibility and certain others that are inflexible.

2. [Wigmore, A Treatise On The Anglo-American System OF Evidence In Trial At Common Law (2d ed. 1923)]

3. Justice UL Bhatt, Lectures on Evidence Act, 1872, 2016 Ed.

Our Evidence Act classifies evidence into Oral and Documentary evidence, [Section 59 and 61 of the Act respectively] based on the mode of its presentation before the court. Evidence is also classified into Primary Evidence and Secondary evidence, [S. 62 and 63 of the Act], Direct and indirect evidence and also Real Evidence. Real evidence though not explicitly mentioned in the act, but can readily be inferred from proviso to section 60 of the Act, which reads as: *...Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection. Thus we find that our evidence act covers oral, documentary, and real evidence as well.*

1.2 What is a Witness?

Moving from the definition of the Evidence, we have the term “Witness” who is the mainstay of the legal system, and who performs a solemn duty by appearing in a court of law and deposing in a matter. The various texts divide the witnesses into various categories such as eye-witness, hearsay witness, opinion witness, or expert witness. A perusal of the Act shows that the term “witness” is used for the first time in section 3 while defining “Evidence” and though the term “Witness/witnesses” appear about 108 times in the Act, including the illustrations, the term is not defined anywhere in the Act. So we have to rely on the interpretation of the courts or the dictionary meaning of the word.

Though the term has not been defined in the Indian Evidence Act it has been defined in some statutes outside India. In the United Kingdom, a "witness" is defined in section 97(1) of the Coroners and Justice Act 2009, as:

"any person called or proposed to be called, to give evidence at the trial or hearing in question" in any criminal proceedings.

Apart from the definition in the statutes, it would be of much help if we have a look at the definition of the word in various dictionaries.

Definition of “Witness” in Dictionaries & Other sources:

Apart from the statutory definition, it will be of importance, if we have a look at the definition found in the general dictionaries and the law dictionaries.

- The Oxford learner’s dictionary defines the term Witness as:
“a person who sees something happen and can describe it to other people”
- On the other hand, the Cambridge dictionary defines the terms witness as: *“a person in a law court who says what they know about a legal case or a particular person”*.
- The Law Commission of India in its 198th report on Witness Identity Protection and

witness Protection Programmes August 2006, quoted “The UN Attorney’s office for the Western District of New York, run programs which have defined the term witness as:

*“A **witness** is someone who appears in a court of law to say what they know about a crime or other event.” A ‘witness’ is defined as someone who has information or evidence concerning a crime and provides information regarding his knowledge to a law enforcement agency. Where the ‘witness’ is a minor, the term includes an appropriate family member. The term ‘witness’ does not include defence witnesses or those individuals involved in the crime as a perpetrator or accomplice.*

The Hon’ble Supreme Court in **Madhu vs. State of Karnataka**⁴ has defined witness as *The term ‘witness’ means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise.*

A perusal of the definition of a Witness helps us conclude that a witness is a person who has either seen an incident, or has information about any incident or crime or regarding any matter that concerns the incident and has been called to the court to depose.

1.3 EYE – WITNESS:

After the definition of the term Witness, let’s delve into the most important variant of the witness, i.e. eye-witness. Historically, the Indian Legal system has long relied upon and has emphasized the importance of the eye-witness or the *sakshi*. In a scholarly article⁵ the history of the role and value of the eye-witnesses, in the ancient Indian legal system has been traced in comprehensive detail.

The term, eye-witness, i.e. witness qualified with eyes, means a witness who has something to depose based on what he has seen. Eye-witness is a subset of the term Witness. The testimony of that witness will contain the narrative of the incident that he has seen through his eyes. The appreciation of the evidence of eye-witness depends upon (i) the accuracy of the witness’s original observation of the events which he described; and (ii) the correctness and extent to what he remembers and his veracity.*[Woodroffe, 20th Ed.]

In this article since we are concerned only with the eye-witness and expert witnesses and their interplay, so we will not look into the other forms of witnesses.

4. (2014) 12 SCC 419

5. [Govind, Vijai. “THE ROLE OF WITNESSES IN THE ANCIENT AND THE MODERN INDIAN JUDICIAL SYSTEM.” Journal of the Indian Law Institute, vol. 15, no. 4, 1973, pp. 645–656. JSTOR, www.jstor.org/stable/43950237

1.4 Importance of the Testimony of the Eye-witness:

Eyewitness's testimony is counted, since time immemorial, as the best form of evidence, especially in criminal trials. **Sri Govinda** (*supra*) has referred to our ancient texts such as *Manusmriti*, *Gautama*, *Yajnavalkya*, and Sacred Books of the East, where it has been provided that the Kings and the Brahmans have to decide the disputes by reaching the truth on the statement of the witnesses. Thus, *Sukranitisara* rightly states that all those who have had personal knowledge of some act crime or incident and who were called for giving any evidence about the same were treated as the *Sakshi* or the witness of the transaction. The eye-witnesses not only help in the identification of the culprit but also tell about the crime-scene.

Its relative value is considered as the best as has been stated in¹: *It is easy to understand why it is so convincing. We trust our own perceptions and experience. "I'll believe it when I see it" isn't just a cliché, it is a statement of the most persuasive form of evidence we allow.*

Statutorily, section 60 of the Evidence Act lays down:

Section 60 – Oral evidence must be direct Oral evidence must, in all cases whatever, be direct; that is to say – If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that senses in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Further, section 60 is supplemented by section 118 which says that all persons are competent to testify, unless prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. So, if a witness is unaffected by the initial barriers of any of the

infirmities as laid down in section 118 of the Act, then he may depose before the court. Section 119 of the Act also makes the signs of a deaf and dumb witness as oral evidence.

Speaking on the importance of an eye-witness, the Hon'ble Supreme Court in **Juman vs. State of Bihar**⁶ : Conviction can even be based on the testimony of a sole eye-witness, if the same inspires confidence. Moreover, the prosecution case has been proved by the testimony of the eye-witness since corroborated by the other witnesses of the occurrence.

1.5 Fallacies of Eye-Witnesses Account:

An eye-witness account is no doubt the mainstay of the criminal justice system. The evidence of an eye-witness, unless tainted, is considered the most credible evidence. The testimony of an eye-witness shuts all other evidence. But then, is the eye-witness as accurate as has been portrayed or is there any shortcoming? Is there a point beyond which the eye-witness can't travel in the ocean of truth? Apart from the apparent limitations, (such as faded memory, darkness, and fleeting incident) the advent of science and technology, and also a study in the field of psychology, some shortcomings of the eye-witness's account have been found. The sacrosanctness with which the eye-witness's account is seen needs a serious rethink.

Many studies have been undertaken to show the limitations of the Eyewitness's testimony. Eyewitness testimony can be affected by many psychological factors: Anxiety / Stress, Reconstructive Memory, Weapon Focus, and Leading Questions⁷

Noted psychologist, Hugo Münsterberg in his 1908 book, *On the Witness Stand*, while dealing with the testimony of the witnesses in courtrooms has written about the limitations of the eye-witness account. Hugo while appreciating the fact the judicial system was paying heed to the other expert's opinion but lamented that the courts were reluctant to admit the progress on experimental psychology. He mentions an experiment in his book where a drama was enacted by few actors and then the students, who were unaware that a drama is being enacted, were told to write an account of that incident. Some were told to write straightway and some others, a few days later. The account received by the professor was as follows: *The whole objective performance was cut up into fourteen little parts which referred partly to actions, partly to words. As mistakes, there were counted the omissions, the wrong additions, and the alterations. The smallest number of mistakes gave twenty-six percent. of [sic] erroneous statements; the largest was eighty percent. The reports with reference to the second half of the performance, which was more strongly emotional, gave an average of fifteen percent. more [sic] mistakes than those of the first half.*

The Hon'ble Supreme Court in **Daya Singh vs. State of Haryana**⁸, while dealing with the identification of an accused agreed with the observation made by Professor Borchard that: "the

6. (2017) 11 SCC 85

7. (Loftus and Palmer, 1974)

8. (2001) 3 SCC 468

emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is untrustworthy...". But the court also held that "it would be difficult to hold that at that time, they had lost their power of perception. Theoretically in some cases what has been noted by the learned author may be true. For that purpose, the evidence of the witness is required to be appreciated with extra care and caution. But, where evidence is cogent, consistent, and without any motive, it is no use to imagine and magnify theoretical possibilities with regard to the state of mind of the witnesses and with regard to their power of memorizing the identity of the assailants. The power of perception and memorization differs from man to man and also depends upon the situation. It also depends upon the capacity to recapitulate what has been seen earlier."

These accounts do tell us that the testimony of the eye-witness cannot be free from blemishes and the courts must also admit factors such as the lapse of memory, the time and occasion for the witness to see the incident, the mental condition of the witness at the time of the incident, the aberrations, the interpolations. But the courts' world over has discarded the use of psychological experts to account for the analysis of the eye-witness's testimony.

2. Expert Testimony

2.1 Introduction and Definition of Expert:

Generally, the opinion, the inferences, and beliefs of an individual, are inadmissible in courts of law as evidence. They are covered under the category of opinion evidence or evidence of third persons. Ordinarily, the witness is supposed to state facts and facts alone and it is the court that concludes on the facts as presented by the witnesses. But there are cases where the court cannot form an opinion, on its own, because of the particular skill involved in the matter. Such matters are those that require a special study, and knowledge that is acquired by persons having training in it. To accommodate the opinion of such persons who are especially skilled in various fields, section 45 to 47 of the Indian evidence act has made the opinion of such persons as relevant facts and has termed them as Experts. **Phipson** (*supra*) says, An expert's evidence is founded on his training and experience, both of which involve the acceptance of hearsay information. It is permissible for him to give an opinion based on such hearsay, provided that it relates to a specific matter of which he does have personal knowledge, or of which admissible evidence will be given by another witness. Halsbury's Law of England in 4th Ed. says: The expert witness need not have acquired his knowledge professionally, it is sufficient if he has made a special study of the subject or has acquired special experience in it.

*"Expert testimony" is also termed "expert evidence," which is defined as "[e]vidence about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field."*⁹

9. Black Law Dictionary 7th Edition 1999.

In **M. Niranjan Reddy vs. B. Jayaram**,¹⁰ the Hon'ble A.P. High Court quoted with approval the judgment of **Oli alias Abdul Kader 1976 L.W. (Cr.) page 38**, where 'expert' was defined as follows:

"An expert is one who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such knowledge may have been acquired by practice, observation, research or careful study. But, the Judge has to decide whether the skill of any person in the matter on which evidence of the Expert's opinion is offered is sufficient to entitle him to be considered as an expert. The Judge must decide the question of competency of the witness. An expert, to be competent as a witness, need not have acquired his knowledge professionally, it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject or acquired experience therein."

The United States Supreme Court has defined an Expert in **U.S. Farris v. Interstate Circuit, CCA Tex**,¹¹ as, *"The term is generally used to designate a person who possesses knowledge and experience not possessed by mankind of General."*

The working of the courts has shown that a whole lot of persons have been treated by the court as an expert. The list of such experts includes doctors, chemical examiners, DNA analysts, handwriting experts, fingerprint experts, motor vehicle experts, engineers, architects, Examiner of electronic evidence, etc. Expert witnesses are in a similar position to that of the witness of fact for he too gives evidence, on oath, and he too is cross-examined on his statement.

After having tried to define the "expert" we will take a look at the brief history of the use of Expert witnesses in some of the major jurisdictions of the world. This will give us an insight into the development of the use of science and specialized knowledge in the courts.

2.2 History of the Use of Experts in the UK:

As has already been discussed that the judiciary has sought help from the experts to conclude properly in the matters pending before it. But have the role and relevance of the experts changed over time or has it remained constant? This requires us to take a look at the history of the evolution of the expert's opinion. For sake of brevity, this article will trace the modern developments in other jurisdictions. The latest position as regards the statutes will also be discussed.

2.2.1. History of the Use of Expert opinion:

In the United Kingdom, with the advent of jury trials, the system of the testimony of sworn witnesses started. In the early system, the jurors were expected to make their inquiries. When the jury or the court felt the need for expert advice, the court sought their advice personally. With the

10. MANU/AP/0468/ 2016

11. 116 Fxt, 768; 31A CJS 524

development of open court and witness system, the experts have begun to depose before the court. In an article tracing the development of the use of the experts in courts.¹² The author notes that: “In 1665 in the notorious Witches Trial 4 I Sir Thomas Browne, the most distinguished physician of the time and author of *Religio Medici*, testified before the jury to his belief in witches, elaborating his opinion by a scientific explanation of the fits to which they were subject.” The author then cites few other cases where the physicians were called in to testify. He refers to a 1678 case, **Rex v. Pembroke** where there are experts on both sides. It was where a murder trial, both the prosecution and defense called physicians to testify to the causes of symptoms observed in an autopsy and to the proposition whether a person can die of wounds without fever. As per Lloyd (supra) by the 8th century, the party system of experts had become firmly settled in Common Law.

In 1782, in the leading case of **Folkes v. Chadd**¹³ *Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: the opinion of scientific men upon proven facts may be given by men of science within their own science.*”

In **R v Bonython**, the Court suggested that there were four considerations that governed the admissibility of expert evidence. They were: First, whether the proposed expert evidence will assist the court in its task; Secondly, whether the witness has the necessary knowledge and expertise; Thirdly, whether the witness is impartial in his or her presentation and assessment of the evidence; and Fourthly, whether there is a reliable body of knowledge and experience to underpin the expert’s evidence.

So we find that the experts have been used in the courts of the United Kingdom for the last half millennium and now their roles have been fully ingrained in the legal system.

2.2.2. Statutory position of Expert opinion in the UK:

In the United Kingdom, the evidence of the expert is admissible in civil cases by virtue of the Civil Evidence Act, 1972 & point 35 of Civil Procedure Rules 1998. In criminal cases, the expert evidence is admissible under the Police and Criminal Evidence Act, 1984, Criminal Justice Act 1988, & Criminal procedure rules. Apart from these explicit provisions in various statutes, the law on expert testimony has also evolved on the case-law basis. Furthermore, the European Courts including the Courts of UK are also governed in some of the cases by the Human Rights Act, 1998.

As a recent trend, the courts in the UK and also the Civil Procedure Rules have been emphasizing also the fact that the Experts coming to depose before the courts owe an independent duty towards the court. [Phipson (Supra)]

12. (THE DEVELOPMENT OF THE USE OF EXPERT TESTIMONY, LLOYD L. ROSENTHAL)

13. [1782] 3 Dougl. 157

2.3 Expert's Opinion in the United States of America:

As in the UK, in the USA too, the expert witnesses appeared in the 18th Century. In the 1920s, in the case *Coca-Cola Company v. Chero-Cola Company*, a psychologist named Richard H. Paynter, an assistant at the laboratory of applied psychology, Columbia University, gave expert testimony as to whether Chero-Cola's trademark would confuse consumers by being too similar to Coca-Cola's trademark. But the first leading case which involved the use of expert testimony was the case of **Frye vs the United States**¹⁴, decided in 1923. Though the case involved the question of the use of results of a systolic blood pressure deception test, a precursor to polygraph tests but the use of expert witness's testimony was also discussed and it was held by the court: "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁵

So the standard as laid down in the case to admit or deny the expert's testimony came to be known as the **Frye standard**. Briefly summed up, it lays down that the expert's opinion when based on a scientific technique is admissible only when the relevant scientific community has generally accepted the technique as reliable.

But in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**,¹⁶ 509 U.S. 579 (1993) the US Supreme Court effectively overruled Frye standard for use in federal courts. The US Supreme Court held that the law as laid down in Frye was inconsistent with the Rule 702 of the Federal Rules of Evidence. While in the Frye case, the query was "*whether the expert's opinion is generally accepted by the relevant scientific community?*" in Daubert case the US Supreme Court set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert In Daubert case, the Court put forth 5 criteria to characterize the weight of evidence:

- I. Whether the theory or technique has been tested?
- II. Whether the theory or technique has been subjected to peer review and publication?
- III. Whether the theory or technique has a known or potential rate of error.
- IV. Whether the theory or technique has standards for controlling the technique's operation.
- V. The degree to which the theory or technique has been accepted in the relevant scientific community testimony.

2.2.2. Statutory position of Expert opinion in the USA:

Rule 702 of the Federal Rules of Evidence, governs the admissibility of expert testimony. The rule provides as follows:

14. 293 F.1013 (D.C. Cir.1923)

15. [<https://www.expertinstitute.com/resources/insights/a-brief-history-of-expert-witnesses-in-u-s-courts/>]

16. 509 U.S. 579 (1993)

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case.

Apart from the Federal rules, different states of the USA have their own rules governing the subject of expert testimony.

2.4 Use of Expert Testimony in Canada

*Expert testimony is used for adjudicating cases in Canada too. In the leading case of **R. v. Mohan**¹⁷ the Canadian Supreme Court stated that expert evidence is admissible when four criteria are established: 1) relevance of the evidence; 2) the necessity of the evidence in assisting the trier of fact; 3) the absence of any exclusionary rule to the reception of evidence, and 4) the proposed expert being properly qualified.*

Section 7 of the Canada Evidence Act allows the parties to examine expert witnesses. This is further governed by Section 657(3)(a) of the Canadian Criminal Code.¹⁸

2.5 Use of Expert Testimony in Australia

Australia does not have a uniform system of law to regulate the testimony of expert evidence. Different states have different laws and procedures but one common feature of the different rules and codes of conduct is that the court exercises considerable control over the form of expert evidence. This is reflective of the importance of, and the need for the court to rely on expert opinion in many cases. Such reliance is only possible if expert reports comply with appropriate procedures for the preparation and articulation of expert evidence.¹⁹

Statutory Provisions in Australia

The evidence of Expert Witnesses is dealt with in part 3.3 of the Evidence Act 1995, and Part 23 of the Federal Court Rules. The Federal Court has also issued a number of practice notes which guide the use of expert evidence. The relevant notes are **Expert Evidence Practice Note (GPN-EXPT)** – It includes the Code of Conduct for Expert Witnesses and Guidelines for concurrent expert evidence. (ii) Central Practice Note and (iii) **Survey Practice Note**.

3. Expert's Opinion in India:

3.1 History of the Use of Expert's Opinion

With the advent of the modern legal system in India by the Britishers, India too adopted the

17. [1994] 2 SCR 9

18. [<https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec657.3>]

19. [<https://mtecc.com.au/the-rules-for-expert-evidence-in-australia/>]

laws and rules as prevalent in the common law system, a necessary implication of that being that the rules regarding the expert opinion as it prevailed in the Common Law was introduced. Further, with the enactment of the Indian Evidence Act in 1872, the use of expert evidence was statutorily introduced in the Indian courts. As opposed to the unsaid rules, the evidence Act explicitly referred to the provisions which made the opinion of experts in a number of fields relevant and admissible.

Looking back to history, in the nineteenth century, when the cases of death due to poisoning posed a problem to the law enforcement agencies, a need was felt for isolating, detecting, and estimating various poisons absorbed in the human system. The first Chemical Examiner's Laboratory was, therefore, set up for this purpose at the then Madras Presidency, under the Department of Health, during 1849. Later, similar laboratories were set up at Calcutta (1853), followed by one each at Agra (1864) and Bombay (1870). These laboratories were equipped to handle the toxicological analysis of viscera, biological analysis of stains of blood, semen, etc. and chemical analysis of food, drugs, and various excisable materials to provide scientific support to the criminal justice delivery system within their limited means.

The first State Forensic Science Laboratory in India was established in the year 1952 at Calcutta. This laboratory becomes fully operated in the year 1953. The first Central Forensic Science Laboratory was established at Calcutta during 1957. To begin with this laboratory was organized into four basic disciplines viz. Forensic Physics, Forensic Chemistry, Forensic Biology and Forensic Ballistic. The Indian Academy of Forensic Sciences (IAFS) was established in the year 1960.²⁰

Coming to judicial decisions, in one of earliest leading cases, **United States Shipping Board vs. The Ship "St. Albans"**,²¹ the Privy Council while commenting on the admissibility of the Expert's opinion held that: *"The extent to which the opinions or conclusions of skilled persons are receivable by way of proof in point of fact has not been seriously in doubt from the time when, in 1782, in **Folkes v. Chadd** (supra). Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: the opinion of scientific men upon proven facts may be given by men of science within their own science."*

Speaking on the admissibility of the expert's evidence, the Hon'ble Supreme Court in **Ramesh Chandra Agrawal v. Regency Hospital Ltd.**²² observed:

16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the

20. [Tewari, R. K., and Ravikumar K. V., "History and development of forensic science in India", Bureau of Police Research & Development, Ministry of Home Affairs Government of India, New Delhi, India, (2000), Vol. 46 (4), Pg. 303-8.]

21. AIR 1931 PC 189

22. (2009) 9 SCC 709

expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed. The other requirements for the admissibility of expert evidence are: (i) that the expert must be within a recognized field of expertise, (ii) that the evidence must be based on reliable principles, & (iii) that the expert must be qualified in that discipline.

The facts reveal that India was one of the earliest countries where the opinion of an expert was not only admitted in evidence but was statutorily recognized. The trends show that our legal system is open to the use of the recent technological advancements in adjudication of the matters pending before it.

3.2 Statutory Provision for Expert's Evidence:

Once we have had a glimpse of the history and use of the expert's evidence in the court, now we will look into the statutory foundation of the use of the expert's evidence. The expert's evidence is governed under various legal provisions:

1. Sec. 53, 53A & 293 of The Code of Criminal Procedure, 1973.
2. Section 75 of the Civil Procedure Code 1908.
2. Identification of Prisoners Act, 1920.
4. Sec. 45 – 60, 73 & 112 of The Indian Evidence Act, 1872

The Indian Evidence Act, 1872 in Part-1, Chapter-II, section 45 to 51 deals with the relevancy of opinion of third persons. We also have section 59 that lays down that all facts except the content of the documents or electronic record, may be proved by oral evidence.

Section 60 of the Act also states that the oral evidence in all cases must be direct. For the evidence to be based on an opinion, the section lays down that if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Further, section 73 of the Evidence Act is also important which says that the court can also direct any person, present in the court, to write any words or figures for enabling the court to compare the words or figures with the alleged earlier written works of the person. Apart from

opinion of experts over the subjects such as: Foreign Law, Art, Science, Handwriting, and Fingerprinting, they also incorporate electronic evidence, and electronic signature.

These provisions of evidence act, in conjunction with section 291 to 294, 53A, 311A of the Code of criminal procedure lays down foundation and power of using the opinion of expert in criminal cases.

Section 75(e) and Order 26 of the Civil Procedure Code lays down the base for using the opinion of the experts in civil cases.

3.3 The relevance and role of experts, in general:

Till now we have been emphasizing on the history and the use of the expert's evidence in the judicial system. But why should an expert be used in court? What will be the relevance of the expert once he appears and deposes in the court? We will try and search answer to these queries.

It is a matter of common knowledge that courts are entrusted with adjudicating all disputes, which are legal in character, unless expressly barred. Some of the disputes involve complex questions of science, arts, and technology. Though it is commonly said that the judges are expert of all experts but in reality, the subjects as stated above require special skill, knowledge and training to have a command over the subject to form an opinion over that matter. It is then the court requires the opinion of an expert witness. The opinion is admissible when the subject matter of inquiry before the court is such that an untrained and inexperienced person cannot prove it.

Lord President Cooper stated the role of an expert witness in the famous Scottish case of **Davie v Magistrates of Edinburgh**²³, where he said: *"Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."*

In India, statutorily, the terms on which opinion of an Expert has been made relevant is governed by section 45 of the Act, which lays down: *Section 45 : When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts. So the section also defines the term "Expert".*

Speaking on the relevance and admissibility of the expert's testimony, the Privy Council in **United States Shipping Board vs. The Ship "St. Albans"**,²⁴ held that: *"The extent to which the opinions or conclusions of skilled persons are receivable by way of proof in point of fact*

23. 1953 SC 34, 40

24. AIR 1931 PC 189

*has not been seriously in doubt from the time when, in 1782, in **Folkes v. Chadd**, Lord Mansfield stated the grounds on which the evidence of Seaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: the opinion of scientific men upon proven facts may be given by men of science within their own science.”*

In **Tomaso Bruno v. State of U.P.**,²⁵ the SC held that The courts, should look at expert evidence with a greater sense of acceptability, they should not be absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. The purpose of an expert opinion is to assist the court and so the court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.

In **Dayal Singh v. State of Uttaranchal**,²⁶ it was held that where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use.

In **S. Gopal Reddy v. State of A.P.**²⁷ the Hon’ble SC held that the evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering ‘conclusive’ proof and therefore safe to rely upon the same without seeking independent and reliable corroboration.

In **Maghan Bihari Lal v. State of Punjab**²⁸, while dealing with the evidence of a handwriting expert, Supreme Court opined: “... We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert.

In one of the often quoted statements of the Supreme Court, on expert testimony, in **State of H.P. v. Jai Lal**,²⁹ the court held: 18. *An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the*

25. (2015) 7 SCC 178 : at page 197

26. (2012) 8 SCC 263

27. (1996) 4 SCC 596

28. (1977) 2 SCC 210

29. (1999) 7 SCC 280

other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. This Court in the case of **Hazi Mohammad Ekramul Haq v. State of W.B.**³⁰ concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons.

While commenting on the requirement of corroboration of the opinion evidence, the Supreme Court in **Chennadi Jalapathi Reddy v. Baddam Pratapa Reddy**,³¹ observed: 13. *In our considered opinion, the decisions in Murari Lal v. State of M.P., (1980) 1 SCC 704] and [Alamgir v. State (NCT of Delhi), (2003) 1 SCC 21] strengthen the proposition that it is the duty of the court to approach opinion evidence cautiously while determining its reliability and that the court may seek independent corroboration of such evidence as a general rule of prudence.*

3.4 When should an Expert be called to testify:

With the foundation of the expert's evidence laid down statutorily, and also by convention, we need to look into another vital aspect – when to call the expert witness? Should he be called wherever an expert has tendered his opinion? Or should he be called only when the court feels that it is unable to understand the technical aspects? It has also been shown that they are relevant for the proper conclusion of certain trials. But should the expert be called in every case where he has submitted his report or should it be left to the discretion of the court or the parties. It is imperative that we look at the guidelines for calling the expert to testify.

In an illustrative case from **Australia, Regina v Bonython**³² (South Australia Supreme Court) The court considered the basis for deciding whether a proposed witness was an expert. The court laid down 3 tests for deciding to call the expert witness or not. The first may be summarized as:

- “Does the court need expert evidence to reach an informed conclusion?” It is whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.
- The second: “is there a reliable body of specialist knowledge?” It is whether the

30. [AIR 1959 SC 488]

31. (2019) 14 SCC 220

32. [1984] 38 SASR

subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his or her opinion of assistance to the court.

- The third: “is the particular witness an expert in that field?” It is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his or her opinion of value in resolving the issues before the court.

Though these were the qualification for calling an expert for giving evidence in Australia, but the guiding principles are equally applicable to India as well.

3.5 Areas where Expert's Opinion is required:

Evidence Act only broadly lays down the areas where the expert's evidence is essential. Section 45 of the evidence Act lists them as, science, arts, foreign law, handwriting and finger impressions, The requirement of the interpretation of the common noun, Science, and Arts in section 45 of the evidence act is left on the judicial discretion of the court. The terms have been interpreted by the various constitutional courts to include the testimony in

Speaking on the generality of the use of expert's opinion the Court of Appeal of UK in **Clarke [1995] 2 Cr.App.R. 425** held that there were no closed categories where expert evidence may be placed before the jury. It would be wrong to deny the law of evidence the advantages to be gained from new techniques and advances in science. * [May on Criminal Evidence, 6th Ed. pg-108]

3.6 Mode of Proof of the Expert's Opinion:

The opinion of the expert is expressed in the form of reports, which are invariably written. But an important question before the court is the manner and mode of the proof of the expert's opinion so that the courts can take the report into account. Before we advert to the mode and manner of proving an expert opinion in India, we will also see the practices adopted in some other countries.

In India, by virtue of section 60 of the evidence act, oral evidence must be direct. So unless the maker of the report himself deposes before the court, the evidence of the Expert cannot be taken into consideration. This general rule is subject to some statutory exceptions. In ordinary practice, the expert deposes in the court and the other party cross-examines him. Section 291 to 294 of the CrPC lays down the condition under which the report of the various experts can be admitted without examining the expert. The provisions are as follows:

Section 291: the evidence of the medical witness, taken and attested by the magistrate, will be admitted in evidence in any inquiry, trial, or other proceeding, although the doctor is not called as a witness.

Section 292: The evidence of the officers of Mint upon any matter sent to them for examination may be used as evidence, without calling the officer of mint as a witness.

Section 293: the report of the government scientific experts, upon any matter or thing submitted to them for examination or analysis, can be used in evidence. The section makes the presence of the expert in the court dependent on the requirement as perceived by the court.

Section 294: when the document filed by the defense or the prosecution is admitted in evidence, by the opposing party, then the same can be read into evidence without the calling of the expert.

Apart from these exceptions, there are other exceptions as well. When the expert who has submitted the report is dead or cannot be found. So if section 32 of the evidence act is attracted then also the report of the expert may be read into evidence without the maker coming and deposing in the court. An expert may also be examined on commission under chapter XXIII of the CrPC.

As regards the electronic evidence, as per section 45A of the evidence act, the report of the examiner of the electronic evidence referred in section 79A of the IT Act 2000 is a relevant fact. Section 79A of the IT Act lays down that the central government shall notify organizations or authority as an Examiner of electronic evidence.

So if we have a look at the provisions of the law, we find that barring a few experts' reports, mentioned specifically in CRPC, the other reports are admitted in evidence only when the maker of the report appears and testifies in the court.

3.7 Competence of Experts:

The evidence of the expert is admitted in the court because of the special skill possessed by the witness. A witness can be an expert witness only for the areas in which he has had special training and in no other field. For example, a doctor can be an expert witness for the opinion on cause of death, but he cannot be an expert in the matters relating to astrophysics. Further, it is possible that the expert may have too little experience which would be insufficient to help the court reach a proper conclusion. There are occasions when the party opposite to the one bringing the expert-witness often challenges the competence of the expert. They do this either by questioning his training, and credentials or by contrasting his opinion with that laid down in the well known treatises.

Section 45 of the Evidence Act neither lays down the standard for the expert nor does it lays down any qualification for the expert to be able to qualify as an expert. The questions regarding the competence of the the witness, as an expert, depends on the judge.³³

Now we come to the question – can we check the competence of the witness before he is

33. (Ratan Lal and Dhiraj Lal on Evidence]

allowed to depose? In USA, there is concept of *Voire Dire*, i.e. a hearing to ascertain to determine the competence of witness. In USA, the party calling an expert has to show: educational background, licenses and certificates, experience and personal research in relevant fields, teaching experience, books and articles written, number of times previously qualified as an expert before deposing as an expert. Canada too follows the principle of *voire dire* for the expert's testimony.

In UK, the courts decide on the competence of the witness to depose as an expert. The common law system recognizes that expertise may be obtained, both, from experience and formal study in the subject.

In Indian judicial system, there is no place for *voire dire* in cases of expert's testimony.

In **Ramesh Chandra Agrawal case** (*supra*) the Hon'ble Supreme Court quoted with approval the observation made in **State of H.P. v. Jai Lal** (*supra*). The court went on to state that:

“ It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.”

Further, in the same judgment, the Hon'ble Supreme Court held that: *The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.* (**See Malay Kumar Ganguly v. Dr. Sukumar Mukherjee (2009) 9 SCC 221.**)

So, in India, though we have not adopted the principle of *voire dire* for the testimony of the experts but the expert has to show that he has made special study of the subject or has acquired experience on the matter which qualifies him as an expert. If the witness deposing in the court fails to bring out his expertise then the evidence will lose its relevance.

3.8 Conflict between Expert's Opinion and Eye-witness

There are occasion when the testimony of the eye-witness contradicts or is at variance with the testimony of the expert. Dealing with one such situation where the constitution bench of Hon'ble Supreme Court in **Shashi Kumar Banerjee vs. Subodh Kumar Banerjee**³⁴ was hearing on the validity of a will, the court held as follows:

34. AIR 1964 SC 529

We do not consider in the circumstances of this case that the evidence of the expert is conclusive and can falsify the evidence of the attesting witnesses and also the circumstances which go to show that this will must have been signed in 1943 as it purports to be. Besides it is necessary to observe that expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence. In the present case all the probabilities are against the expert's opinion and the direct testimony of the two attesting witnesses which we accept is wholly inconsistent with it.

In the segment dealing with the handwriting experts we will deal with the case, in detail.

3.9 Conflict between Expert Testimony & Books/treatises:

There are occasions when the court is faced with the problem as to whose opinion to be accepted when it finds divergence of views as expressed in the treatises and the opinion as delivered by the expert in the court. Should the court follow the view as laid down in the treatises or the expert?

While dealing with these questions, the Supreme Court in **Santosh Kumar Singh v. State**³⁵, **observed as follows:** “68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses.”

Earlier, in the leading case of **Bhagwan Das vs. State of Rajasthan**³⁶ it was held that the report of an expert witness could not be brushed aside by making reference to some text on that subject without such text being put to the expert.

Further, in **Santosh Kumar Singh case (supra)** the Court quoted the following observation made by Supreme Court in the case of **Gambhir v. State of Maharashtra**³⁷

“30. ... The High Court came to its own opinion when the doctors failed to give opinion. The Court has to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court has tried to usurp the functions of an expert.”

So, what follows from the above discussion is that the court can rely on the contrary opinion as mentioned in the books or treatises only when that contrary opinion is put before the expert, and

35. (2010) 9 SCC 747 at page 771

36. [AIR 1957 SC 589]

37. [(1982) 2 SCC 351]

he has been given a chance to explain himself on that point. The courts cannot unilaterally rely on the opinion supplied by his own knowledge or that mentioned in the textbook.

3.10 Limitations of Expert Testimony:

Expert's testimony is not the panacea of all the ills. The expert are not allowed to comment on the ultimate issue, i.e. they cannot comment on the person's innocence or guilt as it is only the court who can decide it. Apart from these theoretical limitations, the evidence of the expert suffers from certain other limitations. The subject matter limitations (limitation in the field of knowledge) also limits their use in the court proceedings.

Unlike the lay-witnesses or the eye-witnesses, the expert is the one who has normally not seen the incident and is trying to answer the when, what, why and how of the incident using his expertise based on the information supplied to him. Invariably, the opinion of the expert is based on the background information supplied to him. So the first limitation on the evidence of the expert is the background information. If the background information is tainted then the whole opinion becomes suspect. There is a tendency of the court to abdicate its role when the experts depose. We need not leave the reins in the hand of the experts. Their report cannot be the sole basis.

In the leading case on the value of expert testimony, **Dayal Singh vs State of Uttaranchal**³⁸ the Supreme Court dealt with the limitations on the expert testimony and held:

If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

The expert's evidence is also limited by other external factors, the most important being the chain of custody requirements. This is required to satisfy that the chain of custody is not broken and that the material has been transferred from one hand to the other without any alteration or modification. A proper documentation of the material which is to be examined by the expert is also required. Poor handling and documentation have led to many failures in high profile cases as well. Further, there should be a detailed documentation of the forensic analysis as well. Unless that is done, there are possibilities that the evidence of the expert may not withstand the rigorous examination in the court.

38. (2012) 8 SCC 263

Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the function of the jury or judge setting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court. Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the application of their criteria to the facts proved in evidence. The scientific opinion, if convincing and tested, becomes a factor for consideration along with the other evidence in the case, but the decision is for the judge and the jury. (Rix, 1999)

4. DOCTOR'S EVIDENCE

4.1 Introduction

The evidence of doctor is normally associated with the branch of forensic medicine and encompasses the application of medical evidence for the purposes of law. The renowned textbook on medical Jurisprudence, Modi's Medical Jurisprudence and Toxicology, in its 23rd Edition, has referred to the ancient texts such as Charak Samhita, and Kautilya's Arthashastra, which contains lists of forensic evidence. The text further notes that the first recorded autopsy was performed in India by Dr Edward Bulkley on 16 August 1693. Interestingly, the first injury certificate was issued by Dr Edward on 09th August 1695. It was found that in India, there were larger number of cases of poisoning and so the initially medical jurisprudence was largely concerned with the poisoning. The credit for establishing forensic medicine on a systemic basis, in Britain, goes to Andrew Duncan, Professor of the Institute of Medicine at the University of Edinburgh.

History of the Use of Medical Evidence:

Medical Witnesses have been used since long in the United Kingdom. In the famous case of *Buckley v Rice-Thomas* (1554) 1 Plowd 118, 124, Justice Saunders said this: *If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve and encourage them as things worthy of commendation.*³⁹

In UK, Samuel Farr wrote the first book on medical jurisprudence, which was published in 1788. In a scholarly article,⁴⁰ the origin of medical jurisprudence in the European countries has been traced. He has traced the developments of medical jurisprudence from Papal Physician to Italy, and from there to Germany and then to France and subsequently to UK. Great Britain found a chair of Forensic Medicine in a University in 1803, enacted laws like Registration Act & other laws that strengthened the medical profession; and further compelled its courts to accept expert evidence only from registered, and therefore educated, medical men.

39. [Lord Hodge, Justice of The Supreme Court 9 October 2017, in his address to Middle Temple Guest Lecture on Expert Evidence: use, abuse and boundaries]

40. Origin and Progress of Medical Jurisprudence 1776-1876 by Stanford Emerson Chaille, published in Journal of Criminal Law and Criminology Volume 40, Issue 4, Article 1 in 1950

But initially, the condition of legal and forensic medicine was not as it stands today. The medical jurisprudence was interspersed with superstitions, miracles, and witchcraft. The growth of science, and invention of instruments such as microscope, stethoscope, and discovery of blood groups enhanced the acceptability of the medical evidence. The teaching of Forensic medicine will further increase and so will the role of the medical experts in the courts.

4.2 Why Medical evidence needed or its importance.

Now, that we have seen the brief history of the growth of medical jurisprudence, a natural question that comes to our mind is the utility of the medical evidence or the medical jurisprudence. The importance that is accorded to the study of forensic medicine can be gauged from the fact that it has been made compulsory part of the study of medicine for all medical students. Their evidence has corroborative value and his testimony can mean the difference between death and acquittal.

In almost all the criminal cases which involves injury to the body, or death, or homicide or sexual assault, the evidence of the doctor becomes necessary. Right from deciding the juvenility of the child not having birth certificate or whose certificate seems apparently forged, or not matching with the appearance, the doctor is called in to examine the alleged juvenile to ascertain her age. The age of not only the accused but also of the victim is required to be decided under POCSO Act.

In cases where the victim is injured, a number of questions need to be clarified and proved before the court. The prosecution need to prove the nature of the injury, the age of the injury, the nature of the weapon that caused the injury, and the places where the injury was caused.

Similarly, in cases of homicide or murder the following facts need to be corroborated by the evidence of a doctor: cause of death, the time of death, the nature of injuries that caused the death and whether that injury is sufficient in ordinary course of nature to cause death, and the weapons used. Related to these is the post-mortem of the deceased. This hold a great significance as the fate of accused depends a lot on the report.

In sexual assault cases, the injuries on the body of the victim, the presence of any spermatozoa, and other related matters, the test of the body of the accused are all within the domain of the medical evidence.

Apart from criminal cases, there are also cases under Motor accident claims tribunal, and other agencies where the nature of injury on the person is essential for deciding the case. The extent and the nature of the disability can be proved by the medical evidence.

Section 15(2)(d) of the India Medical Council Act, 1956 lays down that no person other than a medical practitioner enrolled on a State Medical Register shall be entitled to give evidence at any inquest or in any court of law as an expert under section 45 of the Indian Evidence Act, 1872 on any matter relating to medicine. And Section 15(2)(c) of the Act lays down that no person other than a medical practitioner enrolled on a State Medical Register shall be entitled to sign or

authenticate a medical or fitness certificate or any other certificate required by any law to be signed or authenticated by a duly qualified medical practitioner. So, these two provisions makes it clear that in matters of medicine, and inquest, only doctors can depose as an expert in the court and no other.

A medical witness can be, both, a witness of fact, and also an expert witness. When the doctor deposes what he has observed, such as the number of injuries, position of injuries, the place of injury, he is more a witness of fact than an expert. But when the same witness testifies as to the nature of the weapons that could have caused the injuries, the timing of Injuries, the nature of the injuries etc. then he becomes an expert witness.

The Hon'ble Supreme Court speaking through **Machindra v. Sajjan Galfa Rankhamb, (2017) 13 SCC 491** observed that a medical witness who performs a post-mortem examination is a witness of fact though he also gives an opinion on certain aspects of the case. This proposition of law has been stated by this Court in **Nagindra Bala Mitra v. Sunil Chandra Roy, AIR 1960 SC 706**].

Apart from the reports that the doctor's present before the court, their deposition helps the court in drawing inferences as to the truthfulness or otherwise that of the prosecution or defense case. In the event of inconsistencies between the evidence of the eye-witness and the doctor's evidence, which cannot be reconciled, the benefit goes to the defense. On the contrary, if the medical evidence corroborates the evidence of the eye-witness, then it results in conviction of the accused. In many serious cases such as rape, murder, attempt to murder, and causing grievous injury, etc a lot depends on the medical evidence.

4.3 MEDICO-LEGAL REPORTS AND ITS RELEVANCE:

The doctors, before they come and depose in the court, have to prepare certificate where they express their opinion. In India, the doctors have powers to issue certain certificates by virtue of section 15(1)(c) of the Indian Medical Council Act 1956. The certificates issued by them could be medical certificates, medico-legal reports or dying declaration.

i. Medical Certificates

Medical certificates are issued by the doctor for various purposes including showing the ill health, or good health, birth or of death etc. Medical Council Act authorizes only a registered medical practitioner to issue a medical certificate. These certificates cannot be admitted into evidence unless the doctor deposes before the court.

ii. Medico-Legal Report

Medico-Legal reports are the most commonly used document, issued by the doctors, in a criminal trial. The medico-legal certificates (MLCs) are issued by the doctor on the requisition by

the police or magistrates. They are issued in cases on hurt, rape, death, suicide, etc. The most commonly used MLC are post-mortem report, injury report.

Normally, when an injured or a dead body is brought before the doctor for its examination, the doctor examines them and prepares the report in the prescribed format. However, even if the reports are not in the printed format that per se will not render the report inadmissible. The reports are normally in 2 parts: first the facts as found by the doctor, and second, the opinion of the doctor. The second part is most important as this is the place where the doctor expresses his expert opinion.

iii. Dying Declaration

The law relating to the dying declaration finds its force through section 32(1) of the evidence Act. The dying declaration is the statement of a person under the expectation of death and that he has died. The subject of dying declaration with respect to a doctor has been dealt independently in later part of the article.

4.4 Opinion of Doctor How Binding on the Court:

We have seen how the doctors have assumed an indispensable role in the criminal justice system, so it becomes imperative to discuss the relative value and worth of his opinion in a case. While some argue that the doctor being master of the subject so his opinion should be the accepted, in toto, but the others call for a detailed and deeper analysis of the opinion of doctor. They say that his opinion be accepted only when it is found to be unblemished. In this article we will try to see the probative value of the opinion of the doctor, deposing as an expert.

It is no longer *res integra* that the evidence of the doctor, deposing as an expert is just a corroborative evidence. The evidence of doctor is entitled to great weight but it has to be seen that the doctor can't be allowed to take the place of the judge. The court is the ultimate opinion maker. Reiterating this thought further, the Hon'ble Supreme Court in Para-15 of **State of Haryana v. Bhagirath**,⁴¹ observed as follows: *"15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and other doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."*

While discussing the value of the medical evidence, the Mysore High Court in **Re:**

41. (1999) 5 SCC 96: at page 101

Madivalappa Channappa Hulgur⁴² quoted with approval the following observation made by the Norman, J. in **Queen Vs Ahmed Ally 11 Suth WR Cr 25**:

...The evidence of a medical man, or other skilled witness, however eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect. New and previously unobserved phenomena which, till they have been recorded are supposed to be impossible, are constantly being noticed....

The Supreme Court while discussing the nature of the evidence of a doctor, held in **Solanki Chimanbhai Ukabhai v. State of Gujarat**,⁴³ as follows: *Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.*

As is a matter of common knowledge that the doctors, before giving their opinion, also rely on some other experts or tests conducted by other professionals, common example being the radiologist, the chemical examiner, the pathologists etc. Though the doctor relies on these professional reports but the final opinion has to be that of the doctor.

In **Mohd. Zahid v. State of T.N.**⁴⁴: the Supreme Court held that in cases where the report of the doctor is self-contradictory, such report of the doctor cannot be relied upon. Further, it was also held that when the opinion of the doctor was neither supported by the material written in the text nor the statement of the witnesses, in such condition, the court cannot rely on the evidence of the doctor preparing the post-mortem report.

“24. We are aware of the fact that sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. This is one such case where we find that there is a reasonable doubt in regard to the cause of death of Jabeena and we find it not safe to rely upon the evidence of PW 8 solely for the purpose of coming to the conclusion that Jabeena's death is proved by the prosecution to be homicidal.”

42. 1966 CriLJ 672,

43. (1983) 2 SCC 174 in para-13.

44. (1999) 6 SCC 120

When the medical evidence adduced by the prosecution to prove the guilt of the accused and the defence evidence to prove the innocence of the accused are evenly balanced then the accused must get the benefit of the doubt. -- **State vs Gulzari Lal**⁴⁵.

There could also be cases where the medical opinion is there and the evidence of doctor is also there but if the material or the medical evidence is deficient then the court can also form its own opinion on the subject. **Brij Bhukhan vs State of UP**.⁴⁶

Apart from the opinion of the doctors, there are a number of treatises on the subject of the medical jurisprudence. But one question that keeps occurring before the courts – whom to rely upon when there is discrepancy between the opinion of the doctor and the treatises/books? The court has dealt with these questions.

In **Pratap Misra v. State of Orissa**,⁴⁷ the Supreme Court, referring to the cases of **Bhagwandas case** (*supra*) and **Sunderlal v. State of Madhya Pradesh**⁴⁸ deprecated the approach of Judges in drawing adverse conclusions by relying upon the particular passages in medical books without drawing attention of the doctor who has examined the victims to such passages.

A discussion of the case-laws shows that the evidence of the doctor is an opinion and is hardly conclusive. Their opinion do carry a great value but it is hardly conclusive.

4.5 Difference Between the testimony of the Eye-witness and medical witness:

The congruence of medical evidence and the ocular testimony makes the evidence worthy of notice but things are not always so. There are instances where the deposition of the medical evidence and the eye-witness differ in their version. The difference could be on the nature of the weapons used, the timing of death, the number of injuries alleged to have been caused and so on. The defence often props these differences to discredit the testimony of the witnesses. There are instances when the conclusion arrived at by the doctor, in their post-mortem report, differs from the version of the eye-witnesses. The courts have had to grapple with these problems since long. In this article we will try to see how the courts have resolved the question. When we talk of contradiction between the testimony of the eye-witness and the expert, then the contradiction is not on facts or identification of accused rather it's on the nature of injuries, the weapons used, the time lag in the occurrence. The contradiction can only be on the subject matter of facts under inquiry.

45. AIR 1979 SC 1382

46. AIR 1957 SC 474.

47. (1977) 3 SCC 41,

48. [AIR 1954 SC 28]

In **State of U.P. v. Krishna Gopal**,⁴⁹ the Hon'ble Supreme Court while discussing the relative worth of the evidence of the eye-witnesses account, held as follows: (SCC p. 313, para 24)

“24. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the “credit” of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

In **Khambam Raja Reddy vs. Public Prosecutor, High Court of Andhra Pradesh**⁵⁰, the Hon'ble Supreme Court held that in cases of contradiction between the ocular evidence and the medical evidence, where the ocular evidence does not support the medical evidence in such cases the court should decide the eye-witness's evidence independently and if the eye-witness testimony are trustworthy then it should be accepted. The Supreme Court expressed its full support to the principles as laid down by the court in the earlier decision of **State of M.P. v. Dharkole alias Govind Singh**⁵¹. The court further observed that if the ocular testimony is such that it is not possible to relate the injuries with the circumstances in which they were said to have been inflicted, the court has the discretion not to accept the ocular evidence.

While dealing with the differences and discrepancy between the testimony of eye-witness and the medical witness, in **Dayal Singh v. State of Uttaranchal**,⁵² the Hon'ble SC held in para-36 that where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

In **Mayur Panabhai Shah v. State of Gujarat**,⁵³ the Hon'ble Supreme Court held: *Even where a doctor has deposed in court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.*

49. (1988) 4 SCC 302,

50. (2006) 11 SCC 239

51. (2004) 13 SCC 308

52. (2012) 8 SCC 263

53. (1982) 2 SCC 396: at page 396

In **State of U.P. v. Krishna Gopal**,⁵⁴ it was held that where the eye witnesses' account is found to be trustworthy and credible, medical opinion pointing to alternative possibilities is not accepted as conclusive.

In a 2018 judgment of **Menoka Malik vs. State of West Bengal**⁵⁵ the Hon'ble SC held that it was a well settled law that the medical evidence cannot override the evidence of ocular testimony of the witnesses. If there is a conflict between the ocular testimony and the medical evidence, naturally the ocular testimony prevails.

While deliberating on the issue of discrepancy between the evidence of the eye-witness and ocular testimony, the Hon'ble Patna High Court in **Vidya Sagar Prasad vs. The State of Bihar**⁵⁶ observed that: 44. *It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of witness has a greater evidentiary value vis-à-vis medical evidence; when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved.*

The Apex Court in the case of **Mahavir Singh v. State of Madhya Pradesh**,⁵⁷ approved the observation made by the Court in **Abdul Sayeed v. State of M.P.**,⁵⁸ on the question of contradictions, inconsistencies and exaggerations or embellishments has held as under:-

"22. The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved (See: Abdul Sayeed v. State of M.P., (2010) 10 SCC 259).

24. It is the duty of the Apex Court to separate chaff from the husk and to dredge the truth from the pandemonium of Statements. It is but natural for human beings to state variant statements due to time gap but if such statements go to defeat the core of the prosecution then such contradictions are material and the Court has to be mindful

54. (1988) 4 SCC 302

55. AIR 2018 SC 4011,

56. MANU/BH/1394/2011

57. (2016) 10 SCC 220,

58. (2010) 10 SCC 259,

*of such statements [See: **Tahsildhar Singh v. State of UP**, AIR 1959 SC 1012; **Pudhu Raja v. State**, (2012) 11 SCC 196; **State of UP v. Naresh**, (2011) 4 SCC 324]. The case in hand is a fit case, wherein there are material exaggerations and contradictions, which inevitably raises doubt which is reasonable in normal circumstances and keeping in view the substratum of the prosecution case, we cannot infer beyond reasonable doubt that the appellant caused the death of the deceased.*

In **Ramanand Yadav vs. Prabhu Nath Jha**⁵⁹ : So far as the alleged variance between medical evidence and ocular evidence is concerned it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference.

But in cases where the discrepancies between the eye-witness and the medical evidence is minor and doesn't strike at the root of the case, then the prosecution case cannot be affected. **Maharaj Singh vs State Of Rajasthan**:⁶⁰

Also, the Supreme Court in **State of Rajasthan v. Bhanwar Singh**⁶¹ observed:

“6. ... Though ocular evidence has to be given importance over medical evidence, where the medical evidence totally improbabilises the ocular version that can be taken to be a factor to affect credibility of the prosecution version.”

So, it appears that when there is inconsistency between the testimony of the eye-witnesses and the evidence of the doctor, the court has to tread a fine balance. On the one hand, the ocular testimony of witness gets precedence over the doctor's opinionative evidence while on the other, the evidence of the doctor is also entitled to great respect. The court should try to reconcile the difference and only when they are mutually incompatible then only it should discard the evidence of one in favour of the other.

4.6 Difference between the testimony/opinion of two Doctors:

There are occasions when the report of 2 experts or doctors on the same point is inconsistent. The Supreme Court has dealt with situations where the 2 doctors, one who examined the injured immediately after the incident, and the doctor who later conducted the post-mortem, differed in their report. In one such case, the Hon'ble SC observed in **Piara Singh vs State of Punjab**⁶² that in cases where the opinion of a medical witness is contradicted by another medical witness both of whom are equally competent to form an opinion the opinion of that expert should be accepted which supports the direct evidence in the case.

59. (2003) 12 SCC 606

60. (1981) 2 SCC 18.

61. [(2004) 13 SCC 147]

62. (1977) 4 SCC 452, in PARA-6,

Further, in **Majju vs. State of M.P.**⁶³, the Supreme Court discussed the discrepancy in the report prepared by the doctor examining the victim first and the doctor examining the victim later and relied on the report of the doctor preparing the Injury report as his report was consistent with the evidence of the eye-witnesses. In para-6 of **Majju case (supra)**, the Supreme Court held as follows:

6. The counsel for the appellants contended that the doctor who conducted the post-mortem examination deposed that there were no incised injuries as stated earlier by another doctor who first examined the deceased Bihari Lal. In our opinion, it is not a serious mistake as there are four eyewitnesses in this case who deposed that appellants Majju alias Nasir and Irshad were having farsis with them and they inflicted cut injuries on Bihari Lal. PW 8 Dr Vijay Agrawal conducted the post-mortem and described the injuries in a haphazard manner without proper description of the wounds as to whether these were incised injuries or lacerated injuries. But the doctor, who examined the injured immediately after the occurrence of the incident, described the nature of injuries and that is fully in conformity with the oral evidence given by the witnesses. The Sessions Judge as well as the High Court has rightly relied on the evidence of the doctor who prepared the wound certificate of the deceased.”

The Supreme Court also discussed a similar issue in **Tulsiram Kanu vs. The State**,⁶⁴ and said: In ordinary circumstances, there would be nothing wrong in taking reports of Chemical examiner and Imperial Serologist on record without examining these persons as witnesses, as permitted by the Criminal Procedure Code. When, however, there is a difference of opinion in the reports so much so that the effect of the one report is to nullify the effect of the other, the duty to explain the difference is on the prosecution and the mere production of the report does not, under the circumstances, prove anything which can weigh against the accused.

Again while dealing with the differences of opinion between the doctors, the Supreme Court in **Tanviben Pankajkumar Divetia v. State of Gujarat**,⁶⁵ relied on the doctor who had actually examined the accused and had noted the injuries himself but not on the other doctor who gave his opinion only on the basis of the injury report and the X-ray report without even looking to the X-ray plate.

In **Avtar Krishen Koul vs. Central Bureau of Investigation**⁶⁶ it was held that it is settled proposition of law that the expert opinion must always be received with great care and caution. When there is two expert's opinion and both the experts have been examined by the prosecution, the evidence of one of the expert is not confirmed by the other and when the prosecution fails to

63. (2001) 9 SCC 449

64. AIR 1954 SC 1,

65. (1997) 7 SCC 156

66. 2007 CriLJ 3450

explain with regard to the difference of opinion, then it is unsafe to base a conviction solely on the expert opinion.

There are also occasions where there is difference between the report of the doctor conducting the post-mortem and the doctor who had earlier examined the victim, during treatment. The Hon'ble SC dealt with the discrepancy in **Prahalad Patel vs State of M.P.**⁶⁷ and observed that some of the injuries were not visible after passage of time so the discrepancy was immaterial.

It has also to be seen in the cases of difference between the opinion of the 2 doctors as to which one had examined the victim in greater detail. In **State, Govt. of NCT of Delhi v. Sunil**,⁶⁸ the dead body was examined by a doctor who prepared the Medico-Legal Certificate and pronounced the girl dead. He made the above entry in the MLC. He merely noted the superficial injuries on the dead body. Later, another doctor conducted detailed examination on the dead body, and prepared the post-mortem report. The Supreme Court while reconciling both the report also observed:

“Whatever be the reason, no court could afford to ignore the report of the doctor who conducted the autopsy with meticulous precision about all the features noticed, merely on the strength of what another doctor had scribbled in the MLC at the initial stage.”

To sum up the discussion on this issue, the difference between the 2 medical experts on the same issue, the court should also look into the other factors to form its opinion. The court having benefits of the other background facts as well is better placed to decide as whom to follow. It can be said as a matter of rule that primacy should be given to the doctor's opinion who has examined the person, than the one who has not see the patient/victim. Further, the one who has more reasoned opinion should be followed. Apart from that the courts would do well to follow the guidelines as have been discussed in the case-laws discussed.

4.7 Absence of the Doctor to prove his injury report / Post-mortem report:

During trial, there are circumstances when the doctor who has either examined the injured and prepared the injury report, or the doctor who has conducted post-mortem on the deceased fails to appear before the court to depose. The failure may be on account of the death of the doctor or due to his transfer. It is also possible that the doctor may not have the information of the case.

In case where the doctor has died, his report can well be exhibited under section 32 of the Evidence Act and his report be admitted in evidence.

In **Rajeev Singh vs State of Bihar**⁶⁹ a division bench of Patna High Court held that if a post-mortem report or injury report is proved by a witness in terms of any of the circumstances

67. (2011) 4 SCC 262

68. (2001) 1 SCC 652,

69. 2017 CriLJ 4213

enumerated under Section 32 of the Evidence Act, such evidence would be admissible in evidence. However, such evidence would not have any probative value unless and until the same is proved by any other doctor who is well equipped in medical science and competent to answer the question on the merits of the report as the defence would be deprived of cross-examination on the contents of the report, which would be prejudicial to its interest.

In **Vijender vs. State of Delhi**⁷⁰ the Hon'ble SC commenting on the acceptance of post-mortem report, exhibited not by the doctor who made it but by the clerk, in evidence deprecated the practice and observed: *"It passes our comprehension how the trial Judge entertained the post mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post mortem examination. It is of course true that in an exceptional case where any of the pre-requisites of Section 32 of the Evidence Act is fulfilled a post mortem report can be admitted in evidence as a relevant fact under Sub-section (2) thereof by proving the same through some other competent witness"*

In another case, **Sowam Kisku v. State of Bihar**⁷¹ the DB of Jharkhand High Court observed that if any other Doctor had been examined who knew the signature of the Doctor who conducted autopsy, and who had given evidence as to the nature of post mortem done and the injuries found by the Doctor on the dead body, then in such circumstances the appellants would have had an opportunity to cross-examine the said Doctor to profess their case that injury suffered was not fatal in nature or that the said injuries are not sufficient in the ordinary course of nature to cause the death of the deceased or that the said injuries are likely to cause death. The prosecution by not examining the Doctor in fact had denied the opportunity to the accused appellant as they were prevented from cross-examining the competent person, who would be well equipped in medical science.

Earlier, in **Hadi Kirsani v. State 1966**⁷² it was observed at para- 7 as follows:- [this is an oft repeated para of this judgment] *"7. The position of law may, therefore be summarised thus if the doctor is available for examination in court, the injury report or the post-mortem report given by him is not substantive evidence and is inadmissible unless he is examined. It can be used for corroboration or refreshing memory or for contradiction of his evidence in court. If, however, the doctor is dead or is not available for examination in court under the circumstances mentioned in Section 32, the injury report or the post-mortem report is admissible and relevant. What weight it would carry with a court of fact is altogether a different question. Its probative value would depend on the facts and circumstances of each case."*

70. (1997) 6 SCC 171

71. 2006 Cri. L.J. 2526,

72. CriLJ 45, A.I.R. 1966 Orissa 21,

So from the above discussion it can safely be concluded that the prosecution should examine the doctor who has prepared the report but if the doctor cannot be found or produced in evidence then it's advisable that another doctor who is acquainted with the working of the doctor preparing the report should be called in to exhibit the report. Only if this option too fails then the report should be exhibited by the clerk etc who recognizes the signature of the doctor.

Now that the general principles governing the evidence of a medical expert has been dealt, we will now look at the individual sub-fields where the medical experts play a vital role. In this segment we will look into the various aspects relating to post-mortem, inquest, injury report, rape test, Dying Declaration etc.

4.8 POST-MORTEM / AUTOPSY:

A post-mortem examination, also known as an autopsy, or necropsy is the examination of a body after death. The aim of a post-mortem is to determine the cause of death, the time of death, the possible manner of death and also that the death was natural or unnatural. Post-mortems are carried out by pathologists (doctors who specialise in understanding the nature and causes of disease).

PURPOSE OF MEDICO-LEGAL AUTOPSY

Purpose of post-mortem examination in a particular case of unnatural or suspicious death is to find out the following : –

- (1) To know the exact cause of death.
- (2) To find out the circumstances of death
- (3) To find out the post-mortem interval.
- (4) In case of the unidentified dead body, to establish the identity of the deceased or to help to do so.
- (5) The period for which the deceased survived after sustaining injuries or exposure to the poison.
- (6) To know the nature or the manner of death, whether natural, suicide or homicide.
- (7) Type of weapon or the poison used.
- (8) Whether one or more than one person was involved, in case of homicide.
- (9) Whether any natural disease process contributed in any way, to cause the death.
- (10) Whether any other offence was related with the death e.g. rape.
- (11) Is the injury, which has caused death, expected to cause death in ordinary course of nature?

- (12) Whether the dead body has been displaced from the original place of disposal.
- (13) To know whether more than one method or weapon were used or if more than one person were involved in the crime.
- (14) Whether the deceased received any treatment before death.
- (15) Whether there is anything on or with the dead body which may help identification of the assailant.
- (16) In case of death due to assault, the relative positions of the victim and the assailant.

**Source: MEDICO-LEGAL AUTOPSY BY PANEL OF DOCTORS PRESENT
SCENARIO: JIAFM, 2004; 26(3). ISSN 0971-0973.**

Importance of Post-mortem & Duty of Doctors:

In cases of violent death, or of homicide or suicide, the post-mortem report serves as a vital piece of evidence. They can make the difference between an acquittal or death sentence. So it is expected of the doctor as well to prepare the report in a way that makes the matter clear.

In **State of Haryana v. Ram Singh**⁷³ the Hon'ble Supreme Court while considering the significance of the evidence of the doctor observed: (SCC p. 429, para 1)

"1. While it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-à-vis the injuries appearing on the body of the deceased person and likely use of the weapon therefore and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses."

So, it is the solemn duty of the doctor to prepare the post-mortem report cogently and with clarity. If the doctor does not do so, then his report loses its importance. The Supreme Court in **Sahabuddin v. State of Assam**,⁷⁴ adversely commented on the doctor who performed the post-mortem but gave a vague, indefinite and uncertain opinion.

30. Similarly, PW 1, the doctor who conducted the post-mortem of the corpse of the deceased was expected to categorically state the cause of death in which he miserably failed. He is a doctor who is expected to perform a specialized job. His evidence is of great concern and is normally relied upon by the courts. For reasons best known to him, he made his evidence totally vague, uncertain and indefinite. Given the expertise and knowledge possessed by a doctor, PW 1 was expected to state the cause of death with certainty or the most probable cause of death in the least. According to

73. [(2002) 2 SCC 426]

74. (2012) 13 SCC 213

PW 1, the black spots noticed on the deceased may be because of poisoning or it could be because of suffocation, although he also mentioned in his report that the symptoms described above may occur due to epilepsy. It is not possible to imagine that there would be no distinction whatsoever, if such injuries were inflicted by assault or suffocation or be the result of an epileptic attack.

Further, where the autopsy mentioned the timing of death as 10 days prior to the autopsy and the case of the prosecution was that he had died 5 days ago, the Supreme Court held that medical science cannot tell the time of death exactly. In **Ramjee Rai v. State of Bihar**,⁷⁵ the court observed:

37. Medical science has not achieved such perfection so as to enable a medical practitioner to categorically state in regard to the exact time of death. In a case of this nature, it was difficult to pinpoint the exact time of death. The autopsy surgeon told about the approximate time-lag between the date of post-mortem examination and the likely date of death. He did not explain the basis for arriving at his opinion.

The Court later commented that they had noticed on a number of occasions that it may not be possible for a doctor to pinpoint the exact time of death.

Non-examination of the doctor who conducted the post-mortem is a flaw in the prosecution case, unless the defence itself admits of the report. [**State of U.P. v. Lakhmi, (1998) 4 SCC 336**]

4.9 INQUEST REPORT

A closely related issue along-with the post-mortem of the deceased is the inquest of the deceased. Section 176 of the CrPC deals with the inquest by the Magistrate. The magistrate can conduct the inquest in cases where death has occurred in: in prison, in police custody, in police firing/encounter, exhumation and in cases of dowry death. The object of the inquest is to see whether a person has died under unnatural circumstances, and if so, what the cause of death is.

In inquest, the officer conducting the inquest is supposed to investigate and prepare a preliminary report on the death. The inquest report should contain the apparent cause of death as judged from the appearance and should note the injuries apparent on the body.

Speaking on the importance of the inquest report, the Rajasthan High Court in **Banwari vs State of Rajasthan**⁷⁶ *Ld. counsel appearing on behalf of the accused appellants placing reliance on Gurdeo Singh v. State (2) rightly urged that the inquest report is a document of vital importance and has to be prepared promptly [became (sic)] it has to be handed over to the doctor along with the dead body to be sent for postmortem examination. If the facts about the occurrence are mentioned in the inquest report, it would go to show that by that time the true version of the occurrence had been given therein If, however, the facts of the*

75. (2006) 13 SCC 229

76. 1979 Cri LJ 161

incident are not mentioned in the inquest report, the argument that till that time the investigating officer, who had prepared the inquest report was not definite about the factual position.

In **Shubhendu Nath Tewary vs. State of Bihar**⁷⁷ the division bench of Patna High Court while emphasizing the importance of inquest report observed:

24. Section 174 Cr.P.C. mandates that the police immediately after receipt of the information about the occurrence has to proceed to the P.O., start investigation and prepare inquest report of the dead body. In murder case, inquest report is a document of vital importance and, therefore, the law expects its prompt preparation. Obviously, delay in preparation of inquest report leaves much scope for questioning of the F.I.R., its contents and time of its recording.

In an illustrative case, where the Court dealt with the issue of inquest, in detail, (1993) 1 KLJ 839 it was held:

“Inquest Report would, in the ordinary course consist of three types of recitals. First category consists of the statements made by persons interrogated by the investigating officer during inquest. Second category consists of the opinions of the persons in whose presence the inquest was held. Third is the record of what the investigating officer had seen with his own eyes. The first category has no evidentiary value. Second category cannot be used as evidence on account of more than one inhibition, main among them is the bar contained in S.162 of the Code. But the third category is not subject to any such legal disability. We have not come across any legal hurdle against accepting them as admissible evidence. If the inquest report is proved under law, the recitals falling under the third 'category mentioned above are relevant under S.35 of the Evidence Act and are admissible in evidence even if the officer fails to repeat them in his oral evidence.”

Doubts on the value of Inquest report

The Supreme Court in **Pandurang v. State of Hyderabad**⁷⁸ Vivian Bose, J. has observed that "it is questionable how far an inquest report is admissible except under S.145 of the Evidence Act, but we do not regard it as of value so far as the appellants are concerned".

Further, in **Surjan v. State of Rajasthan**⁷⁹ the Hon'ble Supreme Court quoted the observation of Vivian Bose, J. in Pandurang Case, in Surjan's case, Supreme Court was considering the description contained in the inquest report regarding the injury found on the dead body as "an injury inflicted with a lathi near the top of the head". The description obviously

77. 2007 (1) PLJR 90

78. (AIR 1955 SC 216)

79. (AIR 1956 SC 425)

incorporates more than what the police officer saw with his eyes on the dead body. That is why the Supreme Court said that the statement in the inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of the medical witness.

In **Rameshwar Dayal v. State of U.P.**⁸⁰ Supreme Court found that when the statement made in the inquest report relates to what the officer saw by himself such statement is admissible in evidence notwithstanding absence of oral evidence regarding the case. In that case one investigating officer had deposed in evidence that he saw 4 "empty" cartridges at the spot of occurrence. It was argued before the Supreme Court that as a matter of fact there were four "live" cartridges at the spot and no empty cartridge was found. To bolster up the said point reliance was placed on the entry made by the police officer in the inquest report to the effect that four live cartridges were lying at the spot. It was contended that the said statement in the inquest report cannot be used as evidence since its maker did not say so in court. In support of the said contention a few decisions were cited before the Supreme Court. One of the decisions cited was **Surjan's case**. Their Lordships distinguished all the decisions on facts and held thus: "*Statement made by the investigating Officer in the inquest report is not a statement made by any witness before the police during investigation, but it is a record of what the investigating officer himself observed and found and such evidence is the direct or primary evidence in the case and is, in the eye of law, the best evidence. Unless the record is proved to be suspect or unreliable perfunctory or dishonest, there is no reason to disbelieve such a statement in the inquest report*"

The format of the inquest report has been prescribed under Rule 199(b) of the Bihar Police Manual 1978. It contains 9 columns. The Column No. 6 reads as follows: *Circumstances, if any which give rise to suspicion of foul play. It means the police is required to mention circumstances with regard to commission of offence including the name of suspect if any.*

4.9 SEXUAL ASSAULT AND MEDICAL EVIDENCE

Rape or Sexual assault, sodomy, bestiality are offences covered under the head of sexual offences. Rape is an offence punishable under section 376 of the Indian Penal Code. If the victim is minor then it is an offence under the POCSO Act as well. Modi describes Rape as a crime and not a medical diagnosis to be made by the medical officers treating the victim. Rape or no rape is a legal conclusion arrived to by the courts after trial. In cases involving sexual assault, the doctors give evidence of recent sexual assault, the injuries on the person of the victim and the accused.

Also, the definition of the rape u/s 375 is such that it is quite possible to commit the offence of rape without producing any injury on the private parts of the victim or accused. Medical evidence in the offence of rape, is mostly corroborative.

Medical evidence in cases of rape can be of the following character: marks of violence on the accused or the victim, presence of spermatozoa, marks of violence on genitals, presence of sperm on the clothes etc.

80. (AIR 1978 SC 1558)

Speaking generally, the Supreme Court in **State of Himachal Pradesh vs. Manga Singh, (2019) 16 SCC 773** held that in certain cases corroboration from medical evidence was necessary but that also will depend on facts of the case. It said: *“12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.”*

Doctors who examine the victim or the accused are called to tender their evidence. In the recent years, there have been a lot of changes in the definition of the offence of Rape, and also in the evidence act.

In **Pratap Mishra vs State of Orissa**⁸¹ where the two doctors opined that the presence of spermatozoa in the cervical smear of prosecutrix indicated that the prosecutrix had sexual intercourse between 24 to 48 hours and not earlier and also, the Doctor thought that as the vaginal fluid did not contain any spermatozoa whether living or dead, the spermatozoa found in the cervical smear could only be dead one and this was consistent with the prosecutrix having sexual intercourse at a time beyond 24 hours at the period of time when she was produced before the Doctor. The Supreme Court remarked : *“.....it is well-settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused and in the instant case as to the exact time when the appellants may have had sexual intercourse with the prosecutrix. The period of 24 hours prior to examination was given by the Doctor only roughly and would also include 20 or 18 hours before.”*

Further, there is no rule of law that the evidence of prosecutrix must be supported by the medical evidence. However, at the same time, it also needs to be noted here that if medical evidence is in contradiction with evidence of prosecutrix then the Court has to exercise an extra caution while examining the evidence of prosecutrix. **Dhanraj vs State of Maharashtra**⁸²

The non-production of medical report in cases of rape does not render the offence of rape false. The accused can be convicted on the basis of other material. **Sheikh Zakir vs state of Bihar**⁸³

We find that the medical evidence has an important role to play in cases of sexual assault. Their evidence along-with the DNA evidence, may nail the case of the prosecution or may help an

81. (1977) 3 SCC 41

82. 2014 SCC OnLine Bom 1306

83. AIR 1983 SC 911.

accused. But now in the changes definition of the offence of rape, and even otherwise, the conviction or otherwise depend on whole lot of other factors.

4.10 DETERMINATION OF AGE

Apart from the examination of injuries, and seeking the cause of death or the other injuries, the doctors have also to perform an equally important work, i.e. the determination of the age of a person. We have a number of laws that affects the substantive right of a person, based on his age. An accused, if found to be below the age of 16 years will not be tried in the ordinary courts, but in the juvenile justice board. A child between the age of 16-18 years, if he has committed a heinous crime may be tried by the JJB or by the children court depending on the mental status of the juvenile. Similarly, if the victim of sexual assault is less than 18 years then the accused would be charged under the more stringent provision of law, i.e. POCSO Act. Further, the criminal responsibility of the accused will diminish or increase depending on the age of the children.

The statute has also provided for the mechanism for ascertaining the age of the child but at times, when the certificate is not there then the court or the JJB takes the help of the doctor. The doctor ascertains the age of a person by examining various factors such as physical appearance, appearance of secondary sexual characteristics, development of teeth. Tests such as ossification of bones is also used. Here we are concerned with the legal implication of the medical opinion on the age.

Value of Medico-legal report in age determination:

The juvenile justice board or the court often sends the child before a medical board for determination of age. The board upon examination refers its opinion to the court. Now a question arises – whether the opinion of the board would be final or it is to be treated as any other medical report? The Hon'ble Supreme Court has answered this question in a catena of judgments.

In the case of **Baboo Pasi vs State of Jharkhand**⁸⁴ the supreme court held that the opinion of the medical board based on the radiological examination is a useful guiding factor for determining the age of a person but is not indisputable.

The Supreme court also held that where there was discrepancy as regards the tests done or the pathological tests carried out, then the court would have the liberty to rely on the statement of the victim of rape or her mother.

Further, it has also been laid in **Vishnu vs State of Maharashtra**⁸⁵ that when there is definite proof of age, in the form of documents such as school certificate, the hospital date of birth register etc then the opinion of the doctor will not prevail over the documentary proof.

84. AIR 2009 SC 314,

85. (2006) 1 SCC 283

In another leading case of *Om Prakash v. State of Rajasthan*⁸⁶, the court observed in para-21, “... Thus, in a circumstance where the trial court itself could not arrive at a conclusive finding regarding the age of the accused, the opinion of the medical experts based on x-ray and ossification test will have to be given precedence over the shaky evidence based on school records and a plea of circumstantial inference based on a story set up by the father of the accused which *prima facie* is a cock and bull story.

4.12 DYING DECLARATION AND DOCTORS

Truth sits upon the lips of dying man – goes the famous proverb. The law also admits the proverb and its acceptance is reflected in section 32 of the Evidence Act. Dying declaration is the statement, oral or documentary, given by a dying person as to the cause of his death. Normally, the executive magistrate should record the statement upon the certification of the doctor that the victim was in such condition of health so as to make and understand the statement. But if the situation of the victim is such that an executive magistrate cannot be called then the doctor may record the dying declaration, verbatim.

During Dying declaration, there often arises a question about the mental fitness of the victim to give statement. Here the role of the medical evidence comes into play. The doctor certifies as to the mental condition or not of the maker of the statement. In order to see the admissibility of the dying declaration under section 32(1) of the Evidence Act we will go through the relevant case-laws.

The mental and physical fitness of the declarant plays a crucial role in the admissibility of dying declaration. In *Khushal Rao v. State of Bombay*⁸⁷ the Supreme Court ruled that dying declaration could form the sole basis of conviction, provided the mental capacity of the declarant at the time of declaration and the corroboration of circumstantial evidence with the statement has been cautiously scrutinised before decision-making.

In a case, *Sukanti Moharana v. State of Orissa*⁸⁸, the doctor recorded the dying declaration, but in the dying declaration he failed to note that the patient was oriented to time and place and mentally clear at the time of recording of the dying declaration. But the other evidence proved that he was in fit condition at the time of giving declaration. The Supreme Court while deciding on the admissibility of such dying declaration held that the omission to note that was insufficient to render the dying declaration invalid.

Earlier, in a constitution bench judgment, *Laxman v. State of Maharashtra*⁸⁹ a question regarding the admissibility of the dying declaration was raised. The Supreme Court held that the

86. (2012) 5 SCC 201,

87. AIR 1958 SC 22,

88. (2009) 9 SCC 163

89. [(2002) 6 SCC 710]

trial Court must decide that the declarant was in a fit state of mind to make the declaration, but where the eyewitnesses' evidence including the evidence of a Magistrate who had recorded the dying declaration to that effect was available, mere absence of doctor's certification as to the fitness of the declarant's state of mind, held, would not *ipso facto* render the dying declaration unacceptable. It was also held that the evidentiary value of such a declaration would depend upon the facts and circumstances of the particular case.

Normally, the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.⁹⁰ [**Nanhau Ram v. State of M.P.**,⁹¹, [**Paniben v. State of Gujarat**⁹²]

The Supreme Court has refused to act on the dying declaration recorded by the doctor when it was found that the evidence suggested that the victims would not be in a position to give his dying declaration. The Supreme Court in **Nallapati Sivaiah v. SDO**,⁹³ quoted the judgment of Sabbita case with approval and observed:

*"47. This Court in **Sabbita Satyavathi v. Bandala Srinivasarao [(2004) 10 SCC 620]** refused to place reliance upon the dying declaration of the victim recorded by the Assistant Civil Surgeon at Government Hospital where the deceased was brought in an injured condition. The Court came to the conclusion that having regard to the injuries sustained by the deceased he would not have been in a position to make any statement even if he was alive when brought to the hospital. He must have become unconscious soon after suffering the injuries and there was no question of his either making a statement before PW 1 or before the medical officer."*

Some common terms relating to Injury report and postmortem and their meaning:

Abrasion- This is an injury which involve superficial damage to the skin. It is the scraping away of a portion of skin or mucous membrane, resulting when the skin contacts a rough object with sufficient force.

Bruise- A blotchy, superficial discoloration due to hemorrhage into the tissues from ruptured blood vessels beneath the skin surface, caused by force, without the skin itself being broken; also called a contusion.

Contusion- bruise: An injury in which the skin is not broken, there may be discoloration, pain and swelling as a result of blood seepage under the surface of the skin.

90. (2018) 2 SCC Cri J-22

91. [1988 Supp SCC 152.]

92. (1992) 2 SCC 474, 480-81, para 18.]

93. (2007) 15 SCC 465,

Ecchymosis An irregularly formed hemorrhagic area of the skin: the color is blue-black, changing to greenish brown or yellow.

Erythema- Diffuse redness caused by capillary engorgement in the lower layers of the skin. It can occur with injury, infection or inflammation.

Inflammation- a tissue response to injury to destruction of the cells with the following symptoms: redness, swelling, heat, and pain. Labia Majora- Outer lips to the vagina: usually covered by pubic hair after menarche; a single lip is called a labium majus. Labia Minora- Inner lips to vagina: in the adult they enclose the structures of the vestibule: a single lip is called the labium minus.

Laceration- an injury in the soft tissues resulting from ripping, crushing, overstretching, pulling apart, bending, or shearing: lacerations result from blunt force and are also called tears. Laceration is represented in the acronym TEARS by the T or tear: in contrast to lacerations, cuts come from sharp objects.

Odontology (Forensic) - Odontology is the study of teeth. In a death investigation, identity has sometimes been established through analysis of the teeth and accompanying dental prosthetics, fillings and compounds.

Polymerase Chain Reaction (PCR) - When forensic scientists have only a miniscule amount of DNA to work with, such as saliva on a cigarette butt, this process is used to generate a sizable sample. Called PCR--or Polymerase Chain Reaction, the technique allows small pieces of DNA to be cloned. Put simply, in about 20 minutes the PCR process makes it possible to make millions of copies of the tiny original DNA sample so that there is more than enough DNA to test.

Puncture- a wound made by a pointed instrument.

Scar- Fibrous tissue that replaces normal tissue after the healing of a wound, as in an episiotomy scar.

Source:[<https://cdn.ymaws.com/www.safeta.org/resource/resmgr/imported/GLOSSARY%20OF%20FORENSIC%20TERMS.pdf>]

5. Deoxy-ribonucleic Acid (DNA) TEST

Introduction

Of all the recent advancements made in the technique of criminal investigation, the use of DNA test has made the greatest impact. The advent of the DNA test has saved many a convicts from the gallows and also many others from long terms of incarceration in the prison. In the same vein, it has solved many a mystery murders, and rapes that would have been almost impossible to detect but for the use of the DNA Test. In a short span of time DNA test has reached an iconic status and is now treated as a perfect science. A DNA test report against an accused is almost

arduous to challenge in the court of law. In this segment we will deal with the brief science of the use of the DNA test, in India and in other jurisdictions and then will analyse the other legal questions arising out of the test. We will also look into a brief history of the use of DNA test in India and in other jurisdictions. We will also check for the its alleged limitations.

DNA or deoxyribonucleic acid are the genetic units linearly arranged in the chromosomes. DNA contains the genetic information which decides the phenotypic character of an individual human being. This DNA is typically transferred from the parents to the child. Half of the material comes from the mother and the other half from the father.

DNA is the genetic material that makes every human being unique and so DNA profiling or DNA fingerprinting is used to identify a person. As per experts, the chances of matching of DNA of one person from the other is 1 in 30 billion. (Modi for Medical jurisprudence). *DNA fingerprinting is a technique employed by forensic scientist to assist in the identification of individuals or samples by their respective DNA profiles. Although more than 99.1% of the genome is the same throughout the human population, the remaining 0.9% of human DNA shows variations between individuals. These variable DNA sequences, termed polymorphic markers, can be used to both differentiate and correlate individuals.*⁹⁴

Although deoxyribonucleic acid (DNA) was discovered in 1868, scientists were slow to understand its role in heredity. The discovery of double helix structure of DNA was made by James Watson and Francis Creek in 1953 and in 1962 James Watson, Francis Creek and Maurice Wilkins were awarded Nobel prize for medicine for their discovery of the molecular structure of DNA, which helped solve one of the most important of all biological riddles.

But it was only in 1984 that the information was used for DNA finger-printing. D Alec Jeffreys of Britain is credited with the invention of the use of DNA fingerprint.

5.1. What is DNA TEST

DNA profiling involves the analysis of blood, flesh, semen, hair, bones, saliva, urine, etc for identification of an individual. The DNA testing laboratory involves 3 different types of DNA Typing: Single Locus RFLP, multilocus RFLP, and Polymerase Chain Reaction.

5.2 History of DNA Testing in India

In India, Dr Lalji Singh, and Dr G.V. Rao have been jointly credited with the introduction of DNA testing. Their efforts in the field of DNA testing led to the use of DNA fingerprint technology in criminal cases. The Supreme Court lauded their efforts in **Kamlanantha vs State of T.N.**⁹⁵ They introduced the DNA profiling in the year 1988. The technique has been constantly improving and now the paternity test can be accurately obtained even from the grandparents and cousins and also from the saliva left on the cups.

94. [E. Giardina, in Brenner's Encyclopedia of Genetics (Second edition), 2013]

95. (2005) 5 SCC 194

5.2.1 DNA TEST IN UNITED KINGDOM

The Enderby Case is the first use of DNA in a criminal case and it was done in 1987. In 1983 Lynda Mann, age 15, was raped and murdered near the village of Enderby. This case was unsolved. Three years later, another 15-year-old, Dawn Ashworth, was a victim in a similar offense. Comparing the DNA "fingerprints" derived from semen recovered from both victim's bodies, investigators realized that the same man had raped and killed both women. A 17-year-old man was initially arrested and a sample of his blood was subject to DNA analysis. This man's innocence, however, was clearly established by the lack of a DNA match, and he was released. Subsequently, all males in the Enderby area between 13 and 30 years of age were asked by the police to voluntarily provide blood samples for DNA typing. Of 5,500 men living in the area, all but two complied with the request. A man then came forward and told the police that he had used false identification to supply a blood sample in the name of a friend. This friend, Colin Pitchfork, was subsequently arrested and convicted of Ashworth's murder, with DNA evidence playing a crucial role in the prosecution's case.⁹⁶

In an early and leading case of **Regina vs Doheny**⁹⁷ England and Wales Court of Appeal, the court dealt with the doubts regarding the use of DNA profile in evidence. The court dispelled the doubts and laid down extensive procedures for the admission of DNA evidence.

Currently, the government has set up National DNA Database (NDNAD) on April 10, 1995, for discovering innovative ways to use DNA to identify suspects, protect the innocent, and to convict the guilty. England is one of the world leaders in using the DNA profiling in criminal investigations.

5.2.2 DNA TEST IN USA

The first state appellate court decision to uphold the admission of DNA evidence was in 1988 (Andrews v. Florida, 533 So. 2d 841 [Fla. App.]), and the first major federal court decision to uphold its admission occurred in Jakobetz.

The New York Supreme Court in **People v. Castro, 1989** held that a three-pronged test was developed to determine whether DNA evidence should be admitted:

- I. Is there a generally accepted theory in the scientific community which supports the conclusion that DNA forensic testing can produce reliable results?
- II. Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification, and which are generally accepted in the scientific community?
- III. Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?

96. [Sri. Hanumappa vs Yallakka J. Anand Byrareddy decided on 03-09-2014]

97. 1996 EWCA Crim 728,

Earlier, when the courts in USA were following the Frye standard (*supra*) then only those scientific evidence were admissible which if the principle on which they were based was substantially established to have general acceptance in the field to which it belonged. But with the adoption of Daubert standard (*supra*) wherein the US Supreme Court held: “To summarise: “general acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial Judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on “general acceptance”, as gauged by publication and the decisions of other courts.

After the above judgment, the DNA Test has been frequently applied in the United States of America.⁹⁸

5.2.3 DNA TEST IN CANADA:

DNA evidence was used for the first time in a Canadian courtroom in Edmonton in 1988. It was used in a Rape case, and the DNA evidence helped the accused to be let off from the crime. Currently, DNA evidence has become crucial and has been serving as a backbone of criminal investigation in crimes like rape. DNA evidence has not only helped convictions but has also ensured convictions in cases where the accused were also convicted.⁹⁹

5.2.4 DNA TEST IN AUSTRALIA

In **R v Sing**,¹⁰⁰ and in **R v Ryan**¹⁰¹, the New South Wales Court of Criminal Appeal held that, unless admitted by consent, the evidence from the expert who prepared the final report itself was not admissible. To make the evidence admissible, the chain of custody and handling of the exhibit from which the DNA was taken and analysed must be proved — from collection of the sample to final analysis.¹⁰²

So in Australia, the entire chain from collection of Material to the preparation of the report has to be proved in the court of law.

5.3 USE OF DNA TEST IN CIVIL and CRIMINAL CASES

DNA tests are being used in the civil cases mostly in paternity matters. This is also used for the family law cases.

98. [Mukesh vs NCT of Delhi (2017) 6 SCC 1]

99. [<https://torontosun.com/2013/12/06/dna-25-years-in-canadian-courtrooms/wcm/50162083-5f92-4c5a-ad6a-6bb0dbe43af9>] Last visited on 20th September, 2020.

100. (2002) 54 NSWLR 31

101. [2002] VSCA 176

102. [https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_dna_itsuse_andmisuse.aspx] Last visited on 20th September, 2020.

5.3.1 USE OF DNA TEST IN CRIMINAL MATTERS

The real and widespread use of the DNA fingerprinting has been in the field of criminal investigations and criminal trial. The DNA profiling can be used in the following circumstances: to identify the dead body which is non-recognisable, in rape cases, in murder cases. The crime scene often has traces of various body parts and fluids left and they help in the identification of the accused.

5.4 LEGALITY OF DNA TEST

DNA test has been specifically mentioned in explanation (a) to section 53, section 53A(2)(iv) and also section 54 of the Code of Criminal Procedure. Further, as per the judgment of the Hon'ble Supreme Court in **Selvi Vs. State of Karnataka**,¹⁰³ taking of DNA samples is constitutional. It was held by the Court:

*“In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Sections 53, 53A and 54 of the Cr. P.C. It must also be clarified that a ‘DNA profile’ is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that the as per the majority decision in **State of Bombay v. Kathi Kalu Oghad (AIR 1961 SC 1808)** the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.”*

Section 53A(2)(iv) CrPC casts a duty on the Registered Medical Practitioner examining an accused of offence of rape to prepare a report of his DNA profiling without delay. DNA test reports have been used in our courts for long and have been the basis of many decisions.

5.5 Whether DNA Test can be forced?

Closely linked with the issue of the legality of the use of DNA profiling is the use of force in obtaining the DNA material from the individual directed to be subjected to the DNA Test. If we

103. AIR 2010 S.C. 1974,

look at the statute, then section 53-A of the CrPC itself states that the police may use such force as is necessary for the taking of the sample from the accused. Section 164A of the CrPC also talks about taking of DNA sample from the victim, but the section itself says that the victim cannot be forced to give her DNA sample. So, in criminal cases, force can be used in collecting samples from the accused, but not from the victim.

On the contrary, in civil cases, the law being unclear, the use of force has largely been a case-law based. In most of the leading case-laws, the Supreme Court has held that where the party has failed to take the test, the court is free to draw adverse inferences.

But the question of the use of DNA test by force was upheld by the Supreme Court in the case of **Narayan Dutt Tiwari v. Rohit Shekhar, (2012) 12 SCC 554**. Interestingly, the case concerned was filed for declaration under section 34 of the Specific relief Act that the respondent was the biological son of the petitioner.

5.6 Conclusiveness of DNA Test Report

Can the DNA test be conclusive as regards the matters for which it has been done? This question has been put by the counsels to the DNA experts the world over. We have differing courts answering the question differently.

The Supreme Court quoted, with approval, the remarks of US Supreme Court in *District Attorney's Office for the Third Judicial District v. Osborne* 2009 SCC OnLine US SC 73, where the US SC referring to the DNA test, stated as follows:

“DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognised this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation.

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.”

The Hon'ble SC in one of the earlier cases, **Kamti Devi v. Poshi Ram, (2001) 5 SCC 311**, held: 10. We may remember that Section 112 of the Evidence Act was enacted at a time when

*the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. **The result of a genuine DNA test is said to be scientifically accurate.** [Emphasis supplied by me]*

In **Pantangi Balarama Venkata Ganesh v. State of A.P., (2009) 14 SCC 607**, The Hon'ble SC held that DNA test to be almost conclusive. The Court discussed the concept of DNA test and its importance was emphasised.

In **Mukesh vs. State for NCT of Delhi (2017) 6 SCC 1** the court after discussing a catena of case-laws held that: DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.

5.7 When can DNA test be ordered:

The question as to when the DNA test can be ordered has been a subject of many litigation. In this respect, the Hon'ble Supreme Court in Goutam **Kundu vs State of West Bengal (1993) 3 SCC 418** in Para-26 has laid down the conditions under which DNA test/Blood test can be ordered.

In **Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633** the Supreme Court held that any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course. If the evidence that needs to be obtained by DNA test is otherwise proved, especially in family matters then resort should be made to that first.

In **Sharda vs Dharampal [(2003) 4 SCC 493]** while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court.

Can Court direct prosecution witness to subject herself to DNA profiling along-with the accused?

In an interesting case, the Hon'ble Madras High Court directed the witness, who was also a victim of the case to undergo DNA test. The court in **Saranya v. State, 2016 SCC OnLine Mad 23294** observed:

“53. On a reading of Sections 91 and 311 Cr.P.C. on the touchstone of the principle laid down in Fatehsinh Mohansinh Chauhan's case, Savitri's case and Sakiri Vasu's case, the power of a criminal Court to send a witness for DNA profiling can be traced to Section 91 and the second limb of Section 311 Cr.P.C.”

5.7 ISSUES IN USE OF DNA EVIDENCE

As has been stated, DNA tests are considered to be fairly accurate and the courts rely on the tests to either convict or exonerate the person. But are the results of the DNA tests to be accepted as final truth or are some issues involved with them too. It has been found that often the issue with the DNA evidence is not the whose DNA is it (result) but the how did the DNA sample get there. To put it in simpler words, the report of the DNA test is not questioned but the handling and use of the samples for DNA testing can be questioned.

Too much DNA can skew a sample. Too little can lead to a “no result”. Some products including cloth dyes or cleaning agents can inhibit DNA analysis. Ultra violet light, heat, humidity or bacterial action can destroy DNA. Ideally only a very small amount is needed. The issues that are typically raised in the DNA test is not the analysis but the process of handling the material or the sample for DNA. If there is error in sampling or the material is not carefully labelled then the entire test can become suspect.

The doubts on the DNA tests, either in the form of handling of the sample or in the final reports have also been matter of litigation. In the following paragraphs we will see how the highest courts have dealt with these questions.

In **Rajiv Singh v. State of Bihar, (2015) 16 SCC 369**: the Supreme Court observed a number of anomalies in the DNA TEST report and held: “... *the DNA test report being bereft of the particulars of the tests conducted and the results thereof permitting the conclusion arrived at, is not a self-contained one and ipso facto also does not meet the requirements of an expert opinion*”

In the leading case of **Santosh Kumar Singh v. State, (2010) 9 SCC 747**, Priyadarshini Mattoo Rape case, the defence challenged the test report of the DNA test on the ground that the blood sample taken from the accused was 20 ml but the sample received by the CFSL was 12 ml. The court dealt with the evidence and found that the handling of the blood showed no issues and accepted the test report of the laboratory. Further the Supreme Court also castigated the trial court for having substituted its own opinion on the basis of books in place of the opinion of the experts, without putting those questions to the expert.

6. FINGERPRINT TECHNOLOGY

Our finger contains pattern with ridges (also known as friction ridges) and these patterns do not change with age, unless the deep or ‘basal’ layer is destroyed or intentionally changed by plastic surgery. This makes the fingerprint of a person unique to him. So, the fingerprint is used to identify a person. The use of fingerprint in identifying the person is based on the fact that no two people have the same fingerprints, not even identical twins.

The use of fingerprint in investigation has had a long history. India was among the pioneer to

use the fingerprint in aid of the criminal justice system, and also in identifying a person. On 12 June 1897, upon approval by the Council of the Governor General of India, fingerprints started to be used for the classification of criminal records. In 1897 itself, the world's first, Bengal Fingerprint Bureau was opened at Calcutta. Azizul Haque and Hem Chandra Bose are 2 fingerprint experts credited with the development of the Henry System of fingerprint classification.

6.1 History of the Use of Fingerprint Technology in Courts

Samudra Shastra, an ancient Indian text compiled by a sage named Samudra Rishi in 3102 BC, tells us a great deal about fingerprinting. The fingerprints are used, both in the civil and the criminal cases. In civil cases, they are often used for the proving the fingerprint on the document executed and in criminal cases, they are used to prove the presence of the accused, on the place of incidence. In cases of forgery, they are used to show or deny that the fingerprint belonged to the executor or not.

In India, the statute gave special place to the finger-print impressions and it was specifically introduced in section 45 of the Evidence Act. The Evidence Act did not contain the word "finger impression" since the beginning. It was added subsequently in 1899.

The Hon'ble Patna High Court in **Basudeo Gir vs State AIR 1959 Pat 534**, discussed the history of the introduction of the word "finger impression" in section 45 of the Evidence Act. The court observed:

*"There was, however, a decision of the Calcutta High Court in the case of **Queen Empress v. Fakir Mohammad Sheikh, 1 Cal WN 33** where it was held by Banerjee, J. that the opinion of an expert as to the identity of thumb impression was not admissible under section 45 of the Evidence Act. It was with a view to obviate the conclusion of the learned Judge in that case that the Legislature thought it fit to incorporate the words "finger impressions" in specific terms. The reasons for the amendment quoted by Sarkar in his book on the Law of Evidence in India are relevant for the present purpose as well. The quotation runs thus:"*

"The system of identification by means of such impressions is gaining ground and has been introduced with considerable success, especially in the Lower Provinces of Bengal. It seems desirable that expert-evidence in connection with it should be admitted, and with that object it is proposed by Clause 3 of this Bill, expressly to amend the law on the subject."

Ever since the introduction of the word, Finger impression, in section 45 of the Act, the finger impressions have been used both, by the courts and the investigative authority in a number of cases. But the relative worth of the evidence of the finger-print impression expert has depended upon a number of other connected facts, such as access of the place of crime before the lifting of the samples, time-lag between the crime alleged to have been committed and the lifting of the samples, surface of the crime-scene etc. We will look into these factors and the relative worth of the evidence below.

6.2 Evidentiary Value of the Fingerprint Impressions:

In one of the first cases, where the Fingerprint was used was the case of **Emperor v. Sahdeo, 3 Nagpur L. Rep 1 (1904)** the court held that where it is approved by competent expert testimony that two finger impressions made at different times, however far apart, contain several points of agreement and no points of disagreement in their minutiae no further evidence is required to prove that they were made by the same finger.* [*Fingerprints: Fingerprinting Living and Deceased Individuals : Latent Fingerprints : Court Decisions*]

In the other early case concerning fingerprint technology, when the use of the fingerprint was still in its formative years, in **Ram Das Singh vs Emperor, 21 CWN 469**, the High Court of Calcutta discussed the use of fingerprint technology in identification of a person. But interestingly, the court didn't rely on the mere comparison of the person's old fingerprint with the latest fingerprint impression. The court held:

*"If the identity is going to be proved by such evidence as was given in this case, namely, the fingerprints, there ought to be evidence to prove, **first**, the similarity of the fingerprints of the accused taken at the trial with the fingerprints alleged to be those of the person previously convicted, and **second**, to identify the last-mentioned fingerprints as those of the person who has been previously convicted. In this case there was no evidence on the second point, and for this reason we think these two previous convictions were not properly proved. But as we have already said, that does not affect our decision in this case."*

In **Basgit Singh vs. Emperor AIR 1928 Pat 129**, the Patna High Court while dealing with the probative opinion of an expert on fingerprint, it was held:

"As to the probative value of the opinion of an expert on fingerprints, it must have the same value as the opinion of any other expert, such as a medical officer, etc. In each case the evidence is only a guide to the Court to direct its attention to judge of its value. The Court is at liberty to use its own discretion and to come to a conclusion either in affirmance or differing from the view taken by the expert. In this view it may be said, as has been held repeatedly in a number of cases, that it is not safe to convict an accused upon the sole testimony of an expert. The danger of such a conviction has also been indicated in the decision of the Madras High Court referred to above. Each case, however, must depend on its own circumstances."

To convict a person of a serious crime solely and entirely upon similarly of thumb marks or finger prints is not possible. **Bazari Hajam vs. Emperor AIR 1922 Pat 73**.

In **Gade Lakshmi Mangaraju v. State of A.P., (2001) 6 SCC 205** :it was held that the presence of a fingerprint at the scene of occurrence is a positive evidence. But the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene.

In **H.P. Admn. v. Om Prakash, (1972) 1 SCC 249**, in Para-17 it was held that the reports of the Director of the Finger Print Bureau is treated as evidence without examining the persons giving the report is that the comparison and identification of finger prints has now developed into science and the results derived there from have reached a stage of exactitude.

6.3 When should a document be sent for fingerprint expert:

There are often demands from the parties to the suit or proceedings to send a particular document to the fingerprint expert to determine the identity of the fingerprint.

In **Karuppa Gounder vs. Kuppuswamy AIR 2009 Madras 122**, it held that in a suit for specific performance, the defendant denied the signature on the sale deed, but the plaintiff took no step to obtain the opinion of the handwriting expert. At the stage of defence evidence when the defendant filed an application for sending the document to handwriting expert, it was rejected on the grounds of delay. It was held by Hon'ble Madras High Court that merely because of delay the application should not be rejected.

In **Ajay Kumar Parmar vs State of Rajasthan (2012) 12 SCC 406**. The court cautioned the trial courts and said that though section 73 of the evidence act empowered the courts to examine and compare the signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, but the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject.

In **O. Bharathan v. K. Sudhakaran [(1996) 2 SCC 704]**, the Hon'ble Supreme Court considered the issue of sending the handwriting to an expert and held that the facts of a case will be relevant to decide where the court will exercise its power for comparing the signatures and where it will refer the matter to an expert.

6.4 Conclusion

The art of use of Finger impressions is ancient, but is in use till now. The finger-print has provided many a vital clue in unearthing of the crime. Further, the science of finger-print has developed in an exact science. The only limitation on the use of the finger-print impression being the other external factors such as tampering with the articles before lifting of the finger-print, and exposure of the crime scene to the public. Though, alone, it may be insufficient to get an accused convicted but in corroboration with other evidence it can definitely work wonders.

7. FOOTPRINT TECHNOLOGY

7.1 Introduction

The science of foot-print identification is the measurement of footprint features for recognizing

the identity of a user. A footprint is a universal and easy way to capture a personal “identifier” which does not change much over time.

Footprints can be found on wet and soft floors, muddy areas, chairs, or even on victims themselves, both on their clothing or in the form of bruises. Generally, to make footprints visible, the experts examine the surfaces with oblique lighting with the crime scene darkened or may need to use chemicals, such as amido black, or an electrostatic detector device.

Once a foot-print is discovered then it is photographed. Footprints that have three-dimensional qualities, such as those made in sand or mud, should be cast after they have been photographed. When possible, investigators should seize the footprint and the surface it is on, so it is available for analysis later. Then the foot-marks lifted from the crime-scene are compared with the foot-mark of the accused person or the suspect.

Statutorily, Section 4 of the Identification of Prisoners Act, 1920 authorises a police officer to take measurements (including finger and footprint impressions) from any person arrested for an offence punishable with rigorous imprisonment for term of one year or upwards. Section 5 of the Act gives power to a magistrate to direct any person to allow his measurements (including finger and footprint impressions) to be taken for purposes of any investigation.

As far as Evidence Act is concerned, we find that there is express provision for the use of the fingerprint but the same does not contain explicit provision as to the use of the foot-mark or the foot-print. The issue of the use of footprint was raised in some of the case-laws.

In **AIR 1942 Mad 452, Horwill, J**, laid down that experts in footprints are not recognised by the evidence Act. Further, in **AIR 1951 Mad 737**, the DB of the Madras High Court in its decision delivered by Horwill, J. held that the opinion of a footprint expert is not admissible as evidence.

But the Patna High Court in **Basudeo Gir vs State AIR 1959 Pat 534**, speaking through J. S Mishra cited with approval the decision of the Guwahati High Court and observed as follows:

“In the case of Ganesh Gogoi, (S) AIR 1955 Assam 51, it was, no doubt, observed that the word "foot-print" does not occur in section 45 unlike the word "finger-print," so that foot-print cannot be taken as included within the ambit of that section. The evidence of the witness having held the comparison of the foot-print was yet held to be admissible on the ground that the Judge and Jury could see for themselves as to what extent the footprints coincided. This case, thus, can be taken to have followed the ratio in AIR 1942 Mad 452. In the case of (S) AIR 1956 SC 415, there is an observation to the effect that the science of identification by foot-prints is a rudimentary science and much reliance cannot be placed on the result of such identification.”

Later, in the same judgment, the Hon’ble court held that the word "science" occurring in section 45 should be held to be comprehensive enough to include the opinion of the expert in foot-print as well.

So a conspectus of the decisions cited above shows that the evidence of the footprint expert is admissible and also that though it has not been specifically mentioned in the Evidence Act but still it can be used as an evidence. To see the relative worth of the evidence of the footprint expert, let's have a survey of the case-laws as to how the courts have treated the evidence of the foot-print expert.

7.2 Evidentiary Value of the Footprints:

The investigative agencies have been using the technique of foot-print since long. But the courts have been generally reluctant to rely on the evidence of the foot-print alone. If used with other evidence, the evidence of the foot-print may corroborate the presence of the accused at the site.

In one of the earliest leading cases, the DB of Bombay High Court in **Emperor vs. Hira Gobar AIR 1919 Bom 162**, the Bombay High Court didn't comment on the admissibility of the evidence of the foot-print expert but held:

“The evidence, which relates to the resemblance of the two footprints is not sufficient to corroborate the accomplice. A careful comparison of the foot-print with the tracing on the glass does not yield any better result than that the two footprints may be of the same man. It is impossible to say with any degree of confidence on a comparison of these prints that the mark which was observed on the table in the house of the complainant on the night of the 11th was really the mark of the right foot of accused No. 1. There was some argument as to the admissibility of the evidence of the expert examined on behalf of the prosecution to establish the identity. But it is not necessary to go into that question. Assuming his evidence to be admissible, it is clear that his opinion cannot be accepted as establishing the identity of the appellant as the foot-marks do not coincide with sufficient accuracy. In the course of the argument it was fairly conceded by the Government Pleader that he could not maintain that the two marks were sufficiently identical, and on a comparison of these two marks I have come to the same conclusion. The apparent resemblance between the two marks does not carry the case of the prosecution any further than the evidence of the accomplice.”

In **Emperor vs Bigu AIR 1925 PC 130**, the Privy Council also admitted that the identification of the accused by foot-print, along-with other means was acceptable.

In the case of **Pritam Singh v. State of Punjab AIR 1956 SC 415** the Supreme Court held: *“The science of identification of foot-prints is no doubt a rudimentary science and not much reliance can be placed on the result of such identification. The track evidence, however, can be relied upon as a circumstance which, along with other circumstances, would point to the identity of the culprit though by itself it would not be enough to carry conviction in the minds of the Court.”*

But in this case, it was held that comparison test of the foot-print stood well and the accused

presence on the place of occurrence was confirmed using footprints along-with the other evidence.

In the leading case-law on the use of foot-print, **State of Bihar v. Kapil Singh, (1968) 3 SCR 810 : AIR 1969 SC 53**, the Supreme Court held that the foot-print evidence was a weak type of evidence and an accused cannot be convicted on the basis of this evidence only. The court observed:

“11. The only other circumstance, which has been relied upon by the prosecution, is the identity of the bloodstained footprint with that of the sample footprint of Deo Singh appellant. We do not think that it is necessary to discuss it in detail, because that evidence is, in its very nature, a very weak type of evidence and, in fact, in the High Court even the third Judge, to whom the case was referred on difference of opinion, held that it would not be safe to rely on this evidence and discarded it.”

7.3 Forcibly obtaining footprint : Wether constitutional?

In one of the recent cases, the Supreme Court took up the question of the constitutionality vis-a-vis Article 20(3) of the Constitution of forcibly taking of the foot-print of the accused. The Court in **State of Uttar Pradesh vs. Sunil (2017) 14 SCC 516** discussed the **Kathi Kalu Oghad Case** and **Selvi v. State of Karnataka** and held :

“Thus, we have noticed that albeit any person can be directed to give his foot-prints for corroboration of evidence but the same cannot be considered as violation of the protection guaranteed Under Article 20 (3) of the Constitution of India. It may, however, be noted that non-compliance of such direction of the Court may lead to adverse inference, nevertheless, the same cannot be entertained as the sole basis of conviction.”

So, the question of forcibly taking of the footprint of the accused is perfectly constitutional.

7.4 Use of footprint in other countries:

In USA, the Supreme Court in **John Fitzpatrick Vs. United States 178 U.S. 304(1900)** quoted the case of **Anglely v. State, 35 Tex. Crim. Rep. 427, 34 S. W. 116**, where error was assigned upon the admission of testimony to show the character of shoes Rice (who was connected with the transaction but not jointly indicted) had on when arrested the day after the assault. One ground of the objection was that Rice was not jointly indicted with Anglely. When Rice was arrested and his shoes examined it was found that one of them had a hole in the sole fitting a corresponding peculiarity in the track found upon the ground. The court held this testimony proper, though Rice was separately indicted, because the conspiracy had been shown. This was a circumstance tending to show that he was one of the parties present at the time the assault was committed.

8. HANDWRITING EXPERT

8.1 Introduction

Handwriting is generally defined as ‘making of any mark upon any surface by direct human agency, as a means of communicating information’ (Woodroffe). The handwriting experts are called in to advise the court as to the genuineness of the disputed handwriting. They are so called as it is believed that every individual has some unique and peculiar characteristics in their writing that the experts can find and can compare them with the disputed handwriting. It is also believed that the handwriting is independent of the will of the person writing. It is often said that any person’s signature once developed, rarely changes.

But when an expert is called in to compare the genuine and the alleged forged signatures then the court looks not for the similarities with the original handwriting but the differences. While discussing the nature of the work done by the handwriting experts, the Mysore High Court in **Raviappa vs Nilakanta Rao AIR 1962 Mys 53** held that in examining a disputed document the true test is not the extent of the similarities observed with the genuine documents but the nature and the extent of the differences noticed. The difference exposes the true character of the document in question. Expert evidence as to authorship is admissible by a suitably qualified expert, under section 45, and 47 of the Evidence Act. Section 73 of the Evidence Act allows the court to seek the writing or signature of any person present in the court to enable the court to compare the writing or signature. This section also applies to the finger-print impressions.

The Indian Evidence Act recognises two direct methods of proving the handwriting of a person :

- (1) By an admission of the person who wrote it.
- (2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are :

- (i) By the evidence of a handwriting expert. (Section 45)
- (ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47).
- (iii) Opinion formed by the Court on comparison made by itself. (Section 73). [The State (Delhi Administration) vs. Pali Ram (1979) 2 SCC 158]

8.2 Evidentiary Value of the Handwriting Expert:

The value of the expert in any branch of science also depends upon the exactness of the finding that can be done by the experts. Handwriting is not an exact science like DNA or the fingerprint but it has been in use for long.

In a recent case, **Chennadi Jalapathi Reddy v. Baddam Pratapa Reddy, (2019) 14 SCC 220**: the Hon'ble Supreme Court referred to the earlier Constitution bench judgment in Shashi Banerjee case, with approval and held as follows:

11. We may particularly refer to the decision of the Constitution Bench of this Court in Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529], where it was observed that the evidence of a handwriting expert can rarely be given precedence over substantive evidence. In the said case, the court chose to disregard the testimony of the handwriting expert as to the disputed signature of the testator of a will, finding such evidence to be inconclusive. The court instead relied on the clear testimony of the two attesting witnesses as well as the circumstances surrounding the execution of the will.

In **Bhagwan Kaur vs. Krishan Sharma (1973) 4 SCC 46**, the court held that : The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert.

As per **Rajeshbhai Muljibhai Patel v. State of Gujarat 2020 SCC OnLine SC 161** in terms of Section 45 of the Indian Evidence Act, the opinion of handwriting expert is a relevant piece of evidence; but it is not a conclusive evidence. It is always open to the plaintiff-appellant No. 3 to adduce appropriate evidence to disprove the opinion of the handwriting expert. That apart, Section 73 of the Indian Evidence Act empowers the Court to compare the admitted and disputed writings for the purpose of forming its own opinion.

A related question to the evidentiary value of the handwriting expert is the value of the opinion without the expert appearing in the court to depose. In such cases, the court has held that unless the expert himself deposes the evidence will be of no value. Further the evidence of a handwriting expert can be credit worthy only when his evidence is consistent with the evidence of the other witnesses. [**MP D'Souza vs Narayanswamy AIR 1983 NOC 139 (Kant)**]

8.3 Stages at Which the Handwriting can be sent for the opinion of Experts

In **Janachaitanya Housing Ltd., Ameerpet v. Divya Financiers, 2008 SCC OnLine AP 162**, A Division Bench of the Hon'ble AP High Court while deciding the question: "*whether an application under Section 45 of the Evidence Act filed for sending the signatures for comparison and expert opinion, can be entertained at the later stage, including when coming up for arguments after entire trial?*" held as follows

"14. In view of the same, we are of the opinion that the Court cannot lay down any hard and fast rules controlling the discretion of the Court to send the disputed documents/writings for the opinion of the expert or to examine him in support of such opinion. On sending the document to handwriting expert and on receiving report, parties, on showing sufficient cause, may call upon the Court to permit them to examine handwriting expert or any witness in support or rebut the said opinion.

In a case under section 138 of the NI Act, the defence prayed that the cheque be sent to the handwriting expert and he denied his signature on the impugned cheque. The court held that when the defence denies the signature then the best expert is the bank manager and not the handwriting expert. Further the court noted that the cheque was returned not due to difference in the signature but because of the insufficient fund in the account. **[PR Rama Krishnan vs. Govindarajan 2007 CrLJ 1897]**

The Supreme Court while interpreting section 73 of the Evidence Act held:

“That is to say, the words 'for the purpose of enabling the Court to compare' do not exclude the use of such "admitted" or sample writing for comparison with the alleged writing of the accused, by a handwriting expert cited as a witness by any of the parties. Even where no such expert witness is cited or examined by either party, the Court may, if it thinks necessary for the ends of justice, on its own motion, call an expert witness, allow him to compare the sample writing with the alleged writing and thus give his expert assistance to enable the Court to compare the two writings and arrive at a proper conclusion.” **[The State (Delhi Administration) vs. Pali Ram (1979) 2 SCC 158]**

The use of handwriting experts has been employed since long to detect forgeries. They have been used in all walks of life including the commercial transactions, the registry office and many others.

Opinion of Person Acquainted with Handwriting but not an Expert:

Section 47 of the Evidence Act allows the opinion of a person acquainted with the handwriting of another person or the signature of the other person as relevant and admissible. The only requirement is that the person deposing on the handwriting or signature must have seen the person writing or signing in the course of business or the occasion must be such that he would have seen him writing frequently.

Such evidence can only be discarded when the other person is able to show that he didn't have the occasion to see his handwriting or signature.

8.4 Court as an Expert under section 73 of the Evidence Act:

(i) The expression "any person" in Section 73 includes a person accused of an offence. (ii) The word "court" in Section 73 includes the Court of the Magistrate competent to try the offence or hold an enquiry in respect thereof against such accused person under the CrPC. (iii) Section 73 does not offend Article 20(3) of the Constitution, because by giving a direction to an accused person to give his specimen handwriting the Court does not compel that accused "to be a witness against himself". **State of Bombay v. Kathi Kalu Oghad 1961 CriLJ 856** has been relied upon.

[The State (Delhi Administration) vs. Pali Ram, MANU/SC/0189/1978]

In **Murari Lal v. State of Madhya Pradesh, AIR 1981 SC 363**, Supreme Court, while dealing with the issue of using power u/s 73 of the evidence Act held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative text-book and the courts own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.

The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert. [**The State (Delhi Administration) vs. Pali Ram MANU/SC/0189/1978**]

9. EVIDENCE OF SNIFFER-DOG

9.1 Introduction

Canines are the first among all mammals that have served the humans. The daily Telegraph, in December 2015 quoted a research and said that the dogs have been helping the humans for the last 33000 years. The canines are known for their ability to smell and track. They are used both for the army and police duties. Here we are concerned with their use in policing and investigating crimes. The English used bloodhounds while searching for Jack the Ripper in 1888, (but with hazardous consequences) and during that time they allowed the dogs to accompany police on patrol. In 1899, in Ghent, Belgium, police started formally training dogs for police work. This enhanced the popularity of using dogs for police work. By 1910, Germany had police dogs in over 600 of their largest cities. In 1938, South London introduced two (2) specially trained Labrador Retrievers to the Metropolitan Police Force to accompany bobbies on patrol.*

The police have started using the dogs for sniffing the trails of the accused where the trail of the accused is not readily forthcoming. The most commonly used breeds are the German Shepherd, Belgian Malinois, Bloodhound, and Retriever. Though the dogs are used for multiple purposes including protecting persons and installation, attack dogs, rescue dogs and also for searching drugs, explosives etc.. We are concerned here with the work of the detection dogs that are trained to detect. The detection dogs have the unique ability to separate the odors even if mixed with other scents.

* [https://dogsforlawenforcement.org/index.php/police-canines-in-history/#:~:text=Dogs%20have%20been%20used%20by,training%20dogs%20for%20police%20work.]

Referring to the sniffer dogs the Hon'ble Supreme Court in **Gade Lakshmi Mangraju vs. State of Andhra Pradesh (2001) 6 SCC 205** said that the trends show that hounds belonging to certain special breeds sheltered in specialized kennels and imparted with special training are capable of leading investigating agency to very useful clue in crime detection and thereby help detectives to make a breakthrough in investigation. The Hon'ble Court further observed that the English courts along-with Canada and Scotland such evidence has become, of late, admissible though in United States the position is not uniform in different States.

Our Courts have long accepted the Dog's ability to sniff out the accused or contraband. In **Babu Magbul Shaikh V. State of Maharashtra (1993) CRILJ 2808** the Hon'ble Bombay High Court observed that a tracker dog was not easily influenced and that increased its acceptability as evidence. The court further observed that the special skills of a tracker dog outperformed all other forms of detection, even sophisticated gadgetry. It is now universally acknowledged that in detecting drugs, where every other form of human ingenuity and gadgets are capable of being eluded, that it is virtually impossible to avoid detection when a trained tracker-dog is used, explaining why this mode is found to be the most reliable and fool-proof. Similar has been the experience in cases of robbery, murder and the like where the scent is fresh and the area not too crowded. The Hon'ble Court then went on to observe that the evidence of tracker dog have to be categorized as being of the highest order and reliability.

9.2 Admissibility of Evidence of Sniffer Dog:

The Hon'ble Supreme Court was besieged with the question of relevance and importance of evidence of dog-tracking in **Abdul Rajak Murtaja Dafedar vs. State of Maharashtra (1969) 2 SCC 234**, wherein the 3 judge bench held that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight. In this judgment the Hon'ble SC discussed a number of limitations on the sniffer dog's evidence: **First**, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. **Secondly**, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, **thirdly**, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value.

In **Gade Lakshmi Mangraju (supra)**, the Hon'ble SC again had the occasion to discuss canine evidence. It reiterated the remarks made in Abdul Rajak case(supra) and held that still sniffer dog's evidence was a very weak evidence.

9.3 Objections to the Evidence of the Dog

Its not that the evidence of the sniffer dog has been accepted in other counties, with aplomb. In fact there have been reservation on the use of the sniffer dogs. In one of the leading decisions

that have objected to the use of the sniffer dog is **R.V. Montgomery, 1866 N.I. 100**. In that decision, the court pointed out 3 major reasons for not relying on the evidence of the sniffer dogs. The court said:

"There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence, it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its value."

In **Babu Magbul Shaikh V. State of Maharashtra (1993) CRILJ 2808** the Supreme Court held that for making the evidence of the sniffer dog relevant the following condition must be fulfilled:

"What the courts have insisted upon is that the evidence must pass the test of scrutiny and reliability as in the case of any other evidence. The following guidelines must, however, be borne in mind :

(a) That there must be a reliable and complete record of the exact manner in which the tracking was done and to this extent, therefore, in this country, a panchnama in respect of the dog tracking evidence will have to be clear and complete. It will have to be properly proved and will have to be supported by the evidence of the handler.

(b) It will be essential that there are no discrepancies between the version as recorded in the panchnama and the evidence of the handler as deposed to before the Court.

(c) The evidence of the handler will have to independently pass the test of cross-examination.

(d) Material will have to be placed before the Court by the handler, such as the type of training imported to the dog, its past performance, achievements, reliability, etc., supported, if possible and available, by documents."

9.4 Can the accused be convicted on the sole evidence of the Dog-tracking:

In **Ramesh Ramchandra vs. State of Maharashtra: 2018 (4) BomCR (Cri) 731**, it was held that sole evidence of dog handler of dog pointing out to accused no.1 is not by itself convincing to be acted upon to hold him guilty in the present crime in any manner.

In **R. v. Kang-Brown: [MANU/SCCN/0014/2008]**; it was held that From the record,

however, and from some of the authorities cited by the parties, it appears that serious doubt has occasionally been cast on the reliability of sniffer dogs*

10.TAPE-RECORDED CONVERSATION

Section 7 of the Evidence Act makes the tape recorded conversation admissible in evidence. The condition required for the admissibility of the evidence is that the conversation must be relevant to the issue at hand and the voice in the tape should have been identified. The custody of the tape record should also have been properly proved and there must be no tampering with the tape.

In the leading case-law of **R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471:** at page 477 it was held that “23. *Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act.*”

In **Ram Singh v. Col. Ram Singh, 1985 Supp SCC 611** in para-32 has laid down the 6 conditions for the admissibility of any tape-recorded evidence. They are:

“(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence — direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

* (see, the dissent of Souter J. of the U.S. Supreme Court in **Illinois v. Caballes, MANU / USSC /0005 / 2005:** at pp. 410-13; see also New South Wales Ombudsman, Discussion Paper: Review of Police Powers (Drug Detection Dogs) Act (June 2004)).

11. BALLISTIC EXPERTS

11.1 Introduction.

In this land of lies, an ounce of good circumstances is worth many pounds of oral evidence...'

The term Ballistic means: of or relating to the science of the motion of projectiles in flight; physics, of an object in motion: behaving like a projectile. So the term Ballistic expert connotes the use of expert in the area of fire-arms or explosives. In court, they are required in cases: where the effectiveness of the fire-arms itself is an issue, or when it is required to ascertain the nature of the weapon used, or to compare the pellets obtained from the body with the fire-arms seized, or for comparing the fire-arms. In cases covered under the Arms Act, the nature and effectiveness of the fire-arms is in question while in injuries or death, the type of fire-arms used and also the comparison of the seized fire-arm with the bullets recovered are solved.*

The theory underpinning forensic ballistics is that all firearms possess distinctive features that in turn impart distinctive markings or “toolmarks” onto projectiles and cartridge casings when the weapon is fired. No two types of fire-arms and no 2 projectiles fired from the same fire-arm have exactly the same marks on the discharged bullets. Using a microscope, firearms examiners compare tool marks found on spent projectiles and cartridge casings to determine whether they were fired from a particular weapon, generally by comparing projectiles and cartridge casings found at the scene of a crime or in an autopsy with ones test-fired from a seized weapon.**

If we look at the history of the ballistic examination or the introduction of the evidence of the ballistic expert, we find that the American Courts were initially reluctant but later they agreed to accepting the testimony of the ballistic expert. In a scholarly article on history of the use of Ballistic expert in the court, it was said: *“By the middle Nineteen-forties, all states, where the question of admissibility of a ballistics expert’s testimony had been passed upon, were in accord that such testimony was admissible. But while the courts agree that a qualified expert can give a valid opinion, there is strong disagreement as to what constitutes a qualified expert.”**** In UK, in one of the first known tool mark comparison case involving firearms occurred in 1835 in London. A homeowner was shot and killed, and the servant was suspected of the crime. Henry Goddard, one of the Bow Street Runners (an early London police force), investigated the case. By thorough examination of the physical evidence, Goddard was able to identify a visible flaw in the fired projectile and trace the mark to the manufacturer’s mold. He also identified the paper patch used to provide a seal between the projectile and the gunpowder as having been torn from a newspaper that was found in the servant’s quarters.

* [Inbau, Fred E. “Firearms Identification: ‘Ballistics.’” *The Journal of Criminal Law and Criminology* (1973-), vol. 89, no. 4, 1999, pp. 1293–1314. JSTOR, www.jstor.org/stable/1144180. Accessed 1 June 2020.]

** [Dack, Jeremy R., “Using Forensic Ballistics In The Courtroom” (2014). *Law School Student Scholarship*. 637]

***[Stuart R. Hays, *Ballistics: A Study of the Expert Witness*, 2 Wm. & Mary L. Rev. 61 (1959)]

11.2 When is the examination of Ballistic expert required?

The courts have always grappled with the question whether the ballistic expert's opinion was required in all cases where fire-arms were involved or that it was essential only in some of the cases. In 1963, the Hon'ble SC in **Gurcharan Singh vs State of Punjab (1963) 3 SCR 585; AIR 1963 SC 340**, looked into the question whether the examination of ballistic expert was necessary. The court in this case referred to the observation made in an earlier case **Mohinder Singh v. State [(1950) SCR 821]** and held as follows:

“ . . . These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.”

The Hon'ble SC again had the occasion to deal with the question of the necessity of the ballistic expert in criminal cases. In **Vineet Kumar Chauhan vs State of UP (2007) 14 SCC 660**, the Court held that it cannot be laid down as a general proposition that in all cases involving fire-arms, the prosecution should adduce the evidence of a ballistic expert. The court speaking through Hon'ble J. D K Jain, opined that in cases where the eye-witness was of sterling character, and the statement of the eye-witness about the injuries was consistent with the post-mortem report then there was no requirement of the evidence of the ballistic expert. The court held that the requirement of the testimony of the ballistic expert will depend upon case to case.

As illustration, in a case where the rifle used in the murder of the deceased was not recovered, and the prosecution failed to examine the bullets found from the body of the deceased, in the FSL, the Hon'ble SC held that it was not fatal to the case. **Prem Kumar vs State of Bihar (1995) 3 SCC 228**. Similarly, in **Jai Dev vs State of Punjab AIR 1963 SC 612** where the deceased was killed by gun-shot and the rifle was not recovered, and instead a revolver was recovered, the non-examination of the ballistic expert was not fatal.

The courts have also held that when the experts didn't have the occasion to seeing the injuries on the body and he was deposing on the basis of mere photographs, in such cases, the opinion of the ballistic expert on the observations made by others and measurements noted by them. A small difference in the measurements one way or the other might make all the difference to the final result. **Mohan Singh v. State of Punjab, (1975) 4 SCC 254.**

On the contrary, where both the fire-arm, and the bullets used were recovered, the Hon'ble Supreme Court held that the non-examination of the ballistic expert in such cases would definitely affect the creditworthiness of the prosecution. [Para-21 of **Sukhwant Singh vs State of Punjab (1995) 3 SCC 367**].

The remarks as made by the Hon'ble Supreme Court in **Sukhwant case** (*supra*) was raised in **Surendra Paswan v. State of Jharkhand, (2003) 12 SCC 360**. The court distinguishing with the **Sukhwant Case** held as follows:

10. So far as the effect of the bullet being not sent for ballistic examination is concerned, it has to be noted that Sukhwant Singh case [(1995) 3 SCC 367] is not an authority for the proposition as submitted that whenever a bullet is not sent for ballistic examination the prosecution has to fail. In that case one of the factors which weighed with this Court for not finding the accused guilty was the prosecution's failure to send the weapon and the bullet for ballistic examination. In the instant case, the weapon was not seized. That makes a significant factual difference between Sukhwant Singh case.

There are occasions when the fire-arms need not to be sent to the ballistic expert. The Supreme Court in **Manoj Kumar Achhelal Brahman v. State of Gujarat, (1998) 2 SCC 354** was dealing with an appeal in which the prosecution had alleged that fire-arms were recovered from the accused and during trial the prosecution also adduced oral evidence but it failed to produce either the expert or any police officer who could have testified on the workability of the fire-arm. It opined in para-2 : “... But, unfortunately nobody including the police personnel who had seized the said revolver had deposed that the police officer had himself tested the said weapon and found it to be a pistol in working condition. The learned Designated Court in this case has rightly indicated that it is not always necessary to refer the weapon to the ballistic expert for his opinion. In our view the police personnel who everyday deals with rifles and pistols will be competent to tell whether the weapon in question was in working condition or not provided he tests the same.. .”

The Supreme Court has held that in appropriate cases, the police officials can also be treated as an expert in the matters related to gun etc. in **Brij Pal v. State (Delhi Administration), (1996) 2 SCC 676**, the court held that when the police official had obtained certificate of technical competency and had long experience of inspection, examination and testing of the firearms and ammunition, then the said police personnel should be held to be an expert in arms.

12. NARCO-ANALYSIS, BEAP, POLYGRAPH TEST

The investigators have long been developing and using new technologies to unearth crime. The denouncement of torture and third degree methods have led the police to think of new means and methods. In the process, the law enforcement agencies have experimented with: polygraph test or the lie detector test, the Brain mapping test, and Narco-analysis test. All these tests were used by the law enforcement agencies, but there was lot of doubt on their usage and the admissibility of the evidence as adduced from these tests.

All these tests were cumulatively challenged in the Supreme Court in **Selvi vs State of Karnataka (2010) 7 SCC 263**. In this case, the legality and constitutionality of the special tests not specifically named in section 53A of the Cr.P.C. was under challenge. The 3-Judge bench of Hon'ble Supreme Court, held these 3 tests to be generally unconstitutional and illegal as qua Article 20(3) of the Constitution of India, but allowed them subject to the condition that they would be voluntary i.e. if the accused consented, and that adequate safeguard have to be maintained.

In this section, we will briefly look into these three tests and the methods employed by the experts to bring out facts.

12.1 Narco-analysis:

This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can enable the diagnosis of mental disorders. The use of "truth-serums" and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amatol. [Selvi vs State of Karnataka]

The Honorable Supreme Court after a detailed discussion of the subject of Narco-analysis declared that the test was unconstitutional and violative of Article 20(3) of the Constitution of India.

12.2 Polygraph Test:

Polygraph Test or lie detector test has caught the imagination of the investigative agencies since long. The polygraph machine is based on the simple theory that when a human being lies, then certain changes in blood pressure, pulse, heart beat, respiration, and skin conductivity takes place. The machine tries to measure the difference between the response on a normal answer as compared to the response on the question intended to be put by the investigators. It is presumed that a guilty person is more likely to be concerned with lying about the relevant facts about the

crime, which in turn produces a hyper-arousal state which is picked up by a person trained in reading polygraph results.

Though it was touted as one of the best inventions but soon questions were raised on its efficacy. The experts question the use of polygraph as the tests have shown that arousal are not necessarily triggered by lying or deception. Instead, these could be triggered by nervousness, anxiety, fear, confusion, hypoglycemia, psychosis, depression, alcohol withdrawal or other emotions. This state has also been attributed to the way the questions are asked by the investigating officers. It was also felt that a trained person could beat polygraph tests, which is able to control or suppress his/her arousal symptoms.

As has already been discussed under the head, Expert testimony, the use of polygraph in USA was first attempted in the leading case-law of United States vs Frye 1923. But it was not admitted as evidence. Currently, in US it depends on the individual jurisdictions whether to admit the evidence obtained from polygraph test or not. (United States vs Scheffer). In Canada, the 1987 decision of R v B  land, the Supreme Court of Canada rejected the use of polygraph results as evidence in court, finding that they were inadmissible.

In India, the constitutionality of these tests was challenged in Selvi Case. The Honorable Supreme Court has discussed a number of leading case laws and research from the United States and declared the tests to be violative of Article 20(3) of the constitution of India. The court created an exception that if the accused himself subjected to the test then and only then he could be subjected to the polygraph test. So as far as evidentiary value so concerned, the test itself is unconstitutional so there is no question of its use in the courts.

12.3 Brain Mapping:

It measures the changes in the electrical field potentials produced by the sum of the neuronal activity in the brain by means of electrodes placed on the surface of the skin covering the head and face. The changes directly related to specific perceptual or cognitive events are called event-related potentials. In simple words, it is based on the finding that the brain generates a unique brain-wave pattern when a person encounters a familiar stimulus. Commonly used method in India is called as Brain Electrical Activation Profile test, also known as the 'P300 Waves test'.

During the test, subjects are exposed to auditory or visual stimuli (pictures, videos and sounds) that are relevant to the facts being investigated alongside other irrelevant words and pictures. Such stimuli can be broadly classified as material 'probes' and neutral 'probes'. The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components, the examiner can make inferences about the individual's familiarity with the information related to the crime^{3, 11}. However, this measures only the memory or knowledge of the crime scene and nothing else. For instance, a by-stander who

witnessed a murder could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Similarly, little is known about the impact of viewing portrayal of crime scene in the media such as television, movies and newspaper on brain mapping. Hence, this test cannot be used to prosecute an accused but can be used by an innocent as an 'alibi' by proving that he/she does not have any memory about the crime on this test.

In conclusion, DDT has faced a number of criticisms and it is still unclear to what degree lie detectors and brain mapping can be used to reveal concealed knowledge in applied real-world settings. The Supreme Court judgment on involuntary DDTs is that it has no place in the judicial process. On the contrary, it will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists. Contemporary DDT needs to undergo rigorous research in normative and pathological populations. Premature application of these technologies outside research settings should be resisted. The vulnerability of the techniques to countermeasures also needs to be explored. It is also important to know the sensitivity and specificity of these tests. There should be standard operating guidelines for conducting DDT. The recent Supreme Court judgment on DDT is admirable from the scientific, human rights, ethical, legal and constitutional perspectives.*

The issue of use of Brain Mapping was also raised in **Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294**: where the court held:

74. Furthermore, the admissibility of a result of a scientific test will depend upon its authenticity. Whether the brain mapping test is so developed that the report will have a probative value so as to enable a court to place reliance thereupon, is a matter which would require further consideration, if and when the materials in support thereof are placed before the court.

And as has already been mentioned that the **Selvi case** (*supra*) declared the test to be unconstitutional.

13. VOICE SAMPLE TEST

The voice sample test is a method used by the investigators for unearthing crime. The investigators use the recorded sound and then compares it with the sound of the accused to check whether the sound in question belongs to the accused or not.

The legality of the use of voice sample for investigation was in **Ritesh Sinha v. State of U.P., (2013) 2 SCC 357**. In the case, the Judges had differed and so it was sent to larger bench for adjudicating on the legality of the test. The court framed two questions for reference of the larger bench:

“3.1. Whether Article 20(3) of the Constitution of India, which protects a person

* [<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171915/>] Accessed on 15th September, 2020.

accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?

3.2. Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorise the investigating agency to record the voice sample of the person accused of an offence?"

Hearing the reference, the larger bench of Hon'ble Supreme Court in **Ritesh Sinha v. State of U.P., (2019) 8 SCC 1**: interpreted Explanation to Section 53 CrPC and also section 311A of the CrPC and it was held that the Magistrate can direct the accused to give voice sample even without his permission.

So the current legal position as regards the voice sample test is that the test is, both, legal and valid.

EXAMINER OF ELECTRONIC EVIDENCE

Section 45A of the Evidence Act lays down that the opinion of the examiner of electronic evidence, on any matter relating to electronic form evidence i.e. any information transmitted or stored in any electronic or digital form, as referred to in section 79 of the IT Act 2000, will be a relevant fact.

Now only if the electronic record is produced in terms of section 65B of the Evidence Act, then the question would arise as to the genuineness of the electronic record and in that situation the court can make a resort to Section 45 A of the Evidence Act.

Section 79 of the IT Act 2000 talks of notifying forensic labs for experts as examiner of electronic evidence. The ministry of electronics and information technology has notified the forensic lab at Delhi, Gujarat, State Forensic Science Laboratory, Bangaluru, and CFSL Hyderabad as examiner of electronic evidence u/s 79A of IT Act.

TYPEWRITING

Every typewriting machine has its own unique properties of the typing output, which can be recognised by an expert. The question that whether a particular letter was typed from a particular typewriter has also been subject matter of expert's opinion. Initially the court held that the opinion of the expert on the point was not admissible as it did not attract section 45 of the Evidence Act. **Hanumant Govind Nargundkar vs State of MP [AIR 1952 SC 343]**

Later, the matter relating to the legality of the decision in **Hanumant case** (*supra*) was decided by a constitution bench in the case of State through **CBI vs S.J. Choudhari** and in that case the Supreme Court overruled the Hanumant case and held as follows:

18. In the present case, even without resort to the word 'handwriting' in

Section 45 to include typewriting therein, in the view we have taken, the word ‘science’ is wide enough to meet the requirement of treating the opinion of a typewriter expert as an opinion evidence coming within the ambit of Section 45 of the Evidence Act. This is an additional reason for us to hold that the opinion of the typewriter expert in this context is admissible under Section 45 of the Indian Evidence Act.”

So, the present position as regards the Typewriting expert is that it is admissible as per section 45 of the evidence Act.

Conclusion

The statistics show that the forensic expert testimony in criminal investigations, family court matters, and also judicial proceedings have increased substantially in the last few decades. Development of science and technology has made the courts more dependent on the experts to conclude properly, in matters pending before it. The growing complexity of the matters pending before it and the fact that the generalists man the courts, it has made the courts more reliant. The reliance of the courts is now an irreversible. But has the over-reliance or the increasing reliance of the court on the experts has led to compromising with the independence of the courts. Have the eye-witnesses lost their significance? We find that despite the dependence on the experts, in cases of conflict between ocular testimony and expert evidence, it is the eye-witness who, normally, gains predominance. Our courts have to use a blend of the scientific advancements and the traditional methods, for the ultimate goal of the court is to deliver justice, and not to weigh the relative value of the evidence.

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Topic No. – 19

***The probative value of evidence of the complainant or the
prosecutrix in sexual offences.***

By
Ms. Shweta Kumari Singh,
Additional District & Sessions Judge,
Bhojpur at Ara.

Ms. Shweta Kumari Singh,
Additional District & Sessions Judge,
Bhojpur at Ara.

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Probative Value of Prosecutrix/Complainant Evidence in Sexual Assault Cases

INTRODUCTION

Sexual assault cases deal with the soft underbelly of Indian judicial system, where justice delivery mechanism is being vigorously tested by ever increasing crimes of passion against a class of victims whose capacity to resist and recover, physically, emotionally and socially, is highly compromised, given their peculiar position in the context of the very nature of violation they suffer. Trial of these cases of sexual assault raise precarious evidentiary problems which vigorously test certitude of judicial system and capacity of legal principles and statutory framework to deliver justice. These crimes, carried out on sly and in secrecy, rarely leave any eyewitnesses, thereby leaving the wheels of justice in a deadlock on the binary of the uncorroborated accusation of the prosecutrix and the insistent denial of the alleged ravisher. Judicial and legislative system of this Country have been particularly alive to this challenge.

To strengthen and expand statutory framework so as to make it more effective in meeting the said challenges, Parliament has brought a series of amendments to the statutory provisions. The Criminal Law (Amendment) Act, 1983 [Act 43 of 1983] was an attempt to make the law regarding rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain penal provisions were incorporated for punishing such custodians who molest/sexually assault a women under their custody or care. Section 114-A was also added in the Evidence Act, 1872 for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was also amended by addition of sub-sections 2 and 3 after re-numbering the old Section as sub-section (1).

This was again reinforced by the Criminal Law (Amendment) Act, 2013 (Nirbhaya Act), which provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The most important change that has been made is the change in definition of rape under IPC. Although the Ordinance sought to change the word rape to sexual assault, in the Act the word 'rape' has been retained in Section 375, and was extended to include acts in addition to vaginal penetration. A new section, 376A has been added which states that if a person committing the offence of sexual assault, *"inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death"*. The age of consent in India has been increased to 18 years, which means any sexual activity irrespective of presence of consent with a woman below

the age of 18 will constitute statutory rape. Changes have been introduced in the CrPC and Evidence Act to make the process of recording the statement of the victim more victim friendly and easy. The two critical changes with regard to them are: (1) the 'character of the victim' is now rendered totally irrelevant, and (2) There is now a presumption of 'no consent' in a case where sexual intercourse is proved and on the issue of consent, the victim states in the court that she did not consent. The 2013 Amendment Act was further reinforced by Amendment Act of 2018, wherein punishment for offence of rape of a woman under age of 12 years and 16 years were made more stringent vide addition of Sections 376-AB, 376-DA and 376-DB.

As these crimes, carried out on sly and in secrecy, rarely leave any eyewitnesses, justice for the victim in the course of trial critically hangs by sole thread of credibility that the Courts attribute to her cry for justice. Ironically, as the Courts of justice test the credibility of victim, credibility and certitude of justice delivery mechanism is in turn tested by the justice it delivers to the victim. Judicial acts obtain validity not only because they define truth and resolve a dispute, but also because they reinforce the democratic aspirations of the people, which is critical in maintaining public confidence into the rule of law, failing which not only validity and credibility of the judicial system but also vitality of the system as a whole comes under threat.

Trial of these cases of sexual assault present varied and critical challenges, often perilously placing the judge in such conundrum of conflict where mortality of justice is not too distant a probability. The foremost evidentiary problem arises on account of a deadlock between uncorroborated evidence of a prosecutrix on one hand and insistent denial of the accused on the other. This deadlock is characterized by a peculiarity which gives an uniqueness to the evidentiary problem in sexual assault cases. While in other criminal cases, the presumption of the accused's innocence might lead to his acquittal in situation of such a deadlock; but in cases of sexual assault, presumption of innocence is counterpoised by a countervailing presumption in favour of prosecutrix evidence, which in case of being credible and consistent, could lead to the conviction of the accused.

On the one hand, while the peculiar circumstances of the cases of sexual assault make the countervailing presumption in favour of prosecutrix evidence almost a pre-requisite for delivery of justice; on the other hand, the canvas of its (presumption in favour of prosecutrix) usage violently tests legal principles and capacity of statutory framework to limit miscarriage of justice, as this presumption in favour of prosecutrix's claim is open to manipulation by human frailties to lay ground for unjust convictions. That this possibility is not only theoretical but also practical is borne out on a regular basis in the proceedings of the trial courts.

Frailties of human nature - lust, greed, anger - cut across sexual, social, cultural, geographical and political boundaries. More so, as 'utilitarian' morality of 'modernism', driven by forces of globalization, acquires hegemony in native societies, overwhelming their particular values and morals by 'amoral' enticements of 'progressivism' which is essentially 'consumerist' in character.

Morality of a community is the cultural foundation of its law. Changes in the moral fabric of a society, wrongly or rightly, are invariably expressed in the changes in its legal/statutory framework. That, standards of morality in India have undergone a shift significant enough to effect changes in its legal framework, is brought out by/established by the Hon'ble Supreme Court's decision of decriminalizing "adultery", - a shift from particular moral standards of yesteryears to the so called 'amoral' reality of the present state of affairs. This changing/changed paradigm/state of morality allows a freer play of human frailties, though not at par with the western society such as United States of America whose judicial system had to bring in corroboration statute with an explicit objective to protect against false accusations and prevent unjust convictions.¹ But in India too, it is no accident that in 2014, the Delhi Commission of Women submitted a report stating therein that as large as 53.2% of rape cases filed between April 2013 to July 2014 were false.

At any rate, at any point of time, the ruling forces – ruling by way of decisively determining the state and affairs of human life, materially and ideologically – render their organic set of values as ideals of progress. These values riding upon the hegemony of such forces, soon acquire prevalence. But, prevalence and potency, by themselves, do not convert 'a practice' into 'a right' and 'a usage' into 'a procedure of justice'. On the contrary, it is the presence and possibility of justiciable human good, which if found even in a secluded, odd case, that has been given the form of 'right' and incorporated into procedures of delivery of justice by our Hon'ble Courts, and which indeed defines the 'timeless' character of justice in all times – including our present time. It is this timeless character of justice, codified in law and procedures, that keeps at bay the dictum of 'might is right', which would come to rule if 'prevalence' and 'potency', with novel forms in each age, are given a field day in the judicial system. The changes in the legal framework meant to deliver justice, therefore, cannot be effected to conform to the grounds of 'prevalence' and 'potency'. On the contrary, law by its very nature, is meant to protect from, rather than conform to the demands of forces of hegemony. The Nirbhaya case, which precipitated the Criminal Law Amendment, Act 2013 was very much capable of being addressed within the extant statutory and legal provisions. But, it was the public outrage- a definitional form of "might", that too led by passion in a democratic polity- that triggered the said legislative enactment. And it is here that it can be argued that law statutory and constitutional provisions are not meant to conform to the dictates of "might is right" dictum, rather they are supposed to protect against it.

Thus, the trial courts have to verily aware of this binary that while crimes of sexual assault have an expanse that threatens half the humanity, the law for delivery of justice to this half may itself be manipulated to effect miscarriage of justice towards the other half of humanity. There are many such conflicting challenges that a trial court has to face while deciding these cases of sexual assault. But invariably, it is the evaluatory challenge posed by the prosecutrix evidence that presents the foremost and most formidable challenge before the judicial system. Since nature of crime coupled

1. NEW YORK LAW REVISION COMMISSION, COMMUNICATION AND STUDY RELATING TO SEXUAL CRIMES 76 (1937)

with lethargy of the investigating agency generally rules out presence of any other corroborating evidence in these cases, delivery of justice comes to rely primarily on the probative value/credibility of prosecutrix evidence. Credibility in common law is the commonsense credibility of the judge. Probative value of prosecutrix/complainant evidence is thus formed in the mind of a trial judge who, unaided by any explicit legal formulation for its determination, sifting through myriad of facts and fiction, and shakily aware that evidence, after all, is largely an affair of probability and rarely of certainty, tries to grasp the truth from a range that elusively spreads from 'more likely' to 'less likely'.

This article attempts to briefly discuss: (a) distinction of legal definitions with regard to evidence and its receivability which give clarity of vision while determining probative value of prosecutrix evidence; (b) rules of law, legal principles, and common principles of reason and logic which are useful as tools of determination of probative value; and (c) Issues of law in determination of probative value of prosecutrix evidence in sexual assault cases, in the light of judicial pronouncements of Superior Courts which ably guide precision of application of law and legal principles, and steady the reason of the Judge to the effect of reducing chances of miscarriage of justice.

Section 1 of this article deals with the distinct concepts of evidence and conditions of its receivability in the Court, which by clearing the clutter of irrelevant and immaterial facts and observation not only clears the vision of the trial Court and steadies its reason, but relieves much pressure by saving its extremely hard-pressed time. Clarity with regard to evidence and conditions of its receivability in the Court such as relevancy, materiality and admissibility also serves a crucial function of cleansing the procedures of trial, such as cross-examination, from much criticized sources of contamination/corruption such as character assassination. Section 2 deals with definition and determination of probative value. It briefly discusses rules of law and legal principles as tools of determining probative value of evidence. Section 3 discusses issues of law in determination of probative value of prosecutrix evidence in the light of judicial pronouncements of Superior Courts which ably guide application of the relevant law and steady the reason of the Judge to the effect of reducing chances of miscarriage of justice.

1. Concept of Evidence and Conditions of Its Receivability

A judge's vision is significantly blurred and his reason confounded by a clutter of irrelevant, immaterial facts and fiction masquerading as evidence in the trial of a case. This confounding clutter often arises out of laxity of prosecution, and more often out of a deliberate design of defense to defeat charges pressed against them. Any evidentiary evaluation process is concerned with legal admissibility and relevancy of evidence not only with regard to issues of fact, but also their admissibility for particular purposes – for example, corroboration. A clarity therefore, as to what constitutes evidence, and its relevancy, materiality and admissibility in the Court not only clears the clutter of facts blurring the vision of the Judge, but also much of conflict and confusion regarding issues of law, such as whether to admit character evidence of the prosecutrix. It not only saves the

ever hard pressed time of the Courts but also frees its proceedings from much of the contamination that procedure like cross-examination suffer from and irrecoverably impair prosecutrix self esteem beside impairing the quality of evidence.

1.1. Concept of Evidence: Evidence, in law, is generally referred to as that which is adduced by a party at the trial as a means of establishing factual claims. (“Adducing evidence” is the legal term for presenting or producing evidence in court for the purpose of establishing proof.) This meaning of evidence is reflected in the definitional section of the Indian Evidence Act. “Evidence” in this sense, is what epistemologically constitutes “objects of sensory evidence” (Haack 2004: 48). Evidence, in this usage, is divided conventionally into three main categories: a) oral evidence (the testimony given in court by witnesses), b) documentary evidence (documents produced for inspection by the court), and c) “real evidence”; the first two are self-explanatory and the third captures things other than documents such as weapons of offence like a knife allegedly used in committing a crime.

A second concept of “evidence” refers to a proposition of fact that is established by evidence in the first sense. This is sometimes called an “evidential fact”. For example, that the accused was at or about the scene of the crime at the relevant time is evidence in the second sense of his possible involvement in the crime. But the accused’s presence must be proved by producing evidence in the first sense.

A third concept of evidence is an elaboration or extension of the second. On this conception, evidence is relational. A factual proposition (in Latin, *factum probans*) is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case (*factum probandum*). This concept of evidence highlights relativity of evidence, and underlines the jurists perspective that ‘Evidence, *factum probans*, is always relevant to some *factum probandum*; there is no relevance in the air’². For example, the fact that the accused’s fingerprints were found in a room where something was stolen is evidence in the present sense because one can infer from this that he was in the room, and his presence in the room is evidence of his possible involvement in the theft. In this third sense of “evidence”, which conceives of evidence as a premise for a material inference, “irrelevant evidence” is an oxymoron: it is simply not evidence. Hence, this statement of Bentham³ (1825: 230):

To say that testimony is not pertinent, is to say that it is foreign to the case, has no connection with it, and does not serve to prove the fact in question; in a word, it is to say, that it is not evidence.

1.2. Receivability of Evidence

An evidence is receivable as evidence in legal proceedings only if three basic conditions are satisfied: a) relevancy b) materiality and c) admissibility⁴.

2. J L Montrose. "Basic Concepts of the Law of Evidence", 70 L Q R 540 (Oct 1954)

3. Bentham, J., 1825, *A Treatise on Judicial Evidence*, M. Dumont (ed.), London: Paget.

4. Montrose, J., 1954, “Basic Concepts of the Law of Evidence”, *Law Quarterly Review*, 70: 527–555.

1.2.a. Relevance:

An evidence is relevant if “it has a tendency to make a fact more or less probable than it would be without the evidence”⁵. Likelihood ratio is the measure of relevance. Rulings on relevance are typically made in the course of the trial as and when an objection is raised to the introduction of evidence. The relevance of an item of evidence is assessed on its own, without consideration of other evidence.

In deciding whether the evidence sought to be adduced does have this tendency of making a fact more or less probable, the judge has to look outside the law as “*law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience*” (Thayer⁶ 1898: 265). As Thayer⁷ (1898: 269) famously claimed, relevance “is an affair of logic and not of law”. In this view, law does not control or regulate the assessment of relevance; it assumes that judges are already in possession of the (commonsense) resources to undertake this assessment.

While any evidence that is logically probative is relevant, not every relevant evidence is receivable in the court of law. This distinction⁸ is posited by using words ‘relevance’ and ‘admissibility’. Thayer used the term ‘logically probative’ as a synonym for ‘relevant’, and posited two principles of its determination, which are two basic principles of English Law. The first one is that, anything not logically probative is deemed irrelevant thereby forbidding its receivability. The second principle is that, unless excluded by some principle or rule of law all that is logically probative is admissible. The first principle was stated by Viscount Simon in **R. v. Harris**⁹, wherein the Court stated:

"Evidence of 'similar facts' cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime".

The second principle is enunciated by the court in **R v. Sims**¹⁰ in following words:

"All evidence that is logically probative is admissible unless excluded".

Thus, the question of relevancy is also a matter of admissibility, even though the admissibility has some predominance over relevancy. The test of relevancy is a preliminary test for determining admissibility. Rigour of policy and convenience in determination of admissibility has little effect on relevance. Naturally, in almost all jurisdictions, the question of relevance and admissibility are separately discussed. For example, In United States Federal Rules of Evidence, relevance is defined in Rule 401 and its exclusion is provided in Rule 403. Rule 403 provides that:

5. Federal Rule of Evidence 401

6. Thayer, J., 1898, A Preliminary Treatise on Evidence at the Common Law, Boston: Little, Brown & Co.

7. Thayer, J., 1898, A Preliminary Treatise on Evidence at the Common Law, Boston: Little, Brown & Co.

8. Thayer, A Preliminary Treatise on The Law of Evidence, Chapter VI.

9. 19521 1 All ER 1048

10. (1946) K.B. at 539

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”¹¹

Relevant evidence can be excluded only if its probative value is "outweighed" by the factors as provided. Here a question arises that, if the probative value of relevant evidence is in equal balance with the danger of unfair prejudice or if the probative value is very higher, whether it shall be excluded..... In **State v. Chapple**,¹² Arizona Supreme Court got an opportunity to consider this issue. In this case the accused was charged and convicted for murder. Before the appellate court, he contended that the trial court erred by admitting certain pictures of the dead body, because the pictures were gruesome and inflammatory. Regarding this court said:

“Photographs having probative value are admissible in evidence They must, of course be relevant to an issue in the case and may be admitted in evidence to identify the deceased ... although they may also have a tendency to prejudice the jury against the person who committed the offence. The discretion of the trial court will not be disturbed on appeal unless it has been clearly abused.”¹³

The answer to the aforesaid question is further elaborated upon by the United States Supreme Court in **Old Chief v. United States**.¹⁴ Souter J., delivered the opinion of the court:

“... the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degree of probative value and unfair prejudice not only for the item in question,. But for any actual available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk ... the judge would have to make these calculations with the appreciation of the offering parties need for evidentiary richness and narrative integrity in presenting a case.”

Though, it was not opportune for the Court in the aforesaid case to speak about the decision to be taken in cases in which there is no reasonable substitute having the greater probative value and lower danger of unfair prejudice, it would follow from the reasoning of the Court that in such circumstance the evidence needs to be excluded.

While these definitions give a theoretical basis to the concept of relevance, determination of

11. Rule 403 of the Federal Rules of Evidence

12. 660 P2d 1208 (Ariz. 1983)

13. Ibid. at 1214-15

14. 519 U.S. 172(1997)

relevancy is itself a function of logic and experience of the judge who evaluates the probabilities on which relevancy turns. This is not to say that relevance has no legal dimension. The law distinguishes between questions of law and questions of fact. An issue of relevance poses a question of law that is for the judge to decide, and so far as relevance is defined in legal, the judge must pay heed to the legal definition. But legal definitions of relevance are invariably very broad. Relevance is said to be a logical, and non-legal, concept in the sense that in answering a question of relevance and in applying the definition of relevance, the judge has necessarily to rely on extra-legal resources.

The next important question is whether the law of precedent on question of relevance is binding on subsequent cases? The answer to this question is posited in negative as it is common to reason that doctrine of precedent may not always include the field of relevance. Question of relevance is based on the reasoning faculty of a judge, who must use it according to the circumstances of each case. In the words of Thayer:

*'the doctrine of precedent is inapplicable because relevance is not an affair of law.. the law has no orders for the reasoning faculty, any more than for the perceiving faculty for the eyes and ears.'*¹⁵

1.2.b. Materiality

That fact A is relevant to fact B is not sufficient to make evidence of fact A receivable in court. In addition, B must be a "material" fact. The materiality of facts in a particular case is determined by the law applicable to that case. In a criminal prosecution, it depends on the law which defines the offence with which the accused is charged and at a civil trial, the law which sets out the elements of the legal claim that is being brought against the defendant.

For example, when an accused is prosecuted for the offence/crime of rape and the alleged victim's behavior (fact A) increases the probability that she had consented to have sexual intercourse with the accused (fact B). If the alleged victim is a minor, in this case, while A is relevant to B, under criminal law, it does not matter whether she had consented to the sexual intercourse. If B is of no legal consequence, the court will not allow evidence of A to be adduced for the purpose of proving B: the most obvious reason is that it is a waste of time to receive the evidence.

Not all material facts are necessarily in dispute. The law does not allow evidence to be adduced to prove facts that are not material/immaterial or that are not in issue. Evidence is sometimes described as "irrelevant" not for the reason that no logical inference can be drawn to the proposition that is sought to be proved, but because that proposition is not material or not disputed.

1.2.c. Admissibility

Evidence that is relevant to a factual proposition that is material and in issue may yet be

15. J. Thayer, A Preliminary Treatise on Evidence At Common Law (1989 ed.), p.265.

prohibited by legal rules from being presented at a trial. These rules render the evidence to which they apply “inadmissible” and require the judge to “exclude” it. Two prominent examples of such rules of admissibility or rules of exclusion are the rule against hearsay evidence and the rule against character evidence. For example, though past sexual behaviour/character evidence of the prosecutrix may be both relevant and material to the case, but is inadmissible on account of the express provision of law.

The concepts of admissibility and materiality should also be kept apart. This is because admissibility or exclusionary rules serve purposes and rationales that are distinct from the law defining the crime or civil claim that is before the court and it is this law that determines the materiality of facts in the dispute.

If the evidence is logically irrelevant, it must for that reason be excluded. If the evidence is logically relevant, it will be received by the court unless the law—in the form of an exclusionary or admissibility rule—requires its exclusion. In this scheme, the concept of relevance and the concept of admissibility are distinct: indeed, admissibility rules presuppose the relevance of the evidence to which they apply.

However, Exclusionary rules or rules of admissibility—at any rate, many of them—are more accurately seen as excluding forms of reasoning rather than prohibiting proof of certain types of facts¹⁶. This is particularly true in the case of the hearsay rule. On one authoritative definition of the rule (decision of the **Privy Council in Subramaniam v PP, (1956) 1 Weekly Law Reports 965**), what it prohibits is the use of a hearsay statement to prove the truth of the facts asserted therein. The objection is to the drawing of the inference that p from X’s out-of-court statement that p where X is not available to be examined in court. But the court will allow the evidence of X’s hearsay statement to be admitted—it will allow proof of the statement—where the purpose of adducing the evidence is to persuade the court that X did make the statement and this fact is relevant for some other purpose. For instance, it may be relevant as to the state of mind of the person hearing the statement, and his state of mind may be material to his defense of having acted under duress. Hence, two writers have commented that “*there is no such thing as hearsay evidence, only hearsay uses*”¹⁷ (Roberts and Zuckerman 2010: 385).

Other admissibility rules are also more accurately seen as targeted at forms of reasoning and not types of facts. In the United States, Federal Rule of Evidence 404(a)(1) bars the use of evidence of a person’s character “to prove that on a particular occasion the person acted in accordance with the character” and Federal Rule of Evidence 404(b)(1) provides that evidence of a crime or wrong is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

16. McNamara, P., 1986, “The Canons of Evidence: Rules of Exclusion or Rules of Use?”, *Adelaide Law Review*, 10: 341–364

17. Roberts, P. and A. Zuckerman, 2010, *Criminal Evidence*, Oxford: Oxford University Press, 2nd edition.

2. Probative Value of Evidence – Definition and Determination

Probative value is the ability of a piece of evidence to make a relevant disputed point more or less true. Evidence has probative value if it tends to prove an issue. For example: In a trial for murder, the 'accused's dispute with his neighbor (unrelated to the crime) has no probative value because it provides no relevant information to the tier of the fact. However, if the defendant's dispute was with the victim, this has a much higher probative value as it could be a motive for the murder.

Probative value of evidence essentially deals with the strength or sufficiency of evidence needed to establish proof and so forth. But law remains silent on as to the practical issue of its determination and the judge has to rely on extra-legal principles. However, these principles of evidential reasoning themselves are general in nature, given that 'reason' or 'logic' in 'drawing inferences from evidence test hypothesis' and in 'justifying conclusions'¹⁸ is governed by same principles across different disciplines.

When the evidence is led/presented at the trial, the Judge has to weigh it in reaching the verdict. Weight can refer to any of the following three properties of evidence: (a) the probative value of individual items of evidence, (b) the sufficiency of the whole body of evidence adduced at the trial in meeting the standard of proof, or (c) the relative completeness of this body of evidence.

2.1 Probative Value of Specific Items of Evidence

The concept of probative value plays a role at all stages of evidence evaluatory process, that is from a stage where the judge has to decide whether to receive the evidence in the first place, to the stages of deciding upon issues of fact and law, leading to the final judgment. In many legal systems, if the judge finds the probative value of a proposed item of evidence to be low and substantially outweighed by countervailing considerations, such as the risk of causing unfair prejudice or confusion, the judge can refuse to let the jury hear or see the evidence (e.g., Rule 403 of the United States' Federal Rules of Evidence).

One way of looking at probative value, is in terms of the likelihood ratio. Evidence can be more or less probative depending on the value of the likelihood ratio. The likelihood of an evidence, E (for example, the likelihood of a blood type match) given a hypothesis H (that the accused is in fact guilty) is compared with the likelihood of E given the negation of H (that the accused is in fact innocent). Prior to the introduction of E, one may have formed some belief about H based on other evidence that one already has. This prior belief does not affect the likelihood ratio since its computation is based on the assumptions that H is true, and its alternative assumption

18. Twining and Hampsher Monk 2003:4

that H is false. This way of determination of probative value of an item of evidence, independent of the probative value of other items of evidence, is generally made in the rulings on relevance. Rulings on relevance are typically made in the course of trial as and when an objection is raised to the introduction of evidence. Based on the probative value of an item of evidence in issue thus assessed, its relevance is assessed on its own without consideration of other evidence.

There is a second way of thinking about probative value, wherein the probative value of an item of evidence is assessed contextually. The probative value of E may be low given one state of the other evidence and substantial given a different body of other. For example, where the other evidence shows that a woman had died from falling down an escalator at a mall while she was out shopping, evidence of her husband's history of spousal battery is unlikely to have any probative value in proving that he was responsible for her death. But where the other evidence shows that the wife had died of injuries in the matrimonial home, and the question is whether the injuries were sustained from an accidental fall from the stairs or inflicted by the husband, the same evidence of spousal battery will now have significant probative value. Where the probative value of an item of evidence (E) is assessed contextually, it's probative value is understood as the degree to which E increases (or decreases) the probability of the proposition or hypothesis (H) in support of (or against) which E is led. The probative value of E is measured by the difference between the probability of H given E (the posterior probability) and the probability of H absent E (the prior probability).¹⁹

2.2 Sufficiency of Evidence and the Standards of Proof

Besides the weight of evidence in the sense of probative value of individual items of evidence, when the concept of weight is applied to the total body of evidence presented at the trial, the "weight" is commonly referred to as the "sufficiency of evidence". The law assigns the legal burden of proof between parties to a dispute. A verdict will be given in favour of the side bearing the legal burden of proof only if, having considered all of the evidence, the fact-finder is satisfied that the applicable standard of proof is met.

Standard of Proof as a Probabilistic Threshold

On one interpretation, the standard of proof is a probabilistic threshold. In civil cases, the standard is the "balance of probabilities" or, as it is more popularly called the "preponderance of evidence". The plaintiff will satisfy this standard and succeed in his claim only if there is, on all the evidence adduced in the case, more than 0.5 probability of his claim being true. At criminal trials, the standard for a guilty verdict is "proof beyond a reasonable doubt". Here the probabilistic threshold is thought to be much higher than 0.5 but courts have eschewed any attempt at authoritative quantification.

19. Friedman, R., 1986, "A Close Look at Probative Value", *Boston University Law Review*, 33: 733–759.

However, a major critique of this probabilistic view of threshold of sufficiency of evidence is that statistical evidence is not causally connected with the fact sought to be proved and as such cannot justify belief in or knowledge of the fact (Thomson 1986).²⁰ However, a counter-critique of this critique is whether the court should aim at knowledge of the disputed fact and not simply at accuracy in its finding.

Another argument against this probabilistic way of evaluating evidence is that generally the case that Judges do not evaluate pieces of evidence one-by-one and in the unidirectional manner required under the mathematical model (Amaya 2015: 114–5)²¹. A holistic approach is taken instead where the discrete items of evidence are integrated into large cognitive structures (variously labeled as “mental models”, “stories”, “narratives” and “theories of the case”), and they are assessed globally against the legal definition of the crime or civil claim that is in dispute (Pennington and Hastie 1991, 1993²²; Pardo 2000²³).

This holistic nature of evidential reasoning, which is an observed judicial behavior, has inspired alternative theories that are of a non-mathematical nature. One such alternative is the “explanatory” or “relative plausibility” theory advanced by Allen together with Pardo and others which says juries compare degrees of things like “coherence,” “consistency,” and “consilience” in the plaintiffs’ and defendants’ “stories” and choose the more plausible of the two, but little more.²⁴

But while these alternative theories try to explain and in the process formulate efficient methods of the judicial decisions, they meet with an obvious difficulty that holistic evaluation of evidence does not track well what the law tells its fact-finders about how to proceed. The law says to proceed element-by-element and apply the standard of proof to each element, not to create holistic stories and compare them. Further, this holistic approach of evidentiary evaluation diverges from the law by compelling the non-burdened party, or at least imposing a practical obligation, to choose and formulate a competing version of the truth. The law allows the accused to stand mute and still prevail.

It is not an accident therefore that for hundreds of years, proof at trial has continued to be probabilistic, if not particularly mathematical then certainly logical. This assumption goes well with the principles of common law which require each item of evidence to be given distinct and independent evaluation, which is in keeping with principles of law invariable across time and

20. Thomson, J., 1986, “Liability and Individualized Evidence”, *Law and Contemporary Problems*, 49(3): 199–219.

21. Amaya, A., 2015, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, Oxford: Hart and Portland.

22. Pennington, N. and R. Hastie, 1991, “A Cognitive Model of Juror Decision Making: The Story Model”, *Cardozo Law Review*, 13: 519–557.

—, 1993, “The Story Model for Juror Decision-making” in *Inside the Juror: The Psychology of Juror Decision Making*, R. Hastie (ed.), Cambridge: Cambridge University Press, pp. 192–221.

23. Pardo, M., 2000, “Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism”, *Northwestern University Law Review*, 95: 399–442.

24. Allen & Pardo, *Relative Plausibility and its Critics*,

space, such as that of keeping prejudice at bay from the judicial decision making process. Nevertheless, the contending theories of evidential reasoning, such as the holistic one, reflect an aspect of judicial decision making which is already a reality, and which if kept in mind aid in sanitizing the evidentiary world of the case before the Court.

2.3 Weight of Evidence as the Degree of Evidential Completeness

Weight in the context of legal fact-finding is the amount of evidence before the court. Strength of evidence is the property of weight. Weight is distinguishable from probability. The weight of evidence may be high and the mathematical probability low, as in the situation where the prosecution adduces a great deal of evidence tending to incriminate the accused but the defense has an unshakeable alibi (Cohen 1986: 641)²⁵. Conversely, the state of evidence adduced in a case might establish a sufficient degree of probability—high enough to cross the supposed threshold of proof on the mathematical conception of the standard of proof—and yet lack adequate weight. In the much-discussed gate-crasher's paradox, the only available evidence shows that the defendant was one of a thousand spectators at a rodeo show and that only four hundred and ninety nine tickets were issued. The defendant is sued by the show organizer for gate-crashing. The mathematical probability that the defendant was a gate-crasher is 0.501 and this meets the probabilistic threshold for civil liability. But, according to the negation principle of mathematical probability, there is probability of 0.499 that the accused did pay for his entrance. In these circumstances, it is intuitively unjust to find him liable (Cohen 1977: 75). A possible explanation for not finding him liable is that the evidence is too flimsy or of insufficient weight.

3. Probative Value of Prosecutrix Evidence in Sexual Assault Cases: Issues of Law.

‘Prosecutrix’: A Debatable Usage

Courts have for the longest time referred to the victim of a sexual assault as "the prosecutrix", if such person was the complainant in a criminal prosecution. This usage has been of late subject of serious criticism and been an issue of dissenting judicial opinions on the ground that use of an aggressive word such as ‘prosecutrix’ gives rise to an inference that victims of sexual assault are not really ‘victims’ and such use may unfairly diminish the degree of harm actually suffered.

Moreover, it has been argued that if the term is used to refer to those who initiate criminal actions, its use being restricted to sexual assault cases where the overwhelming number of victims are female, brings in an unnecessary gender distinction which may be suggestive of discrimination. Further, if the term is used to imply that the woman who was sexually assaulted is actually prosecuting the case, then its use implies that in sexual assault cases, the State does not pursue the prosecution; rather, the woman-victim of the assault does. All other crime victims are represented by the State. Usage of word "Prosecutrix", it is therefore argued, implies that the rights of the

25. Cohen, L., 1986, "The Role of Evidential Weight in Criminal Proof", *Boston University Law Review*, 66: 635–649.

women involved in sexual assault cases are not defended by the State and the women must fend for themselves.

While this critique itself is open to counter-critique of carrying explicit overtones of feminist politics, it has also met with robust 'etymological' response with solid foundation in precedence and principles of jurisprudence. Debate and dissensions apart, this usage continues unabated in judicial proceedings, wherein it is evident that word 'prosecutrix' is used as an agent noun, which is a noun denoting the performer of an action, as confirmed by the etymological notes that appear both in Webster's New International Dictionary of the English Language and the Oxford English Dictionary. The word "prosecutrix" is inherently sexist only insofar as it discriminates between men and women, boys and girls. That is to say, it "mark[s] or perceive[s] the distinguishing or peculiar feature of" gender. It is not, however, intrinsically sexist in the sense that it "make[s] a difference in treatment or favor on a basis other than individual merit." The Oxford English Dictionary also reports these various senses of "discriminate". In any case, use of word 'prosecutrix' for victims of sexual assault serves a very useful purpose of keeping the judge/fact-finder keenly aware of the 'interested' nature of prosecutrix evidence, an awareness that is indispensable in maintainability of judgments as has been held in a catena of judicial pronouncements by Hon'ble Supreme Court.

Sexual Assault:

Merriam-Webster defines 'Sexual assault' as "illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent (as because of age or physical or mental incapacity) or who places the assailant (such as a doctor) in a position of trust or authority."

The "sexual assault" provision in the statutes covers acts defined currently as rape, sexual abuse/assault, rape of a child, and indecency with a child. To factor in assaults on victims in care/authority/superintendence/family of the accused, statutes provide for a harsher punishment vide classification of such assault in the category of aggravated assault. "Aggravated assault" provision incorporates the illegal acts currently defined as aggravated rape and aggravated sexual abuse. A statutory distinction is made between sexual assault and penetrative sexual assault. Section 7 of the POCSO Act defines sexual assault as: "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." Likewise, while Section 9 defines 'aggravated sexual assault', section 3 defines 'penetrative sexual assault' and section 6 defines 'aggravated penetrative sexual assault'.

Provisions of aggravated penetrative sexual assault and Section 375 of IPC defining rape are, to all intents and purposes, similar. Cases which fall under Section 5 of the POCSO Act, which deals with aggravated penetrative sexual assault are treated as a class apart from cases which fall under Section 3 of the said statute, which deals with penetrative sexual assault. Just as

certain aggravated cases of penetrative sexual assault have, by Section 5 of the POCSO Act, been categorized as aggravated penetrative sexual assault, in a similar vein, sub-section (1) of Section 375, IPC, deals with punishment for rape simplicitor, whereas certain aggravated cases of rape are separately dealt under Section 376 (2), 376- A, 376-AB and 376-DA and 376-DB.

Issues of Law

The probative value of evidence required to lend assurance to the testimony of the prosecutrix necessarily depends on the facts and circumstances of each case. For example, age of the prosecutrix not only has a bearing on the threshold of the probative value, but also standards of prudence and procedure to be maintained in its determination. But, there are certain common issues cutting across specificity of facts and circumstances of these cases, that a judge has to deal with in the evaluatory process of a prosecutrix evidence.

3.1 Whether Conviction Can Rest On The Sole Testimony Of The Prosecutrix

In the cases of sexual assault, nature of crime and laxity of investigation often leaves prosecutrix evidence standing alone against insistent denial of defense. The foremost question that therefore arises in the given circumstances is whether prosecutrix evidence can, in itself, be sufficient for conviction. Besides the law laid down by Hon'ble Supreme Court in *In State of H.P. v. Raghubir Singh, (1993) 2 SCC 622*, that evidence is weighed, not counted, the statutes certainly concur as there is nothing in them that requires corroboration.

The statutory position regarding competency of evidence can be briefly summarized as follows. Under the Evidence Act, 'Evidence' means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Corroboration requirement crops up section 114(b), dealing with the testimony of an accomplice, which says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. But even in the case of an accomplice, Section 133 provides that he shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Section 133 makes it clear that:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

So, requirement of corroboration for prosecutrix evidence in the cases of sexual assault crops up only when facts and circumstances of the case project 'prosecutrix' in the light of 'an accomplice'. It is clear, therefore, that prosecutrix evidence in cases of sexual assault is in itself sufficient for conviction, unless facts and circumstances of the case present her in the light of an 'accomplice'. For example, in case of a girl who is below the age of consent, her consent will not matter so far as the charge of rape is concerned, but if she consented, her testimony will naturally be as suspect as that of an accomplice and therefore would require corroboration. To elaborate further, when a girl is below the age of consent, her consent is immaterial in determination of charge, that is of rape. But, that charge itself has to be established during the course of trial, on the basis of evidence, which has to be evaluated by the trial court. This evaluation of evidence would be affected by the fact of consent, if any, by the prosecutrix when she is underage. The act itself being a crime by statutory definition, and the accused being charged with the said crime, prosecutrix being a consenting partner in the said criminal act is by definition 'an accomplice', and as such evaluation of her evidence would require corroboration. Similarly, in large number of cases of unnatural offences, for example in *The King v. Baskerville* where Baskerville had been convicted of having committed acts of gross indecency with the two boys, there the boys were accomplices because they were freely consenting parties. This state of law is reflected in Hon'ble Supreme Court's pronouncement in **State of Maharashtra vs. Chandraprakash Kewal Chand Jain, (1990) 1 SCC 550** wherein the Hon'ble Court laid down :

"Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation."

However, a caution that the trial court has to exercise while dispensing with the need of corroboration, or even otherwise in deciding upon the sexual assault cases is laid pithily in **State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550**, wherein Hon'ble Supreme Court observed:

"What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration.... if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence".

The legal position, therefore, is, quite unambiguous, that the evidence of the prosecutrix, is ordinarily to be believed, and may form the sole basis for conviction, unless cogent reasons, for the court to be hesitant in believing the statement at its face value, and to seek corroboration thereof, exist.

3.1.a Essentials Of Evaluatory Process In The Appreciation Of The Uncorroborated Testimony Of The Prosecutrix

In *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550 Hon'ble Supreme Court held that:

- (iv) Evidence of a prosecutrix in a case of sexual assault 'need not be tested with the same amount of suspicion as that of an accomplice.'
- (v) Her evidence must receive the same weight as is attached to an injured in cases of physical violence.
- (vi) Degree of proof required to be met by prosecutrix evidence is no more than that required of an injured witness.
- (vii) The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more.
- (viii) The court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her.

Further it has been laid down by Hon'ble Supreme Court that:

- (ix) Even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion (in **State of U.P. vs. Pappu 2004 Supp(6) SCR 585**)
- (x) Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. (**State of Punjab vs Gurmit Singh, 1996 AIR 1393, 1996 SCC (2) 384**)
- (xi) The contradictions, inconsistencies and discrepancies pointed out are immaterial if none of those contradictions goes to the root of the case. For example, discrepancies in prosecutrix's statement as to whether she was going to get her chappal repaired or was easing herself, has no material bearing on the prosecution's case as "the fact remains that at that time she was going through that area."
- (xii) Evidence of Prosecutrix does not require corroboration from any other evidence

including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. [Hon'ble Supreme Court in **Moti Lal v. State of M.P., (2008) 11 SCC 20**]

- (xiii) The fact that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted. [Hon'ble Supreme Court in **B. C. Deva @ Dyava v. State of Karnataka, (2007) 12 SCC 122**]
- (xiv) The delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof [Hon'ble Supreme Court in **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384**].
- (xv) While suggestions put in the cross-examination cannot be used to fill in the lacuna in the evidence of the prosecution, the suggestions given by the defense, however, can be used to lend assurance to the prosecution case, is the law settled by the Hon'ble Supreme Court in **Rakesh Kumar alias Babli vs. State of Haryana AIR 1987 SC 690** and **Radhesham s/o Govardhan Bhagat vs. The State of Maharashtra 2000 ALL MR (Cri.) 52**).

3.1.b Nature of Evidence Required to Lend Assurance To The Testimony Of The Prosecutrix When Corroboration Not Required

1. If a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy.
2. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.
3. In case of a prosecutrix's testimony, presence of evident distress is also taken to increase the probative value of her evidence, as it would be rationally open to regard them as more credible and reliable by reason of that evident distress. To put it more accurately, the distress increases the extent to which the evidence of complainant/prosecutrix could rationally affect the court's assessment of the probability that the accused has committed the offence against the complainant.
4. In cases where corroboration is not essential to conviction, evidence of conduct of prosecutrix or any other witness of any kind that lends corroboration to the prosecutrix evidence,

‘may be more than enough in itself to justify acceptance of the complainant’s (prosecutrix) story’. [Hon’ble Supreme Court in **Rameshwar vs The State Of Rajasthan** 1952 AIR 54, 1952 SCR 377].

3.2 Requirement of Corroboration

As corollary to the law settled by Hon’ble Supreme Court in a catena of cases that ‘If a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy’, corroboration requirement crops up when prosecutrix evidence is ‘shown to be infirm and not trustworthy’. This essentially puts forth three essential conditions for corroboration requirement to develop. First condition is in the nature of ‘onus of proof’ which rests on the defense to ‘show’ that prosecutrix evidence is ‘infirm and not trustworthy’. It is as a preliminary requirement for the trial court to seek corroboration of prosecutrix evidence. Second and third requirements are that prosecutrix evidence is- a) infirm, and/or b) not trustworthy. These two conditions are in the nature of ‘issues of fact’ that need to be proved by the defense in order to plead for prosecutrix evidence to be confirmed/tested by corroboration.

3.2.a Infirmary and Non-Trustworthiness of Prosecutrix Evidence

But to decide on these two issues of fact, that is ‘infirmary’ and ‘non-trustworthiness’ of prosecutrix evidence, their nature and origin needs to be appreciated in the first place. While ‘infirmary’ is a property of ‘reason’, suggesting incomprehensibility by a ‘reasonable mind’, we begin with the nature of second condition, that is the prosecutrix evidence being not-trustworthy. Trustworthiness of a piece of evidence in a criminal prosecution essentially turns on the presence or absence of the motive of the concerned witness to falsely implicate the accused. Motive to implicate itself turns on a priori requirement of ‘familiarity’ with the accused. It is reasonably improbable to hold a motive against a ‘stranger’ – unless reason is seriously impaired. This is ‘the’ ground which was raised by the Lord Justices in **Bishram. v. Emperor A.I.R. 1944 Nag. 363**, where the Hon’ble Court made a distinction between accusation of rape by a woman and where a child says that a particular person is a culprit. This distinction was made on the count of familiarity of the accused, explicated by citing an example wherein accused is a ‘stranger’. Unless one is going to attribute to a child the possible existence of motives to choose a particular person as a culprit which might come into play in the case of a woman, the Hon’ble Court argued that there is ‘no distinction between a case of robbery by a stranger or of rape by a stranger’. In both cases one is thrown back on the question whether the evidence of the child can be accepted as to the identity of the culprit and the fact that the case is a rape case introduces no different element.

Therefore, familiarity of the prosecutrix with the accused is a source of motive, almost in the nature of a pre-condition for a motive to exist. In the case where the accused is a total stranger, it would fail reason to attribute any possible source of motive to the prosecutrix. Thus, while

familiarity may be a source of motive, it is no condition of sufficiency for motive to exist. Familiarity needs to go further to establish a motive. While the exact nature and character of evidence needed to establish motive would be peculiar to the facts and circumstances of the case, one may reasonably put forth certain traits of the journey that the 'fact of familiarity' must make to reach conclusion of a 'motive'. A reasonable source of corruption of evidence arises where familiarity is characterized by 'exchanges'/'behaviour' of benefit/satisfaction – benefit may be physical, emotional or material. This brings in the issue of 'consent' with which if proved triggers the statutory provision of corroboration regarding 'accomplice witness'.

3.2.b Consent And Its Vitiating: Definition and Determination

Consent is defined in the explanation 2 of Section 375 of IPC defining rape, wherein it says:

Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

While section 375 defines consent, section 90 of IPC makes it clear that a 'consent' based on a "misconception of fact" or 'fear' is no consent in the eyes of the law. It provides as follows:

"Section 90 : Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

Therefore, two essential conditions must be fulfilled for the application of Section 90 IPC, and a 'consent' to be considered vitiated. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. The onus of proof on both these counts rests on prosecution.

Hon'ble Supreme Court has repeatedly held that 'consent' with respect to Section 375 of the IPC involves: a) an active understanding of the circumstances, b) actions and consequences of the proposed act. When an individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, 'consents' to such action [Hon'ble Supreme Court in **Pramod Suryabhan Pawar vs The State of Maharashtra**].

For example, promise to marry is a common and prevalent “misconception of fact” alleged by the complainant/prosecutrix that vitiates her consent. Specifically in the context of a promise to marry, Hon’ble Supreme Court has repeatedly observed that there is a distinction between: i) a false promise given on the understanding by the maker that it will be broken; and ii) the breach of a promise which is made in good faith but subsequently not fulfilled. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance. **[Pramod Suryabhan Pawar vs The State Of Maharashtra, decided on 21 August, 2019]**

To establish a false promise, it must be proved that the maker of the promise should have had no intention of upholding his word at the time of giving it. Thus, in order to come within the meaning of the term “misconception of fact”, the fact must have an “immediate relevance”. That is the alleged fact, such as ‘promise to marry the complainant’, must be of immediate relevance to the complainant’s decision to engage in sexual intercourse with the accused. This fact must be proved by prosecution for ‘prosecutrix’ consent to be considered vitiated. If her consent is motivated by other factors as well, such as love, provisions of Section 90 of IPC cannot be called into aid to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her. **[Uday v State of Karnataka (2003) 4SCC46].**

Recently, Hon'ble Delhi High Court in **State v. Sandeep [2019SC Online Del 10332 decided on 25-09-2019]** noted that *"It is important to bear in mind that two consenting adults establishing a physical relationship, is not crime. Jilting a lover, however abhorrent that it may seem to some, is also not an offence punishable under the Penal Code, 1860."* It further held that inducement to have a physical relationship by promising marriage, must have a clear nexus with the moment, promise of marriage cannot be held out as an inducement for engaging in sex over a protracted and indefinite period of time.

Thus, whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. Evidence must be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to the inference beyond reasonable doubt the two aforesaid facts in issue; that is a) it must be shown that the consent was given under a misconception of fact, and b) it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

3.2.c Nature And Extent Of Corroboration When Required

Leading law regarding nature and extent of corroboration required for an accomplice witness is the judgment authored by Lord Reading, the Lord Chief Justice of England, in **The King v. Baskerville (1) [1916] 2 K.B, 658**, which is the leading authority cited in a catena of Hon'ble Supreme Court pronouncements. Rules propounded in the said judgment at pages 664 to 669 are:

"It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction.....Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony."

Thus, following are salient features of the nature and extent of corroboration required:

4. All that is required from the requirement of corroboration is that there must be "some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it."

5. This corroboration, when required, in case of prosecutrix evidence is: a) 'short of corroboration required in the case of an accomplice', and b) is in the nature of an effort on the part of the Court to look for evidence which may lay assurance to her testimony [Hon'ble Supreme Court in **State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550**].

6. The corroborative evidence must lend assurance to Prosecutrix evidence on two counts: a) it should make it safe to believe that the crime was committed; and b) it should in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the prosecutrix that the accused committed the crime.

7. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that-

"a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all...It would not at all tend to show that the party accused participated in it."

8. The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

9. The law as to what constitutes independent nature of a witness has been settled by Hon'ble Supreme Court in a series of judicial pronouncements defining 'independent'. As laid down in **Rameshwar (Supra)**, Hon'ble Supreme Court observed :

"Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she (mother of prosecutrix) should implicate him falsely."

Thus, there is no legal bar to exclude the close relatives such as mother on the ground of independence from coming under the operation of corroboration rule merely on the ground of their relationship, unless motive of implication is evident.

10. The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice."

3.2.d Previous Statement Of Prosecutrix As Corroboration

That the previous statement of prosecutrix is legally admissible as evidence of conduct is indisputable because of Illustration (j) to section 8 of the Evidence Act which is in these terms:

"The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

While this settles the law with regard to its legal admissibility and relevancy as to conduct, the issue with regard to its admissibility for the particular purpose of corroboration is settled by section 157 of the Evidence Act which lays down that:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

This section therefore makes prosecutrix/complainant previous statement legally admissible as corroboration, that too without exception, provided the condition prescribed, that is to say, "at or about the time etc.," are fulfilled. And the test as to whether a previous statement was made "at or about the time when the fact took place", within the meaning of section 157, Evidence Act, is laid down by Hon'ble Supreme Court in **Rameshwar vs The State Of Rajasthan: 1952 AIR 54, 1952 SCR 377**, as whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was an opportunity for tutoring or concoction. The weight to be attached to it is, of course, another matter and it may be that in some cases the

evidentiary value of two statements emanating from the same tainted source may not be high, but in view of section 118 its legal admissibility as corroboration cannot be questioned. However, Hon'ble Supreme Court in *Rameshwar vs The State of Rajasthan*, has made a very pithy and pertinent observation that illuminates the weighing process of such statements as corroboration wherein the Hon'ble Court thus stated with regard to previous statement of prosecutrix as corroboration:

"...even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind (that is the act of previous statement of prosecutrix having been made) may be more than enough in itself to justify acceptance of the complainant's story."

Similarly, the statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, being a previous statement, though not being a substantive piece of evidence, can be used for the purpose of contradiction or corroboration of her testimony in consonance with provisions of section 145 and 157 of the Evidence Act. So, when the testimony of the prosecutrix seems improbable, unreliable and unworthy of credence, the probative value of her testimony becomes virtually nill.

3.3 Proof Of Age Of Victim Of Rape

Hon'ble Supreme Court in ***Mahadeo v. State of Maharashtra (2013) 14 SCC 637***, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining--

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or

(iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary,

give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

Law regarding appreciation of proof of age has been elucidated upon by Hon'ble Supreme Court in the case of **Birad Mal Singhvi v. Anand Purohit, 1988 AIR 1796, 1988 SCR Supl. (2) 1** wherein the Hon'ble Court observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted'.

The same proposition of law was reiterated by the Hon'ble Supreme Court in the case of **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal, (2003) 8 SCC 745** where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue"."

3.4 Cross-Examination of Prosecutrix and Procedural Miscarriage of Justice

The treatment of the victims of sexual assault in the court during their cross-examination is an issue of serious concern as the entire trauma of assault suffered by the victim is brought in much more malignant and malicious way to bear upon her, bruising her emotional world, her honour and

her self worth in irreparable ways in full public display. The provisions of Evidence Act regarding relevancy of facts notwithstanding, both prosecution and the court often remain mute spectators.

3.4.a In Camera Trial: A Statutory and Evidential Necessity

“Trial of rape cases in camera should be the rule and an open trial in such cases an exception” is a sharp and decisive law laid down by Hon’ble Supreme Court in **State of Punjab vs Gurmit Singh and Ors 1996 AIR 1393, 1996 SCC (2) 384**. Sub- section (2) of Section 327 Cr. P.C which requires the inquiry into and trial of rape "shall be conducted in camera". The statutes therefore explicitly cast a duty on the Court to conduct the trial of rape cases etc. invariably "in camera". Hon’ble Supreme Court has time and again exhorted the trial courts to *‘act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) Cr. P.C. and hold the trial of rape cases in camera.’*²⁶

In camera trial is required not only to guard the victim from undergoing a second onslaught of the entire trauma of the criminal assault on her body, emotions, dignity and honour only this time in full public gaze and ensure that the trial is, at every point of time in trial, in keeping with the sanctity of a temple of justice, where justice is at stake in every process, at every moment, but also to improve the quality of evidence. It would improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. While conducting trial in camera, Courts should also be keenly aware of subsection 3 of Section 327 of Cr.P.C which, when trials are held in camera, makes it unlawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court. While on the one hand, these two provisions, Section 327 (2) and (3) of Cr.P.C. provide an exception to the general rule of an open trial, on the other, they render in- camera trial as a general rule of trial in sexual assault cases, making open court trial an exception.

3.5 Child As A Prosecutrix

While in principle, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value; in practice, the trial courts dither to place inherent confidence into the evidence of a child prosecutrix, often seeking corroboration of independent nature.

In **Bishram. v. Emperor A.I.R. 1944 Nag. 363**, the Hon’ble Court made a distinction between accusation of rape by a woman and where a child says that a particular person is a culprit. This distinction was made on the count of identity/familiarity of the accused. The Hon’ble Court

26. State of Punjab vs Gurmit Singh and Ors 1996 AIR 1393, 1996 SCC (2) 384

argued that unless one is going to attribute to a child the possible existence of motives to choose a particular person as a culprit which might come into play in the case of a woman, there is no distinction between a case of robbery by a stranger or of rape by a stranger. In both cases one is thrown back on the question whether the evidence of the child can be accepted as to the identity of the culprit and the fact that the case is a rape case introduces no different element.

Even in cases where the accused is not a stranger, **Kinkhede A.J.C in A.I.R 1926 Nag. 745** emphasized that when the victim of an offence of rape is an innocent girl of tender age her evidence carries great weight. Law was explicitly laid down by Hon'ble Court in Bishram that it is the existence of possible motives for false incrimination which might attract the necessity for corroboration and where no such motives can even be suggested it cannot be said that there is any rule of law or of prudence which makes independent corroboration necessary as to the culprit's identity.

However, Hon'ble Supreme Court in **Rameshwar (supra)** has laid down that the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. The Judge must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law, the Hon'ble Court opined in the said case, is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

Thus, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value. In any case, there is no statutory embargo, neither express nor implied, on either admissibility or reliability of evidence of a child witness. Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under: 118. Who may testify:

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.: A lunatic is not incompetent to testify, unless he is prevented by his

lunacy from understanding the questions put to him and giving rational answers to them.

Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him/her, or from giving rational answers to such questions, by reason of his/her age. Thus, whether evidence of a child is admissible and the extent to which it is reliable would depend again upon the sensibility and sensitivity of the Trial court which is in a capacity to directly observe and assess the demeanour, carriage and sensibility of the concerned child. But, in a series of pronouncements, Hon'ble Supreme Court has laid down the law that this assessment by the Trial Court must be reflected in its judgment, failure of which would mortally effect both admissibility and reliability of the evidence.

3.5.a Admissibility of Prosecutrix (Child) Evidence and Sanctity of An Oath

Given the tender age, it is generally the case that a child does not understand the sanctity of an oath, in which circumstance, an oath cannot be administered to her. This leads often to an issue regarding admissibility of the child's evidence. Non-administering of an oath to a child witness, or her incapability to understand its sanctity does not effect 'admissibility' of her/his evidence, its 'credibility' being a different matter. The statutory provision regarding this issue is explicit wherein Section 5 of the Indian Oaths Act, 1873 provides:

"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

Thus, the only requirement for admissibility of evidence on account absence of oath or its affirmation is that the Court or the examining authority should be of the opinion that the witness understands the duty of speaking the truth. This requirement therefore puts the onus on the Court or authority examining the witness to form an opinion, which obviously needs to be put on record. But this onus is often found to raise next issue, that is what happens to the admissibility of evidence if the Court examining the child witness fails to record its opinion regarding her understanding her duty to speak the truth.

3.5.b Opinion Of The Court With Regard To Understanding of Child Witness

The issue, therefore, is whether the opinion referred to must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken. The issue of evidence

at stake here is that of its competency/admissibility and not credibility. The Oath act does not deal with competency. As has been held by Hon'ble Supreme Court in a catena of cases that the 'main object (of the Oaths Act) is to render person who give false evidence liable to prosecution...a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth'. Therefore, in view of section 118 of the Evidence Act, these matters only effect credibility and not admissibility of the evidence, is the law settled by Hon'ble Supreme Court in **Rameshwar vs the State of Rajasthan** (*supra*). The Hon'ble Court in the aforesaid case further reasoned that "*Section 5 is the main provision regarding the administration of oaths. The proviso only sets out the cases in which the oath is not to be administered. If, therefore, an omission to take the oath does not affect the admissibility of the evidence, it follows that irregularity of the kind we are considering which arises out of the proviso cannot affect the admissibility either.*" Furthermore, this reason of the Hon'ble Court is resoundingly backed by Section 13 of the Oaths act which states: "*No omission to take any oath or make any affirmation..... and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever.....*"

Therefore, in cases where the opinion of the Court examining the witness is not formally recorded, it does not impinge upon the admissibility of that evidence. But, it also has been laid out by Hon'ble Supreme Court in a series of pronouncements that in such an eventuality, the credibility of the witness may be seriously affected. The Hon'ble Court, however, has also put forth that in circumstances when there is no formal certificate, 'whether the magistrate or judge really was of that opinion can....be gathered from the circumstances.....In the present case, it is plain that the learned Judge had the provision in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the judge would doubtless have made good the omission.' [**Rameshwar vs The State of Rajasthan, Supra**]

3.5.c Age of The Child Prosecutrix- A Factor in Probative Value Of Evidence

Presumption that a child of tender years would not, ordinarily, lie depends to a large extent on the age of the child. While there is no defined dividing line in such cases, however, it may be reasonable to presume that a child of the age of four, or thereabouts, would be of an age at which, to questions spontaneously put to the child, the answer would ordinarily be the truth. Nevertheless, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily ?tutored.

3.5.d Corroboration Requirement for Evidence of a Child Witness

Corroboration requirement for evidence of a child witness, though a judicial practice, is essentially reflective of its prudence. That, the corroboration requirement is 'more a rule of

practical wisdom than of law' was laid down by Hon'ble Supreme Court in **Panchhi v. State of U.P., (1998) 7 SCC 177**. It is not the state of law to consider evidence of a child as inherently tainted. As Hon'ble Supreme Court went on to observe in the aforesaid judgment, "*...the law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring*"

Being a matter of judicial prudence, the requirement of corroboration, in suitable facts and circumstances of the case, may be dispensed with. The law is again laid down explicitly by Hon'ble Supreme Court in **State of U.P. v. Krishna Master, (2010) 12 SCC 324**, wherein Hon'ble Court ruled: "*In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever.*"

It has been laid down by Hon'ble Supreme Court in a series of successive pronouncement that evidence of a child witness would be reliable to the extent of the Court being assured of spontaneity of his/her deposition or her susceptibility to tutoring. An inference as whether child has been tutored or not can be drawn from the contents of her deposition.

Even where parts of child's deposition is found to be tutored, like the case of hostile witness, the whole of the evidence need not be thrown away. Hon'ble Supreme Court has laid down in **Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516** that:

"Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (vide)"

The law on the issue, therefore, can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. And, a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction is the law laid down explicitly in **Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341**.

Conclusion:

Sexual assault cases deal with the soft underbelly of Indian judicial system, where justice delivery mechanism is being vigorously tested by ever increasing crimes of passion against a class of victims whose capacity to resist and recover, physically, emotionally and socially, is highly compromised given their peculiar position in the context of the nature of violation they suffer. The very nature of crime, committed on sly and in secrecy, generally leaves victim – her body, her

trauma, her vulnerability— as the only evidence in the case. Given the laxity of investigating agencies, delivery of justice in these cases comes to turn to the sole count of Prosecutrix/complainant evidence. Thus, probative value of prosecutrix/complainant evidence, in its definition and determination, is the foundation of justice in sexual assault cases - if it flounders, so does justice. While statutes provide a framework in which the trial court has to arrive at a probative value in its evaluation of evidences, it proffers no direct help in actual determination of probative value which is arrived at in the mind of the Judge, where logic and experience of the judge sifts through strengths and weaknesses of defence and prosecution to arrive at a decision. In the myriad of facts, fiction and hypothesis, truth is to be grasped by the judge from an elusive range which spreads from ‘more likely’ to ‘less likely’ – evidence, after all, being an affair of probability, rarely of certainty. In this conundrum of conflicting facts and principles and procedures, clarity of what constitutes evidence and conditions of its receivability helps clear much of the clutter which often confounds logic of the Judge and blurs his vision in determination of a probative value of the body of evidence before him. In this determination, rules of law and legal principles aided by common principles of reason and logic prove useful tools in the hands of the Judge. These tools when ably used in the light of judicial pronouncements of superior courts of justice steady the hands of justice to the effect of reducing, however minute but greatly meaningful, chances of miscarriage of justice in a class of cases where sensitivity touches soul, and significance gives justice its cause.



Topic No. –20

Evidentiary value of partisan, interested, inimical, hostile and related witnesses, child witness in a criminal trial.

By
Arvind Kr Sharma,
Additional District & Sessions Judge,
Motihari.

Arvind Kr Sharma,
Additional District & Sessions Judge, Motihari.

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Evidentiary Value of Partisan, Interested, Inimical, Hostile, Related, and Child Witnesses in Criminal Trial.

INTRODUCTION

Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the Society. Every citizen who has knowledge of the commission of offence is duty bound to tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case. It is the duty of the courts to appreciate evidence intensely, carefully and analyse the same. Courts have to judge the evidence before them by applying the test of human probabilities. Stanzas 14 and 18 of Eighth Chapter of Manu Samhita deal with role of witnesses. They read as follows:

"Stanza 14 "Jatro dharmo hyadharmena Satyam Jatranrutenacha Hanyate
prekshyamananam Hatastrata Sabhasadah"

(Where in the presence of Judges "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin), and Stanza 18 reads as follows:

"Padodharmasya Kartaram Padah sakshinomruchhati Padah sabhasadah sarban pado
rajanmruchhati"

In the adharma flowing from wrong decision in a Court of law, one fourth each is attributed to the person committing the adharma, witness, the judges and the ruler". Thus, judicial officers must appreciate evidence very carefully and analyse the evidence. Witnesses must depose without fear or favour, without intimidation or allurements, but due to various reasons they may depose under fear or with intention to favour a particular party or under allurement for extraneous considerations. Some of such witnesses, who do not come to court with clear hand, mind or heart may be enumerated as Partisan, Interested, Inimical, Hostile, Related, and Child witnesses.

Importance of Witness in Criminal Trial

According to Bentham, "Witnesses are the eyes and ears of justice." The role of a witness is paramount in the Criminal Justice System of any country. In Adversarial system, the prosecution has to prove its case, by using evidence which is challenged by the defence. The Hon'ble Supreme Court in State of Gujrat Versus Anirudh Singh AIR 1997 SC 2780, highlighted the necessity of people's assistance in detection of crime and observed that:

"It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence".

Malimath Committee report on reforms in criminal justice system in 2003, while emphasizing importance of witness observed:

"By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth.

He/ She performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross examination and cannot refuse to answer questions on the ground the answer will incriminate him"

Hon'ble Supreme Court, in the case of *Zahira Habibulla H. Sheidkh and Another versus State of Gujrat and others* (2004) 4 S.C.C. 158, identified the important position of witnesses with respect to the fair trial: "Fair Trial means a trial where the witnesses do not get threatened or are forced to give false evidence against the accused".

The Supreme Court in **Himanshu Singh versus State of M. P. and others (2008) 4 SCR 783** observed as under: -

"Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties."

A witness though wholly truthful is liable to be overawed by the court atmosphere and the piercing cross examination made by the council and out of nervousness may mix-up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved through the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps, it is sort of a psychological defence mechanism activated on the spur of moment.

What Makes a Witness More or Less Believable?

The edifice of administration of justice is based upon witnesses coming forward and deposing without fear or favour, without intimidation or allurements in Court of law. Hon'ble Supreme Court in **Dalip Singh versus State of Punjab, AIR 1953 SC 364**, held as follows:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

One of the main reasons for the large percentage of acquittals in criminal cases is of witnesses' turning hostile and giving false testimony in criminal cases. Several reasons are attributed to this malady such as inordinate delay in the trial of cases, threats or inducement from the accused etc. As in criminal cases the prosecution relies mainly on oral evidence the problem assumes critical importance. If witnesses are deposing under fear or intimidation or for favour or allurements, the foundation of administration of justice not only gets weakened, but it may even get obliterated. Many times, witnesses deliberately conceal facts or consciously distort the truth in court. Perjury could result in the conviction of an innocent person, or the acquittal of a criminal, thereby rendering court decisions vulnerable.

Court may consider many different factors when they're deciding whether they believe witnesses' testimony, including:

- (a) Do the witnesses have a personal or financial interest in the case? For instance, do they have a relationship with the crime victim or one of the parties (the defendant or prosecution)?
- (b) Did the government offer them leniency or immunity for their own possible crimes in return for their testimony?
- (c) Are the witnesses biased for or against either party?
- (d) Is the testimony clear, consistent, and convincing?
- (e) Does other evidence support or contradict what the witnesses said? This could include a witness's own previous statements that contradict the testimony at the trial.
- (f) Do the witnesses have a reputation for being honest and trustworthy?
- (g) Was there anything that hindered the witnesses' ability to see or hear the events they're testifying about? Do they have visual or hearing impairments? Were they under the influence of drugs or alcohol at the time?
- (h) Do the witnesses' appearance and demeanour support or undermine their credibility? Do they appear uncertain or sure of their testimony? Juries might be less likely to believe witnesses whose age or mental condition suggests memory problems.

How to evaluate the evidence of a witness

The question whether a particular witness is to be believed or not is a question of fact and not a question of law. The value to be attached to the evidence of every particular witness has to be judged in the particular case by the court concerned and no rule of thumb can be laid down to

guide the subordinate courts' in every case. In criminal case court should judge the evidence by probabilities, intrinsic worth of evidence and animus of the witnesses.

Whether a person is a competent witness or not may be a question of law governed by the Evidence Act. Once it is found as a matter of law that he is competent to give evidence, whether his evidence on a certain matter is admissible or not is again a question of law governed by the Evidence Act, which contains the provisions as to what statements of a witness are admissible and what inadmissible. After a witness has been found to be competent to give evidence and has made a statement which is admissible in evidence, a third question arises, it being whether it should be believed or not and this essentially is a question of fact. Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. Whether a statement of a witness should be believed or not depends upon so many circumstances that it is impossible to lay down hard and fast rules, Section 114 of the Evidence Act permits, but does not compel, a Court to presume that an accomplice is unworthy of credit unless corroborated. He is a competent witness and it is for the Court to Judge, as a matter of fact, whether his evidence should be believed or not. It may hold that it should not be believed unless corroborated, but if it, considering all the circumstances of the case, chooses to believe it, even though uncorroborated, and convicts the accused solely on its basis, the conviction is not against any law; this is made clear by Section 133 of the Evidence Act. Barring these two provisions contained in section 114 and 133 of the Evidence Act, there are no provisions dealing with the question of believing or not believing a witness; the matter has been left at the sound discretion of the Court. The function of a Court, whether a civil court or a criminal court, is to decide whether a certain fact is proved or not. A civil court has to decide whether a certain fact in issue is proved by the party on whom the onus lay and a criminal court has to decide whether the commission of the offence by the accused is proved. A fact is said to be proved, vide Section 3 of the Evidence Act, "when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists".

The law after laying down which persons, are competent to give evidence and which are not and what evidence is admissible and what not, has left it to the Court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. It has not given any guidance to the Court in deciding whether the evidence should be believed or not or what weight should be attached to it or what effect should be given to it; these matters have been left at the sound discretion of the Court to be exercised on consideration of all circumstances. When the legislature itself has left these matters at the discretion of the Court without attempting to fetter it by laying down any hard and fast rules, it is not open even to the highest Court to fetter the discretion of not only lower Courts, but also of itself, by laying down hard and fast rules, because it would be tantamount to legislating. Law is invariable and a finding on a question of law must be given according to the law regardless of circumstances.

If the circumstances have to be considered at all, it is only for the purpose of seeing whether the law is applicable or not.

Evaluating evidence and rendering decisions is a great responsibility in criminal cases. The credibility of any witness, who gives evidence as to the facts either for the prosecution or the defence is material to the issue. A party can only prove facts relevant to his case and it is only the party, on whom the burden lies, is bound to prove the facts. Where a special intent is of the essence of the offence, the special intent must be proved so that proof of a different intent will not suffice. Therefore, a witness is a person who has first hand information about the happening of an event. The declaration and statement of a witness, are made under oath and are received as evidence for some purpose, whether such statements or declaration are made on oral examination or by deposition or affidavit. The witness has to assist the court in the Administration of justice, by attending the court when required. The trial court may call as the court's witness person, who were personally present at the event, forming the basis of the prosecution and his testimony is material or of eyewitness, or any other witness.

In **Ram Chandra Rambux versus Champabai & Ors, AIR 1965 SC 354**, it was observed that;

"It is open to the court to look into surrounding circumstances. In order to judge the credibility of the witness, the court is not confined only to the way, in which the witnesses have deposed or to the demeanour of witnesses, but it is open to look into the surrounding circumstances, as well as the probabilities', so that it may be able to form a correct idea of the trustworthiness of the witnesses."

Evaluation of evidence of Partisan witnesses, Interested witnesses, Inimical witnesses, Hostile witnesses, Related witnesses and Child witnesses:

Hon'ble Supreme Court in the case of **Vadivelu Thevar versus The State of Madras AIR 1957 SC 614** classified witnesses into three categories.

- i. Those that are wholly reliable,
- ii. Those that are wholly unreliable and
- iii. Those who are neither wholly reliable nor wholly unreliable.

In the first category, the court have no difficulty in coming to the conclusion either way. It can convict or acquit the accused on the deposition of a single witness, if it is found to be fully reliable. In the second category, also there is no difficulty in arriving, at an appropriate conclusion. There is no question of placing any reliance upon the deposition of wholly unreliable witness. It is only in the case of witnesses who are neither wholly reliable nor wholly unreliable that the courts have to circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

The maxim “falsus in uno, falsus in omnibus” is not applicable in India. Falsus in Uno, Falsus in Omnibus is a legal maxim, used in India, with the following meaning: False in one, false in all. The Supreme Court held in **Sohrab versus State of M.P. AIR 1972 SC 2020**, that falsus in uno, falsus in omnibus is not a sound rule, for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries and embellishments.

In **Gangadhar Behera versus State of Orissa [2002] 8 SCC 381**, the Supreme Court held that this principle is not applicable in India. It is only a rule of caution. Court has to separate chaff from grain and to find in each case as to what extent the evidence is acceptable. If separation is not possible, the entire evidence has to be rejected in toto.

The Hon’ble Supreme Court of India in the case titled as **Mahendran Versus The State of Tamil Nadu, AIR 2019 SC 1719**, held that the maxim “falsus in uno, falsus in omnibus” has no application in India. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons.

Evaluation of testimony of various categories of witnesses :

Now we shall discussed the intrinsic of various categories of witnesses in the light of pronouncements of Hon’ble Apex Court and Hon’ble High Courts of various States.

Testimony of Partisan Witness :

Partisan means a person who is a fervent, sometimes militant supporter or proponent of a party, cause, faction, person, or idea or a member of an organized body of fighters who attack or harass an enemy, especially within occupied territory; a guerrilla or of, relating to, or characteristic of a partisan or partisans. or biased in support of a party, group, or cause.

Based upon the above definition the following witnesses will come within the preview of Partisan Witnesses:

- i. Detective, Decoy or Trap witnesses
- ii. Police Witnesses
- iii. Expert Witnesses
- iv. Witness and Victim belonging to same Political Party.

Detective, Decoy or Trap witnesses:

Decoy witnesses are employed by investigating agencies to grab culprits particularly in corruption cases and cases of selling and possessing of intoxicants. This mode of laying trap against the accused persons gives rise to many controversies. Numerous ethical and legal issues

envelop the relevance of decoy witnesses' evidence and the weight appended to it in criminal cases. The supporters of the use of decoy witness's evidence argue that had not been there a decoy witness it would have been difficult to apprehend the accused. But they forget while making such an argument that it was the decoy person who instigated the crime and ultimately it was the investigating agency which laid the foundation of commission of the crime. The institution which is primarily charged to prevent commission of crimes if gets involved in facilitating commission of crimes, it would raise questions as to utility of such institution. In response to this objection, the supporters of using decoy witness's evidence take refuge behind a so-called realist argument: any approach, not specifically prohibited by law but handy in bringing criminals behind the bars, can be resorted to.

A trap witness is not an approver, but he is certainly an interested witness, in the sense that he is interested to see that the trap laid by him succeeds. Detectives, decoys and trap witness cannot be put on a par with the accomplice. These are the persons who act for the advancement of public justice and their aim is to bring the culprits to book. Although they pretend to collaborate with the culprits in the commission of crime, they do not share the element of *Mens rea*. These persons therefore cannot be considered as accomplices and their evidence requires no corroboration.

Honest Trap Witness:

In Vemireddy Satyanarayana Reddy and Others Versus State of Hyderabad, AIR 1956 SC 379, Supreme Court held: -

“What law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy the reasonable minds that the man can be regarded as a truthful witness.”

In Ramjanam Singh vs. The State of Bihar, (1956 SC 643 at 651), It was observed therein:

“The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them; and if they do, whether it is because of caution, or because of their better instincts or because some other has shown them either the futility or the wickedness of wrong doing it behaves society and the state to protect them and help them in their good resolve, not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside.”

Police Witnesses:

In Bhanupratap Hariprasad Dave versus State of Gujrat (1969) 1 SCR 22, it was held that, the police witnesses are said to be partisan witnesses, as they are interested in the success of the trap laid by them, but it cannot be said that they are accomplices. Their evidence must be

rested in the same way as any other interested witnesses is tested and the court may look for independent corroboration before convicting the accused person.

In Parmod Kumar versus State (NCT of Delhi) AIR 2013 Supreme Court 3344, Hon'ble Supreme Court has held that -

"The witnesses from the department of police cannot per se be said to be untruthful or unreliable. It would depend upon the veracity, credibility and unimpeachability of their testimony. There is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trust worthy, the Court can definitely act upon the same. If, in the course of scrutinizing the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence."

In State of Punjab versus Balbir Singh, 1994(1) Recent Criminal Reports 736, it has been ruled by the Hon'ble Supreme Court that "there is no bar in recording the conviction by relying upon the statements of police officers." It has been observed in paragraph No.8 of the judgment that "It is well settled that the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official, but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions."

In Rohtash Kumar versus State of Haryana (2013) 14 SCC 434, Evidence of police witness must be subject to scrutiny. The evidence of the police officer cannot be discarded merely, on the ground that they belonged to the police force and are either interested in investigating or are in the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars, should be sought.

There can be no prohibition to the effect that a policeman cannot be a witness or that is deposition cannot be relied upon. The rule of prudence, however, only requires a greater degree of scrutiny of their evidence, as they may be said to be interested in the result of the case. No infirmity is attached to the testimony of police official merely, because they belong to the police and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police official if it is found to be reliable. As a precaution it must be corroborated by some independent evidence. There is no principle of law that a statement made in court by police personnel has to be disbelieved. Court cannot assume that every statement of policeman, as a necessity, has to be false.

The testimony of partisan witness in factious cases must be scrutinized with more than ordinary care and accepted with due caution. A partisan witness merely means a person who is interested in the prosecution and in bribery cases in the successful laying of a trap and in the successful prosecution of the alleged bribe-taker.

Expert Witnesses

Expert is defined under section 45 of The Evidence Act, 1872. The court needs an expert to form an opinion upon: Foreign law, Science & Art, Identity of Handwriting, Identity of finger impression, Electronic evidence. Experts are ethically bound to be impartial when performing evaluations or providing expert opinions in court. Critics say experts are vulnerable to bias in favour of person who engages them.

The data given by the expert are relevant and admissible. If any oral evidence contradicts the data / report; it will not make the data evidence obsolete. But, as per section 46, in case any fact is in contradiction to the opinion of the expert, that fact becomes relevant. If the opinion of the expert is relevant, the contradictory fact becomes relevant even though it was not relevant as such. The value of expert opinion depends upon the facts on which it is based and the competency of such expert in forming a reliable opinion.

The evidence given by the expert is just an opinion and is not a fact-based testimony and thus are given slight value. This is the reason that eye-witnesses or other factual witnesses are given a priority over the expert's opinion. This is because opinion evidence cannot supersede substantive evidence. No expert can claim that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of the question put to him.

However, the evidentiary value of an expert's opinion depends upon the facts and circumstances. For example, if there is a dispute as to who is the biological parent of a child, the DNA report of the Medical expert is of great importance. If the expert says that the DNA of the child or parents matches, then it is a relevant fact in deciding the case.

But in case if a handwriting expert says that the signatures matches or not matches with the person; this fact does not hold much value because there can be a possibility that the person has practiced a lot to copy the signature. But on the other hand, DNA cannot be copied or changed.

The Opinion of an expert must be of corroborative nature to the facts and circumstances of the given case. If the opinion contradicts an unimpeachable eyewitness or documentary evidence, then it will not have the upper hand over direct evidence. The Section does not provide for any specific attainment of knowledge or study or experience for, being called an expert. Experts are admissible as a witness but, they are not to make a conclusion as it is a judicial function.

In **Forest Range officer v. P. Mohammad Ali AIR 1994 SC 120**, it was held that expert opinion is only the opinion evidence. It does not help the Court in interpretation. The mere opinion

of an expert cannot override the positive evidence of the attesting witness. Expert opinion is not necessarily binding on the Court.

In **Muralila v. State of Madhya Pradesh 1980 SCR (2) 249**, it was held by the Supreme Court that there is no justification for condemning the opinion evidence of an expert to the same class of evidence as that of an accomplice and insist upon corroboration. The court also stated that it would be a grave injustice to base a conviction solely on the opinion of handwriting expert or any other kind of expert, without substantial corroboration. An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.

Witness and Victim belonging to same Political Party

Many times, it is alleged by the defence that witness and victim belong to same political party, hence they are biased. No doubt it may be a ground for not believing or relying upon such witness but merely because victim and prosecution witnesses belong to same political party evidence of such witnesses cannot be brushed aside. The court must keep in mind that, like minded people are more likely to be present at the spot and knowing the true facts. The evidence of such witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence on the ground of belonging to same political party. If on a perusal of the evidence the Court is satisfied that the evidence is credit-worthy there is no bar in the Court relying on the said evidence.

Interested witness:

A witness may be called 'interested' only when he or she derives some benefit from the result of the litigation in the decree in a civil case or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be an 'interested witness'. A 'related witness' is not equivalent to an 'interested witness'. The 'interested' witness means a person who desires to falsely implicate the accused. Relative is not necessarily interested witness. According to English law Dictionary, 'A witness in a trial who has a personal interest in the outcome of the matter on hand' is an interested witnesses. Interested witness is one who has some kind of material stake in the outcome of the case and is not an unbiased witness.

In **Takdir Samsuddin Sheikh versus State of Gujrat and Another (2011) 10 SCC 158**, Hon'ble Supreme Court observed that, the meaning of the terms 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reasons. It is a settled position that the evidence of interested witness is highly unreliable and the same cannot be accepted without corroboration. A close relative is usually

natural witness. He is not considered as interested witnesses as he has no personal interest or material gain in becoming an interested witness.

The difference between a related witness and an interested witness has been brought out by Hon'ble Supreme Court in the case of **State of Rajasthan versus Kalki AIR 1981 SC 1390**, It was held that:

“True, it is, she is the wife of the deceased; but she cannot be called an “interested” witness. She is related to the deceased. “Related” is not equivalent to “interested”. A witness may be called “interested” only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be “interested”.”

Appreciation of evidence of interested witnesses, has been explained in **Dalip Singh versus State of Punjab, AIR 1953 SC 364**. It is one of the earliest cases on the point. In that case, it was held as follows: "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

In **Piara Singh and others versus State of Punjab, AIR 1977 SC 2274**, Hon'ble Supreme Court held: "It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is credit-worthy there is no bar in the Court relying on the said evidence."

In **Hari Obula Reddy and others versus The State of Andhra Pradesh, (1981) 3 SCC 675**, a three-judge Bench of this Court observed: "it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

In **Mano Dutt and Another versus State of U.P (2012) 4 SCC 79** and **State of Haryana versus Shakuntla (SC110)** it has been held that when the statement of witnesses, who

are relatives and as such are parties known to the affected party, it is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution there would hardly be any reason for the court to reject such evidence merely on the ground that the witnesses were family members or interested witness or person known to the affected party.

In **Seema alias Veeranam versus State by Inspector of Police, (2005) 11 SCC 142**, It was held that the statement is not to be rejected merely on the ground that he is a related witness or the sole witness, or both; if otherwise the same is found credible. It is paramount duty of court to be more careful in the matter of scrutiny of evidence of the interested witness, and if on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground, that the witness is an interested person.

It shall be profitable to refer to the judgment of the Hon'ble Supreme Court in the case of **Jayabalan versus UT of Pondicherry, (2010) 1 SCC 199**, in the following manner:

“We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

A relationship is not a reason to conceal actual culprits and make allegations against innocent persons. The court analyses the evidence to determine carefully whether it is cogent and credible. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

Inimical witnesses

Inimical witnesses: Enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny, the testimony of such witnesses is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should be kept in mind and ascertained on the facts of each case.

In **Ramashish Rai versus Jagdish Singh, (2005) 10 SCC 498**, the following observations were made by this Court: "The requirement of law is that the testimony of inimical witnesses has to

be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

Hostile witnesses

As a common law practice, it means the "contrivance of artful witnesses" who willfully by hostile evidence "ruin the case" of party calling such witness. A hostile witness is not necessarily a false witness. Common law, laid down certain peculiarities of a hostile witness, such as 'not desirous of telling the truth at the instance of the party calling him' or the existence of a hostile animus to the party calling such a witness.

The courts exercising its discretion under Section 154 of Indian Evidence Act, may allow a person who has called witness to ask questions that can be put to him by the defence counsel in cross examination. The evidence given by the witness can be relied upon, if it is relevant to determine the guilt of the accused.

Black law dictionary defines hostile witness as "A witness who is biased against the examining party or who is unwilling to testify".

It does not permit a party, calling the witness to cross examine as exempted under the common law. As per the common law, a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness who is called by a party to prove a particular fact in issue or relevant to the issue and he fails to prove such fact, or prove the opposite test. In India, the right to cross examine a witness by the party calling him is governed by the provision of the Indian Evidence Act, 1872. The courts keep an eye on the trial at the time of examination and cross examination.

The Hon'ble Supreme Court tried to clear the meaning of hostile witness as adverse witnesses, unfavourable witness, who had given rise to conflict of opinion.

The statement of a witness if declared as hostile by prosecution, is neither inadmissible nor of value. The statement for the examination of the prosecution is admissible. It is not necessary to discard the evidence of the hostile witness in toto but it is relied upon partly as some portion inspires the confidence. It would not result to throw out the prosecution case but the court has to rely upon the relative effective testimony.

The Evidence of the hostile witness cannot be discarded as the relevant fact of the statement is admissible. The Court remains alert at the time of any undue influence over the course of trial and he has not to wait for trial to end but intervene. The court held that the corroborated part of evidence of hostile witness regarding the commission of offence is admissible. It has no justification to reject his evidence as a whole. The Credibility of Hostile witness can form the basis of

conviction. It includes the fact that he is willing to go back upon previous statements made by him. A witness's primary allegiance is to the truth and not to the party calling him.

On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

- i. Threat / Intimidation.
- ii. Inducement by various means.
- iii. Use of muscle and money power by the accused.
- iv. Use of stock witnesses.
- v. Protracted trials.
- vi. Hassles faced by the witnesses during investigation and trial.
- vii .Non-existence of any clear-cut legislation to check hostility of witness.

Child witnesses

Indian Evidence Act, 1872 does not prescribe particular age as determinative factor to treat witness to be competent one. On the contrary, Section 118 of the Evidence Act envisages all persons shall be competent to testify, unless the court considers that they are prevented from understanding the question, because of tender years, extreme old age, disease, whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he had intellectual capacity to understand questions and is giving rational answers thereto.

This ideology was concisely explained by Brewer J. in **Wheeler versus United States 159 US 523**. The evidence of a child witness is not required to be rejected perse but the court as a rule of evidence must scrutinize such evidence closely. Once convinced about the quality there of and reliability, it can record conviction. The only precaution which the court should bear in mind is, that the evidence given by the child witness, is reliable, like any other competent witness.

There is no provision in law to ask preliminary questions to test the capacity of child witnesses, to testify, though it has always been taken to be wholesome, as a course to be adopted. If, the child is examined as a witness, the best test of his capacity, is the evidence itself and the manner in which it is given.

There is nothing illegal in the procedure, even if the court itself records the evidence straight away, without resorting to preliminary questions.

A child witness is just like any other witness except the possibility of the danger of being tutored by interested elders to give out a coloured version which they want. Being easily amenable to tutoring by influence and capable of giving out the version, by their capacity, to remember and reproduce the evidence of such witness, has to be carefully considered against the possibility of such danger. When once that danger, which gives only a rule of caution of court is ruled out, the evidence is having better sanctity, than that of elders, on account of the innocence, tender age,

incapacity of malice and consequent concoctions. The rule of caution and prudence become great, when the child witness is the sole witness and the possibility of coaching by strangers is there. When the evidence is not having any of these infirmities, then it is corroborated with other sources. There is absolutely no justification in rejecting the evidence, by assuming, mere possibility of tutoring.

The only requirement of Law is that before basing a conviction on the sole testimony of child witness, the rule of caution, that it is unsafe to rely on such testimony, unless corroborated by other evidence, should be present in the mind of the court. The Rule of Law does not specify that the testimony of a child witness cannot be believed in any circumstances.

The court should record the evidence of a child witness in question and answer form, even though no procedure is laid down with respect to the mode of recording the testimony of child witness.

A child witness, if found competent to depose, to the facts is reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered U/s 118 Indian Evidence Act provided that such witness is able to understand the answers. The evidence of child witness and credibility thereof, would depend upon the circumstances of each case.

Earlier, the criterion of determining the competency of child witness as a general rule, is that none could be admitted under the age of nine years, very few under ten. But today, no particular age is required in practice to render the evidence of a child admissible. A mere reasonable rule has been adopted and the competency of children is now regarded not by their age, but by the degree of understanding, which they seem to possess.

A child may be a competent witness to give evidence in court if it appears that she can understand the questions put to her and can give rational answers there to.

In the decision reported in **(1998) 7 SCC 177 Panchhi and others versus State of U. P.** in paragraphs 11 and 12, the Supreme Court observed as follows:

"Para 11 : But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.

Para 12: Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law.

Further, in the decision reported in **1995 (Supp) 4 SCC 416 Arbind Singh versus State of Bihar**, in paragraph 3 of the judgment, the Supreme Court observed as follows:

"Para 3 : It is well-settled that a child witness is prone to tutoring and hence the

court should look for corroboration particularly when the evidence betrays traces of tutoring....."

It was also seen that by the Supreme Court reported in **(1997) 5 SCC 341 Dattu Ramrao Sakhare and others versus State of Maharashtra**, it was held as follows and the relevant passage found in paragraph 5 is reproduced.

"Para 5 : In other words even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored....."

Further, in the decision reported in **(2004) 1 SCC 64 Ratansih Dalsukhbhai Nayak versus State of Gujrat**, the Supreme Court held in paragraph 7 as follows:

"Para 7 : The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shackled and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

In **(2003) 3 SCC 21 Bhagwan Singh and others versus State of M. P.**, the Supreme Court also observed as follows:

"Para 19: The law recognizes the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony."

A perusal of the decisions of the Supreme Court cited above clearly shows that a child is

incapable of being administered oath or affirmation as he is only a minor. Yet, in the light of section 118 of the Evidence Act, child witnesses are not debarred from giving evidence. At the same time, the Courts have put certain restrictions in accepting the evidence of child witnesses especially on the question of corroboration and he may be biased being under the control of the interested persons and the Court must avoid any traces of tutoring or likelihood of tutoring.

In **Rameshwar versus State of Rajasthan**, the court examined the provisions of Section 5 of the Indian Oath Act, 1873 and Section 118 of the Indian Evidence Act, 1872 and held that:

“Every witness is competent to depose unless the court considers that he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender age, extreme old age, disease of body and mind or any other cause of the same kind.”

It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state, why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. A witness is said to be competent if he is called to give evidence and compellable if being competent, he may be compelled by the court to do so. A compellable witness is one who if he chooses to ignore a witness summons, is in contempt of court and faces the penalty of imprisonment. The same applies in the case of a compellable witness who attends the court but refuses to testify, although such a witness may be entitled, on grounds of public policy or privilege, to refuse to answer some or all the questions put to him. At Common Law, the competency and compellability of law is governed by a general rule with two limbs. The first limb is that anyone can be competent witness in any proceedings. Section 53(1) of the Youth Justice and Criminal Evidence Act, 1999 provides that: “At every stage in criminal proceeding, all persons are competent to give evidence. The second limb of the general rule is that all competent witnesses are compellable”.

Measures taken for eliminating the problem of witnesses deposing under fear, favour or bias:

Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

“Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times, crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable, he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. ... Time has come for a comprehensive law being enacted for protection of the witness and members of his family.”

The Law Commission of India in its 198th Report [Report on “witness identity protection and witness protection programmes”] observed as under:

“The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims / witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.”

All this has created problems of low convictions in India. This has serious repercussions on the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender. In this whole process, protection of witnesses assumes significance to enable them to depose fearlessly and truthfully. That would also ensure fair trial as well, which is another concomitant of the rule of law.

The issue of miseries faced by the witnesses, has been highlighted and emphasised by the courts in India, including Supreme Court, time and again. Issues of identity protection of identity of witnesses and witness protection programme have been raised in number of judgments like **NHRC versus State of Gujarat, People’s Union for Civil Liberties (PUCL) versus Union of India, Sakshi versus Union of India (2004) 4 SCC 158** and **Zahira Habibulla H. Sheidkh and Another versus State of Gujrat and others (2004) 4 S.C.C. 158**.

In *People’s Union for Civil Liberties*, wherein constitutionality of some of the provisions of the Prevention of Terrorism Act (POTA), 2002, were challenged, the Court carefully analysed Section 30 of the Act, which had mentioned about the protection of witnesses. This provision provides for the proceedings to be held in camera in order to keep the identity of witness confidential. The Court felt the reality that very often witnesses do not come forward to testify before court in serious crimes. Witnesses are not ready to give evidence mainly because their lives might be in danger. In the court’s view, Section 30 of the Act maintains a balance between the

rights of a witness, the rights of an accused and the interest of the public. However, secrecy of the witness is an exception and not a rule under this section.

The protection of a child witness, who may also be a victim, becomes all the more important.

In **Sakshi versus Union of India (2005) 5 SCC 518**, the Court stressed that there is a dire need to come up with a legislation for the protection of witnesses. The Court also had issued certain guidelines on the procedure of taking of evidence from a child witness. The Court also pointed out the need for special protection to a victim of sexual abuse at the time of recording her statement in court. The petitioner in that case had given certain suggestions for effectively dealing with the special provisions for testimony in child sexual abuse cases, which were as follows:

- (a) The judges shall allow the use of a videotaped interview of the testimony of the child in the presence of a child-support person.
- (b) A child could be permitted to testify through closed circuit television or from behind a screen to acquire an honest and frank account of the acts complained of without any fear.
- (c) Only the judge should be allowed to cross-examine a minor on the basis of the questions given by the defence in writing after the examination of the minor.
- (d) During the testimony of the child, sufficient interval should be provided as and when she requires it.

In some other judgments, Hon'ble Supreme Court gave some more guidelines, in the following manner:

- (a) Section 354 and 377 of the Indian Penal Code should be tried and inquired on the same principles mentioned under sub- section (2) of Section 327 of Code of Criminal Procedure.
- (b) While holding the trial of rape or child sex abuse, some sort of arrangements like a screen or something like it may be used so as to make sure that victim or witnesses (who are equally vulnerable and need protection like the victim) do not confront the accused;
- (c) Questions raised during the cross-examination by the counsel of the accused that are directly related to and be reminiscent to the victim or the witnesses of the incident should be written down and given to the presiding officer of the court in advance. The presiding officer must put forth those questions to the victim or witness in simple and clear language and as far as possible without making her uncomfortable;

It hardly needs to be emphasized that failure to hear material witness is denial of fair trial. The practice, however, to give protection to the witnesses is based on ad hocism, i.e., on case to case

basis. The Courts have also, in the process, adopted different means to ensure witness protection, which can be stated in brief detail:

- (a) Publication of evidence of the witness only during the course of trial and not after. **Naresh Shridhar Mirajkar and others versus State of Maharashtra and Another 1966 (3) SCR 744.**
- (b) Re-trial allowed due to apprehension and threat to the life of witness. **Sunil Kumar Pal versus Phota Sheikh and others, AIR 1984 SC 1591**
- (c) Necessity of anonymity for victims in cases of rape. **Delhi Domestic Working Women's Forum versus Union of India, (1995) 1 SCC 14.**
- (d) Discouraging the practice of obtaining adjournments in cases when witness is present and accused is absent. **State of U. P. versus Shambhu Nath Singh, (2001) 4 SCC 667]**
- (e) Making threatening of witnesses as a ground for cancellation of bail. **Ram Govind Upadhyay versus Sudarshan Singh (2002) SLT 587]**
- (f) Cross-examination by video conferencing — This is one of the innovative methods devised, which is specifically helpful to the victims of sexual crimes, particularly, child witnesses who are victims of crime as well.

Witness Protection Scheme, 2018: "Witness Protection Scheme, 2018 Aims & Objective:

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is essential in maintaining the rule of law. The objective of this Scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice. Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authorities with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.

Need and justification for the scheme:

Jeremy Bentham has said that "Witnesses are the eyes and ears of justice." In cases involving influential people, witnesses turn hostile because of threat to life and property. Witnesses find that there is no legal obligation by the state for extending any security.

Hon'ble Supreme Court of India also held in **State of Gujrat versus Anirudh Singh AIR 1997 SC 2780** that: "It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence." Malimath Committee on Reforms of Criminal Justice System, 2003 said in its report that "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth". **Zahira Habibulla H. Sheikh and Another versus State of Gujrat 2004 (4) SCC 158 SC** while defining Fair Trial said "If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial".

First ever reference to Witness Protection in India came in 14th Report of the Law Commission of India in 1958. Further reference on the subject are found in 154th and 178th report of the Law Commission in India. 198th Report of the Law Commission of India titled as "Witness Identity Protection and Witness Protection Programmes, 2006" is dedicated to the subject.

Hon'ble Supreme Court observed in **Zahira Habibulla H. Sheikh and Another versus State of Gujrat and others (2004) 4 S.C.C. 158**, "country cannot afford to expose its morally correct citizens to the peril of being harassed by anti-social elements like rapists and murderers". The 4th National Police Commission Report, 1980 noted 'prosecution witnesses are turning hostile because of pressure of accused and there is need of regulation to check manipulation of witnesses.' Legislature has introduced Section 195 A of Indian penal Code, in 2006 making Criminal Intimidation of Witnesses a criminal offence punishable with seven years of imprisonment. Likewise, in statues namely Juvenile Justice (Care and Protection of Children), Act 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Castes and Tribes (Prevention of Atrocities) Act, 1989 also provides for safeguarding witnesses against the threats. However, no formal structured programme has been introduced as on date for addressing the issue of witness protection in a holistic manner.

In recent years extremism, terrorism and organized crimes have grown and are becoming stronger and more diverse. In the investigation and prosecution of such crimes, it is essential that witnesses, have trust in criminal justice system. Witnesses need to have the confidence to come forward to assist law enforcement and prosecuting agencies. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups might seek to inflict upon them in order to discourage them from co-operating with the law enforcement agencies and deposing before the court of law. Hence, it is high time that a scheme is put in place for addressing the issues of witness protection uniformly in the country.

Scope of the Scheme: Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video

means) for recording of testimony. In other more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis depending upon their vulnerability and threat perception.

Conclusion

Justice in accordance with law does not mean mechanical or robotic justice or disposing of cases for statistical purpose. A judge renders justice, by adjudicating disputes and complaints in accordance with law. He also renders justice by deciding the cases speedily and effectively after hearing. In this connection, it is worthy of being noted, as said by the Supreme Court in **Chaturbhuj Pande v. Collector, (AIR 1969 SC 255)** that:

“The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life,”

The discovery of any fact can be had either by direct perception or by inference. Judicial officers have, of necessity, to infer the truth or otherwise from the testimony of the persons who are said to have knowledge thereof by direct perception. However, whether their testimony is worthy of acceptance has to be judged, on the basis of the circumstances under which they observed, the state of their observation, whether casual, disturbed, or distracted, their power of observance, the elasticity of their impressions, facility of description and possible lapse of memory. Allowance also must be made for possible distortion of the story and even lying.

From the discussion above, General rules regarding Evaluation of evidence of Partisan witnesses, interested witnesses, Inimical witnesses, Hostile witnesses, Related witnesses and Child witnesses, the approach which the Court ought to adopt in such matters has been examined by Hon'ble Supreme Court in several cases, reference to which is unnecessary except a few that should suffice. In **Dalip Singh versus State of Punjab, AIR 1953 SC 364**, the court observed:

“A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence.

There is no such general rule. Each case must be limited to and be governed by its own facts.”

In **Masalti versus State of U. P. (1964) 8 SCR 133** Hon’ble Supreme Court observed:

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

In **Darya Singh versus State of Punjab (1964) 3 SCR 397** and a more recent reminder of the legal principles in **Takdir Samsuddin Sheikh versus State of Gujrat and Another (2011) 10 SCC 158** where Supreme Court observed:

- “(i) While appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term ‘interested’ postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some or the other reason. (**Kartik Malhar versus State of Bihar (1996) 1 SCC 614** and **Rakesh and Another versus State of Madhya Pradesh JT 2011 (10) SC 525**.)
- (ii) This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided, he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. **Vadivelu Thevar versus The State of Madras, AIR 1957 SC 614; Sunil Kumar versus State Govt. of NCT of Delhi (2003) 11 SCC 367; Namdeo versus State of Maharashtra (2007) 14 SCC 150; and Bipin Kumar Mondal versus State of West Bengal AIR 2010 SC 3638**.” (*emphasis supplied*)

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Topic No. – 21

***Contradictions, and discrepancies in evidence in criminal trial;
How far they are material in appreciation of evidence. Can the
court rely on the testimony of a single witness?***

By
Ms. Dhriti Jasleen Sharma,
Joint Secretary, BSLSA,
Patna.

Ms. Dhriti Jasleen Sharma,
Joint Secretary, BSLSA, Patna.

Topic : Contradictions, and discrepancies in evidence in criminal trial; How far they are material in appreciation of evidence. Can the court rely on the testimony of a single witness?

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Contradictions, and discrepancies in evidence in criminal trial; How far they are material in appreciation of evidence. Can the court rely on the testimony of a single witness?

Meaning of the term evidence

Whenever any cause of action is filed before the Court for adjudication of the issues in controversy, each party has to prove his case. To prove the case, each party to the lis has to lead the evidence in his or her favour. Evidence is something, which serves a purpose to prove or disprove the existence or absence or non-existence of a fact in issue or relevant fact.

Now the important term to be discussed is the word “Evidence”. The word “evidence” has been derived from the Latin term “evidentia” which means to show clearly, to make clear to the sight, to discover clearly and certainly, to make plainly certain, to ascertain or to prove. It is also said that the word ‘Evidence’ is based on the Latin word ‘evidere’ which infers to show particularly, to clarify to view or sight, to find unmistakably, to verify, to ensure, to learn, to demonstrate. As indicated by Sir Blackstone, ‘Evidence’ means what illustrates, clarifies or learns the reality of current realities or focuses on an issue either on one side or the other. As per Sir Taylor, the Law of Evidence implies through contention to demonstrate or discredit any self-evident actuality, the reality of which is submitted to legal examination. Under the Indian Evidence Act, Section 3 defines Evidence as under: -

- “1. All the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called oral evidence; and
2. All the documents including electronic records produced for the inspection of the court; such documents are called documentary evidence”.

The quality and appreciation of evidence in Indian Courts are governed by Indian Evidence Act, 1872. Section 101 -117, 118-134, and 135-164 of the Indian Evidence Act, 1872 talk about burden of proof, competence of witnesses or who can testify as a witness, how can one testify, what statements will be considered as testimony. The party who alleges the existence of a certain fact has to prove its existence and the party, who denies it, has to disprove its existence or prove its non-existence. However, all facts traditionally considered, as evidence may not be evidence in the eyes of evidence law. Rather, evidence is something presented before the court for the purpose of proving or disproving an issue under question. In other words, evidence is the means of satisfying the court with the truth or untruth of disputed facts between the parties in their pleadings.

Evidence is the “Key” by which a court needs to render a decision. Without evidence there can be no proof. Evidence provides the court with information. Proving facts through the presentation of evidence means convincing court to accept a particular version of events.

Of course, one can search truth even by other means violating the constitutional rights of the parties. However, evidences obtained through unlawful means could not contribute to the maintenance and prevalence of justice in the future. So the process of proof should be regulated by evidentiary rules and principles in order to achieve accelerated as well as fair justice.

In both criminal and civil proceedings, the law of evidence has a number of purposes. In short, the law of evidence regulates the process of proof. The rule of civil and criminal evidence, in conjunction with the rules of procedure, establish the frame work for the process of proof and the conduct of litigation, so that an advocaterepresenting the litigant or preparing his case for trial or presenting it to the court or tribunal will know what issues his client must prove in order to succeed in the case before Court.

Witness:

"Witnesses" as Bentham said: are the eyes and ears of justice. Witness is an important constituent of the administration of justice. Witness is someone who has knowledge about a matter, whether he/she has sensed it or is testifying on behalf of another witness. In law a witness is someone who, either voluntarily provides testimonial evidence, either oral or written, of what he/she knows or claims to know. A witness is a person who is required to come to court to answer questions about a case. A witness is a person who has personally seen an event happen. The event could be a crime or an accident or anything.

Credibility of witness and appreciation of evidence:

Before recording evidence, the witness promises to tell the truth by way of oath which is administered to the witness. However, whether testimony is worthy of belief is based on competence of the witness and likelihood that it is true. Unless the testimony is contrary to other known facts or is extremely unlikely based on human experience, the test of credibility is purely subjective. As per Marriam Webster's law Dictionary, the word "Credible" means "offering reasonable grounds for being believed". A witness whose testimony is more than likely to be true is based on his/her experience, knowledge, training and appearance of honesty and forthrightness, as well as common human experience. This is subjective in that the trier of fact (judge or jury) may be influenced by the demeanour of the witness or other factors.

Credible seems here to be used in the way that people have employed it ever since it appeared in the English language in the fourteenth century: of something that is convincing or is capable of being believed. As per "Credibility Evidence in Criminal Proceedings", published in 2011 by Australian LegalExpert Mark Dennis, "credibility evidence" is that which is admitted solely on the basis that it is credibility evidence, and not on any other basis. If it is admitted on some other basis, it is not considered credibility evidence under the NSW (Australian) Law of Evidence. Whilst this distinction may seem somewhat academic, it becomes of importance in relation to other provisions dealing with credibility evidence. In United States of America, such a

witness is "more than likely to be true based on his/her experience, knowledge, training and appearance of honesty and forthrightness." Some factors for determining the credibility of testimony of the witnesses in U.S. courts include: -

- (a) the witness had personal knowledge,
- (b) he or she was actually present at the scene,
- (c) the witness paid attention at the scene, and
- (d) he or she told the whole truth.

With regard to appreciation of Evidence, the credible evidence adduced through testimony of witnesses it is seen if it is credible and free from contradictions, omissions and discrepancies. "Contradiction" as per the dictionary meaning is the act of saying something that is opposite or very different in meaning to something else what is said earlier. In judicial trials, the contradictions occur during the cross examination. A contradiction is said to take place when any witness takes oath and testifies something which is contrary or totally different in the meaning or context with regard to the previous statement of said witness which is relied on by the party adducing the said witness. On the other hand, dictionary meaning of "Omission" is something that has been left out or excluded. In trials before the Courts, during cross examination, an omission takes place when any witness purposely or otherwise skips out/omits any fact or statement he has made in his previous statement. In criminal trials, the omissions and contradictions refer to the previous statements made by the witnesses and the most common reference is statement u/s 161 Cr.P.C. 1973 recorded by police during investigation. In simple words, Omission means missing to state something from the earlier statement. Contradiction means stating something different from the earlier statement. Causes, and more particularly, effects of such 'something missing (omissions)' and 'something different (contradictions)' have to be dealt with by the trial Judge while weighing and appreciating the testimonies of witnesses.

The credibility of testimony of the witness should create and inspire confidence in the mind of the Judge, and for inspiring confidence about credibility of the witness and the evidence, it should be free from contradictions and discrepancies. The terms contradiction and omission are not defined anywhere in the Indian Evidence Act, 1872 (the Evidence Act) or the Code of Criminal Procedure, 1973 (Cr.P.C) but a diminutive reference is perceived under Section 155 of the Evidence Act. Section 155(3) reads as "by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted". Under Sec. 157 of Evidence Act, the former statement of witness may be proved to corroborate the later testimony given in the court during the examination— in-chief and cross examination as of the same fact. As such, only in statement made by a witness as substantive piece of evidence before the court can be corroborated with the former statement made by him but when it contradicts the earlier version, then by conjointly reading section 155(3) its credit gets impeached.

Hon'ble Supreme Court, in **Tahsildar Singh And Another vs The State Of Uttar Pradesh, 1959 AIR 1012** has held that: -

" Contradict " according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police-officer-in the sense we have indicated-and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in Sec.162 of Cr.P.C and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, viz., that the statement should have been recorded".

The Hon'ble Supreme Court, in case of **Bhogin bhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753** held as "Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all-important "probabilities factor" echoes in favour of the version narrated by the witnesses"

However the normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence and this aspect was appreciated by Hon'ble Supreme Court in **A.Shankar Vs. State of Karnataka, (2011) 6 SCC 279** wherein it was held that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to be relied upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be

made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, that is, materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.

Proving the contradictions and omissions in trial especially in criminal cases/proceedings is one of the methods for impeaching the credibility of the witnesses. After considering the counsel for accused on the point of proving contradictions, Court has to examine the said omissions/contradictions. Proof regarding contradictions is a strong defence in the hands of said counsel to get accused acquitted from accusations. The argument of contradiction and omissions are used as 'magical wand' to convince the Judge that the contradictions are material and these cannot be ignored.

Presumption is that every witness is impartial and independent unless proved contrary. Judicial pronouncements have further laid down parameters/ guidelines in order to appreciate all aspects while dealing with the controversy arising with reference of credibility and reliability of witnesses. A witness is considered to be credible if he stands by his statements and the same can be proved later on. Witnesses may also need to identify the accused person, and there is no minimum number of witnesses required to identify an accused in order to get him sentenced. Any conviction is not influenced by the quantity of the witnesses but by the quality and credibility of witness testimonies. It is irrelevant whether a person can speak or not, if he is capable of understanding questions and answering them, he is capable of being a witness.

Every contradiction, discrepancy or improvement is not fatal for prosecution, but it is only major contradiction, discrepancy or improvement on material facts shaking very genesis of prosecution case which matters for creating doubt on prosecution case. Hon'ble Apex Court in case **Pawan Kumar Alias Monu Mittal Vs. State of Uttar Pradesh** and another with other connected matters reported in (2015) 7 SCC 48 has held as under: -

"35. As regards the allegation of contradictions in the statements of prosecution witnesses, we do not find any major contradictions which require our attention and consideration. When a witness is examined at length it is quite possible for him to make some

discrepancies. No true witness can possibly escape from making some discrepant details. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence."

While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Sec.155 of the Evidence Act enables the court to impeach the credibility of the witness by proof of former inconsistent statement. Sec.145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance with the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects creditworthiness and trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting credibility. The court has to shift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence. Merely the reason that witness is a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinized to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a 'partisan' or 'interested' witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness. Exaggeration of the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape".

Hon'ble Patna High Court in the recent Judgement in the matter of **Chandan Chaudhry v. the State of Bihar**, has held that evidentiary value of an injured witness carries greater weight and the same may be relied upon unless there are major contradictions in his statement. The appellant

assailed the order of conviction stating that the same has been passed mechanically, without proper appreciation of the facts. He contended that non-examination of the Investigating Officer by the prosecution had prejudiced him as there were material exaggeration and contradictions in evidence, which went unaddressed in his absence.

It was held by Hon'ble Apex Court "it is a sound and well-established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact." Generally speaking, oral testimony in this context may be classified into three categories namely:

- (1) wholly reliable:
- (2) wholly unreliable:
- (3) neither wholly reliable nor wholly unreliable.

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion or interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is feasible and free from all taints which tend to render oral testimony open to the suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution."

Similar view has been given by different Supreme Courts of different countries. Hon'ble Supreme Court of Israel in *Hirsch Berenblat v. Attorney-General*, decided on May 22, 1964 while granting allowing appeal, held that in criminal matters, a court can convict on the evidence of a single witness without corroboration, after duly "cautioning" itself as to its credibility per se and considering its weight and relevance in the whole complex of evidence tendered by the prosecution with regard to the circumstances of the case and the defendant's participation therein. The best evidence of events that occurred many years prior to trial is written evidence, especially when recollection of these events are bound, as in the present case, to arouse profound emotion. It was held that there is quite a serious contradiction between the versions of witnesses in describing the event. The contradiction is patent. It also gives further room to think that the source of the contradiction is not that the events occurred as described by witnesses but that they never occurred at all."

The law laid down by Hon'ble Supreme Court of India in landmark judgment passed in **S. Govindaraju Vs. State of Karnataka, 2013 (10) SCALE 454**, wherein the concept of minor and major contradictions was elaborately discussed and it was held that, "It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not effect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial Court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witnesses also make material improvements before the court in order to make the evidence acceptable, it would not be safe to rely upon such evidence. The discrepancies in the evidence of eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, the witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence available or with a statement that has already been recorded, then in such a case, it cannot be held that the prosecution has proved its case beyond reasonable doubt".

Though every discrepancy and contradiction in evidence of prosecution witnesses is not fatal to case of the prosecution. In appreciating evidence, the approach of court must be integrated and not truncated or isolated. In other words, the impact of evidence in totality on prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the innocence of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be added that ultimately and finally the decision in every case depends upon the facts of each case.

Conclusion

It is paramount duty of the court to decrypt the truth and find out whether party to the lis has proved his case or not. The testimony of witnesses produced by the parties and the evidence produced before the Court instils the faith of the Court or not. The tool of contradiction and omission is very effective to shake or shatter the credibility of prosecution evidence. Proof of contradiction and omissions though is very useful in criminal trial, it has to be used with circumspection and within legal frame work. The credibility of witness does not stand impeached merely by proving contradictions on record. It is required for defence side to show that prosecution witness may deliberately depose, change or improve their original statement in order to cause prejudice to the accused. Similarly, minor omission or discrepancy in evidence is not enough to hold accused

not guilty. Thus, by striking out balance and by evaluating evidence in proper perspective justice can be done. "Minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not make the court to reject the evidence in its entirety," Justice Chauhan writing the judgement said.

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Topic No. – 22

The jurisprudence of circumstantial evidence with special reference to prosecution case solely based on circumstantial evidence, the hypothesis of guilt, last seen theory, lack of absence of explanation on part of accused and its effects.

By
Sri Suvash Chandra Sharma,
Additional Registrar,
Juvenile Justice Secretariat,
Patna High Court.

Sri Suvash Chandra Sharma,
Additional Registrar,
Juvenile Justice Secretariat, Patna High Court.

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The jurisprudence of circumstantial evidence with special reference to prosecution case solely based on circumstantial evidence, the hypothesis of guilt, last seen theory, lack of absence of explanation on part of accused and its effects.

SECTION (1): ORIGIN & DEVELOPMENT OF CONCEPT OF CIRCUMSTANTIAL EVIDENCE

The common law is always pronounced to be very ancient. Indeed its antiquity has been celebrated ever since its practitioners began to speak and write of it, since in questions of mine and thine or matters of life and death, antiquity seems reassuring. Yet substantial discussion of evidence was first aired in the eighteenth century as trials moved more and more surely in principle, from rituals of words to findings of facts.

The conscious formulation of rules intensified in the same period, but these rules themselves necessarily evolved over time as the task of the jury evolved, from twelve men sworn to judge the case from their own knowledge to twelve, who were to judge strictly on the basis of facts presented before them by witnesses¹.

In his commentaries of 1768, Blackstone concedes that a jury "may have in their own consciences, by their private knowledge," evidence sufficient to sway them, but by this time practice had established that they ought to decide primarily on the basis of evidence presented in court by others. By the eighteenth century, also, formal prosecution had developed to a point where evidence had to be managed by someone in an orderly and effective manner. In civil cases, the increasing complexity of commercial life meant that more written evidence would be introduced, and altogether more indirect evidence than direct testimony would be available on the point at issue.

The concept of circumstantial evidence was emerged as an English narrative, in the history and the novel. In a famous comic novel by English playwright and novelist Henry Fielding (who was also a Lawyer) *"The History of Tom Jones, a Foundling"*, often known simply as "Tom Jones" published in 1749, the writer aptly admired many strange accidents between two crucial characters Partridge and Mrs. Waters, when she spent a whole day there with Mr. Jones. In the ninth book of this novel one of the characters says to Mrs. Waters, *"express my astonishment at what you have told me; and yet surely would not, and could not, have put together so many circumstances to evidence an Untruth."*

This English narrative of the probative force of circumstantial evidence floating in the history and novel was claimed by the prosecution as a rule of evidence in two famous State Trials, i.e. **R**

1. Pp.7-182 James B. Thayer, A Preliminary Treatise on Evidence at the common law (1898)

v Blandy² (in which Mary Blandy was convicted of parricide³) and in **R v Donellan**⁴ (in which John Donellan was hanged for the murder of his brother in law). In both these cases the accused persons were convicted based on the chain of circumstances leading to a conclusion of explicit culpability of them.

In the course of impeachment proceeding of Warren Hastings. Edmund Burke, who was not a lawyer but one of the managers of the prosecution brought by the commons, clashed with the law judges advising the Lords on the admissibility of the evidence associating with the concept of circumstantial evidence. An English Judge and Law Professor Edward Christian observed that *"the genesis of circumstantial evidence, which is an eighteenth-century creation is from the philosophical branch of English jurisprudence."*

Before the eighteenth century the inductive reasoning typical in circumstantial evidence was known as "presumption" – the Latin word borrowed from Civil and Canon law⁵, without its modern pejorative connotations. Blackstone treats the two expressions as synonymous: Circumstantial Evidence or the doctrine of Presumptions. The term still survives in its narrower sense of presumption of law, essentially shortcuts though otherwise tedious or perhaps impossible ways of proof. When evidence on a fact at issue is complicated or unavailable, presumption invites evidence on a logically related issue that is easier to prove. Presumptions of law still touch on fact, and some may be thought of as generalizations about human behaviour.⁶

In the eighteenth century they were distinguished from the presumption of fact, which were treated with a new sense of amplitude as circumstantial evidence: whereas presumption denotes inference or probability, circumstantial evidence scants logic in favour of evidentiary facts, however, connected to the point at issue.⁷

Sir Edward Coke was the favourite authority for presumptions in the old sense. Coke taught that "many times Juries, together with other matter, are much induced by presumptions, whereof there be three sorts, viz. violent, probable and light or Temeraire." Having borrowed these degrees of presumption from the civilian writers, he set down the following maxim and example: "Violenta presumptio" also called as "plena probatio"; "presumptio probabilis" and "presumptio levis seu temeraria." He has illustrated the first form, i.e. "Violenta presumptio" by the following example:

"If one runneth the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the

2. (1752) 18 State Trials 1118

3. the killing of a parent or other near relative.

4. Warwick Assizes, 1781 before Judge Francis Buller

5. Canon Law is a set of ordinances and regulations made by an ecclesiastical authority like Church etc.

6. Charles T. McCormick, Handbook of the Law of Evidence (St. Paul, Minn 1954), P 650 "most presumptions have a strong footing in probability."

7. Lord Mansfield distinguished presumptions of law from presumptions of fact in Goodtitle vs Duke of Chandos, 2 Burr. 1065 at 1702.

house" The presumption against the person coming out with that bloody sword is of the first degree, i.e. "Violenta presumptio". Of the second and third-degree of presumption, he gave no example and simply rounded out the maxim with the words, "presumptio probabilis" moveth little, but, "presumptio levis seu temeraria" moveth not at all.

The history of Scottish law shows a parallel development. In his 17th century treatise, George Mackenzie cited several recent convictions based on presumption.⁸

In the corresponding work of the early 19th century, John Burnett (Scottish advocate and Judge) first devotes a shorter chapter to the use of "direct and circumstantial evidence" in his book "A Treatise on Various Branches of the Criminal law of Scotland". He conservatively stuck with the terminology of presumption. He explained the term circumstantial evidence in following words: "It may happen in a particular case, that the circumstances are such, as to create in mind even a stronger degree of faith than direct testimony: and in this, circumstantial evidence (the witnesses being all credible) differs from positive, that in the former there is not the same risk of error and falsehood. Witnesses to the fact may be mistaken, or may falsify: - "they may err". As Lord Stair says. "through inadvertence or precipitancy, and through the secret insinuations of favour and hatred, which they themselves do not perceive;" but circumstances, which are clearly proved, if apt and coherent in themselves, and established by witnesses unconnected with each other, are not liable to such objections: but carry with them, in some instances, a safer and more satisfactory conclusion than direct testimony."

In the first half of the next century William Paley (an English philosopher, and utilitarian) coined the maxim "Circumstances cannot lie" in his popular chapter "Of Crimes and Punishments" of his book *The Principles of Moral and Political Philosophy*, 1785. Paley observed that "A concurrence of well authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie."

According to Bentham- since all evidence is introduced in Court through testimony, the distinction between direct and indirect evidence cannot be a true dichotomy. His definition of these types runs as follows:

"The evidence afforded by any given mass of testimony is either direct or circumstantial, according to the relation it bears to the fact to which it is considered as applying. It is direct, in respect of any and every fact expressly narrated by it: and, in particular, every fact of which the witness represents himself as having been a percipient witness. It is circumstantial, in respect of any and every fact not thus expressly narrated by it; in particular, every fact of which the witness does not represent himself as having been a percipient witness, and the existence of which, therefore, is a matter of inference, being left to be concluded from its supposed connection with the facts spoken to by the testimony in its character of direct evidence."

8. George Mackenzie, *Laws and Custom of Scotland in Matters Criminal* (Edinburgh, 1678)

SECTION (2): ELEMENTS OF CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence depends on the relation of two facts;

1. the factum probandum, or say the principal fact, - the fact the existence of which is supposed or proposed to be proved, - the fact evidenced to, - the fact which is the subject of proof; and
2. the factum probans, - the evidentiary fact, - the fact from the existence of which that of the "factum probandum" (principal fact) is inferred.

These facts do not differ in kind, note, but in their position in the argument. Hence there must be a chain of circumstances to prove the existence of any fact.

SECTION (3): CHAIN OF CIRCUMSTANCES

It is a chain of facts, of any length, may be easily conceived, and chains of different lengths frequently exemplified: each such link being, at the same time, with reference to the preceding link, a principal fact, and with reference to a succeeding one, an evidentiary fact. The metaphor of the chain, thus expounded, is that of a series of linked inferences. In other words, it is in fact a framework of facts, arranged in certain positions of relation to the fact sought, and connected with it and with each other by lines expressive, at once, of their separate and united significance.

Another figure more frequently used as descriptive of the same process, or rather of the body of evidence constructed by it, is that of a chain connecting the two great and fundamental points of a case i.e. the crime committed, and the individual charged with its commission & the links of such chain answering to the evidentiary facts proved. This figure expresses, with great force and aptness, the historical order of the facts, and the necessity of a continuous connection between them throughout, but it does not represent that other feature of the process, which has been prominently presented in the present section ; namely, the aggregation of distinct elements, or elements drawn from distinct sources into one consistent and homogeneous body. The evidence does not always present a single line of continuous and connected circumstances, but often exhibits lines of connection from different points in collateral positions. Supposing, however, a chain to be composed of a number of minor and constituent chains, the figure acquires aptness in every sense. The evidentiary facts, with their inferred and assigned meanings, may also in many cases be very appropriately compared to the strands of a rope or cable, forming so many lines of connection with the principal fact, each continuous in itself, though weak in its connecting power ; but, when woven together in sufficient numbers, constituting a medium of connection which cannot be broken.⁹

9. A treatise on the nature, principles and rules of circumstantial evidence : especially that of the presumptive kind, in criminal cases : Burrill, Alexander M. (Alexander Mansfield), 1807-1869.

SECTION (4): ESSENTIAL CHARACTERISTICS OF CIRCUMSTANTIAL EVIDENCE.

On a superficial view, direct and circumstantial(indirect), would appear to be distinct species of evidence; whereas, these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence; the distinction is, that by Direct Evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum*; Circumstantial Evidence is equally direct in its nature, but as its name imports, it is direct evidence of a minor fact or facts of such a nature that the mind is led intuitively, or by a conscious process of reasoning, towards or to the conviction that from it or them some other fact may be inferred.¹⁰

Example: A witness deposes that he saw A. inflict on B. a wound, of which he instantly died; this is a case of direct evidence. B dies of poisoning; A. is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper; and of the same kind as that which has caused death; the paper is found in his secret drawer, and the poison gone. The evidence of these facts is direct; the facts themselves constitute indirect and circumstantial evidence, as applicable to the inquiry whether the murder has been committed, and whether it was committed by A.¹¹

In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, often seem to be contemporaneous. But the case is very different when we have to come to a decision upon circumstantial evidence, the judgement in respect of which is essentially inferential. There is no apparent and necessary connection between the facts and the inference; the facts may be true and the inference erroneous, and it is only by comparison, conscious or unconscious, with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

SECTION (5) : HYPOTHESIS OF GUILT.

It is a kind of supposition about the guilt of an accused based on a chain of proved facts and circumstances leading to a conclusion availing all the probabilities and possibilities that the person under charge has committed the offence. Each element of this hypothesis i.e. chain of proved facts, continuity of chain of evidence, conclusive nature of circumstances & exclusion of all other human probabilities and possibilities except the guilt of the accused should be proved with high degree of proof.

In order to construct the required body of evidence out of the materials or elements which may be available for the purpose, with the nearest approach to truth, or to the actual case as it occurred, it is requisite not only that all the materials should be got together, but that they should be

10. An essay on the principles of circumstantial evidence : Wills, William, d. 1860.

11. Ibid.

arranged, as far as possible, in their proper places, or in the relative positions which they occupied, or are reasonably supposed to have occupied, in the actual case; it being, in fact, as already observed, a process of re-constructing and representing, with more or less of completeness and truth, the original case itself. These relative positions cannot always be effectually ascertained until all the attainable facts have been brought together, examined and compared, or adjusted temporarily (as it were) to each other, so as to develop the traces of their former actual connections ; much as an architect would proceed who was required to reconstruct a demolished edifice, out of the same materials which originally composed it, with the nearest possible approach to identity in every particular.

In our legal system, this preliminary process is essentially performed by the investigating officer(I.O.) of the case, and the course of his proceedings in submitting its results to the Court may be briefly described as follows. His investigations having resulted in connecting, to his own satisfaction, the two fundamental facts of a crime and a criminal, he frames out of them the compound fact or proposition that the accused committed the crime charged, (which is the essence of the indictment as found,) and presents it formally to the Court, as the *factum probandum* of the case. Placing this in a central position, in connection with the hypothesis of guilty agency, as he has extracted it from the facts, he proceeds to present and prove in detail, the particular circumstances or indicatory facts themselves ; giving to them their necessary relative positions, grouping them around the assumed central point, and in this way establishing lines or links of connection between it and them ; and finally compacting and, as it were, crossing, this frame-work of evidence, by lines connecting the facts with each other ; thus realizing the common but significant figure of a network of circumstances. Having done this in the view of the Court, he calls upon them to examine for themselves the body of evidence thus put together, in connection with, and as supporting the hypothesis of guilt, as he has advanced it, and the affirmative of the issue before them : insisting, virtually if not in form, that the facts presented are the genuine facts of the case ; that they are arranged in their true positions ; and that, as naturally and reasonably interpreted, they point towards, and converge upon, and effectually connect themselves with the principal fact of the guilt of the prisoner, and no other : or, in other words, that they can be explained and accounted for, in no other reasonable way than upon the, single supposition of the truth of that fact.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact to which it is adduced to prove; the mode of argument resembling the method of the demonstration by the *reductio ad absurdum* (a method of proving the falsity of a premise by showing that its logical consequence is absurd or contradictory). While the concurrence of several separate facts, all of which point to the same conclusion, may, though the probative force of each be slight, be quite sufficient in their cumulative effect to produce conviction, a mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with the innocence

as with the guilt of an accused person cannot have any probative force. The principle is a fundamental one and of universal application namely, in cases dependent on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. But before circumstantial evidence can be made the basis of a safe inference of guilt, it must exclude every possible hypothesis except the guilt of the accused. But if the possibility is remote and one which he is able to explain the absence of explanation may be taken into account.

SECTION (6) : LACK/ABSENCE OF EXPLANATION OR FALSE EXPLANATION ON THE PART OF ACCUSED AND ITS EFFECTS.

As there are circumstantial facts which render the principal fact more probable, so there are others which render it less probable. A fact, which diminishes the probability of the principal facts is called as '*invalidating facts*'¹². A fact, which augments its probability, may be called a '*corroborating facts*'¹³. The whole judicial logic consists in making a just estimate of these two classes of facts. An error in this estimate produces an injustice. In crimes, if any corroborating facts be omitted, or valued too low, a criminal may escape from punishment; if an invalidating facts be forgotten, or valued too low, an innocent person may be condemned.

During trial the defence is made in a corresponding course, by means of exculpatory facts proved and supposed; it being insisted that the criminative facts presented are not the genuine facts of the case; that the positions assigned them are not the true ones ; that the connections claimed to have been established do not exist; that, in their indications, they do not converge upon the point or fact assumed, or upon any one common point or centre, or that they may converge upon other points as well as that occupied by the principal fact in issue; in other words, that they may be explained and accounted for, on one or more hypotheses consistently with the innocence of the accused, as reasonably as upon the affirmative hypothesis, or more so. And, in fine, these adverse hypotheses are specifically placed before the Court; thus relieving them, in most cases, from the necessary duty of seeking for them themselves. There may be a hundred possible explanations available to the accused other than that he himself was the original culprit, but it is not for the Court to invent or imagine such explanation. It is for the accused person to give his explanation, if he has one¹⁴.

Courtney Stanhope Kenny in his book¹⁵ at page 388 explained the effect of silence or unexplained hostile testimony – "Strong as is the presumption of innocence, it is not too strong to

12. As called by Jeremy Bentham in his famous book 'A Treatise on Judicial Evidence'.

13. *ibid*.

14. *Narayana v. King Emperor*, AIR 1933 Mad 233 (A)

15. *Outlines of Criminal Law*, (Based on the Lectures Delivered in the Cambridge University) 15th Edition.

be sometimes rebutted by the presumption of the Continuance of Life; in a case of bigamy, the presumption that the prisoner would have contracted a second marriage unless his first wife were dead may be outweighed if it be shown that she was alive only five and twenty days before this second wedding took place. But it may be useful to note that an amount of testimony which is not sufficient to rebut the presumption of innocence entirely (i.e. to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence) may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted. A frequent illustration of this occurs in the case where a person accused of theft is shown to have been in possession of the goods shortly after the stealing." Further at page 395 of his book¹⁶ he includes the accused's false statements and his silence among the principal forms of circumstantial evidence.

In '**Mangal Singh's case (R)**¹⁷', Young C. J. stated that the want of explanation of a very suspicious circumstance is itself circumstantial evidence. The Courts "*regard false statements in explanation or defence made, or procured to be made, as in themselves tending to show guilt*" as stated by Fuller C. J. in (1895) 40 Law Ed 1090 at p. 1095 (Z3).

In **Pershadi's case**¹⁸ decided by the Hon'ble Allahabad High Court and upheld by the Hon'ble Apex Court,¹⁹ the issues touching the aspects relating to the present heading of discussion was extensively dealt with and following propositions were laid down as the correct law on this point:

- (1) Circumstantial evidence to justify conviction must be inconsistent with any reasonable or rational hypothesis of guilt of the accused.
- (2) When the inference of guilt from the proved incriminating (i.e. circumstantial) facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him, even if the court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an

16. Ibid.

17. Mangal Singh v. Emperor, AIR 1937 Lah 127 (R).

18. Pershadi vs The State, AIR 1955 All 443, 1955 CriLJ 1125.

19. Pershadi vs State of Uttar Pradesh, AIR 1957 SC 211, 1957 CriLJ 328.

explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not.

- (3) If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not.
- (4) If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him.

It is trite law, nevertheless fundamental, that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. In our legal system, by now it is well established principle of law that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found not to be true then the same offers an additional link in the chain of circumstances to complete the chain²⁰. In other words a false answer offered by the accused when his attention was drawn to a circumstance, renders that circumstance capable of inculcating him and in such a situation false answer can also be counted as providing a missing link for completing the chain²¹.

SECTION (7) : LAST SEEN THEORY

This theory falls under the category of concomitant circumstantial evidence which is derived from the conduct and relations of the accused party, as serving to connect him with a crime committed, comprises those which actually accompany its commission. These are, usually, of a much more important and decisive character in establishing guilt of the accused, than the category of precedent circumstantial evidence (*motives; means as contemplated; verbal intimations of the act contemplated; expressions of ill-will; declarations of intention; threats; preparations, including the acquisition of means; opportunities and facilities, including the possession of means; & attempts.*), in as much as they, for the most part, constitute portions of the *res gesta*, or transaction itself. And this division may, without impropriety, be extended so far as to include not only those circumstances which are strictly contemporaneous with the criminal act, but those also, which immediately precede and follow it. The great leading circumstance of this class, the one

20. Swapan Patra vs. State of West Bengal, (1999) 9 SCC 242; reiterated in State of Maharashtra v. Suresh (2000) 1 SCC 471; Kuldeep Singh & Ors. Vs. State of Rajasthan, JT 2000 (5) SC 161; Anthony D'Souza & others vs. State of Karnataka, (2003) 1 SCC 259.

21. *ibid*.

which first occurs for consideration, and the one of which evidence is always specially sought, is that of presence, on the part of the accused, at the scene of crime, or company or juxta-position with the subject of it, at the time of its commission; or, at least, of proximity or vicinity of the accused to the scene or subject of the crime; about such time. This circumstance, in connection with others, and sometimes with the aid of a very few others, is constantly employed as a means of establishing, by a necessary or a reasonable inference, the presumption of his agency or participation in the criminal act.²²

In the crime of murder, this important fact of presence or vicinity is deduced from a variety of circumstances, constituting presumptions of various degrees of force, according to the case. The strongest form of presumption against a person accused of this offence, arises from circumstances which, while they show his presence at the scene of crime, at the time of its commission, exclude, at the same time, the supposition of the presence of any other person; leading, in fact, rather to a necessary conclusion than to a presumption, in the proper sense. The force of the evidence, in these cases, consists in the concurrence or coincidence of the three leading circumstances of person, time and place. The closer these are brought to the subject of the crime, the stronger their effect to demonstrate the presence of the accused, and to show such presence to have been exclusive. Proximity, on the part of the accused, may be, in itself, of various degrees, from mere vicinity, up to actual juxta-position or contact. It may also be of various kinds, such as proximity to the person of the deceased, or to the scene of the crime, or to both; and it may exist at different stages; as before the commission of the crime, or afterwards, or both before and after. And the effect of this circumstance is the same, whether it grows out of the immediate act of the accused, or out of that of the deceased himself; as where the accused is not seen at all, but is known to occupy premises which the deceased is observed to approach or enter.

The strongest form in which this circumstance can be presented, and the one which requires the least reasoning to give it effect, is undoubtedly that of the juxta-position of the persons of the accused and deceased, proved, by actual observation, to have existed both immediately before and immediately after the crime is perpetrated. These show presence at the moment of actual perpetration, with the greatest effect possible, short of direct evidence; and they may be so connected by the circumstances of time and place, as to have the full exclusive operation.

Last seen theory is one of the form of actual juxta-position of the persons of an accused and deceased individual, from which a presumption of guilt may be deduced. The criminative effect of these circumstances is dependent, as discussed above, upon those of time and place; or, in other words, upon the distance from the point where the parties were observed, to that where the body

22. A treatise on the nature, principles and rules of circumstantial evidence : especially that of the presumptive kind, in criminal cases : Burrill, Alexander M. (Alexander Mansfield), 1807-1869.

is found, and the length of time which may have intervened. These intervals may be so short as to render the supposition of the intervening presence of a third person extremely improbable; but it is seldom that they have the positively exclusive effect. The circumstance of previous personal juxtaposition is, however, always an important one in itself, as furnishing a starting point of investigation, and a means of arriving at the knowledge of other circumstances. Hence, where a person has been found dead by violence, and no one near the body, or has suddenly and unaccountably disappeared, the first inquiry which naturally suggests itself, and the one which, in fact, is always made, is— "*In whose company was he last seen alive ?*"

The hypothesis of last seen together in a criminal case of murder is a circumstance which is only a link in the chain and would be a material piece of evidence in the process of finding out as to who is the guilty person but that evidence alone would not be sufficient. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases²³. The "last seen" doctrine is a mere presumption which, like all presumptions, is rebuttable. It means in effect however, that the law presumes that the person "last seen" with the deceased bears the full responsibility for his death if it turns out that the person last seen with him is dead. The mere fact that the accused and the deceased were together in the field prior to the occurrence does not by itself lead to irresistible inference that the accused must have murdered the deceased, it could not be deemed to be conclusive unless it is further established that during the interval between the time when they were last seen together and the time at which the victim died, every circumstance was inconsistent with the innocence of the accused. The theory of last seen together is extremely a weak piece of evidence. But it is a strong circumstance against the accused while appreciating the circumstantial evidence. In such cases, unless the accused is able to explain properly the material circumstances appearing against him, he can be held guilty for commission of offence for which he is charged²⁴.

SECTION (8) : PRESUMPTIVE VIS-À-VIS CIRCUMSTANTIAL EVIDENCE

The term PRESUMPTIVE is frequently used as synonyms with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy. It is not all evidence derived from circumstances, which authorizes that particular kind of inference known as a 'presumption. Presumptive evidence is a species of circumstantial evidence, though so large a species, as to be

23. State of U.P. V Satish, AIR 2005 SC 1000(1).

24. Murugan vs State of Tamilnadu (2018)2 S CeJ 1042.

practically almost co-extensive with its genus, and this explains why it is so frequently regarded as identical with it. Circumstantial evidence is only another name of indirect evidence. It is evidence composed of circumstances, or relative facts, bearing indirectly on the fact in issue, or which is sought to be proved, and requiring, in its application to such fact, a process of special inference leading to the conclusion desired. Presumptive evidence is, in brief, evidence presenting facts from which that particular kind of inference, already described as a presumption, may be drawn, as to the existence of other facts. In other words, it is that species of indirect evidence which, when presented to the mind, in connection with any fact sought to be established, suggests or induces, with more or less force, a presumption or belief as to the truth of such fact; that it is either true or false ; that it has or has not existed; that it will or will not take place; and when the effect of such evidence is satisfactory and convincing, it is termed "presumptive proof."

The word "presumption" *ex vi termini*, imports an inference from facts i.e. the belief deduced from facts or experience; and the adjective "presumptive" as applied to evidentiary facts, implies if not the certainty at least the great probability of some relation between the facts and the inference i.e. giving reasonable ground for presumption or belief; warranting inferences. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial evidence is thus a more general term than presumptive evidence. It points rather to the fact that the evidence is not direct (such as that of an eyewitness to the very fact to be proved) but that of fact supposed to have a bearing upon that main fact, and it contains no hint as to the proving power of the evidence so described, whereas presumptive evidence if the term be correctly used, implies that it has a certain proving force and doesn't raise a presumption or create a belief in favour of the fact to be proved. The distinction is thin, but real and in the sense here indicated circumstantial evidence may be said to be related to presumptive evidence as genus to species.

SECTION (9) : RELATIVE VALUE OF DIRECT AND INDIRECT OR CIRCUMSTANCES EVIDENCE.

Many writers of authority, both ancient and modern, have treated circumstantial evidence as inherently and of necessity of less value than direct evidence. In one sense this must be true. If the assumption be made that the direct evidence is free from all sources of error, imperfect observation, bias, temptation to exaggerate, and all other disturbing causes, the evidence of eye-witnesses needs nothing more. It has been said with the strictest philosophical truth that "*proof is nothing more than a presumption of the highest order*". Where the evidence of eye-witnesses is free from all possible disturbing elements and is absolutely unassailable, there can be no other kind to prove equally satisfactory. The evidence is confined to one fact that of the actual crime whereas, where the inference of the crime has to be collected from a number of subordinate facts, all of which *ex hypothesi* are relevant and contributing to the inference, the process is much more

complex and, in that respect, less satisfactory. How far it is likely that in any particular case ideal excellence of testimony is likely to be attained in direct or in circumstantial evidence is quite another matter. The direct evidence is certainly more likely to be wrapped by sympathy, indignation and other similar disturbing causes. On the other hand, the small circumstances which are constantly important parts of a chain of circumstantial evidence are less likely to have attracted attention and from their number afford more points of possible uncertainty.

On the other hand many fallacies and some truisms are to be found in writings and judgement dealing with circumstantial evidence. It has been said, for instance, that "*circumstances are inflexible proofs. They will not bend to the inclination of parties. Witnesses may be mistaken, may be corrupted; things can be neither; and therefore, so far as they go, deserve unlimited, unreserved faith.*"²⁵ "Circumstances," says Paley, "cannot lie". The circumstances are assumed to be in every case established beyond the possibility of mistake; and it is implied, that a circumstance established to be true possesses some mysterious force of its own, special in its nature and essence. Now, a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts, that they cannot lie; for the fact cannot at the same time exist and not exist: so that in truth, the doctrine is merely the expression of a truism that a fact is a fact. But one aspect has been overlooked, that circumstances and facts of every kind must be proved by human testimony; that although "circumstances cannot lie," the narrators of them may and often do lie; that, like witnesses of all other facts, they may be biased or mistaken, and that the facts, even if indisputably true, may lead to the erroneous inference. Hence, circumstantial evidence possesses no advantage over direct evidence.

There is another source of fallacy and danger to which, circumstantial evidence is peculiarly liable. Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, frequently of a delicate and perplexing character, liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror imparting its own nature of the true nature of things.

But, in truth, direct and circumstantial evidence ought not to be placed in contrast, since they are not mutually opposed; for evidence of a circumstantial and secondary nature can seldom, if ever, be justifiably resorted to, or carry conviction, except where direct evidence is unattainable or unreliable, or where the circumstantial evidence is used merely in confirmation of the direct.

SECTION (10) : SOURCE AND CLASSIFICATION OF CIRCUMSTANTIAL EVIDENCE.

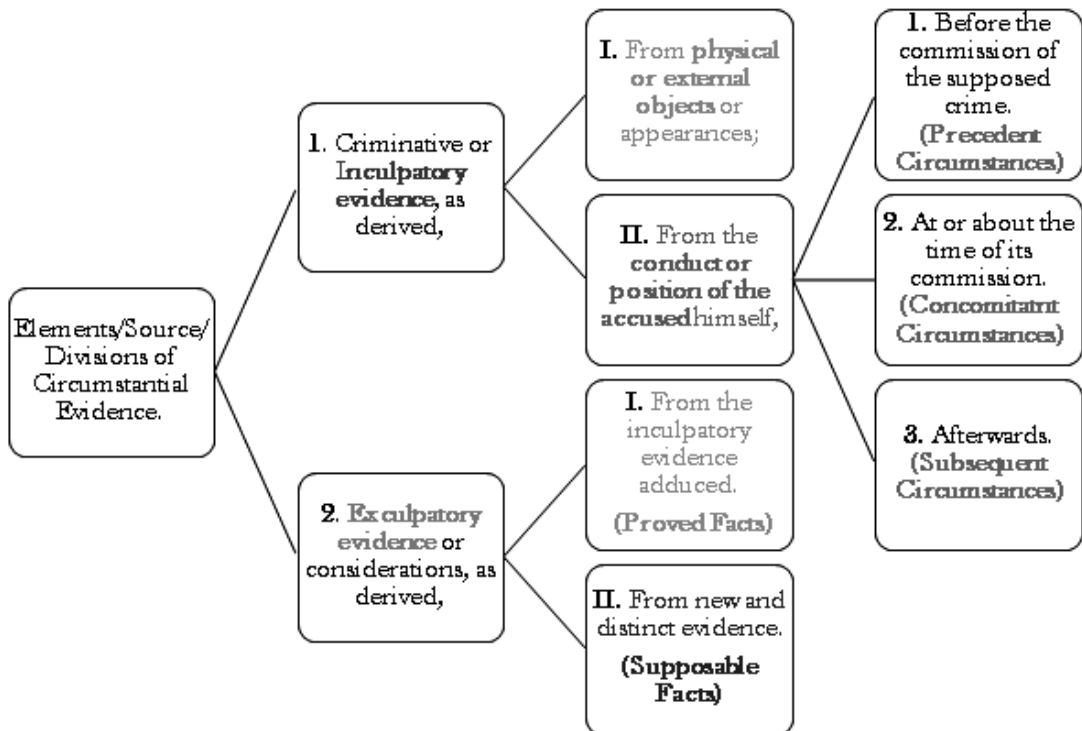
The course of external nature, and the mental and physical constitution of man, and actions and moral and mechanical relations, are the only sources of correct inference from those fact

25. Burnett's Criminal Law of Scotland (1811) P.253

which constitute circumstantial evidence. In every enquiry into the truth of any alleged fact, as to which the materials for our judgement are secondary facts, there must exist relations and dependencies, inseparable from the principal fact, which will commonly be manifested by external phenomena.

All the acts of the party, all things that explain or throw light on these acts, all the acts of other relative to the affair, that come to his knowledge and many influence him; his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences, and explanations; his looks, his speech, his silence where he was called to speak; everything which tends to establish the connection between all these particulars; every circumstances, precedent, concomitant, and subsequent, become parts of circumstantial evidence. These are in their nature infinite, and cannot be comprehended within a new rule, or brought under any classification.²⁶

Evidentiary facts of circumstantial nature are broadly categorized into following Divisions and Sub-Divisions²⁷:-



26. Burke's Works, ed. 1852, vol.viii., p.95

27. A treatise on the nature, principles and rules of circumstantial evidence : especially that of the presumptive kind, in criminal cases : Burrill, Alexander M. (Alexander Mansfield), 1807-1869.

Section (10.1) : CRIMINATIVE OR INCULPATORY EVIDENCE.**Section 10.1–(1) : CRIMINATIVE OR INCULPATORY EVIDENCE, AS DERIVED FROM PHYSICAL OR EXTERNAL OBJECTS OR APPEARANCES.**

- (1) The subject of the offence.
- (2) The appearances/Condition of such subject.
- (3) The instruments of the offence.
- (4) The appearance/condition of such instruments.
- (5) The place of the offence, or scene of the crime.
- (6) The place of the offence, considered as the instrument or means of its commission :as the pond, pit, well or stream where the body is drowned etc.
- (7) The appearances/condition of the place or scene of the crime, or of neighboring bodies or places.
- (8) Sounds heard at the scene of crime, or in its vicinity.
- (9) Smells of smoke or burning substances .
- (10) Impressions on the sense of touch.
- (11) Impressions on the sense of taste.
- (12) Detached bodies found at the scene of crime, or in its vicinity; as articles of dress, or portions of them etc.
- (13) Symptoms of poison; as contortions of the body, spasms, vomiting, swelling, discoloration, complaint of burning and pricking sensations.
- (14) Peculiarities about the person of the accused.
- (15) Peculiarities about objects in the possession of the accused.
- (16) Materials of the subject-matter of the offence, or capable of being converted into instruments of the offence, including the means of their production.
- (17) Receptacles enclosing or having enclosed the subject, the instrument, or the fruits of the offence.
- (18) The fruits of the offence.
- (19) The fruits of the offence, considered as indicia of the presence of the offender; as, in murder, accompanied by robbery, the articles stolen, and carried about from place to place, sold or offered for sale; and the like.

All the foregoing are so many signs, appearances or tokens of human agency, which, when presented by competent evidence, become facts, from which a conclusion of guilt, or the contrary,

is to be inferred. Some of them go merely to show a *corpus delicti*, or to answer what is always the first inquiry, whether a crime has been committed. Others go to indicate the particular perpetrator, or to prove that the party who is arraigned for trial, was concerned in the crime, as principal or accessory.

The participation of the accused in the crime proved to have been committed, is shown by those physical facts or appearances which connect him with it; affording so many natural coincidences, harmonizing with the supposition of his guilt. They are, in other words, the traces, marks, or indications, more or less distinct and impressive, of the presence of a particular criminal agent; and they may be considered under two principal divisions: first, traces or indications at the scene of the crime, derived or supposed to be derived from his person; and, secondly, traces or indications upon or near his person, derived or supposed to be derived from participation.

A. Traces or indications at the scene of crime, derived, or supposed to be derived from the person of the accused, comprise impressions from physical objects and substances on in the crime. as well as the objects and substances themselves; and may be enumerated in the following order²⁸.

1. Impressions directly from the person; such as prints in earth or snow, of the feet or shoes, and impressions of other parts of the body.
2. Impressions made by instruments used by the person come next to be considered. These operate, in the detection of the criminal, in two ways, that is to say :first, generally, as indicating the quarter from which the offender came ; and they may have this effect, though the instruments themselves are not found : secondly, specially, as identifying the guilty person ; and this is effected, where the instruments themselves are found, by comparing them with the impressions.
3. Marks made by instruments held or used by the offender in a peculiar manner. These often contribute material aid in fixing the charge of guilt on a particular individual.
4. Objects left at the scene of crime, by the supposed offender, being identified as belonging to him or previously seen in his possession.
5. Objects left at the scene of crime, corresponding with other objects in the possession of the supposed offender.
6. Fragments or portions of objects found at the scene of the crime, corresponding with other portions of objects, found on the accused, or known to have been in his possession.

B. Traces, marks or indications on the person or premises of the accused, derived or supposed to be derived from the scene or subject of the crime, embrace the following appearances and objects.

28. The principles of judicial proof as given by logic, psychology, and general experience, and illustrated in judicial trials; : Wigmore, John Henry, 1863-1943.

1. Wounds or marks of violence of a peculiar kind.
2. Stains of particular substances, visible on the clothing. These often serve to indicate the presence of the accused at the scene of crime, to trace his movements there, and to trace him from it, as effectually as foot-prints of a peculiar kind.
3. Objects found on the person or premises of the accused, and shown to have been taken from the scene or subject of the crime; such as a watch, keys, and similar small articles.
4. The fruits of the crime; such as money, or papers found in the prisoner's possession, and shown to have belonged to the person upon whom the crime has been committed.

Section 10.1 -- (2) : CRIMINATIVE OR INCULPATORY EVIDENCE, AS DERIVED FROM THE CONDUCT OR POSITION OF THE ACCUSED HIMSELF.

This division is further classified into three sub-divisions namely (1) Precedent Circumstances (2) Concomitant Circumstances & (3) Subsequent Circumstances.

Section 10.1.2 –(1) : Precedent Circumstances

The following are the precedent circumstances:

- (1) Motives;
- (2) Means of committing crime, as a subject of contemplation in connection with motives.;
- (3) Verbal intimations of future criminal action;
- (4) Expressions of ill-will;
- (5) Declarations of intention;
- (6) Threats to injure or destroy;
- (7) Preparations for crime; including the acquisition of means; this element is further categorized into two sub-headings:-
 - a. Direct or principal preparations.
 - i. The contriving and fashioning, or the procurement of the fashioning of instruments or means of mischief or destruction, or the obtaining them by purchase, borrowing and even theft.
 - ii. Actual trials of the selected means, to test their sufficiency, or the skill of the party in using them.
 - iii. Activities which are immediately precedent to the act, extending nearly or quite to the time of its commission. Lurking around the scene of crime, taking notice of localities and objects, adopting precautions to prevent the discovery

of approach; and keeping the criminal purpose steady by the use of artificial stimulants etc.

b. Auxiliary preparations.

- i. The removal of obstacles out of the way ; such as persons who might prevent the act, or, at least, render it hazardous by witnessing its perpetration.
- ii. Acts intended to avert suspicion of an evil purpose. Preparations of this description are sometimes made considerably in advance of the intended crime

(8) Opportunities and facilities for the commission of crime,, including the possession of means;

(9) Attempts to commit crime.

Section 10.1.2 –(2) : Concomitant Circumstances

The circumstance under this category include not only those circumstances which are strictly contemporaneous with the criminal act, but those also, which immediately precede and follow it.

Proximity, on the part of the accused, of various degrees, from mere vicinity, up to actual juxta-position or contact. It may also be of various kinds, such as

1. Proximity to the person of the deceased (before the commission of the crime, or afterwards, or both before and after)
2. Proximity to the scene of the crime,(before the commission of the crime, or afterwards, or both before and after)
3. Proximity to the person of the deceased and scene of the crime both (before the commission of the crime, or afterwards, or both before and after)

The effect of this circumstance is the same, whether it grows out of the immediate act of the accused, or out of that of the deceased himself; as where the accused is not seen at all, but is known to occupy premises which the deceased is observed to approach or enter.

Section 10.1.2 –(3) : Subsequent Circumstances.

1. Destruction, Suppression, and Removal of Evidence.
2. Fabrication or Forgery of Evidence.

a. *Forgery of real evidence,*

- i. Giving an appearance to the subject or scene of the crime, or both, as shall produce an impression that no crime at all has been committed, or it is an outcome of accident.
- ii. Without disguising the general fact of a crime having been committed, the fabricator aim is to divert suspicion from himself to other unknown persons.

- iii. Attempt to inculpate a particular individual, not from any actual malice against such individual, (who may be an entire stranger,) but solely as the most effectual means in his power, of exculpating himself.
 - iv. Malicious forgery of real evidence, i.e. having a particular malice against some known individual, and having committed a crime, either for his own gain or gratification, or, possibly, with the sole view of injuring such individual, proceeds to fabricate certain physical facts and appearances, which shall, on their face, connect the latter with the crime so closely, as to lead to his arrest and trial, on suspicion of having committed it.
- b. Forgery by Language and Conduct.
 - i. Counterfeiting alarm, and running from the scene of crime in pretended terror.
 - ii. Making inquiries after the deceased, and expressing surprise at his absence.
 - iii. Pretending violent sorrow for the death or disappearance of the person murdered.
 - iv. Expressing an opinion, in cases of the sudden disappearance of a person, that he had gone away. Sometimes, such opinions are expressed in language conveying an imputation upon character.
 - v. Spreading reports that a murdered and missing person had gone to a distance, or had been seen in various places, remote from the scene of the crime, and, in some instances, near it.
 - vi. Writing letters, with a similar view to prevent or mislead inquiry.
 - vii. Spreading reports as to the movements of the suspected party, in order to prevent pursuit, or confound and defeat inquiry.
 - viii. Spreading reports as to the cause or manner of the death of the deceased party. This expedient has been resorted to, in some cases of poisoning.
- c. Inducement of intended witnesses.
- 3. Possession of articles of Criminative Evidence.
- 4. Recent Possession of the Fruits of Crime including the material objects of more or less value, acquired by means and in consequence of its commission, subject to following condition
 - a. The possession must be recent.
 - b. The possession must be exclusive.
- 5. Sudden change of life or circumstances of the perpetrator.

6. Conduct, Demeanour and Language after the commission of a Crime:
 - a. Giving various, false and inconsistent accounts of the cause of the death of a deceased person.
 - b. Giving improbable or contradictory accounts of the manner of the death, where the accused claims to have witnessed it.
 - c. Objecting to have a dead body examined, in order to ascertain the cause of death.
 - d. Refusing to look at the body of a murdered person.
 - e. Confusion manifested at a simple inquiry.
 - f. Casual observations leading to important results.
 - g. Leading inquiry away from certain localities.
 - h. Objecting to particular modes of search, or to search in particular places.
 - i. Resisting examination of the person, or the use of the person, to verify physical facts.
7. Alarm and confusion in view of discovery.
8. Concealment and Flight: Where it becomes impossible to conceal a crime by expedients of this description, the criminal consults his safety by concealing himself; and where no facilities for such concealment are found, resorts to actual flight.
9. Conduct and language on Arrest.
10. Silence under Accusation.
11. Evasive and incomplete response.
12. False response or explanation.
13. Indirect confessional evidence.
14. Demeanour during trial.

Section (10.2) – EXCULPATORY EVIDENCE OR CONSIDERATIONS.

These facts or circumstances will be found, on examination, to be of two principal kinds: first, facts or circumstances actually proved; and, secondly, facts or circumstances not proved nor requiring to be proved, but such as may be supposed to have existed ; being in the nature of reasonable probabilities or possibilities, to the benefit of which, under certain conditions of the criminative facts, an accused is always entitled.

Section 10.2 –(1) : EXCULPATORY FACTS OR CIRCUMSTANCES, ACTUALLY PROVED

In regard to their effect as evidence, they may be divided into three principal classes:

- a. Exculpatory facts going to show the insufficiency of the evidence to prove the criminative facts alleged and relied on;
- b. Exculpatory facts going to disprove or overthrow the criminative facts proved; Facts or circumstances which may be used for this purpose, may be subdivided into two classes:-
 - i. Exculpatory facts, leading to necessary inferences such as Alibi Evidence.
 - ii. Exculpatory facts, leading to probable inferences: Under this head, the following further sub-divisions of exculpatory facts may be made:
 1. Particular physical facts;
 2. Particular facts of conduct;
- c. General or habitual fact of conduct, constituting moral character.
- d. Exculpatory facts going to avoid the effect of the criminative facts proved, by explanations consistent with the truth of their existence.

Section 10.2 –(2) : EXCULPATORY FACTS OR CIRCUMSTANCES, NOT NECESSARILY PROVED, BEING THE INFIRMATIVE CONSIDERATIONS APPLICABLE TO THE CRIMINATIVE FACTS PROVED (SUPPOSABLE FACTS).

- a. Physical facts or circumstances: Physical facts, as employed to connect an accused party with a crime proved, or considered as proved, may be resolved into three kinds:-
 - i. Criminative objects or articles found in possession.
 - ii. Criminative appearances on the person.
 - iii. Criminative appearances at the scene of the crime.
- b. Facts of conduct, or moral circumstances: The exculpatory or infirmative considerations to which facts of this class may be considered to be subject, are, for the most part, applied to them in the same general way as to facts of the physical class, precedent, concomitant and subsequent circumstances as mentioned above.

SECTION (11) : RULES OF INDUCTION APPLICABLE TO CIRCUMSTANTIAL EVIDENCE

Evidence is necessarily of various kinds, according to the nature of the subject; but the precautionary maxims of judgement calculated to guard against the erroneous assumptions of

facts, and to aid in the formation of a correct estimate of the effects of relevant facts must in all cases be substantially the same. Following are the rules laid down on the basis of philosophical wisdom and judicial experience as safeguards of truth and justice with respect to evidence in general, apply with peculiar force and pertinency to cases of circumstantial evidence.²⁹

These rules may be conveniently arranged under four divisions: **first**, general and preliminary rules; **secondly**, rules regulating the formation of the basis of fact, from which the inference of guilt is to be drawn; **thirdly**, rules of inference from the basis of fact as established; and **lastly**, rules for securing correctness in the final and general conclusion.

1. General and Preliminary Rules of Evidence.

Rule – 1: The onus of proving every thing essential to the establishment of the charge against the accused, lies on the prosecutor.

Rule – 2: In all cases, the best evidence must be adduced, which the nature of the case admits.

2. Rules regulating the formation of the evidence of the facts from which the inference of guilt is to be drawn.

Rule – 1: The facts proposed to be proved must be the genuine facts of the case.

Rule – 2: As many of the genuine facts of the case should be presented, as may be possible.

Rule – 3: The evidentiary facts must all be proved, and the existence of none of them can be presumed.

3. Rules of inference, by which the factum probandum is deduced, in the first instance, from the evidentiary facts proved.

Rule – 1: There must be clear and unequivocal proof of a Corpus Delicti.

Rule – 2: The facts alleged as the basis of any legal inference, must be strictly and indisputably connected with the factum probandum.

Rule – 3: The hypothesis of delinquency or guilt should flow naturally from the facts proved, and be consistent with them all.

4. Rules for the most certain attainment of truth in the conclusion or verdict and for avoidance of error and consequent injustice to the accused.

Rule – 1: The evidence against the accused must be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offence imputed to him.

Rule – 2: In cases of doubt, it is safer to acquit than condemn.

With the advancement of the science and technology, the scope of circumstantial evidence in

29. An essay on the principles of circumstantial evidence : Wills, William, d. 1860

criminal jurisprudence is extended to a different level, where the technological and scientific outputs are extensively used to prove a fact with highest degree of certainty and accuracy.

As the aforesaid rules are based on the philosophical wisdom and judicial experience, it is expected that in this new scientific and highly technological era and having regard to the persistent contributions of these elements in criminal jurisprudence, these rules will certainly extend with new dimension to another level.

SECTION (12) : PROSECUTION CASE SOLELY BASED ON CIRCUMSTANTIAL EVIDENCE

Undoubtedly conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as discussed in the foregoing paragraphs and must be strictly proved in accordance with the Rules discussed above. In India, the principle regarding responsibility of prosecution in the cases solely based on circumstantial evidence is no more a *res-integra* and it is well settled by the following judicial pronouncements of the Hon'ble Supreme Court of India.

In **Hanumant Govind Nargundkar v. State of M.P.**³⁰, it was observed thus: (AIR pp. 345-46, para 10) '10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

In **Bhagat Ram v. State of Punjab**³¹ it was laid down that – "where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See **Hukam Singh v. State of Rajasthan** [(1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063] , **Eradu v. State of Hyderabad** [AIR 1956 SC 316] , **Earabhadrapa v. State of Karnataka** [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , **State of U.P. v. Sukhbasi** [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , **Balwinder Singh v. State of Punjab** [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and **Ashok Kumar Chatterjee v. State of M.P.** [1989 Supp (1) SCC

30. [AIR 1952 SC 343]

31. [AIR 1954 SC 621]

560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

In *Sharad Birdhichand Sarda v. State of Maharashtra*³² it has been held that – "the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) the circumstances should be of a conclusive nature and tendency;
- (4) they should exclude every possible hypothesis except the one to be proved; and
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. [Ed.: As observed in **Bodhraj v. State of J&K, (2002) 8 SCC 45**, at pp. 55-58, paras 9-17.]"

In *Padala Veera Reddy v. State of A.P.*³³ it was laid down that – "when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

32. [(1984) 4 SCC 116 : 1984 SCC (Cri) 487]

33. [1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407]

In **State of U.P. v. Ashok Kumar Srivastava**³⁴ it was pointed out that – "great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt."

In **C. Chenga Reddy v. State of A.P.**³⁵ wherein it has been observed thus: (SCC pp. 206-07, para 21) "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In **Mohd. Arif v. State (NCT of Delhi)**³⁶ it was held that – "(Para 190) There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused."

In **Brajendrasingh v. State of M.P.**³⁷, it was held that – "the circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. The Court held as under: "27. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion

34. [(1992) 2 SCC 86 : 1992 SCC (Cri) 241: 1992 Cri LJ 1104]

35. [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205]

36. (2011) 13 SCC 621 : (2012) 2 SCC (Cri) 766 at page 690

37. (2012) 4 SCC 289

inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

In **Shanti Devi v. State of Rajasthan**³⁸ this Court held that the principles for conviction of accused based on circumstantial evidence are :—

"10.1 The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

10.2 The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

10.3 the circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

10.4 the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

Dealing with the aspects relating to approach of the Court in a case based on circumstantial Evidence, Hon'ble Apex Court in **Kiriti Pal v. State of W.B.**³⁹, held vide Para 33 – In a case based on circumstantial evidence, the court must adopt a very cautious approach and should record conviction only if all the links in the chain are complete pointing to the guilt of the accused. All the links forming complete chain must be firmly established by the prosecution. Each link taken separately may just suggest suspicion but such suspicion itself may not take the place of proof and not be sufficient to convict the accused. All the circumstances must be firmly established and must be consistent only with the hypothesis of the guilt. But that is not to say that the prosecution must meet each and every hypothesis put forward by the accused however farfetched it may be. As discussed earlier, the telephonic calls and the recovery may raise suspicion against the accused but mere suspicion itself cannot take the place of proof. In our view, evidence adduced by the prosecution against Appellants 2 and 3 (Siddique Mia and Mustaque Mia) does not form a complete chain connecting the accused with the crime and the conviction of the appellants under Section 302 IPC read with Section 120-B IPC cannot be sustained and deserves to be set aside. Likewise, conviction of fourth appellant Durga Sutradhar under Section 120-B cannot be sustained and is liable to be set aside.

38. (2012) 12 SCC 158

39. (2015) 11 SCC 178 : (2015) 4 SCC (Cri) 343 : 2015 SCC OnLine SC 401 at page 192

Elaborating the principle relating to quality of evidence in the cases based on Circumstantial Evidence, Hon'ble Supreme Court of **India in Rajiv Singh v. State of Bihar**⁴⁰ held vide (Para 74) "The following extract from Para 1504 of Corpus Juris Secundum, Vol. 23, in our comprehension synthesizes the pronounced judicial opinion with regard to the quality of circumstantial evidence to decisively prove and establish the guilt of an accused person in a criminal case:

"While in order to sustain a conviction on circumstantial evidence, all of the circumstances proved must be consistent with guilt [**Garcia v. State, 899 So 2d 447** (Fla Dist Ct App 4th Dist 2005); **State v. Toomes, 191 SW 3d 122** (Tenn Crim App 2005) and **Tooke v. Commonwealth, 47 Va App 759 : 627 SE 2d 533** (Va Ct App 2006)], circumstantial evidence will not support a conviction if it is merely consistent with guilt [**People v. Squillante, 18 Misc 2d 561 : 185 NYS 2d 357** (NY Sup Ct 1959)] or creates merely a suspicion of guilt [**Littlejohn v. Commonwealth, 24 Va App 401 : 482 SE 2d 853** (Va Ct App 1997)] . If the circumstantial facts proved can be reconciled either with the theory of innocence or with the theory of guilt, the theory of innocence must be adopted and any conviction must be reversed [**United States v. Reveles, 190 F 3d 678** (5th Cir 1999)] , even though the theory of guilt is the more probable [**State v. Potter, 252 NC 312 : 113 SE 2d 573** (NC 1960)] . In other words, in circumstantial evidence cases, if the evidence viewed in the light most favorable to the prosecution gives equal or *nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt* [**Shields v. State, 702 So 2d 380** (Miss 1997)] ."

In **Nathiya v. State**⁴¹ it is held (vide Para 27) "As recently as in **Sujit Biswas v. State of Assam** [**Sujit Biswas v. State of Assam, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677**] and **Raja v. State of Haryana** [**Raja v. State of Haryana, (2015) 11 SCC 43 : (2015) 4 SCC (Cri) 267**], it has been propounded that in scrutinizing the circumstantial evidence, a court is required to evaluate it to ensure that the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. It was underlined that whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted. That in judging the culpability of the accused, the circumstances adduced when collectively considered, must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime alleged. That the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused, was emphatically propounded."

In **Satish Nirankari v. State of Rajasthan**⁴² it was held that – "criminal cases cannot be decided on the basis of hypothesis. It is for the prosecution to prove the guilt of the accused beyond reasonable doubt. It is for the prosecution to prove all circumstances which leave no

40. (2015) 16 SCC 369 : (2015) 4 SCC (Cri) 837 : 2015 SCC OnLine SC 1336 at page 396

41. (2016) 10 SCC 298 : (2017) 1 SCC (Cri) 99 : 2016 SCC OnLine SC 1246 at page 306

42. (2017) 8 SCC 497

doubt of the guilt of the accused. The chain of circumstances must be complete and must clearly point to the guilt of the accused. The chain cannot get broken in between."

In **Murugan v. State of T.N.**⁴³ at para 32, it is observed that –

32. A theory of "accused last seen in the company of the deceased" is a strong circumstance against the accused while appreciating the circumstantial evidence. In such cases, unless the accused is able to explain properly the material circumstances appearing against him, he can be held guilty for commission of offence for which he is charged. In this case, it was rightly held by the two courts below against the appellant and we find no good ground to disturb this finding.

In **Satpal v. State of Haryana**⁴⁴ it has been held under para 6 that – "...Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

Dev Kanya Tiwari v. State of U.P.⁴⁵ it has been observed by the Hon'ble Apex Court that – "Having heard the learned counsel on either side, we have carefully gone through the material on record. Apparently, there is no eyewitness to the incident and the case is entirely based upon circumstantial evidence. In such a case, the court is expected to be more careful while analyzing the evidence and convicting the accused. In other words, in all probabilities, the chain of circumstances should lead to the irresistible conclusion that the accused participated in the commission of crime and committed the offence. This Court has long back set the mode of evaluating circumstantial evidence in **Hanumant Govind Nargundkar v. State of M.P.** [**Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343 : 1953 Cri LJ 129**] in the following terms: (AIR pp. 345-46, para 10)

"10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first

43. (2018) 16 SCC 96 : (2019) 4 SCC (Cri) 735 : 2018 SCC OnLine SC 483 at page 101

44. (2018) 6 SCC 610 : 2018 SCC OnLine SC 476 at page 612

45. (2018) 5 SCC 734 : 2018 SCC OnLine SC 291 : (2018) 2 SCC (Cri) 860 at page 738

instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

In **Manoj Suryavanshi vs State of Chattisgarh**⁴⁶ it has been held that – it is a case of circumstantial evidence and therefore before convicting the accused on the basis of circumstantial evidence, the prosecution has to prove beyond doubt and complete the chain of events which lead to the conclusion that it is the accused alone who has committed the offence.

Recently in **Satish Kumar v. State of H.P.**⁴⁷ it is held that "This Court in **Sharad Birdhichand Sarda v. State of Maharashtra**, delineated the conditions, which must be fulfilled before a case against an accused can be said to be established on the basis of circumstances. It was held as under:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

46. 2020 SCC OnLine SC 313

47. 2020 SCC OnLine SC 267

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

Hence, from these judicial pronouncements, it is apparent that the aforesaid five golden principles, which has been termed as "Panchsheel of the proof of a case based on circumstantial evidence" by the Hon'ble Supreme Court are the robust guiding lines for appreciating the evidences while deciding a case based on circumstantial evidence.



Topic No. – 23

Right of silence of an accused at pre-trial and the trial stage; Aspects relating to the privilege against self-incrimination.

By
Sri Puneet Kumar Garg,
Additional District & Sessions Judge,
Muzaffarpur.

Sri Puneet Kumar Garg,
Additional District & Sessions Judge, Muzaffarpur.

Topic : Right of silence of an accused at pre-trial and the trial stage; Aspects relating to the privilege against self-incrimination.

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Right of Silence of an accused at Pre-trial and at the Trial stage; Aspects relating to the privilege against self-incrimination.

“.....throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt” –

Per Viscount Sankey in Woolmingtonv. DPP¹

Introduction

The ‘right to silence’ is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court. The right to silence is based on the principle ‘**nemo tenetur se ipsum prodere**’, the privilege against self-incrimination.

The right of refusal to answer questions that may incriminate a person is a procedural safeguard that has gradually evolved in common law and bears a close relation to the ‘right to a fair trial’. There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and High Commissions which required defendants and suspects to take ex officio oaths. These bodies mainly decided cases involving religious non-conformism in a Protestant-dominated society, as well as offences like treason and sedition. Under an ex officio oath, the defendant was required to answer all questions posed by the judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a ‘right to silence’.

The use of the ex officio oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. During the trial of John Lilburne (a vocal critic of Charles I, the then monarch) on sedition in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the contents of the written complaint against him, John Lilburne went on to vehemently oppose the use of ex-officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the ‘right to silence’.

The right to silence is a vital right of the accused recognized by the law around the globe. It sprouts from the right to protection against self-incrimination embodied in the Indian Constitution under Article 20(3). It is propped by the cardinal principle of criminal law that it is the duty of the prosecution to prove the guilt of the accused as he is presumed to be innocent until proven guilty.

1. 1935 AC 462 at 481.

The right to silence has various sides. One is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself.

Some of the aspects relating to the right to silence came to be included in the Universal Declaration of Human Rights, 1948, European Convention, and other International Covenant:-

- Art. 11.1 provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.”
- The International Covenant on Civil and Political Rights, 1966 to which India is a party state in Art. 9.1 that none shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;

Art. 9.2 states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Art. 14(3)(g) refers to various “minimum guarantees” and states that everyone has a right: Not to be compelled to testify against himself or to confess guilt.”

- The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Art. 6(1) that every person charged has a right to a ‘fair’ trial and Art. 6(2) thereof states:

“Art. 6(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Right to silence in India

In India, the right of silence is protected by Articles 20 (3) and 21 of the Constitution, sections 161 (2), 313 (3), and 315 of the Code of Criminal Procedure, 1973, and Sec.24, 25, and 26 of Indian Evidence Act. Article 21 of the Constitution of India provides that *no person shall be deprived of his life or personal liberty except according to the procedure established by Law*. The Hon’ble Apex Court in **Maneka Gandhi v. Union of India**,² held that Article 21 of the Constitution of India requires a fair, just and equitable procedure to be followed in criminal cases. Hence, ‘right against self-incrimination or right of keeping silence can be examined in respect of its relationship with the multiple dimensions of ‘personal liberty’ under Article 21, which include guarantees such as the ‘right to a fair trial’ and ‘substantive due process’.

Clause (3) of Art. 20 of the Constitution of India lays down that “no person accused of any offence shall be compelled to be a witness against himself”. In other words, the accused person is protected against incriminating himself under compulsion i.e. making a statement that makes the

2. (1978) 1 SCC 248.

case against the accused person at least probable considered by itself. It can be claimed by natural persons as well as by corporations, etc.

This clause is based on the maxim *nemo tenetur se ipsum prodere*, which means that 'no man is bound to accuse himself'. The accused is presumed to be innocent till his guilt is proved and the prosecution must establish his guilt. Thus, the accused need not make any admission or statement against his free will. Clause (3) of Art. 20 is an attempt to prevent the torture of the accused by investigating agencies to extract a confession from him. The Universal Declaration of Human Rights proclaims: 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment' (Art. 5).

The 'right to remain silent' is an extension of the rule of civil liberty enjoined by our Constitution. Considering the guarantee under Art. 20(3) and also humanizing standards under Art. 21, a court is required to tread cautiously while construing retracted confession. To withdraw from what has been said previously needs to be interpreted in vein of the right to remain silent as an extension of this civil liberty.³

Now it has to be seen how far this privilege/right of keeping silence or not to incriminate against oneself is available to an accused person during Pre-trial i.e. at the investigation stage or/ and at the trial stage. Before proceeding further it has to be understood that this immunity is available only to a person who is accused of an offence. The same has been confirmed in **State of Bombay V Kathi Kalu Oghad**⁴ as under:-

"To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

Hence a person cannot claim the protection if at the time he made the statement, he was not an accused but becomes an accused thereafter. Further, unlike the USA and England, the protection in India is confined to the 'accused' only and not to other witnesses.

At the Pre-trial stage:- An Accused Person can avail his right of keeping silence or not to incriminate himself in the Pre-trial stage under the umbrella of various provisions of laws, including but not limited to Article 20(3), Article 21 of the Indian Constitution, Section 161 of Cr.P.C., Sec. 24, 25 and 26 of Evidence Act, etc.

- Article 21 of the Constitution of India requires a fair, just, and equitable procedure to be followed in criminal cases. **Maneka Gandhi V Union of India**,⁵ and Art. 20(3) lays down that "no person accused of any offence shall be compelled to be a witness against himself". A person against whom a formal accusation relating to the commission of an offence (viz. FIR, Complaint, Criminal prosecution before the court) has been

3. Alope Nath Dutta v State of W.B., (2007) 12 SCC 23.

4. AIR 1961 SC 1808.

5. Supra note 2.

leveled is covered by Art. 20(3). However, it is not necessary that to avail the privilege contained in Art. 20(3), the actual trial or inquiry should have commenced. Where a person was arrested on suspicion of having committed an offence, eliciting information from him would not be protected by Art. 20(3), when neither the case is registered nor an FIR is recorded.

In **Nandini Sathpathy V P.L. Dani**⁶, during the investigation, the accused was interrogated regarding a long list of questions given to her in writing. She refused to answer those questions claiming the protection of Art. 20(3). It was held that the protection contained in Art. 20(3) extends back to the stage of police investigation not commencing in court only, since such inquiry was accusatory. Further, the ban on self-accusation and the 'right to silence' extends beyond that case and protects the accused regarding other offences, pending or imminent, which might deter him or her from voluntary disclosure of incriminatory nature.

- Protection under Article 20(3) extends to the stage of the investigation as per law declared by Supreme Court in **State of Bombay V Kathi Kalu Oghad**,⁷ wherein the Court held, "...If the protection was intended to be confined to being a witness in Court then really it would have been idle protection. It would be completely defeated by compelling a person to give all the evidence outside the court and then, having what he was so compelled to do proved in court through other witnesses."
- Sec. 161 Code of Criminal Procedure, 1973 authorize any police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and such person shall be bound to answer truly all question as put to him by the said Police officer, However sub section (2) of sec. 161 of the Code of Criminal Procedure, 1973 grants a right to silence to those questions which would tend to expose to a criminal charge or a penalty or forfeiture. These provisions substantiate the right of the accused to keep silence.
- Similarly, Sec. 24, 25, and 26 of the Indian Evidence Act, makes the confession of an accused person irrelevant when the said confession is caused by inducement, threat, or promise (Sec. 24), when the confession is made to a police officer (Sec. 25) and when confession by an accused while in police custody. These provisions strengthen his right of silence or his right not to incriminate against himself.
- An accused person cannot be compelled for narcoanalysis technique, polygraph examination, and the BEAP test. The Hon'ble Supreme Court in **Selvi v. State of Karnataka**,⁸ held that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination,

6. AIR 1978 SC 1025.

7. Supra note 4.

8. (2010) 7 SCC 263.

and the BEAP test) come within the scope of 'testimonial compulsion', thereby attracting the protective shield of Article 20(3).

During Trial stage:- During Trial in addition to other safeguards as discussed above, there are several other provisions such as Sec. 313 and 315 of the code of criminal procedure which boosts or provide an umbrella to an accused person for exercising his rights to keep silence or not to incriminate against himself.

- **Section 313 and the Right to Silence:-**Section 313 provides the accused with the 'right to silence' at the stage of the trial. The Section stipulates the power of the Court to question the witness at any stage of the trial about circumstances appearing in the evidence against him. The accused is not administered an oath when he is examined under sub-clause (3) of this Section and is not liable to be punished for not answering or providing a false answer during such an examination. The legislative scheme of the provision is to allow the accused to explain circumstances that appear to be incriminating him. However, there is no express provision that requires an explanation from the accused. Moreover, the Section includes the right to silence of the accused when it provides that the refusal to answer by the accused is not punishable. Also, it can be inferred from the non-administration of the oath to the accused before such examination that the accused is not under any compulsion to answer any questions made under this Section. Thus, Section 313, in spirit, acts as an aid to the accused to explain or rebut any incriminating evidence against him if he deems fit.

The Section also provides that answers given by the accused may be taken into consideration by the Court. This makes it even more important that the accused must answer only when he is certain that his answer could not be used as evidence against him and further displays the significance of his right to silence.

- Sec. 315 of Cr.P.C provides that an accused person is a competent witness and can appear as witness and give evidence or oath provided he made a request in writing to this effect. However, his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.

Circumstances when the accused was not deemed to be privileged by this right of Silence and/or Right against self-incrimination:-

- When adverse inferences are drawn The jurisprudence on drawing adverse inferences against the accused from his silence while being questioned under Section 313 has been dealt with by the Court on several occasions. The Courts have vacillated on this issue and there have been judgments both prohibiting and allowing for the same. However, recent judgments have been inclined towards allowing such inferences to

be drawn by the Court. In **Ramnaresh v. State of Chhattisgarh**,⁹ it was held, “the Court would be entitled to draw an inference, including adverse inference, as may be acceptable to it in accordance with law.” It was observed that even though the accused under Section 313 was permitted to maintain silence at the time of trial it did not preclude the Court from drawing such an inference. In **Munish Mubar v. State of Haryana**¹⁰, it was held that it is obligatory for the accused to furnish an explanation with respect to implicating circumstances associated with him, the failure of which could lead to adverse inferences being drawn from the silence of the accused. In **Brajendra Singh v. State of M.P.**,¹¹ the Court held, that even though the statement of the accused under Section 313 cannot be solely relied upon to convict him but where such a statement is in line with the case of the prosecution, then the heavy onus of providing adequate proof on the prosecution, is to some extent, reduced. In **Raj Kumar Singh @ Raju v. State of Rajasthan**,¹² it was noted that, “an adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same.”

Recently the Hon’ble Supreme Court in **Prahlad v. State of Rajasthan**,¹³ adopted the aforesaid principle of the adverse inference. That case was concerning to rape and murder of an eight-year-old girl child. The accused was charged with the same as he was the last person seen with her while purchasing sweets for her from a shop, shortly after which she went missing. Her corpse was discovered the next morning. The Trial Court convicted the accused of offences under Section 302 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act 2012. The decision was affirmed by the High Court. The accused challenged his conviction and filed an appeal in the Supreme Court. The Supreme Court acquitted him of the POCSO charges due to lack of reliable material against him. However, he was convicted of murder. The conviction was based on an adverse inference drawn by the Court from the failure of the accused to explain the events which followed after he bought the sweets for the girl. Apart from the fact that the accused was the last person seen with the girl, the Court solely relied on the adverse inference drawn from the silence of the accused to convict him for her murder.

➤ **Regarding the production of material objects or compulsion to give specimen writing/signature, finger impression or giving of blood specimens:-**

9. (2012) 4 SCC 257.

10. (2012) 10 SCC 464.

11. (2012) 4 SCC 289.

12. 2013 SCC OnLine Raj 2350.

13. 2018 SCC Online SC 2548.

- Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document that is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person. In **State of Bombay v. Kathi Kalu Oghad**,¹⁴ the Apex Court, however, held that the immunity granted to the accused does not extend to the compulsory production of material objects or compulsion to give specimen writing/signature, finger impression, or giving of blood specimens. In these cases, the accused is not giving any personal testimony. They are merely materials for comparison, to lend assurance to the court that its inference based on other pieces of evidence is reliable. The court distinguished 'to be a witness' from 'furnishing evidence'. Compulsion for the production of documents is prohibited only if the documents convey the personal knowledge of the accused relating to the charge ('to be a witness'). Where an accused is compelled to produce a document in his possession, which is not based on his personal knowledge ('furnishing evidence'), there is no violation of Art. 20(3), because he does not become a witness by the mere fact that he has produced it. It does not amount to testimonial compulsion offending Art. 20(3).
- Specimen writing/signature, finger impression, or blood specimens even obtained without the consent of the accused person is relevant and can be considered by the court while adjudication. This right of the state is fortified by S.53 of Cr.P.C., which empowers a police officer to get examined an accused person from a Medical Practitioner, and as per explanation attached with this section, Medical examination includes the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.

It was further ruled that “Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonials in nature, they are not incriminating by themselves if they are used for identification or

14. Supra note 4.

corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.”

- **Search of the premises of accused person** Search of the premises of a person accused of an offence under a search warrant and seizure of the documents are not violative of Art. 20(3). In such cases, it is not the act of the accused but that of a police officer to which the accused is obliged to submit and is, therefore, not his testimonial act in any sense. It cannot be treated as a compelled production of a thing/document. However, if the accused is compelled to be a party to a search, it would be violative of Art. 20(3).¹⁵
- **Statements recorded through electronic medium** Tape-recording of statements made by the accused, without his knowledge, but without force or oppression, is not violative of Art. 20(3).¹⁶
- **Compelled testimony-** The provisions of Sec. 27 of the Evidence Act, 1872 (under which a statement made by the accused leading to the discovery of some facts is admissible in evidence) are not within the prohibition of Art. 20(3), unless the compulsion had been used in obtaining the information from the accused person. Compulsion in this context would mean “duress”. The Supreme Court in **Nandini Sathpathy V P.L. Dani**¹⁷ held that “relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Art. 20(3) if elicited by pressure from the mouth of the accused”. The Hon’ble Court further widened the scope of compulsion and held that “compelled testimony” is evidently procured not merely by physical threats or violence but also by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative proximity, overbearing and intimidating methods and the like.

In **Sampaty Kumar v. E.O. Enforcement Directorate, Madras**,¹⁸ held that administration of “caution” to the person summoned that not making a truthful statement was an offence, did not amount to the use of pressure within the meaning of Art. 20(3). Protection against self-incrimination secured by Art. 20(3) is available

15. V.S. Kuttan Pillai v. Ramakrishnan, AIR 1980 SC 185.

16. Ibid.

17. Supra note 6.

18. AIR 1998 SC 16.

only if the accused is compelled to give evidence against himself. Administration of such a caution, the court said, was, in fact, in the interest of the person who was making the statement.

- **Waiver of privilege**-The privilege given by Art. 20(3) to the accused person may be waived by the accused. Thus, this Article is not violated when he volunteers evidence against himself. Art. 20(3) would not apply to a case where the confession was made by the accused without any inducement, threat or promise.¹⁹
- **Administrative and quasi-criminal proceedings**- the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. For instance in **Raja Narayanlal Bansilal v. Maneck Phiroz Mistry**,²⁰ the contention related to the admissibility of a statement made before an inspector who was appointed under the Companies Act, 1923 to investigate the affairs of a company and report thereon. It had to be decided whether the persons who were examined by the concerned inspector could claim the protection of Article 20(3). The Hon'ble Supreme Court held that a general inquiry and investigation into the affairs of the company cannot be regarded as an investigation that starts with an accusation contemplated in Article 20(3) of the Constitution.

Conclusion

Right of an accused to keep silence is indeed a valuable right recognized by the legislature considering the various factors of the society in which we are living. However, with the passage of time, this right of an accused person is shattering by drawing adverse inferences by the Hon'ble Court against keeping silence by the accused as done in **Prahlad v. State of Rajasthan**.²¹ At this juncture, I would like to draw the attention towards Section 342 of the Code of Criminal Procedure, 1898 which corresponds the Section 313 of the Code of Criminal Procedure, 1973 to show the legislative intent.

“The accused shall not render himself liable to punishment by refusing to answer questions or by giving false answers to them, but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks fit.”

Section 313(3) of the new Code states:

“The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.”

It is clear from the above that the framers of the new code did not wish to retain the practice of the Court to draw inferences from the refusal of the accused to answer questions posed to him

19. Kalawati vs state of H.P, AIR 1983 SC 131.

20. [1961] 1 SCR 417.

21. Supra note 13.

under Section 313. The practice was, undoubtedly, dropped due to the introduction of Article 20(3) in the Indian Constitution which provided for protection against self-incrimination. It only allows the Court to draw inferences from the answers provided by the accused not from his silence. It expressly precludes the administration of oath to the accused so that the accused is not under any fear of punishment while making his statements. This affects the reliability of the statements made by the accused and, therefore, such a statement cannot be regarded as evidence under Section 3 of the Indian Evidence Act. Thus, it is logically redundant to draw adverse inferences from the silence of the accused under Section 313 to the extent of solely relying on such evidence to convict the accused. Further, the practice of drawing an adverse inference from the accused exercising his right to silence would amount to testimonial compulsion and would contravene Article 20(3).

It is the need of the hour to recognize the right to silence as an unbridled right of the accused person being a part of the right of Fair Trial as provided to him under various provisions of the Constitution of India.

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Topic No. – 24

Application of the doctrine of ‘exclusionary rule’ and concept of ‘falsus in uno, falsus in omnibus’ in India.

By

Ms. Namita Singh & Sri. Abhijit Kumar
Officers on Special Duty,
Patna High Court.

Ms. Namita Singh & Sri. Abhijit Kumar
Officers on Special Duty, Patna High Court.

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CONCEPT OF ‘FALSUS IN UNO, FALSUS IN OMNIBUS’ IN INDIA AND APPLICATION OF DOCTRINE OF ‘EXCLUSIONARY RULE’

INTRODUCTION

Legal Doctrines may most simply be defined as rules or principles with such a long history in the law that lawyers and scholars have accorded them the label of "doctrine." More specifically, calling something a doctrine usually means that either it is very important to some field of law, or that it provides a comprehensive way to resolve a certain type of legal dispute. Similarly, a legal maxim may be defined as an established principle or proposition of law or a legal policy usually stated in Latin form. Most of these **Latin maxims** originated from the middle ages in the European states where Latin was in use as their legal language. These principles don't have the authority of law but when Courts apply the maxims in deciding issues of law or the legislature incorporates such maxims while framing laws, they take the form of law and form the basis of sound judgements.

Among the Legal Doctrines, the doctrine of ‘Exclusionary Rule’, also known as ‘fruit of the poisonous tree’ and, among the maxims, the maxim of ‘falsus in uno, falsus in omnibus’, are among the most widely discussed and debated ones, especially in the Indian context of it.

A. ‘FALSUS IN UNO, FALSUS IN OMNIBUS’

The fables of Aesop tell us the story of a boy who vexes the villagers again and again by crying “Wolf!” even though there was none, only to watch them rushing to help. He learns his lesson when the “Wolf” actually comes but no heed is paid to his cries as he has already discredited himself by his lies.

“There is no believing a liar, even when he speaks the truth”

I. THE DOCTRINE

The doctrine of ‘Falsus in uno, falsus in omnibus’ is a Latin phrase which means, “false in one thing, false in everything” and seems an embodiment of the fable of Aesop as stated above.

This doctrine is applied on testimony of a witness to mean that if one fact in the testimony of the witness is false, the entire testimony becomes doubtful.

II. ORIGIN

Regarding the origin of this doctrine¹, in the 26th Volume of The St. John's Law Review

1. 26th Volume of The St. John's Law Review dated May 1952

dated May 1952, Dennis M. Hurley has stated that, “..... no positive source is discernible in seeking the earliest appearance of the maxim *nominatim* as we know it today. One writer implies that it was taken over from civil law sources and transplanted into the Anglo-Saxon legal soil. An 1855 North Carolina court¹⁰ and an 1869 Ohio court make the same assertion but cite no authorities in support of that conclusion. While an independent search fails to disclose any reference to the maxim by name, Domat, in his highly respected treatise on the civil law, comes very close to its spirit when he says that “[w]hatever proves the want of probity in a witness is sufficient to make his evidence to be rejected.” Nor is the rendition of the maxim in Latin alone an indication of a Roman law or civil law background; for in early common law, legal writings were commonly in Latin—the language of the learned. As far as its appearance in the common law is concerned, Wigmore feels that the earliest case in which it is found is *Hampden’s Trial*. There in 1684, it was quoted as we know it by the attorney for the defense. It is difficult to go back any further than that, for a reading of the report of that case fails to provide earlier sources, and Bacon, Wingate and Noye, all of whom studiously compiled legal maxims before that date, make absolutely no reference to it.”

III APPLICABILITY OF THE DOCTRINE

The rule is based on the reasoning that, since perjury is an offence, the testimony of a witness who has been found to perjure himself in the trial, has to be disregarded. There was wide acceptance of the doctrine in 17th Century English Courts. However, by the early nineteenth century, English courts began instructing juries that they may presume a witness who testified falsely was unreliable, but such a presumption was not mandatory. Over the years, it was realised that it has no relevance as a formal rule of evidence and, in most countries the maxim lost general acceptance.

It was widely accepted and relied upon in United States of America till very recently. In 2013, for example, the United States Court of Appeals for the Ninth Circuit² held that in immigration cases, a court may “use an adverse credibility finding on one claim to support an adverse finding on another claim.” Likewise, at the O.J. Simpson murder trial³, Judge Lance Ito applied the doctrine to instruct the jury that “witness who is willfully false in one material part of his or her testimony is to be distrusted in others”. However, now many jurisdictions there also, have abandoned the principle as a formal rule of evidence and instead apply the rule as a “permissible inference that the jury may or may not draw.”

IV. THE INDIAN CONTEXT

In India, in the case of **Nisar Ali v. The State of Uttar Pradesh**⁴ (AIR 1957 SC 366), as

2. *Enying Li v V. Holder*, 738 F. 3d 1160, 1168 (9th CIR.2013)

3. George Fisher, *The Jury’s Rise As Lie Detector*, 107 Yale Law Journal 575, 700 (1997) (discussing use of doctrine with regard to the testimony of detective Mark Fuhrman.

4. (AIR 1957 SC 366)

far back as the year 1957, the Supreme Court observed that, the maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.

Again, in **Ugar Ahir & Ors. v. State of Bihar**⁵, AIR 1965 SC 277, the Apex Court held as under:

"The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

In the case of **Nathu Singh Yadav v. State of Madhya Pradesh**⁶, (2002) 10 SCC 366, as well, a similar view was taken. Later, in the case of, **Jakki @ Selvaraj & Anr. v. State, represented by the IP, Coimbatore**⁷, (2007) 9 SCC 589, the Supreme Court observed that, *"The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be discarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'."*

Thus, in India, the maxim "falsus in uno, falsus in omnibus" has never received general acceptance nor has it come to occupy the status of rule of law. It is merely a rule of caution.

V. A RULE OF CAUTION

More than 150 years ago, Bentham stated that "Witnesses are eyes and ears of justice." Section 60 of the Indian Evidence Act lays down that the Oral Evidence must be direct. In other words, this means that if the evidence is about any fact which has been heard, seen, perceived by any other senses or is about an opinion, then according to this section oral Evidence will be valid

5. AIR 1965 SC 277

6. (2002) 10 SCC 366

7. (2007) 9 SCC 589

only when such evidence has been given by the person who himself heard, saw, perceived or formed an opinion. Thus, witnesses play a pivotal role in the pursuit of justice delivery foundation of which rests on the pillars of truth and impartiality.

The Hon'ble Supreme Court of India has divided the reliability of witnesses in three categories as held in **Vadivelu Thevar v. State of Madras**⁸ AIR 1957 SC 614 as under:

1. Wholly reliable.
2. Wholly unreliable. and
3. Neither wholly reliable nor wholly unreliable.

The applicability of this Doctrine as a 'Rule of Caution' will lie with regard to the third group of witnesses in deciding if the entire testimony of such witness has to be discarded or, only so much of it that is unreliable may be discarded and the rest may be accepted. The principle settled by a multitude of judicial pronouncements is against discarding the entire testimony, to the extent that even if a major portion of evidence is found to be deficient, in case the rest is sufficient to prove the guilt of the accused, notwithstanding the acquittal of a number of other accused persons, the conviction of that accused can be maintained.

It was reiterated in the recent judgment of **Mahendran vs. State of Tamil Nadu**⁹ AIR 2019 SC 1719, when, a Division Bench of the apex Court held that the entire testimony of witness cannot be discarded merely because part of it was found to be false. It was observed that, *"38..... Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment...."*

VI. SEPARATING THE CHAFF FROM THE GRAIN

It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that the evidence has been found to be deficient to prove the guilty of the other accused persons. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. However, in cases where it is not feasible to separate truth from falsehood, because grain and chaff are so inextricably mixed up that separation would amount to a virtual reconstruction of a new case, there the evidence has to be discarded in totality.

8. AIR 1957 SC 614

9. AIR 2019 SC 1719

The Cases

Gangadhar Behera and Others vs. State of Orissa¹⁰ 6 (2002) 8 SCC 381; **Sucha Singh v. State of Punjab**¹¹ (2003 (7) SCC 643)

"... To the same effect is the decision in State of Punjab v. Jagir Singh and Lehna v. State of Haryana. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence"

In **Balaka Singh vs State of Punjab**¹² AIR 1975 SC 1962, this Court observed as under:

"It is true that, as laid down by this Court in Zwinglee Ariel v. State of Madhya Pradesh, AIR 1954 SC 15, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

10. 6 (2002) 8 SCC 381

11. (2003 (7) SCC 643)

12. AIR 1975 SC 1962

In the judgment, **Ram Udagar Singh v. State of Bihar**¹³, (2004)¹⁰ Supreme Court Cases, 443, it has been held by the Hon'ble Supreme Court that, in cases where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto.

Gubbala Venygopalswamy v. State of Andhra Pradesh¹⁴ (2004 (10) SCC 120) - “As a rule of universal application it cannot be said that when a portion of the prosecution evidence is discarded as unworthy of credence, there cannot be any conviction. It is always open to the Court to differentiate between an accused who has been convicted and those who have been acquitted. [See *Guru Charan Singh and Another v. State of Punjab* (AIR 1956 SC 460) and *Sucha Singh and anr. Vs state of Punjab* (2003 (5) Supreme 445)]. The maxim “*Falsus in uno falsus in omnibus*” is merely a rule of caution. As has been indicated by this Court in *Sucha Singh's case* (supra), in terms of felicitous metaphor, an attempt has to be made to separate grain from the chaff, truth from falsehood. When the prosecution is able to establish its case by acceptable evidence, though in part, the accused can be convicted even if the co-accused have been acquitted on the ground that the evidence led was not sufficient to fasten guilt on them. But where the position is such that the evidence is totally unreliable, and it will be impossible to separate truth from falsehood to an extent that they are inextricably mixed up, and in the process of separation an absolute new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, conviction cannot be made.”

In **Dalbir Singh vs State of Haryana**¹⁵ CRIMINAL APPEAL NO. 899 OF 2008, it was observed thus,

“9. Coming to applicability of the principle of *falsus in uno falsus in omnibus*, even if major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of large number of other co-accused persons, his conviction can be maintained. However, where large number of other persons are accused, the Court has to carefully screen the evidence. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end.

13. (2004)¹⁰ Supreme Court Cases, 443

14. (2004 (10) SCC 120)

15. CRIMINAL APPEAL NO. 899 OF 2008

The maxim "falsus in uno falsus in omnibus" has no application in Indian and the witnesses cannot be branded as liar."

VII. MINOR DISCREPANCIES, WHICH DO NOT GO TO THE ROOT OF THE MATTER

Section 191 of IPC states, "Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence".

In the testimony of the witnesses, inconsistencies are common, mostly because memories will change with passage of time. During the trial of a case the defense tries to highlight these inconsistencies in their favour by their cross-examination, while the prosecution tries to prove that the inconsistencies are reasonable. The duty of the Court is then to determine the truthfulness and accuracy of the testimony of each witness. It must be decided whether a witness told the truth and was accurate or, whether he testified falsely or was mistaken. It is well settled that a witness cannot be discredited simply on the ground of an erroneous statement. However, where the statements of a witness are willfully and corruptly false, the court may disregard his whole testimony unless corroborated by other testimony. The maxim, 'falsus in uno, falsus in omnibus,' should only be applied in cases where a witness willfully and knowingly gives false testimony. In other words, where the witness lies about a major and material fact, it will cast a doubt on the entire testimony.

Thus, there has to be an effort to assess as to whether the discrepancies are minor or material. The minor discrepancies in the evidence, which are considered normal, are those which are due to simple errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence. These discrepancies are bound to be present, howsoever honest and truthful a witness may be. These do not corrode the credibility of the prosecution case. However, material discrepancies are major discrepancies and inconsistencies which shake the very basis of the prosecution case.

Where a witness testifies regarding a fact in respect to which he cannot be presumed liable to mistake and, if the fact turns out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood. For example, if the witness who claims to be an eye-witness fails to correctly depose regarding the place of occurrence or time and date of occurrence, it may shake the credibility of the case. The said aspects have been highlighted in several judgments.

The Cases

As observed by the Apex Court in **State of Rajasthan vs Smt Kalki and anr**¹⁶. [1981 (2) SCC 752], normal discrepancies in evidence are those which are due to normal errors of

16. [1981 (2) SCC 752]

observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

Bharwada Bhogini Hirjibhai vs. State of Gujrat¹⁷ AIR 1983 SC 753:— "Over much importance cannot be attached to minor discrepancies."

In **State of U.P. v. M.K. Anthony**¹⁸, AIR 1985 SC 48, the Apex Court has observed that in case of minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking the sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer and not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

In **Sidhan Vs. State of Kerala**¹⁹, 1986 Cr.L.J. 470, it was held:

"Minor discrepancies regarding minute details of the incident including the sequence of events and overt acts are possible even in the versions of truthful witnesses. In fact, such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities."

"The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time."

In **Appabhai and anr. vs State of Gujarat**²⁰, AIR 1988 SC 696 Supreme Court has ruled thus: *"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of*

17. AIR 1983 SC 753

18. AIR 1985 SC 48

19. 1986 Cr.L.J. 470

20. AIR 1988 SC 696

men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.”

In the case of, **Krishan Mochi v. State of Bihar etc**²¹. (2002 (6) SCC 81) it was held:

“It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination which may be sometime because he is a bucolic person and is not able to understand the question put to him by the skillful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurence or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure, he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time.

Thus, in a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be

21. (2002 (6) SCC 81)

there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it, but if the same are boulders, court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals".

Mritunjoy Biswas vs. Pranab @ Kuti Biswas²²; 2013 CriLJ 4212 (SC)

"It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, it needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission."

VIII. EVIDENCE OF RELATED AND INTERSTED WITNESSES

A related witness is one who has some kind of relationship with the victim such as father, mother, sibling etc and, an interested witness is someone who has a direct interest in the outcome of the case and may stand to derive some benefit from the result of the litigation. Thus, it is important for the Courts to analyse the reliability of evidence of such witnesses and ensure that the existence of close relationship or an interest in the outcome, does not affect the truthfulness of the testimony. The general settled rule in this regard is that testimony of a witness cannot be outrightly discarded merely on account of the fact that the witness is a related or an interested witness rather, it calls for a greater degree of care and caution in its analysis.

The Cases

In **Kartik Malhar vs. State of Bihar²³ (1996) 1 SCC 614 (620)** it has been held that, "Interested witness, a close relative who is a natural witness cannot be regarded as an interested

22. 2013 CriLJ 4212 (SC)

23. (1996) 1 SCC 614 (620)

witness. The term ‘interested’ postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason.”

In **Prahalad Patel v. State of M.P.**²⁴ (2011) 4 SCC 262, the Supreme Court held that the testimony of related witnesses cannot be discredited on the ground of being related to the deceased. The law advocates that the testimony of a related witness cannot be discredited mechanically because relationship of the witness cannot be a criterion to decide upon the credibility of the testimony as laid down in *Raju alias Balachandran vs. State of Tamil Nadu* AIR 2013 SC 983. and reiterated in *A. Alagupandian vs. State of Tamil Nadu*. 2012(3) RCR (Criminal) 729 (SC).

In the case of **Jalpat Rai v. State of Haryana**²⁵, 2011 (14) SCC 208, it was held that, "All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

“... Interestedness of the witness does not require outright rejection of evidence, only necessities the deeper scrutiny.”

In **Dalip Singh vs State of Punjab**²⁶ 1954 SCR 145, it was observed that a related witness would ordinarily speak the truth but in case of an enmity, there may be a tendency to drag in an innocent person as an accused – each case has to be considered on its own facts.

In **Darya Singh vs State of Punjab**²⁷ 1964 3 SCR 397 – a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined carefully and all the infirmities taken into account. It was observed that where the witness shares the hostility of the victim against the assailant, it would be unlikely that he would not name the real assailant but would substitute the real assailant with the “enemy” of the victim.

IX. PRINCIPLES TO BE FOLLOWED WHILE EVALUATING EVIDENCE OF EYE WITNESSES

In 2010 III AD (Delhi) 34 *Gore Lal vs. State*, Division Bench of Delhi High Court observed that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of their testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of the testimony delivered. High Court relied upon *CrI. A.No.327/2007 Akbar & Anr. Vs State*²⁸, and decisions

24. (2011) 4 SCC 262

25. 2011 (14) SCC 208

26. 1954 SCR 145

27. 1964 3 SCR 397

28. *CrI. A.No.327/2007*

of Hon'ble Supreme Court reported as **Tahsildar Singh vs State of UP**²⁹, AIR 1959 SC 1012, **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**³⁰, AIR 1983 SC 753 & **Leela Ram (Dead) through Dulichand vs. State of Haryana**³¹, AIR 1999 SC 3717 and observed that 13 principles are to be followed while evaluating evidence of eye witnesses.

The enumerated principles are hereby listed as hereunder:

- (1) While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
- (2) If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.
- (3) When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence
- 4) Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.
- 5) Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.
- 6) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

29. AIR 1959 SC 1012

30. AIR 1983 SC 753

31. AIR 1999 SC 3717

- 7) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
- (8) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- (9) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (10) In regard to exact time of an incident, or the time duration of an occurrence usually people make their estimates by guess work on the spur of the moment at the time of interrogation and one cannot expect people to make very precise or reliable estimate in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
- (11) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to be confused, or mixed up when interrogated later on.
- (12) A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witnesses sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.
- (13) A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

In furtherance of these well enunciated principles, it will be apt to quote the observation of the Apex Court in **Zahira H Sheikh v. State of Gujrat**³² (2004 (4) SCC 158), as follows:

"Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primary of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt

32. (2004 (4) SCC 158)

collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies.”

In this context, **The Witness Protection Scheme, 2018**, requires a mention, which is the first attempt at the national level to grant protection to the witnesses. This scheme attempts to ensure that witnesses receive adequate protection and it aims to strengthen criminal and civil justice system in India.

X. CONCLUSION

It is an undeniable fact that it is rare to come across a witness whose evidence is devoid of all inconsistency, exaggeration or embellishments. However, the mere existence of any falsehood in the testimony of a witness does not require for it to be discarded in entirety. In fact, it is incumbent upon the court to find out the truth hidden in the testimony of the witness by careful separation of the grain from the chaff.

The maxim of “*falsus in uno, falsus in omnibus*” is clearly neither a mandatory rule of law nor a rule of practice. It is merely a rule of evidence and needs to be retained as such.

B. DOCTRINE OF ‘EXCLUSIONARY RULE OF EVIDENCE’

INTRODUCTION

Evidence constitutes the mainstay of the trial of a case. The quality, consistency, admissibility and relevance of evidence are some of the primary constituents upon which the outcome of the case remains dependent. Therefore, sustained efforts should be made by courts to maintain the sanctity of evidence, so as to ensure the impartiality of the final decision.

The Indian Evidence Act, 1872 devotes a lot of attention towards admissibility and relevancy of evidence. In other words, the Act postulates that admissibility of any evidence principally depends on the extent of its relevancy in a particular case. Conversely, this approach largely projects that the source of procurement of evidence may be relegated to the backseat if the evidence appears to be relevant. In simple terms, the Act is silent on the source of evidence. The general perception remains that the source of procurement of evidence should be legal, and that any shortcomings in collecting the same may incapacitate it. It is in this background that the present topic assumes significance.

Evidence is the material on which the first party intends to sustain his or her claim, and there are different approaches around the world with regard to the source of its procurement and admissibility. While any discussion about evidence collected legally can be dispensed with, it is the evidence collected illegally, or improperly, which requires deliberations.

I. POSITION WITH REGARD TO ADMISSIBILITY OF EVIDENCE PROCURED ILLEGALLY IN VARIOUS COUNTRIES

A. The United States:

In the United States, it is the doctrine of ‘**Fruits of Poisonous Tree**’, which was coined by Justice **Frankfurter** of the United States Supreme Court. It guides the admissibility of illegally obtained evidence, and while applying the exclusionary principle, it postulates that illegally obtained evidence is inadmissible. While the former doctrine lays down that evidence whose source suffers from primary illegality in the procedure are inadmissible as the evidence emanates from the poisonous tree i.e. the illegal procedure, the latter rule consequentially lays down that such evidence obtained illegally cannot be made admissible in a criminal trial³³. It means that if the tree is poisonous, then even the fruits will bear poison in them. Similarly, evidence procured through tainted means renders it unworthy. Both these doctrines were formulated to support the **Fourth Amendment Rights to the U.S.** Constitution which warrant the right of citizens against any unwarranted search and seizures in their persons, houses, or papers³⁴. In the case of **Boyd v. U.S.**, the US Supreme Court held that illegal search and seizure is an unreasonable interference to the right to privacy of an individual and compelling a person to produce private papers is violative of Fourth Amendment Rights³⁵. In this case, customs officers seized petitioner’s glass plates in suspicion that the documents related to these objects were falsified to evade customs duties. The petitioner was asked to produce the documents related to these disputed articles. The issue before the court was whether the production of person’s private papers to be used as evidence against him in the trial, constitute unreasonable search and seizure within the fourth amendment. The

33. Dushyant Kishan Kaul, Fruit of the Poisonous Tree: A Comparative Analysis, 4 Commonwealth Law Review-Journal 206 (June 4, 2018)

34. Constitution of the United States, Fourth Amendment, Constitution Annotated Analysis, and Interpretation of the U.S. Constitution.

35. Boyd and Ors. v. United States, 116 U.S. 616 (1886) (¶ 20).

evidence was excluded and court laid down a principle that all intrusion from the part of the government or its employee will constitute the breach of personal security, personal liberty and private property. Here it is imperative to make a mention also about the Fifth Amendment Rights, which include right against self-incrimination, and while making the exclusionary rule mandatory in all state prosecutions, the US Supreme Court went on to hold that exclusionary rule also acts as a safeguard against the Fifth Amendments Rights. **Still further**, the US Supreme Court stretched out the scope of the exclusionary rule in the case of **Katz v. U.S.** In this case, Katz's (a gambler) activities were monitored by FBI by recording his telephonic conversations through an electronic device attached to the telephone booth which was later used against him. The constitutional issue before the court was whether the fourth amendment will be applicable to the intangible areas like conversations overheard by others. It was ruled that eavesdropping by the FBI constituted a breach of the fourth amendment and exclusionary principle was applied, it will be considered as 'search and seizure' under the fourth amendment, the scope of seizure was extended to oral statements. It was held that eavesdropping and recording of private conversions of accused also amount to 'unreasonable search and seizure' and is violative of Fourth Amendment Rights³⁶.

There are certain counter measures to balance out the exclusionary principle rule in the United States, so as to ensure that it does not become an absolute rule. For this, certain exceptions have been embedded to its application. Thus, the application of this rule will be hindered if a search is carried out in good faith but subsequently, the warrant is found to be invalid for some reasons. Similarly, if the evidence is unearthed by any private individual instead of a prosecution officer, this rule would be ousted.

In a landmark judgment touching upon the extent of applicability of exclusionary rule to exclude the illegally obtained evidence from all purposes in a trial, the US Supreme Court held that previously excluded evidence, if it satisfies the test of 'trustworthiness', can be used to shake the credibility of the accused in a trial (**Harris v. New York**³⁷). Thus, in the United States, the exclusionary rule of evidence draws its mandate from the Fourth Amendment Rights and, guided by the exceptions, presents a prudent approach towards the law of evidence.

B. The United Kingdom:

The observations of the Judicial Committee of the Privy Council in the leading case of **Kuruma v. The Queen**³⁸, are of great interest, and are generally taken as the starting point of any inquiry on the subject that does not support to go too deeply into its history. The case itself did not arise in England, but was decided by the Privy Council, and the actual decision in the case was in favour of admission of evidence. The Privy Council in that case held that evidence about the unlawful possession of ammunition by the accused, which was discovered following an illegal

36. *Katz v. U.S.*, 389 U.S. 347 (1967).

37. *Harris v. New York*, 401 U.S. 222 (1971).

38. *Kuruma son of Kaniu v. The Queen (Eastern Africa)*, [1955] Crim LR 339

search of his person, was admissible. The Privy Council acted on the principle that, provided real evidence is relevant, it is legally admissible, howsoever improperly it had been procured. It also held that the person against whom such evidence is tendered may have a civil remedy against the person who obtained it; and the latter may be liable to disciplinary, or even criminal proceedings, but the law is that : "It matters not how you get it; if you steal it even then it would be admissible in evidence. However, it would be pertinent to mention here that in delivering the opinion of the Board, Lord Goddard remarked: "No doubt, in a criminal case the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused if, for instance, some piece of evidence had been obtained from a defendant by a trick, no doubt, the judge might properly rule it out."

Thus, in the United Kingdom, under the Queen's rule, the evidence has been made admissible even if it is illegally procured through unlawful procedures³⁹. The principle followed in the landmark case of **Kuruma v. The Queens** (*supra*), especially in light of the remarks of Lord Goddard, came to be later known as the '**Unfair Operation Rule.**' This rule now stands codified under Section 78 of the Police and Criminal Evidence Act, 1984 (commonly known as PACE), wherein a Court has the discretion to exclude evidence if it leads to unfairness to the accused⁴⁰. Here, evidence also includes improperly obtained evidence and confessions obtained in defiance of the Rule of the land.

C. Canada:

The approach taken in Canadian law can be said to be taking a middle path. As a general rule of evidence, the Canadian Courts follows discretionary rule which necessitates that Courts exercise discretion to govern the admissibility of illegally obtained evidence⁴¹. The Supreme Court of Canada in the case of **R. v. Collins**⁴², while elaborating further on this rule, held that the use of any evidence that violates the rights enshrined under the Charter is a violation of fair trial and is thereby rendered inadmissible. However, quite significantly it also observed that the misbehaviour of officer is not a ground to exclude the illegally obtained evidence. Furthermore, the Supreme Court has also decreed the "**Rule Of Absolute Exclusion**" wherein previously excluded evidence cannot be admitted to impeach the credit of the accused⁴³. This approach is diametrically opposite to the US Supreme Court ruling in the **Harris case** (*supra*), wherein the US Supreme Court had held that previously excluded evidence, if it satisfies the test of 'trustworthiness', can be used to shake the credibility of the accused in a trial.

39. R. v. Leatham, 8 Cox CC 498, 501 (1861) (U.K.)

40. Siddharth Shukla, Is illegally obtained evidence admissible under the Indian Laws? A comparative analysis of illegally obtained evidence, Ipleaders Blog (Sept. 27, 2018).

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42. R. v. Collins, (1987) 1 S.C.R. 265 (¶ 37) (Can).

43. R. v. Calder, (1996) 1 S.C.R. 660 (Can).

II. INDIAN LEGAL JURISPRUDENCE VISA VIS DOCTRINE OF EXCLUSIONARY RULE OF EVIDENCE:

A. The Indian Evidence Act, 1872

The Indian Evidence Act, which like many statutes is based on English law, has an entire chapter dedicated to the relevancy of facts, which specifies that the primary criterion for determining the admissibility of evidence in Indian courts is its relevance. Hence, as things stand today, source is not what takes priority⁴⁴.

Section 5 of evidence, lays down that - Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Section 3(e) of the Act defines “Relevant” in the context of facts as, one fact being relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Act. Chapter II of the Evidence Act deals with relevancy of the facts. The provisions of this chapter determine “relevancy” as the only test of admissibility of evidence. There is no provision that bars admissibility of evidence obtained illegally or improperly.

Further, though **section 26** of the Act provides that confession by accused while in custody of police shall not be proved against him, unless it is made in the immediate presence of a Magistrate, **section 27** lays down that when any fact is deposed to or discovered in consequence of information received from an accused person in the custody of a police officer, the part of such information which relates distinctly to the fact thereby discovered may be proved against the accused, whether it amounts to confession or not.

Still further, **section 167** of the Act provides that, “the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Therefore, there is nothing under the Indian Evidence Act which prevents the courts in India from accepting illegally or improperly obtained evidence.

Thus, the position in Indian law seems to flow from the legal jurisprudence of the United Kingdom. As stated above, the Indian Evidence Act, 1872, formulated during the British Rule contemplates that the admissibility of evidence depends on the extent of its relevancy in the case. It allows admissibility of illegally obtained evidence so long as the evidence is relevant to the facts-in-issue at the trial. In the Indian legal system, the gathering and the procuring of the evidence does not render the evidence so procured inadmissible, though it may affect its weight in some cases.

44. Satvik Varma : Column : Fruit of the Poisonous Tree.

B. The Case Laws

In the case of **Natwarlal Damodardas Soni**⁴⁵ and **R.M. Malkani**⁴⁶ it was held that any illegally obtained evidence is admissible in the Court of Law if it is relevant to the matter, but the value of such evidence is to be dealt with care and caution by the Courts. Further, in the landmark case of **Pooran Mal v. Director of Inspection of Income Tax**⁴⁷, the Supreme Court held that no Constitutional or Statutory construction prescribes to exclude the illegally obtained evidence, thereby laying that the only test of admissibility of evidence is the relevancy of the evidence. In the same breath, this case also decreed the 'Unfair Operation Rule' of England wherein the Courts have the discretion to exclude the illegally obtained evidence if it leads to unfair treatment to the accused. Still further, The Supreme Court in **Shri N. Sri Rama Reddy etc. v. Shri V. V. Giri**⁴⁸ and **S. Pratap Singh v. The State of Punjab**⁴⁹ accepted the conversation or the dialogue recorded on a tape recording machine as admissible evidence.

A Supreme Court decision of 1973 in **Yusufalli Esmail Nagree v. The State of Maharashtra**⁵⁰, is sometimes regarded as recognising a discretion in the courts in India to exclude evidence obtained illegally. But in fact the Supreme Court in that case held the evidence to be admissible and did not accept the contention that illegality in gathering the evidence affected its admissibility. The point related to the admission, in evidence, of a tape record of a conversation that took place in the telephone. The charge was one of bribery, the accused being the Coroner of Bombay who had demanded a bribe of Rs. 20,000 from a Bombay Doctor. The bribe was demanded as the Coroner's price for not declaring the doctor guilty of negligence. The conversation that took place was between the doctor and the accused. The conversation was recorded by the anti-corruption police, who had been called in by the doctor for the purpose. A tape recorder was attached to the telephone at the doctor's end and the conversation that took place between the doctor and the accused was recorded on the tape recorder attached to the telephone. Rejecting the argument that it was illegal so to tamper with a telephone communication, the Supreme Court held that even if there was any illegality, admission of the evidence in question did not thereby become impermissible. A feeble attempt was made to challenge the evidence on the score of article 21 of the Constitution, but that challenge also did not succeed.

On the heels of this decision, in 1974 the Supreme Court re-examined the issue of wrongfully obtained evidence. This case, before a Five Judge Constitution Bench, pertained to searches and seizures to check tax evasion under the Income Tax Act, with a prayer seeking to restrain the tax

45. *State of Maharashtra v. Natwarlal Damodardas Soni*, (1980) 4 SCC 669

46. *R.M. Malkani v. State of Maharashtra*, AIR 1973 SC 157.

47. *Pooran Mal, etc. v. Director of Inspection (Investigation) of Income Tax*, AIR 1974 SC 348

48. 1971 AIR 1162

49. 1964 AIR 72

50. 1968 AIR 147

department from using, as evidence, any information gathered from the seized account books. The Constitution Bench held that information seized as a result of such search could be used in evidence even if the process was illegal. The Bench observed that nothing in Article 19 of the Constitution forbade the use of evidence obtained as a result of an illegal search. The Constitution Bench also noted that no provision of the Act was challenged as violating the Constitution and the Act considered relevance as the only test of admissibility. In fact, the Constitution Bench authoritatively stated that it was not open to them to strain the language of our Constitution, because some Judges of the “*American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution.*” The Bench concluded by noting “neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.”

In **Magraj Patodia v. R. K. Birla & Ors**⁵¹ the Supreme Court dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of respondent No. 1. The correspondence was between respondent No. 1, i.e. the elected candidate and various other persons. The witness who produced the file said that respondent No. 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court. This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved.

C. The Indian Legal Position after recognition of Right to Privacy

Gradually, a perceptible shift in the Indian legal jurisprudence appeared on the horizon, precisely after **recognition of Right to Privacy** by the Supreme Court.

This shift in the position of law became visible when in the case of **State of Punjab v. Baldev Singh**⁵², the Supreme Court held that illegally obtained evidence is not admissible in the Court of Law if **it is obtained in violation of Section 50 of the NDPS Act**, as this provision confers procedural rights to the accused which are statutorily mandated and thus, are deemed to be followed. This standing of law to exclude the illegally obtained evidence is only confined to the provisions of the NDPS Act and does not apply to other situations.

in the landmark case of **Justice K.S. Puttaswamy and Anr. v. Union of India and Ors**⁵³, the 9 Judge Bench of the Supreme Court has recognized that the right to privacy forms an integral part of the right to life and personal liberty under Article 21 of the Constitution and citizens have the

51. 1971 AIR 1295

52. State of Punjab v. Baldev Singh, (1999) 6 SCC 172.

53. Justice K.S. Puttaswamy and Anr. v. Union of India and Ors., (2017) 10 SCC 1, ¶ 489.

right to give consent in relation to the physical body, personal data, and property. The recognition of the right to privacy under Article 21 defies the reasoning given in the **Pooran Mal case** (*supra*) that there is no Constitutional construction which prescribes the exclusion of illegally obtained evidence. Since citizens have the right to protect their personal data from unreasonable interference by the State through the means of right to privacy it can be presumed that there exists a reasonable expectation of privacy against ‘unreasonable search and seizure’ and any evidence obtained through illegal search should not be made admissible as it would violate the Fundamental Right to privacy of the citizens⁵⁴. However, to admit such illegal evidence procured in violation of the right to privacy of any individual there must be legislation in place authorizing the admissibility of such evidence, and such law must have rational nexus with the legitimate aim and must be proportional.

However, in the recent **Rafale Judgment**, the Supreme Court reiterated the position in **Pooran Mal case** (*supra*) and held the test of admissibility of any evidence lies in its ‘relevancy’ unless it is expressly or impliedly barred by the Constitutional provision or Statutory mandate. At the hearing of the review petitions seeking inquiry into the Rafale deal, arguments based on the doctrine of “*Fruit of the Poisonous Tree*” were submitted. This doctrine has no parallel in India and, as indicated during the hearing, there is nothing which prevents Indian courts from considering even stolen evidence, if it helps establish guilt or prove one’s innocence. The Indian courts’ powers to admit such evidence is bolstered when the probative value of the evidence indicates its relevance. Even otherwise, the Indian Constitution empowers the Supreme Court to make any order for the discovery or production of any document before it.

The Supreme Court has also observed that evidence illegally obtained is not liable to be shut out, and that every detail should be placed before it to examine the guilt of an accused and more importantly to reach a just conclusion. Notably, it is accepted that no constitutional limitation existed precluding it from reviewing illegally obtained evidence as, in 1974, there was no recognition of a fundamental right to privacy. The law has now evolved and progressed to recognize privacy as a fundamental right as pronounced by another Constitution Bench in 2018. English Courts themselves are beginning to strike a balance between individuals’ rights like prohibiting phone tapping or hacking of emails, and weigh its probative value against the prejudicial effect of illegally obtained material⁵⁵.

It would serve the purpose right to refer to the “**Four Principles**” as enumerated by the report of the Law Commission of India authored by Justice K.K. Mathew on the subject “**How far should there be a discretion with the court in a criminal case to exclude evidence that has been obtained illegally or improperly?**” It lays down broad guidelines within which illegally obtained pieces of evidence should not be accepted. The four principles are:

- **Reliability Principle**

54. Paras Marya, A Relook at the Admissibility of Illegally or Improperly obtained evidence, 8(2) NLIU Law Review 225.

55. Satvik Varma: Column: Fruit of the Poisonous Tree

- ***Disciplinary Principle***
- ***Protective Principle and***
- ***Judicial Integrity Principle***

According to Reliability Principle, the evidence is admitted based on its reliability, but if evidence has been obtained through torture, violence or under pressure, then it might not be reliable.

Disciplinary Principle states that courts should discourage the improper manners used for obtaining evidence. This will deter the prosecution or defendant from resorting to such manners for getting pieces of evidence.

Protective Principle follows the idea that exclusion of illegally obtained evidence is one of the remedies to the person against whom the evidence was obtained with the breach of individual's right.

Judicial Integrity Principle is based on the idea that to maintain respect for the administration of justice, the court should be careful while admitting illegally obtained evidence as by allowing such shreds of evidence, courts are promoting the improper methods of procuring evidence.

The Commission recommended inclusion of a new chapter containing new section as 166A in the Indian Evidence Act, 1872, on the following lines:

Chapter 10A - Evidence Obtained Illegally Or Improperly 166A

1. In a criminal proceeding, where it is shown that anything in evidence was obtained by illegal or improper means, the court, after considering the nature of the illegality or impropriety and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence, if the court is of the opinion that because of the nature of the illegal or improper means by which it was obtained its admission would tend to bring the administration of justice into disrepute.

2. In determining whether evidence should be excluded under this section, the court shall consider all the circumstances surrounding the proceeding and the manner in which the evidence was obtained, including:

- a. the extent to which human dignity and social values were violated in obtaining the evidence;
- b. the seriousness of the case;
- c. the importance of the evidence;
- d. the question whether any harm to an accused or others was incited wilfully or not, and
- e. the question whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.⁵⁶

56. Dearth of discretion to refuse evidence obtained illegally in Indian Courts by Chitrangada07

The above suggestions however, have not seen the light of the day.

The entire gamut of judicial pronouncements indicates that India is yet to settle its position with regard to the doctrine of exclusionary rule of evidence and admissibility of illegally obtained evidence. This dichotomy further enhances the discretion of Courts to settle the position of law on a case-to-case basis. This discretion is further highlighted due to the absence of any legislatively enacted law to govern this matter. Nevertheless, by closely following the judicial pronouncements on the subject and carefully analysing them, certain broad guidelines with regard to the rule of admissibility of illegally obtained evidence can certainly be culled out. It can be said that all relevant evidence is admissible, but subject to any Constitutional or Statutory prohibition. Further, it seems plausible to observe that the Courts have wide discretionary powers to exclude any evidence obtained in defiance of any procedural statutory right, particularly if the evidence leads to unfair treatment to the accused. Similarly, it would be prudent to ensure that the conviction of any accused is not upheld which is based on evidence obtained in violation of the procedural statutory right of the accused.

CONCLUSION:

In a nutshell it can be epitomized that the Indian Legal jurisprudence has largely been under the shadow of the British legal jurisprudence. The Indian Courts have been accepting evidence obtained illegally or improperly, and primarily the test of relevancy is only kept in perspective, subject to any specific Constitutional or statutory restrictions. Gradually, the courts are becoming increasingly sensitive towards the concept of the right to privacy. This right to privacy has been exalted as a fundamental right of the citizens. As such, there is every reason for all stakeholders, i.e. not only the Judiciary but also the Legislature to revisit this ambivalence in the position of law, and to establish uniformity in approach.

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50. *R.M. Malkani v. State of Maharashtra*, AIR 1973 SC 157.
51. *Pooran Mal, etc. v. Director of Inspection (Investigation) of Income Tax*, AIR 1974 SC 348
52. 1971 AIR 1162
53. 1964 AIR 72
54. 1968 AIR 147
55. 1971 AIR 1295
56. *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172.
57. *Justice K.S. Puttaswamy and Anr. v. Union of India and Ors.*, (2017) 10 SCC 1, ¶ 489.
58. Paras Marya, A Relook at the Admissibility of Illegally or Improperly obtained evidence, 8(2) NLIU Law Review 225.
59. Satvik Varma: Column: Fruit of the Poisonous Tree
60. Dearth of discretion to refuse evidence obtained illegally in Indian Courts by Chitrangada07



Topic No. – 25

Conceptions of legal evidence: - (a) as an object of sensory evidence, (b) as a fact, (c) as an inferential premise and (d) as that which counts evidence in law.

By
Sri Arun Kr. Jha,
Registrar (Appointment),
Patna High Court.

Sri Arun Kr. Jha,**Registrar (Appointment), Patna High Court.**

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CONCEPTIONS OF LEGAL EVIDENCE: - (i) As an Object of Sensory evidence, (ii) as a fact, (iii) as an inferential premise, and (iv) as that which counts evidence in Law.

A distinctive feature of contemporary legal adjudication is its fact-orientation. The adjudication of every dispute under a legal rule is based on what are believed to be, or are taken as, the facts of the case. Shapiro reports that the concept the fact originated in law and Milsom attributes the development of law as a system of normative rules to the court's increasing sensitivity to the facts of disputes.¹ And, the facts are to be supplied to the courts / judicial bodies through the testimony of a witness which is commonly known as evidence. So, the whole edifice of the legal system is built on the bedrock of evidence. With the advent of proper social order and civilization, we had a justice system. All known civilizations, starting from Egyptian and Indian civilization to the Romans and the Persians, each had their distinct system of resolving disputes but the role of witnesses remained central to all of them, albeit, in differing forms. Times since immemorial, the judicial systems have been using evidence to decide disputed questions not only between individuals but also between the other actors as well. However, the mode and the manner of using the evidence have varied from system to system, and also from time to time.

Human Beings, as of nature, keep drawing inferences every moment from the evidence that they receive. Analysis of evidence goes on in all spheres of life, continuously. Moreover, all of us nearly all of the time (except in law and evidence-based medicines) live in a world of free proof, that is, free from rules of admissibility or weight or quantum or priority. Only in law and some rigid bureaucratic regimes are there formal binding rules of evidence.

Evidence, in law, is said to be any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it.² Evidence is how the courts inform themselves of the existence of facts.³

History of Development of Evidence Laws:

During its early stages, the evidence as used in the judicial system rested more on supernatural events and less on rational conceptions. The system of evidence has evolved from trial by ordeal to trial by battle to trial on oath. Slowly and steadily, the judicial system became more complex and an elaborate set of rules regarding acceptance or rejection of material was developed. The rules of evidence have developed and evolved in a different legal system based on their unique experiences and their requirements. The evidence laws were codified in some countries and at some places, the judicial system continued to run on general principles evolved over a period of time.

Codification of Evidence Laws:

The codification of the Evidence Laws constitutes an important phase in the evolution of the

1. A philosophy of evidence law, Ho Hock Lai, OUP, 2008 Edn.

2. <https://www.britannica.com/topic/evidence-law>

3. Justice U L Bhatt, Relevancy, Proof and Evaluation of Evidence.. (Universal/Lexis Nexis, 2013 ed, Reprint 2019.

evidence act. In the common law legal world, India was amongst the first countries to have a codified set of Evidence Act. Even the country of the origin of the common law took another century to have a full and detailed set of Evidence Laws. In fact, in the United Kingdom, there was stiff opposition to the codification of the laws. Even today, the laws governing evidence matter in the UK have failed to cover the entire body of the law, and have confined it to some parts. The Civil Evidence Act of 1938 dealt only with the hearsay rule as applicable to statements made in documents, while the Criminal Evidence Act of 1965 dealt with the admissibility of hearsay evidence in criminal trials. The CJA 2003, though more comprehensive, too, confines itself in demarcating the admissibility of only two classes of evidence—hearsay evidence and evidence as to bad character.⁴ Even in the USA, the codification of the evidence act took place very late, in 1975. The Federal Rules of Evidence were enacted in 1975 and most of the states of the USA have largely modeled their evidence laws on the Federal Rules.

Apart from the codification, we find that the evidence laws have been shaped by many factors both, external to the judicial system and some internal. Among the external factors, the growth of technology, the emergence of new concepts such as IT and Cyber technology, have shaped how we treat the term evidence. Internally, or within the system, we find that we have shifted from the jury trial to judge trial, and now there is the proliferation of tribunals and other quasi-judicial bodies that have a relaxed application of rules of evidence. But despite the changes and the modifications brought by the technology, tribunals, and the interpretation by the courts, one fact remains and that is, simplicity still eludes the rules of evidence.

The Law of Evidence in India is almost entirely based on English Law of Evidence which, in principle, is loosely based on the following rules:

1. Evidence must be confined to the matters/fact in issue.
2. Hearsay evidence is not to be admitted.
3. In all cases, the best evidence must be given.

But what is the evidence?

While writing ‘An Introduction to the Indian Evidence Act’, Stephen noted that the term evidence in the aforementioned expression is undefined and ambiguous. This term has come to mean different things in different circumstances. So what is meant by evidence in legal parlance?

Section 3 of the Indian Evidence Act, 1872 (hereinafter ‘the Act’) provides, inter alia, that evidence means and includes –

1. All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry:

Such statements are called oral evidence:

4. Statute Law Review, 2016, Vol. 00, No. 00, 0–6 doi:10.1093/slr/hmw039.

2. All documents including electronic records produced for the inspection of the court, Such documents are called documentary evidence.

In the words of Stephen, sometimes evidence means the words uttered and things exhibited by witnesses before a court of law.

Sometimes it means the facts proved to exist by those words or things and regarded as the groundwork of inferences as to other facts not so proved.

Again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.

Evidence in its first sense denotes presenting or producing evidence in court for proving certain facts. Haack⁵ termed it as ‘objects of sensory evidence’. This evidence is divided into three categories:

1. **Oral Evidence** (as in Section 59 and 60 of the ‘the Act’)
2. **Documentary Evidence** (as in Section 61 to 90 A of the ‘the Act’).
3. **Real Evidence** (Proviso to Section 60 of the ‘the Act’)

The first two need no elaboration and are self-explanatory. But if we closely look at the last proviso to section 60 of the Evidence Act then we come across a third variety, i.e. Real evidence. Oral and Documentary evidence having been already defined let us take a look at the definition of Real Evidence. Bentham in his seminal treatise⁶ defines real evidence as to all evidence of which any object belonging to the class of things is the source; persons also included, in respect of such properties as belonging to them in common with things. As a common example, a murder weapon used in committing the offence of murder and produce before the Court. To this is also added a fourth category of evidence, “demonstrative evidence”, which “includes maps, charts, diagrams, models” (Schum 1994: 93). These devices serve as aids in presenting and understanding evidence.⁷

Now, the evidence in the second sense refers to an evidential fact which is established by evidence in the first sense. To borrow an example that the accused was at or about the scene of the crime at the relevant time is evidence in the second sense of his possible involvement in the crime. But the presence of the accused, on the other hand, must be proved by adducing evidence in the court of law, i.e. as in the first sense of objects of sensory evidence. However, we must keep in mind that successfully proving the presence of the accused does not depend solely on prosecution adducing evidence of a witness justifying that he saw the accused in the vicinity of the crime at the relevant time but will depend on the assessment of a judge about the veracity of the witness and the reliability of his testimony.

5. 2004, Epistemology Legalised, or Truth, Justice and the American Way, American Journal of Jurisprudence, 49 43-61.

6. The Works of Jeremy Bentham, vol. 7 (Rationale of Judicial Evidence Part 2)

7. <https://plato.stanford.edu/entries/evidence-legal/notes.html>,

Evidence in its third sense, is a fact that serves as a premise for drawing an inference, whether directly or indirectly, to a matter that is material to the case which means *factum probans* as a tool for making inference for *factum probandum*. To borrow another example, the fact that the accused's fingerprints were found in a room where something was stolen is evidence in the present sense because one can infer from this that he was in the room and his presence in the room is evidence of his possible involvement in the theft. So the fact must be of such nature that it may help in drawing reasonable inference towards the commission of an act that is material to the case. What is not relevant for this purpose is simply not evidence.

But it is pertinent to note here that without evidence in the second or third sense, there could still be evidence in the first sense. Take for example in the previous illustration it emerges in the cross-examination of the expert that his testimony of having found a fingerprint match was a lie. In such a situation evidence as testimony remains in the court's record whether it is believed or not. The defence could say that there is no evidence that the accused was in the room. The factual premise from which an inference is sought to be drawn towards the accused's guilt is not established.

Lastly, we come to the conditions which make the evidence admissible in a court of law in a trial. This introduces us to another facet of the legal concept of evidence. Under these conditions, legal evidence is that which counts as evidence in law. Something which may ordinarily be treated as evidence but still the courts chose to reject the same. For example hearsay. Although in an ordinary walk of life it is quite common-place to rely on hearsay for forming our factual beliefs. But the court will not rely on hearsay as a premise for an inference towards the truth of what is asserted.

Thus, we can say that legal evidence can be viewed as an object of sensory evidence, as a fact, as an inferential premise, and as that which counts as evidence in law.⁸ We can safely presume that the meaning of the term evidence can be inferred from the context and in legal discourse the use of this term will always be somewhat obscure.)

What are Legal Evidence and its relevance:

In its simplest conception, rules of evidence are a series of exceptions to a single principle of freedom of proof.⁹ After the definition of various kinds of evidence, we come to the term "Legal evidence". Legal evidence, in its simplest form, can be defined as that which is accepted as evidence by a court of law. While substantiating on what constitutes legal evidence, the Supreme Court in **Khushi Ram v. Hashim, AIR 1959 SC 542** observed as follows:

"4. . . .The distinction must always be drawn between the absence of legal evidence and the absence of reliable evidence. If it could be said with justification that

8. Ho, Hock Lai, "The Legal Concept of Evidence", The Stanford Encyclopedia of Philosophy (Winter 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2015/entries/evidence-legal/>>.

9. William Twining, Rethinking Evidence, 2nd Edition, Cambridge University Press, UK, 2006.

there was no legal evidence at all in support of the prosecution case, it may lead to the inference that the commitment was bad in that it was not based on any legal evidence at all. But on the other hand, where circumstances are relied upon to show that the evidence may perhaps not be believed, they do not lead to the inference that there is no legal evidence on the record”

The Supreme Court has time and again reiterated the importance of legal evidence and has held that in the absence of legal evidence, the court cannot reach a particular conclusion.

In **Ghuran Yadav v. the State of Bihar, (1971) 1 SCC 311** the Supreme Court observed as follows:

5. On going through the record and examining the evidence which we have just discussed we are clear that there is no legal evidence on the record on which we can sustain the conclusions of the courts below that it was the appellant's house that was searched.

6. Normally this Court, of course, does not examine for appraisal under Article 136 of the Constitution the evidence on questions of fact decided by the courts below. But when there are reasons to think that the conclusions may be based on no evidence, then this Court is not only entitled but it has an obligation in the larger interests of justice to examine the evidence to see if there is legal evidence on which those conclusions can be sustained. In this case, we find that there is no legal evidence on which the courts below could base their conclusions. The appeal accordingly succeeds and allowing the same we acquit the appellant.”

(Emphasis supplied)

Further, the Supreme Court in **Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171** has stated that:

“However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond a reasonable doubt based on legal evidence and material on the record, he cannot be convicted for an offence.”

In **Principal Secy. Govt. of A.P. v. M. Adinarayana, (2004) 12 SCC 579** the Supreme Court held that:

“So, it is well settled that if the findings recorded by the tribunals or of the disciplinary authorities are found to be perverse, which are not based on the legal evidence, then the Administrative Tribunal or the Court is empowered to treat such flaw as a legal flaw and quash the impugned action”

These observations make it clear that unless there is legal evidence, the court cannot rely on other material to conclude. A conspectus of case-laws from other branches or fields of law also

substantiates that in the absence of legal evidence, the courts cannot conclude¹⁰. Now a question that arises is what evidence is in a general sense of the term but not legal evidence. Hearsay evidence is the best example of being treated as evidence by the common man but it has no relevance in the court of law as it does not constitute, what is known as legal evidence. Evidence, as talked by the lay man, differs from the concept of law as spoken of by the legal fraternity or the legal practitioner.

(i) As a Fact:

Courts and Lawyers spend a vast majority of their time handling facts. It would not be an exaggeration to say that the judicial system, more than anything else, deals just with facts. Either some facts are to be proved or some disproved. But does the legal system recognize all facts as facts for its purposes? The answer lies in the various definitions and the analysis of the word, fact. The 'the Act' recognizes Facts, and defines it as follows: "*Fact*". —"*Fact*" means and includes—(1) anything, state of things, or relation of things, capable of being perceived by the senses; (2) any mental condition of which any person is conscious. The definition tells us that facts as per the evidence act can be covered under two heads: **External Facts** and **Internal Facts**. External Facts are those that can be perceived by any of our five senses while internal facts pertain to the mental condition of which we are conscious. The inference is not a fact. In the legal field, not all facts need to be relevant.

Evidence, as has already been discussed is a bundle of facts, which concerns a particular case. But does all evidence count as evidence in the court of law. The answer to the question is no. The evidence has to fulfill a host of criteria and standards to be counted as evidence in the court of law. So what are the criteria for a fact to be used as evidence in a particular case or proceeding?

Generally, to be admissible in court, the evidence must be relevant (i.e., material and having probative value) and not outweighed by countervailing considerations (e.g., the evidence is unfairly prejudicial, confusing, a waste of time, privileged, or based on hearsay)¹¹. James Bradley Thayer, an American Jurist, maintained that the common law of evidence was based on two principles: (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in unless a clear ground of policy of law excludes it.¹² His legal principle forms the basis of the common law legal system. Dean Henry Wigmore, a student of Thayer, on the other hand, described it as follows: the study of evidence in law consists of two parts: the law of evidence, which he misleadingly called 'the Trial Rules', and 'the Principles of Judicial Proof as found in Logic, Psychology, and General Experience'.¹³

10. Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali, (2007) 11 SCC 668

11. https://www.law.cornell.edu/wex/admissible_evidence

12. file:///home/ubuntu/Downloads/Benthams_Theory_of_Evidence_Setting_a_Context.pdf

13. Ibid.

Facts as in Indian Legal System:

Speaking specifically of our legal system, Only two types of facts, facts in issue and relevant facts are the ones with which we need to be concerned with.

Facts in issue is defined in section 3 of the evidence act as: "Facts in issue".-The expression "*facts in issue*" means and includes--any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any suit or proceeding, necessarily follows. It is the facts in issue that form the core of a legal issue that is required to be proved or disproved to make out a case in the court.

Relevant facts as defined under section 3 of 'the Act' are as follows: "*Relevant*".- *One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.* To put in simple words, a fact is relevant to the facts in issue when it is related to the facts in issue in any of the ways as laid down under section 5 to 55 of the 'the Act'.

If a fact does not constitute a fact in issue or relevant fact then that fact need not bother the court or tribunal. Proof or disproof of such fact will not have any impact on the outcome of the case. So during the trial, a court must be concerned with:

- (38) Facts in issue of the case.
- (39) Relevancy of the facts
- (40) Admissibility of the evidence led,
- (41) And on whom the burden of proof lies. (Justice U L Bhatt, 2013 ed. supra)

"Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence that is manifestly and inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question". Archana Guha vs. Ranjit :1990 CriLJ 2012.

Dealing with the jury trial (but it can be adopted for our purpose without much change) William Twining¹⁴ says that the trial follows a standard pattern, which is as follows:

- (i) What are the facts to be proved? (Facts in issue, or Facta probanda) this is the issue of materiality.
- (ii) Of any facts offered as evidence or potential evidence: Does this fact tend to support

14. Ibid.

or tend to negate one or more fact-in-issue. This is issue of relevance which is governed by logic.

- (iii) Of any facts offered as evidence or potential evidence: Is there a rule or principle that requires that the relevant piece of evidence be excluded, as it is inadmissible evidence or it is against the policy of the law to admit the evidence.
- (iv) What weight should be given to this item of evidence (or the evidence as a whole) in the circumstances of the case? This is the probative value of the evidence.

(ii) As an inferential premise,

Evidence is required in the court of law not for the sake of it but for the sake of making certain inferences and drawing conclusions. The term inference as defined in Black's Law Dictionary is: *inference is a conclusion reached by considering other facts and deducing a logical consequence to them.*

The general principle governing inference has been best explained by the learned author, in the form of the question: Are the known facts inconsistent with any other than the conclusion suggested?

Inferences are— (i) inference from an assertion, oral or documentary, of the truth of the matter asserted. Direct assertion.

(ii) inference from facts, which upon the strength of such assertion, are believed to exist, of facts of which the existence has so far not been asserted. Circumstantial assertion.¹⁵

The presumption is another form of inference. The presumption is defined as – *a legal inference or assumption that a fact exists, based on the known or proven existence of some other facts or group of facts.*¹⁶

Presumption allows the court to draw inference from a particular fact. And then we have two types of presumptions, presumptions of fact and presumption of law. The presumption of fact is the logical inference that the court draws from the set of facts presented before it. This presumption is independent of the legal consequence and is discretionary.

On the other hand, legal presumptions are based on law and are annexed to particular facts. Presumptions of law are obligatory and are mostly irrefutable presumptions.

(iii) As that which counts evidence in Law.

Evidence, as has already been discussed is a bundle of facts, which concerns a particular case. But does all evidence count as evidence in the court of law? The answer to the question is no. The evidence has to fulfill a host of criteria and standards to be counted as evidence in the court of law. What are the criteria?

15. Justice U L Bhatt, Relevancy, Proof and Evaluation of Evidence. (Universal/Lexis Nexis, 2013 ed, Reprint 2019.

16. Ibid.

Lee Loevinger, in *Facts, Evidence and Legal Proof*¹⁷ summarized the basic rules of evidence as follows:

- A) Evidence not relevant to the legal issues before the court cannot be received.
- (B) Hearsay evidence cannot be received, except for numerous special cases in which such evidence is received. (Hearsay is essentially assertions, whether written or oral, made outside the courtroom.)
- (C) Testimony in the form of opinions or conclusions cannot be received, except by experts.
- (D) Secondary evidence as to the content or intent of writings cannot be received.
- (E) Privileged communications cannot be received. These include involuntary responses from one accused of a crime; communications between spouses; communications to a lawyer, doctor, or priest, and other classes of communications established by statutes in various states.
- (F) Evidence must be offered in accordance with specified formal and procedural rules. Thus leading, argumentative and hypothetical questions are generally forbidden; interrogation at each stage of examination of a witness must be within the “scope” of the preceding stage, and so forth.)

Thus the evidence must have the qualities of being (i) relevant, (ii) admissible, and (iii) material, before getting counted as evidence in law.

Relevant:

Evidence laws lay down that the only evidence which is relevant to the case be admitted and the rest of the evidence be excluded. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Problems of relevancy call for an answer to the question of whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence¹⁸. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.¹⁹

Under the Indian Laws of Evidence, Relevant facts are defined in section 3 while Chapter II of ‘the Act’ - deals with “of the Relevancy of Facts”. To reiterate Section 3 of ‘the Act’ defines Relevant as *One fact is said to be relevant to another when the one is connected with the*

17. Lee Loevinger, *Facts, Evidence, and Legal Proof*, 9 W. Res L. Rev. 154(1958)

18. https://www.law.cornell.edu/rules/fre/rule_401

19. https://www.law.cornell.edu/rules/fre/rule_401 James, *Relevancy, Probability and the Law*, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in *Selected Writings on Evidence and Trial* 610, 615, n. 15 (Fryer ed. 1957)

other in any of the ways referred to in the provisions of this Act relating to Relevancy of facts.

A perusal of the definition of the word Relevant, as per ‘the Act’, would show that a fact can be relevant, only if it fulfills the conditions as stipulated in the provisions of the Act and no other. A fact in itself is not relevant; it is relevant only in relation to other facts. The conditions for a fact to be relevant are as has been laid down from section 5 to 55 of ‘the Act’.

Similarly, in the United States, as per Rule 401 of the Federal Rules of Evidence, Evidence is relevant if: (a) *it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.*

It is often said that the law of evidence, everywhere, is a means of excluding evidence. The judicial system requires the pleadings, the cases to be defined in terms of substantive law. And most of the evidence excluded from the litigation is based on irrelevance. As Loevinger noted that the true objection to most evidence that is excluded on the grounds of “irrelevance” is not that it is logically irrelevant, or unrelated to the subject matter, but that it is of a kind very likely to be influential with the fact-finder but which should not be considered because of some legal principle of policy. He further observed that sometimes an argument as to the “relevance” of evidence is a convenient method of securing an early determination as to the applicable principle of substantive law in a trial.²⁰

Importance of Relevant Evidence in the Indian Judicial System: No courts can hold different procedures than laid down by ‘the Act’, only relevant and admissible evidence can be proved and inadmissible or irrelevant evidence cannot be proved²¹.

The Supreme Court of India lay down that it shall not appreciate below Court's conclusion if it is based on irrelevant evidence.²²

The Supreme Court while summarizing the effects of irrelevant evidence, held that where findings of subordinate courts are shown to be "perverse or based on no evidence or irrelevant evidence," there the Court will interfere with the findings of the court²³. This means, inter alia. that no court can rely on irrelevant evidence to conclude in a case, howsoever appealing it may be.

All the facts that are relevant need not be also admissible. On the other hand, all that is admissible also need not be relevant. Two facts must have a correlation in a manner that the connection of one fact with the other, either taken by it or in connection with the other facts, proves or makes the existence of the other fact probable?

As has been noted above, the purpose of evidence laws is to exclude that evidence, which

20. Lee Loevinger, Facts, Evidence, and Legal Proof, 9 W. Res L. Rev. 154(1958)

21. State of Gujarat vs. Ashulal Nanji Bisnol (GUJHC) : MANU/GJ/1037/2001.

22. Mohini Suraj Bhan vs. Vinod Kumar Mital: MANU/SC/0593/1986, (1986) 1 SCC 687.

23. (2009) 11 SCC 141;Mahesh Dattatray Thirthkar vs. State of Maharashtra.

does not help or corroborate the existence of the fact in issue. The various provisions from sections 5 to 55 of 'the Act' list such provisions. Preparation, motive, subsequent conduct, opinion of a third person (expert), evidence as to character (in certain cases), etc. are included in the category of relevant facts.

The rule against hearsay evidence is a hallmark of the common law. But using logical productiveness, the legislature has accepted the hearsay evidence, if it were like *res gestae*. So even hearsay can be accepted as relevant if it forms part of the same transaction as fact-in-issue. Section 6 of the 'the Act' permits the rule of *res gestae*. A statement, which may not be relevant under section 6 may still be relevant under section 35, or admissible under section 155 or 157 of 'the Act'.²⁴

Similarly, the opinion of a person is not treated to be relevant but an exception has been carved out in the evidence act. Section 45 of 'the Act' makes the opinion of an expert relevant. Also, section 50 of 'the Act' makes the opinion on the relationship relevant.

The general rules of evidence lay down that evidence as to character cannot be led but then the same has been made relevant under certain circumstances mentioned from section 52 to 55 of 'the Act'.

Some Common Relevancy Issues²⁵:

- (i) Remoteness in Time or Place
- (ii) Prior similar events
- (iii) Circumstantial evidence
- (iv) Tangential Issues
- (v) Conditional Relevance
- (vi) Motive
- (vii) Mental condition and *mens rea*.
- (viii) Backgrounds and Relationships among Parties
- (ix) Evidence that someone else committed the crime

As we can see that the question of relevance is more a question of logic than of law. A fact may be held to be relevant by a court of law, but it may not create a precedent as the relevance of any fact depends on the other facts as also the peculiar legal question that arose in the matter.

Admissibility

The second criterion for a fact to be counted as evidence in law is that the evidence brought

24. Justice U L Bhatt, *Relevancy, Proof and Evaluation of Evidence*. (Universal/Lexis Nexis, 2013 ed, Reprint 2019).

25. <https://law.indiana.edu/instruction/tanford/b723/04relev/T04.pdf>

before the court must be admissible. The mere fact that the evidence is relevant doesn't make it evidence unless it's relevant. The evidence law excludes certain evidence that may be relevant but is legally barred. An example of one such rule is regarding the rule against hearsay evidence. Subject to an exception, i.e. section 6 of the 'the Act', hearsay evidence is not accepted. The rule of evidence also excludes the evidence of bad character, subject to the condition as laid down in section 54 of 'the Act'.

Before we proceed ahead, we need to understand that the terms, relevance, and admissibility though may appear to be similar yet have different connotations. The distinction is fine and subtle. Hock Lai Ho, while presenting the distinction between the terms admissibility and relevance, has stated as follows: If evidence is rejected on the ground of irrelevance, it is, as Thayer (1898: 515) puts it, "the rule of reason that rejects it"; *if the evidence is rejected under admissibility or exclusionary rule, the rejection is by force of law. The concepts of admissibility and materiality should also be kept apart. This is because admissibility or exclusionary rules serve purposes and rationales that are distinct from the law defining the crime or civil claim that is before the court and it is this law that determines the materiality of facts in the dispute.*²⁶

Now, how is the question of admissibility of evidence to be decided and what is the scope of the terms admissibility? In **State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari, (2013) 12 SCC 17**, the Supreme Court observed as follows:

"10. When a question pertaining to the admissibility of evidence before an Indian court arises, it has to be determined with reference to the provisions of the Evidence Act. Alternatively, the question may be determined under a special enactment, which may either make such evidence admissible or render it inadmissible.....

11. It is relevant in the first instance to describe the expanse/sphere of admissible evidence. The same has been postulated in Section 5 of the Evidence Act. Under Section 5 aforementioned, evidence may be given "of every fact in issue" and of such other facts which are expressly "declared to be relevant", and of no other facts."

So for example, a confession simpliciter will be dealt with as per the provision of sections 24 to 27 of the 'the Act', but a confession under TADA or POTA will be dealt with as it has been mentioned in those laws.

When we look at other practical aspects of the admissibility of evidence, we have some vital questions: When should the court take up the question of admissibility of evidence, during the time of tendering of the evidence or during the analysis of the evidence or at the end of the trial? We are also confronted with the issue of inadmissibility of two types: when the evidence itself is inadmissible, and the other when the mode of proof is irregular.

26. Ho, Hock Lai, "The Legal Concept of Evidence", The Stanford Encyclopedia of Philosophy (Winter 2015 Edition), <https://plato.stanford.edu/archives/win2015/entries/evidence>

Often, the court is vexed with the question of determining the admissibility of a particular piece of evidence, mostly documentary, during the trial. Since the admissibility involves question of law, so it had the tendency of delaying the trial. Taking up the issue of determining the admissibility, the Supreme Court in a leading judgment **Bipin Shantilal vs State of Gujarat**²⁷ held that if there was a dispute pertaining to the admissibility, during the recording of evidence, then the particular piece of evidence should be admitted tentatively, and then at the argument stage, the admissibility of the document or evidence can finally be decided. Similarly, in the case of a dispute regarding oral evidence, the Supreme Court held that the court can record the objected part of the evidence with a note of it and decide upon the admissibility at the final stage.

There is also some confusion regarding the admissibility and exhibition of the document. It must be kept in mind that just because a document has been exhibited, objection to its admissibility is not excluded; and it can be raised even at the stage of Appeal/Revision. There is no dispute over this proposition of law as was laid down in **The Roman Catholic Mission v. The State (1966) 3 SCR 283**.²⁸

Also, it has been argued in the article²⁹ as discussed above that: *Order 13 Rule 3 of the CPC enables the court to reject any irrelevant or inadmissible document at any stage of the suit recording the grounds for the rejection. The phrase ‘at any stage of the suit’ is a clear indication that the court need not reject inadmissible documents at the threshold. Bipin's case is, thus, in keeping with this rule. Section 136 of the ‘Act’, empowers the judge to question the relevancy of evidence. U/s 165 the Judge may ask any question at any time about any fact relevant or irrelevant, which is meant to discover or to obtain proper proof of relevant facts. These provisions don't prescribe that objections to admissibility should be decided immediately.*

Materiality

Now that we have analyzed the two conditions of accepting a piece of evidence to be legal evidence, we come to the third and the last part, i.e. its receivability. To make a particular fact receivable, it should be relevant, and the evidence should be admissible. But the mere facts that it is relevant and admissible aren't sufficient. It must be a “material” fact. The materiality of facts in a particular case is determined by the law applicable to that case. In a criminal prosecution, it depends on the law which defines the offence with which the accused is charged, and at a civil trial, the law which sets out the elements of the legal claim that is being brought against the defendant. A disputed material fact is called a “fact in issue”³⁰.

27. *Bipin Shantilal v. State of Gujarat* (2002) 10 SCC 529.

28. *Admissibility of Evidence/Documents Dealing with Mid-trial Objections*, (2012) 4 LW (JS)

29. *Admissibility of Evidence/Documents Dealing with Mid-trial Objections*, (2012) 4 LW (JS)

30. Ho, Hock Lai, "The Legal Concept of Evidence", *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2015/entries/evidence-legal/>>

Again the observation of Loevinger³¹ on the point of rules of exclusions under the law of evidence is quite illuminating. In his view: "Taking the law of evidence as a whole, it can be said that all of the exclusionary rules comprising this body of law are based either on a judgment as to the supposed weight, or reliability, of a certain kind of evidence or on a judgment as to the social desirability as a matter of policy of permitting an inquiry into certain matters. Both kinds of judgment are proper ones for the law to make."³²

At the same time, he is further of the view that: "The general body of the rules of evidence do not satisfy the principles of rational discourse as they are recognized in other areas of contemporary thought and action for reasons which have been suggested. More than this, they are patently inadequate to the needs of society which law is supposed to meet and are in large part responsible for the dissatisfaction with the legal process which is expressed directly in widespread criticism and indirectly in the establishment of non-judicial agencies of all kinds to supplant or substitute for the courts that still adhere to the exclusionary rules. So long as the legal profession continues to think and talk in terms of "hearsay," "legal relevance," "opinions and conclusions" and of "competent" or "incompetent," "admissible" or "inadmissible," it will not be able to struggle out of the morass in which the present law of evidence has mired it."³³

To conclude, we can say that the law on legal evidence is woefully lacking in certainty and is still in search of a chimera of simplicity.



31. Lee Loevinger, *Facts, Evidence, and Legal Proof*, 9 W. Res L. Rev. 154(1958)

32. Ibid.

33. Ibid.

Topic No. – 26

Electronic Evidence Procedure & challenges relating to production, safe custody and mode of proof of electronic evidence; sufficiency and standards of proof of electronic evidence & factors affecting its appreciation.

By
Sri Kumar Amit Manu,
Additional District & Sessions Judge,
Purnea.

Sri Kumar Amit Manu,
Additional District & Sessions Judge, Purnea.

Topic : Electronic Evidence Procedure & challenges relating to production, safe custody and mode of proof of electronic evidence; sufficiency and standards of proof of electronic evidence & factors affecting its appreciation.

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Electronic Evidence Procedure & challenges relating to production, safe custody and mode of proof of electronic evidence; sufficiency and standards of proof of electronic evidence & factors affecting its appreciation

1. INTRODUCTION & APPROACH OF COURT ON TECHNOLOGICAL ADVANCEMENT

There is no iota of doubt that technology in general and computers specifically have benefitted society since their introduction and dissemination but there is also a sinister side to this technology, that it is abused. More use of technology has given rise to the importance of protection of data. Since the data network are connected across the world and sensing a model law for its regularization, General Assembly of United Nations by resolution dated 30th January 1997 has adopted the Model Law on Electronic commerce adopted by the United Nations Commission on International Trade Law. India, in order to regulate law with respect to Information Technology, considered it necessary to give effect to the said resolution of United Nations, enacted Information technology act 2000. The object of the law is extracted below:-

“An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”

The concluding part of the objective is more important, when it comes to the Courts, as the topic in hand, vastly deals with it. The Information Technology Act 2000, hereinafter referred as I.T Act 2000, has made major amendments in the Indian Penal Code, the Indian Evidence Act 1872, the Bankers' Books Evidence Act, 1891 so to keep it abreast with the changing technological advancements. It is said by a celebrated author in his book which is worth quoting “The law it is said walks a respectable distance behind science, but courts try to keep abreast”. Such quotes, give us idea that Court has bounden duty to interpret the law as per the fast-changing society so that Justice is not made a victim of technology. In this regard, it is apt to highlight how the tape-recorded conversation was interpreted by our Hon’ble Apex Court as relevant evidence even though in those times, there was no amendment in Evidence Act, to take care of such technological advancement. In **Yusufalli Esmail Nagree v. The State of Maharashtra**,¹ Hon’ble Apex Court held on tape recorded conversation that it is relevant because the contemporaneous

1. AIR 1968 SC 147

dialogue, which was tape recorded, formed part of Res Gestae and is relevant and admissible under sec 6 of Evidence Act. Thus, not only the law but the mindset of court has to be tuned to keep abreast so as to decode the technological changes in the correct perspective as the Statutes are ongoing. In this context the observation of Hon'ble Apex Court in **State of Maharashtra v. Dr Praful B Desai**², is worth noticing: - It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled "Statutory Interpretation", 2nd Edition page 6174:

"It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law. In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording. An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials. "

In **State of Punjab v. Amritsar Beverages Ltd**³, Hon'ble Supreme Court observed that Internet and other information technologies brought with them issues not foreseen by law and held that creative interpretation ought to be restored to achieve balance between age old and rigid laws on one hand and advance technology, on the other.

Before, we proceed to touch the topic, it is essential to have an overview on the history of Information Technology across the world, very briefly because it is old saying that the history helps us to understand the Present.

2. HISTORY: ROLE OF ELECTRONIC EVIDENCE IN CRIME

Most of us, who are in our forties, associate the advent of I.T with desktops which were integral to our growing up. However Information Technology predates those unseemly devices. Its

2. (2003)4 SCC 601.

3. 2006) 7 SCC 607.

thing of a past now. But the history of Information technology dates back even longer. The history dates back to 1960s when the computers required super large infrastructure to withstand and it was largely owned and operated by corporations, Government agency etc. CRIME BY COMPUTER, by DONN PARKER is said to be perhaps the first book of its kind which described that how digital information can be made use of for investigation and prosecution of crimes in society with the help of computers. In 1993, F.B.I had hosted the first International Conference on Computer Evidence at the FBI, Academy in Quantico, Virginia, which was attended by representative from 26 countries. At the meeting it was deliberated that they need to work together for coordination of efforts at agency level. In its second conference, the idea of International Organization on computer evidence (IOCE) was founded. After 1995, there was real advancement of technology where computers became order of the day and all institutions started making use of it which propelled the need to formulate a law to tackle such huge changes. Transaction started to be facilitated through emails, internet networks went global, and cell phones started reaching the house of every family. To combat crimes using Technological eco- system, all the countries came up with law to deal with it and India was no exception which has introduced I.T Act 2000 with an amendment in the year 2008. It has made amendments to various other acts as well to deal with procedural aspect of such changes.

3. VARIOUS LAWS /RULES/REGULATION IN INDIA WITH RESPECT TO INFORMATION TECHNOLOGY

List of Important laws/rules/regulations effecting Electronic Evidence and Information Technology are: -

1. Information Technology Act, 2000 amended in 2008
2. Indian Evidence Act, 1872
3. The Bankers' Books Evidence Act, 1891
4. Indian Telegraph Act, 1885
5. The Indian Wireless Telegraphy Act, 1933
6. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011
7. Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009
8. Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009
9. (Information Technology (Guidelines for Cyber Cafe) Rules, 2011
10. Information Technology (Electronic Service Delivery) Rules, 2011

11. Information Technology (Qualification And Experience of Adjudicating Officers and Manner of Holding Enquiry) Rules, 2003

4. WHAT IS ELECTRONIC EVIDENCE

The Indian Evidence Act 1872 as amended by I.T Act 2000, introduces a new clause which says “all Documents including Electronic Records Produced for the Inspection of the Courts, such evidence are called Documentary Evidence”. The definition makes electronic records as Documentary Evidence. Now it’s important to dwell upon the definition of electronic records as stated in I. T. Act 2000. Sec 2(1)(t) of the Act defines it in simpler meaning that any data generated, stored, received or sent in an electronic form. Data can be in form of record, image or sound. It can be received or sent not only in an electronic form but through a micro film or computer-generated micro fiche. Moving ahead in understanding the chain of concepts, it is necessary to now know the meaning of electronic form. Sec 2(1)(r) of the Act defines it to mean Information generated, sent, received, stored in a computer memory, media, magnetic, optical, micro film, computer generated micro fiche or similar device. Thus, the definition includes information stored in our computer systems, cell phones, Hard drives, memory card etc. Information stored in these illustrative devices are in electronic form. The next important concepts are data and documents. What is data and whether the data stored in electronic form in an electronic record is a document or not. Data has been defined under sec 2(1)(0) of I.T Act 2000, which means Information, Knowledge, facts, concepts, instructions and such data is prepared in a formalized manner as well as processed or intended to be processed in a computer system or computer network and it may be in any form. computer system has been defined under sec 2(l) of I.T Act,2000 that a device having input and output support device and contains computer programs input data, output data, that performs logic, arithmetic, instructions, data storage and retrieval, communication control and other functions. It also defines why calculators are not computer system because it is non programmable and not capable of being used in conjunction with external files. A computer network as defined in the act means one or more computers are inter connected through wire, wireless etc.

To simplify the whole concept in terms of common understanding, when we use a cell phone and draft a sentence in it by typing and suppose it is saved in pdf /word/jpg format, the data stored in the memory of phone is in an electronic form. Such data saved in electronic form can be processed by the mobile programmes, it can also be sent via sharing option through internet or a copy of it, can be taken through e print etc. As, such data is generated, stored and sent in electronic form, which thus, makes it electronic record. When such data is shared with another mobile through internet, they become part of computer network. Thus, if in a case, such mobile phone is seized and produced in consequence thereof to court with respect to offence committed in connection with such data, the mobile phones become primary evidence as they are electronic records. If an e print-out of such data or data of cell phone has been transferred in pen drive etc

are produced, it becomes a computer output and thereby a secondary evidence subject to sec 65B of the Indian evidence act 1872, which shall be dealt in detail later on in the discussion. Hon'ble Delhi High Court, while interpreting the meaning of "electronic record" has held in **Dharambir v. Central Bureau Of Investigation**⁴, that: -

A collective reading of the above definitions shows that an electronic record is not confined to data alone but it also means the record or data generated received or sent in an electronic form. The word 'data' includes 'a representation of information, knowledge and facts' which is either intended to be processed, is being processed 'or has been processed in a computer system or computer network" or stored initially in the memory of computer.' The word 'data' therefore includes not only the active memory of the computer, in this case the hard disc, but even the subcutaneous memory. Indeed, it was submitted by learned Counsel for CBI that there are six levels of memory in the hard discs and therefore an information which was written and then rewritten upon more than 5 times could still be retrieved from the subcutaneous memory of the hard disc. Even if there is a doubt whether that entire information can be reconstructed, certainly the information to the effect that the memory in the hard disc has been written and rewritten upon for over six times would be available. It is possible to analyse a hard disc with the help of a software programme, to find out on what date the information was first written with the exact time of such change. It is possible to retrieve such information in respect of each of the occasions when such information is removed and reinserted or changed on the hard disc. While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will therefore be an electronic record. This is of course peculiar to electronic devices like hard discs.

The Hard Disc, thus was held to be an electronic record as the data stored under it can be processed, rewritten, retrieved, sent or shared. As regards, whether information contained in memory chip, pen drive etc are documents within the meaning of Evidence Act, Hon'ble Apex Court in **P. Gopalkrishnan @ Dileep v. State of Kerala**,⁵ has held that on a bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the Court." While interpreting definition of documents in the evidence Act Hon'ble Apex Court has interpreted to mean that data which is stored in electronic form in Memory card/Pen drive is document within the

4. 148 (2008) DLT 289

5. 2019 SCC online SC 1532.

meaning of Sec 3 of The Indian Evidence Act 1872. Honble Supreme Court recently in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**,⁶ has clarified meaning deemed document occurring in sec 65B of the Act as The words "...without further proof or production of the original..." make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible"

PRECEDENTS ON ELECTRONIC RECORD: -

1. Cell Phones are computers within the meaning of I.T Act 2000.⁷
2. Hard Disc are Electronic records.⁸
3. CDs are Electronic record.⁹

GADGETS FROM WHERE DATA CAN BE RETRIEVED FOR EVIDENCE:

1. LAN/NIC (Network Interface Card)- The device also and MAC(Media access control) can be assessed.
2. Modem/Routers/Hubs/Switches- I.P address can be found in files contained in routers
3. Smart cards/Biometric scanner-The metal chip contains information that can be retrieved by skimmers.
4. Cordless phones/Modern land line phones- Data regarding call logs, last call, time of call can be retrieved from phone itself

KINDS OF ELECTRONIC EVIDENCE

Electronic Evidence can be tangible and intangible. It can also be volatile and Non-volatile. Electronic evidence exists in intangible form but it can be produced in tangible form by producing its copy. Volatile (Non-persistent) Memory that loses its contents, as soon as power is turned off; e.g. Data stored in RAM (semiconductor storage) (System BIOS: CMOS RAM - battery powered). Non-volatile (Persistent) No change in contents, even if power is turned off; e.g. Data stored in a tape / hard disk (magnetic storage), CD / DVD (optical storage), data cards, USB Thumb Drives – Flash memory)

FORMS OF ELECTRONIC EVIDENCE

Electronic Evidence can be found in the following forms. It is illustrated below:-

-
6. 2020 (7) SCC 1.
 7. Syed Asif Uddin and Others v. State of Andhra Pradesh, 2006 (1) ALD Cri 96
 8. Dharambir v. Central Bureau Of Investigation, 148 (2008) DLT 289
 9. 2008 CriLJ 953.

- Email messages (deleted too)
- Cache files
- Office files
- Domain access logs
- Deleted files of all kinds
- Web/e-Mail Server access logs
- Encrypted Files
- Slack Space
- Compressed Files, Unallocated Space
- Temp files
- Registry
- Recycle Bin
- Cookies
- Web history

SOURCES OF ELECTRONIC EVIDENCE

There are various sources of Electronic Evidence and they are illustrated below:

1. Hard Drive(s)
2. CD, DVDs
3. USB Mem.
4. Mag. Tapes
5. RFID Tags
6. PDAs
7. Smart Cards
8. Web pages
9. Voice mail
10. E-Diary
11. Scanner, Printer
12. Fax, Photocopier M/c
13. Digital Phone Set
14. iPods

15. Cell phone
16. Digi Cam
17. Configuration settings of digital devices etc

COMPARATIVE STUDY OF ELECTRONIC EVIDENCE

In India, the electronic evidence is governed by two laws namely the I.T Act 2000 and Indian Evidence Act, 1872. The Evidence Act has been amended by the I.T act of 2000 to deal with emerging age of digital format and electronic ecosystem. In Europe, none of the Countries stipulate in their legal codes a specific definition of what electronic evidence is. In all of them some references that are more or less specific for traditional evidence, encompassing some of those pertinent to electronic evidence. In Italy, the criminal code has, we have found been updated in accordance with European regulations and contains a text defining the electronic document as any computer tool that contains information with evidentiary value or any software indicated for the processing of the information. Furthermore, this country code of electronic government includes the precise meaning of an electronic document, electronic authentication and other concepts such as an electronic identity document or certification of service supplies. In U.K, till about 1999, electronic records had to be proved as per the provisions of sec 69 of the Police and the criminal evidence act, 1984. Sec 64B(2) of Indian Evidence Act appears to have been drawn heavily from sec 69(b) of the PACE Act. However later on, above provision has been repealed through enactment of sec 60 of the Youth Justice and Criminal Evidence act, 1999. In U.S.A, both federal and state legislatures deal with provisions of electronic records. Rule 101(b) (6) of the Federal Rules of Evidence, 1975, extends the meaning of “written material” to include “electronically stored Information”. Rule 1001 sets out inter alia that original with respect to electronically stored information means any printout or other output readable by sight, if it accurately reflects the information. The federal statute of the United States therefore categorizes printouts of electronic records as originals. US Supreme has held prior to such enactment, that production of witnesses to original entries, if records were made in computers maintained as part of business standard equipment and the electronic record has been maintained as per ordinary course of business and the evidence led demonstrates trustworthiness of the source of information, method and time of preparation of such electronic records. These rules of evidence appear to have also been adopted by Indian Legislature. Amendments to the applicable federal provisions were made prior periodically and these provisions appear to have clearly diluted the threshold for proof by treating the printouts as originals.

In Australia, the Cyber Crime Act, 2001, Incorporated amendments inter alia to the crimes Act, 1914 to introduce computer related offences and enforcement with respect to electronically stored data. The Electronic Transaction Act, 1999, deals with e commerce. In 2012, as a signatory on convention to cyber crime, Australia amended its cyber-crime laws. In effect the amended laws of US, UK and Australia have given their electronic Evidence, the best evidence

tags with the ease of proving such documents. In Spain, the criminal procedure law includes the modes of evidence, the means of reproducing words, the sounds, images as well as instruments permitting the filing and knowing and reproducing words, data, figures and mathematical operations carried out for accounting purposes and other ends, relevant to the trial. Furthermore, the enumerations of different formats that can be considered a document under the criminal code including the format containing the data is included. In Belgium, the law related to computer crimes states that the regulations referring to collective evidence under this law are applicable to all types of evidence and therefore also to the electronic type.

In Portugal, the law defines documentary evidence as any type of declaration, symbol, or note presented in written form or any other technical means in accordance with criminal laws of the country thus including electronic documents. Portuguese civil code defines documentary evidence as mechanical or electronic reproduction of data. In Srilanka, Sec 21(2) of The Electronic Transaction Act No. 19 of 2006 provides for admissibility of data message, electronic document, electronic record, or communication, touching upon facts in issue or relevant fact and which was compiled, received and obtained during business, trade, or profession or other regularly conducted activity. The said provision places onus to establish reason to believe that such documents are unreliable or inaccurate on the person making such claim. The presumption is in favour of authenticity of electronic evidence and those who say it otherwise has to prove the contrary as per sec 21(3) of the Act.

5. SEARCH, SEIZURE, CUSTODY AND PRODUCTION OF ELECTRONIC EVIDENCE

The Topic is to be seen on the touchstone of what should be the approach of Courts so that the Probative value of Electronic Evidence is best appreciated. As we all know, the procedures and safeguards as enumerated in laws with respect to search and Seizure is firstly to ensure that a genuine search took place, secondly that Evidence so procured has not been tampered with and thirdly to obviate any chances of manipulation. When it comes to Electronic Evidence, strict adherence to these procedures are more important considering the fact that electronic evidence, firstly, is easily prone to manipulation and secondly the chances of data loss as some virtual data are also volatile in nature. The Court, thus always require to see the strict compliance of these procedures which are enumerated hereunder: -

- Search and seizure have been made as per requirement of Law.
- After seizure proper packing/sealing has been made to avoid tampering of its content.
- The same has been produced/Forwarded before Jurisdictional Courts.
- After the Court cognizance of the fact of seizure and its production, the same is returned for its proper Custody.

When it comes to safe custody of Electronic Evidence, the term which is referred across

world is “chain of Custody”. Before dealing with Chain of Custody, it is important to discuss two Important connected concepts to get an overview of the matter. These connected aspects are:

1. Whether a Search and Seizure can breach the right to Privacy?
2. What is the approach of Indian Courts in this regard?

Electronic Evidence, being more prone to manipulation, therefore role of Digital Forensics become extremely crucial and Important. In this backdrop, it is essential to have knowledge, even basic, of Digital Forensics which in turn, can help to appreciate the electronic Evidence in its correct perspective.

SEARCH / SEIZURE VIS A VIS RIGHT TO PRIVACY

Article 12 of the Universal Declaration of Human Rights (1948) states that no one should be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks. In places like USA and U.K, there is strict adherence to right to privacy and stringent procedures are in place for grant of permission for such intrusion. More Particularly in USA, after the Fourth Amendment in the U.S Constitution, for making search one must have cogent reason supported by oath/affirmation. In India, right to Privacy has been held to be a fundamental right nevertheless a balance has to be struck between right to privacy and concealment of Evidence, as where, in investigation of crime, search and seizure are held to be legal as such procedure involves inbuilt safeguards and reasonable reasons for such search. In **Karnail Singh v. State Of Haryana**,¹⁰ it has been held by Hon’ble Apex Court that “A balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of Citizens from the oppression and Injustice on the other” Hon’ble Apex Court in **M.P Sharma v. Satish Chandra, District Magistrate**,¹¹ has held that (Overruled in Part) “Power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and that power is necessary regulated by law”

However this Judgment has been specially overruled by recent Judgment of Hon’ble Apex Court in Justice **K .S. Puttaswamy v. Union of India**,¹² but if we see the essence of Judgment at Part T (Page 261), it has overruled only the part of Judgment. Hon’ble Apex Court has made an important observation at Para 25 of the Judgment, which is extracted below:-

“M P Sharma was a case where a law prescribing a search to obtain documents for investigating into offences was challenged as being contrary to the guarantee against self-incrimination in Article 20(3). The Court repelled the argument that a search for documents compelled a person accused of an offence to be witness against

10. 2009(8) SCC 539.

11. A.I.R 1954 SC 300.

12. (2017) 10 SCC 1

himself. Unlike a notice to produce documents, which is addressed to a person and whose compliance would constitute a testimonial act, a search warrant and a seizure which follows are not testimonial acts of a person to whom the warrant is addressed, within the meaning of Article 20(3). The Court having held this, the controversy in M P Sharma would rest at that. The observations in M P Sharma to the effect that the constitution makers had not thought it fit to subject the regulatory power of search and seizure to constitutional limitations by recognising a fundamental right of privacy (like the US Fourth amendment), and that there was no justification to impart it into a 'totally different fundamental right' are at the highest, stray observations".

The Judgment further clarifies the point at Part T (Page 264) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

Hence the right to Privacy as held, in the aforesaid Landmark Judgment delivered by Hon'ble Apex Court, that it is not absolute and if there is rational nexus between the objects and the means adopted to achieve them, there is no breach of privacy rights. A search made for furnishing of evidence having reasonable nexus with the object of the act and in consonance with statutory provisions contained in the act or in the Cr.P.C shall not offend the privacy rights of the individual.

DIGITAL FORENSICS AND ITS RELEVANCE

Understanding Digital forensic is important for Judiciary in the same way Medico legal Jurisprudence is essential to appreciate the Injury. Some illustrative example would show how the familiarity with digital forensics is important in a criminal justice system. Suppose in cross examination of Investigating Officer, the Defence Counsel put certain queries to the investigating officer which is mentioned hereunder: -

- When you reached the spot, whether the computer system was switched ON. If yes, how did you proceed to seize the system. Explain?

Answer-When I reached the spot, I saw the system switched ON.

- When you saw the system turned On, how did you proceed to seize it?

Answer-I could figure out nothing but few files. I copied them, shut the system down. Seized the system and produced before court for sending it for forensic examination.

- When Forensic Examiner was summoned, Defence Counsel asked few questions to him, which are as follows: -

You have stated in your report that you recovered some lost data (Programme code) from RAM?

Answer-Yes, I have recovered it.

- I am again asking whether you recovered the memory from RAM or ROM.

Answer-I repeat, its RAM.

- Was the recovery from BIOS environment.

Answer-No.

- If I suggest, the data you recovered cannot be recovered as it is volatile, would it be true.

Answer-No

When it comes to appreciation of evidence, the court becomes Expert of all the Experts. In the supplied dieresis above, a court will first look to the standard operating procedures for search and seizure in cases of digital evidence where forensic examination is necessary. Two remarkable things will catch the eye of the court in the facts illustrated above, firstly, the investigating officer is not supposed to switch off the live system by shutting it down as shutting it down shall allow it to lose volatile data from RAM, secondly the forensic expert has wrongly deposed in Court, as once shut down, the programme code can't be recovered from RAM because it is considered to be, a volatile memory, stored in RAM. In contrast, ROM, saves the data for longer periods even after it is shut down. So, the idea of placing the illustration above was to be more empathetic with respect to the importance of Digital forensic and knowledge of standard operating procedures, which helps to appreciate the evidence in correct perspective. Hon'ble Delhi High Court in Pooja Khetan v. NCT of Delhi and others while dealing with a writ Petition found that there is staggering dissimilarity in carrying out investigation while dealing with electronic evidence so the Hon'ble Court directed the Government to come up with SOPs (Standard Operating Procedures). Thereafter, Delhi Police came up with SOPs while dealing with Electronic Evidence. Similarly, Data Protection council of India, a NASSCOM initiative, has come up with such similar SOPs. There are some inter Government organisations which has also similar SOPs as the science remains the same across the world. Railway Protection force of Indian Railways has also come up with Standard operating procedures to deal with Digital forensics, search as well as seizure in electronic Evidence. C.B.I Manual also talks about such procedures.

SOP's of Delhi Police is extracted below for an overview on the subject. "DELHI POLICE STANDING ORDER 448/2017 PROCEDURE FOR SEARCH AND SEIZURE OF COMPUTER, COMMUNICATION, DIGITAL STORAGE DEVICES AND PREPARATION OF SEIZURE MEMO DURING INVESTIGATION

1. INTRODUCTION

- With increased use of communication devices/ computers and digital storage devices in homes and offices, there has been increasing instances of crimes involving these devices, either as a tool, or target or simply as a piece of evidence. The investigation of such crimes is complex as the evidence is often in an intangible form. Its collection and preservation present unique challenges to the investigator. The increased use of networks and the growth of the internet have added to this complexity.

- During the seizure of digital evidence in course of investigation of a cyber crime or conventional crime with digital trails, the seizure procedure involves several precautions that are required to be taken in addition to the precautions and care taken during seizure of conventional articles

- The stages of digital crime scene search and seizure are: A. Preparation/ Planning stage. B-Collection stage. C-Preservation/ Transportation stage.

GUIDELINES FOR SEARCH AND SEIZURE OF DIGITAL EVIDENCE

(A) Preparation/ Planning Stage: Before proceeding to the place of the suspect or the scene of crime from where the seizure of electronic items/ digital evidence is to be done, the IO should try to get the following information.

- Whether the system is live or offline. In case of live systems, IO needs to obtain appropriate orders from the competent court to make the system offline. The IO will have to take Image copy of the data with the help of cyber expert and forensic devices. Thereafter, the image copy will be considered as the original (primary) evidence in such cases along with the certificate under Sec. 65- B of Indian Evidence Act.
- Format of 65-B, Indian Evidence Act certificates as per the requirements. 3. Requirement should be analysed in advance as to whether seizure of the complete system is required or a portion of the data needs to be seized. In case of seizure of part data, necessary 65-B certification will be required from the concerned authority (custodian of the data).

(B) Collection / seizure Stage : While conducting search and seizure, the IO should follow the following steps:

- The IO should separate all the employees from their working terminals.
- IO should avoid taking help from the alleged company's employees or from the accused persons.
- IO should identify the equipment of concern as soon as possible.

- IO should document all the steps with proper date and time. A format for the same is attached for reference.
- Date and time of seizure of electronic device is very important IO should make sure while preparing the seizure to mention the date and time (in IST format). Note: IO should ensure to mention the current time as obtained from any standard source (such as Indian Meteorological Department website).

(C) Preservation / Transportation Stage

- IO should make sure that a serial number is allotted for each device and the same should be duly noted, not only in the Panchnama, but also in the Chain of Custody and Seizure Memo.
- IO should protect digital magnetic media from external electric and magnetic fields.
- IO should also ensure protection of digital media, particularly optical media from scratches.
- As computer devices and parts are sensitive in nature, hence they should be handled carefully. IO should wrap the computer components using Styrofoam and other protective coverings.
- IO should keep the components of each computer system together and should label each part after dismantling.
- The computer system should be secured in a way that would reduce vibrations. The IO should store the computer in a secure, cool, dry place, away from any electric or electromagnetic signals.

DOS AND DON'TS

For Laptop: -

1. Check whether the Laptop is ON or OFF.
2. If ON, then
 - Take a Screen Shot of the screen.
 - Take the list of Programs running in RAM; running Operating System.
 - Remove the power chord of the laptop from the power outlet (Never Shutdown).
 - Remove the battery from the Laptop.
 - Note down the colour, Make and Model of the Laptop.
 - Note down any Serial number available on the chassis of the Laptop.
 - If you can remove the back cover of the laptop, then note down the make, model, Serial no. and capacity of hard disk.

3. If OFF, then

- Remove the power chord of the laptop from the power outlet (Never switch on the Laptop).
- Remove the battery from the Laptop.
- Note down the colour, Make and Model of the Laptop.
- Note down any Serial number available on the chassis of the Laptop.
- If you can remove the back cover of the laptop, then note down the make, model, Serial no. and capacity of hard disk.

For Desktop—

1. Check whether the desktop is ON or OFF.

2. If ON, then

- Take a Screen Shot of the screen.
- Take the list of Programs running in RAM; running Operating System.
- Remove the power chord of the laptop from the power outlet (Never Shutdown).
- Note down the colour, Make and Model of the desktop.
- Note down any Serial number available on the chassis of the desktop.
- If you can remove the side panel of the desktop/ CPU, then note down the make, model, Serial no. and capacity of hard disk.

3. If Off, then

- Remove the power chord of the desktop from the power outlet (Never switch On).
- Note down the colour, Make and Model.
- Note down any Serial number available on the chassis.
- If you can remove side panel of the desktop/ CPU, then note down the make, model, serial no. and capacity of hard disk.

For Mobile Phones/ Tablets: -

- Check whether the device is ON or OFF
- If ON, then
 - i. Leave it ON.
 - ii. Photograph the device.

- iii. Label and collect all cables of the device.
- iv. If possible, keep the device charged.
- v. Seize the phone in a Faraday bag.
- vi. Note down any Serial number if available on the chassis of the mobile phone.
- vii. Never remove the battery.
- If OFF, then Seize the device in a Faraday Bag along with all cables of the device.

For Miscellaneous storage devices: -

- ❖ Collect any storage media like USB Pen drives, External storage hard disks, Memory cards, SIM Cards, CDs, DVDs etc. which may be used to store data.
- ❖ Note down the make, colour, capacity and any Serial No. available on the device.
- ❖ Wrap the device in antistatic bag and wrap it in a bubble wrapper along with the connecting cables, if any.
- ❖ Seize the CDs and DVDs in a suitable protective hard case only.
- ❖ Check if any printer, Photostat machine or any scanning device is available, If yes then
- ❖ Check whether the system is available with its internal storage capacity.

For CCTV Footage / Digital Video Recorder: -

- A. Immediately after registration of FIR, the Investigating Officer should identify all CCTV cameras in and around the relevant spot without any avoidable delay.
 - B. The Investigating Officer should call the District Cyber Cell Team at the Scene of Crime for collection of CCTV System Hard Disks without any delay and not later than 48 hours as far as practicable, from the registration of FIR.
 - C. The District Cyber Cell Team should scan the Scene of Crime to identify any CCTV system that may have captured any visuals/audio.
 - D. Thereafter, the District Cyber Cell Team should extract the storage media (Hard Disk) containing the relevant CCTV footage and assist the Investigating Officer in its seizure.
 - E. The District Cyber Cell Team should simultaneously ensure that the Hard Disk/ storage media of the concerned CCTV System seized by the Investigating Officer is immediately replaced by a new Hard Disk/storage media of same/similar specification to enable uninterrupted operation of CCTV system.
 - F. In case the DVR is also seized along with the Hard Disk, a corresponding replacement of the same should be provided to the custodian/owner of the CCTV system.
7. If the

Investigating Officer is not able to collect all relevant CCTV footages in 48 hours, then he should notify all persons owning/operating relevant CCTV systems, to take necessary steps to ensure that the relevant footage as detailed in the Notice is not altered/destroyed/deleted.

- G. In respect of CCTV systems, other than those at the Scene of Crime or in its immediate premises, the IO should get their Hard Disks seized with the help of the District Cyber Cell Team without any undue or avoidable delay in course of ongoing investigation. 9. Whenever possible, the proprietary recorded video files from the DVR should be retrieved to maintain the integrity and image quality of the evidence.
- H. Steps involved:
- ✓ A copy of the DVR's instruction Manual should be taken in possession by the IO.
 - ✓ IO should determine the earliest recorded date. This will determine approximately how much time the IO has to retrieve the data before the system begins to overwrite it.
 - ✓ IO should compare the time displayed by the DVR system with the current time. (such as the time displayed by Indian Meteorological Department website)
 - ✓ Remove the power cord from the DVR.
 - ✓ Remove all the cables connected with the DVR.
 - ✓ Seize the hard disk in an antistatic bag.
 - ✓ IO to collect, if available, a copy of the original CD of the DVR Player provided by the DVR manufacturer along with the DVR from the owner/custodian of the DVR.
 - ✓ If the IO needs footage from any banking premises like ATM or from Bank or any other agency, then he earliest and without any delay. Most of the ATM footages are overwritten in a time span ranging between 3 to 7 days.
 - ✓ Whenever the District Cyber Cell Team assists the IO in seizure of hard disk from the custody of any person other than the accused, it should immediately provide a replacement hard disk with same/similar specifications to the custodian/owner of the e CCTV.
 - ✓ Whenever the District Cyber Cell Team assists the Investigating Officer in seizure of complete DVR from the custody of any person other than the accused, it should immediately provide a replacement DVR with same/similar specifications to the custodian/ owner of the CCTV. 14. The Heads of the Officers of the Units/ Districts should ensure that their respective District/Unit maintains a reserve stock

of DVRs/Hard Disks of the most common specifications and the same is made available to the District Cyber Cell Team and replenished as per requirement. The Districts/Units should replenish their reserve hard disks stocks through regular procurement as per laid down procedures of procurement.

- ✓ . The Investigating Officers should follow the abovementioned guidelines at the time of search and seizure of CCTV Systems, computer and communication devices.
- ✓ A suggested seizure memo for seizure of computer, storage and communication devices is provided at Annexure „A?. This Standing Order supersedes previous SO No. 448/2016 issued vide No.6402-6530/ RB/ PHQ, dated 01.12.2016 and all other standing/ Circular orders are repugnant to the provisions detailed in this Standing Order”.

These are standard Operating Procedures, which should generally be followed while handling electronic evidence on seizure and search, because it comprises the best methods to ensure the preservation and obviate manipulation of Data.

FORENSIC INVESTIGATION CONSISTS OF FOUR IMPORTANT STAGES

1. Collection and Preservation of evidence
2. Extraction of Evidence
3. Examination of Evidence
4. Organization of Evidence.

SIX IMPORTANT PROCESSES IN DIGITAL FORENSICS ARE: -

1. Identification
2. Search and Seizure
3. Preservation
4. Examination
5. Analysis
6. Reporting

Some relevant concepts: Digital Forensics

What is Volatile Data from a live system: Why it is so much important? It is important because it retrieves following details of data which are volatile in nature and that is why Live systems should not be shut down before retrieving such data. Such data once shut down, is lost forever.

- i. Current running state & system configuration details
- ii. Activities performed / in progress
- iii. Root cause of the incident
- iv. Timeline of the incident
- v. Time, date, user responsible for the incident
- vi. Network connection details
- vii. Once system is shutdown / rebooted, volatile data is lost for ever

Some Volatile Digital Evidence (may be in main memory/ROM) and its Order of Volatility are as follows:

- Registers & Cache
- Routing Tables
- ARP Cache
- Process Table
- Kernel Statistics & Modules
- Main Memory (RAM)
- Temporary System files
- Secondary Memory
- Router Configuration
- Network Topology

Some standard methods for Volatile Data Collection Process are

- Collect system uptime, incident's date & time, and command history from the suspicious system.
- Run forensic tools or OS commands, to know date and time of actions to establish a timeline / trail of events.
- Document all forensic collection activities including s/w tools / commands used in logbook.
- Collect all types of volatile information from system and network.
- End the forensic collection by recording the used commands along with date and time of use.

What is Hash Value # and its relevance in Appreciation of Evidence?

Hash value is popularly known as fingerprint of data. It is useful in authenticating, discovering

and examining electronic evidence. In simple words, it is like putting numbers to a file by generating a value and identifying the file with that number. There are few accepted hash value algorithms like MD5 and SHA25. Once, hash value of a file, part of a file, group of files is generated, a slightest of manipulation shall make a change in its value. This is why, such unique value has its distinction and importance in electronic evidence. Thus, Hash value generation is extremely important. Every machine/file would have a specific hash value and specifying the hash value on the chain of custody document ensures that there is no tampering with the machine along the way and the hash value for the image is the same even when the same is produced in the court during the evidentiary hearings. Hash value is stated to be a result of a calculation (hash algorithm) that could be performed on a string of text, electronic file or entire hard drive's contents. Each hashing algorithm uses a specific number of bytes to store a thumbprint of the contents. The most common hash value, it would appear to be MD5. MD5 has a particular value which if picked up from a CD, its authenticity is best illustrated by the fact that the memory chip also contains the thumbprint, namely, the hash value MD5.

WHAT IS FORENSIC CLONE / MIRROR IMAGE OF ELECTRONIC RECORD

Forensic clone or mirror Image is an exact bit-for-bit copy of a piece of digital evidence and is done by a process for copying a physical storage device for conducting investigations and gathering electronic evidence. This forensic clone @ copy does not just include files which are visible to the operating system but every bit of data, every sector, partition, files, folders, master boot records, deleted files and un- allocated spaces. The image is an identical copy of all the drive structures and contents.

Now a question often comes in mind that how forensic Image/Mirror Image of Electronic record is different from Copy and Paste? The procedure to copy paste is most common among digital users. Everybody knows the copy and paste command that enables us to copy our files. However, a copy and paste process is not the same as the processes used to carry out forensic imaging/mirror image/forensic clone (copies). When a copy and paste is done from one hard drive to another, what is being copied are just the files visible to the user. All other additional data that the hard drive uses to locate and access the hidden files, is missing. Data such as File Allocation Tables (FAT) and the Master Boot Records are not copied. As such, if the seemingly duplicate drive created is used as a replacement to the original, the system will not boot and will be non-functional. The hash value of forensic copy and original copy are same. Files, folders, hard drives, and more can be cloned. A forensic clone is also known as a bit-stream image or forensic image. A forensic image of a hard drive captures everything on the hard drive, from the physical beginning to the physical end. Performing a "copy and paste" via the operating system, thus, is not the same as a forensic clone. A true forensic image captures both the active and latent data. That is a key difference between the two and the primary reason why a forensic image is preferred. Digital evidence is extremely volatile. As such, one should never conduct an examination on the original

evidence unless there are exigent circumstances or no other options. Hon'ble Apex Court has also acknowledged this fact in recent case **P. Gopalkrishnan @ Dileep v. State of Kerala**,¹³ wherein it was observed: *It is well known that a cloned copy is not a photocopy, but is a mirror image of the original, and the accused has the right to have the same to present his defence effectively.*

Having an overview of the key concepts of search vis a vis Right to Privacy, some basics of Digital Forensics as well as Standard operating procedures acknowledged across the globe, it would now be apt to discuss Core key concepts: -

1. Important Statutory Provision regarding Search and Seizure.
2. Meaning of Chain of Custody.
3. Meaning of Safe Custody and its Production in Court.
4. E-Discovery and furnishing of Electronic Documents to Accused under sec 207 Cr.P.C.
5. Whether Electronic record could be furnished to accused under sec 207 Cr.P.C if the contents of documents is against the dignity of women.

SEARCH AND SEIZURE IN INDIA

The main object of any detailed procedure for search and providing safeguard is to first ensure and authenticate search procedure and secondly to connect the breach in right to privacy of an individual with a reasonable nexus of object. The object surely is "to procure/furnish evidence when an offence is believed to have been committed". When it comes to Electronic Evidence, it is subjected to same rules of search and seizure as provided in Code of Criminal Procedure. The I.T Act 2000, however provides for provision of Confiscation as well as provision for search and seizure. The provision reads as Any computer, computer system, floppies, compact disks, tape drives or any other accessories related thereto, in respect of which any provision of this Act, rules, orders or regulations made thereunder has been or is being contravened, shall be liable to confiscation: Provided that where it is established to the satisfaction of the court adjudicating the confiscation that the person in whose possession, power or control of any such computer, computer system, floppies, compact disks, tape drives or any other accessories relating thereto is found is not responsible for the contravention of the provisions of this Act, rules, orders or regulations made thereunder, the court may, instead of making an order for confiscation of such computer, computer system, floppies, compact disks, tape drives or any other accessories related thereto, make such other order authorised by this Act against the person contravening of the provisions of this Act, rules, orders or regulations made thereunder as it may think fit.

Sec 80 of Information Technology Act, 2000 as amended in 2008, also provides for search

13. Supra Note 5.

and seizure made for offence committed under the act. Sec 81 of the Act stipulates that the act has an overriding effect on other laws. Power of police officer and other officers to enter, search, etc.-

- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any police officer, not below the rank of a Inspector, or any other officer of the Central Government or a State Government authorised by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act. Explanation. - For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.
- (2) Where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.
- (3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section.

Under Cr.P.C, search and seizure can be made, with or without Warrant. Chapter VII of the code sets out the process to compel the production of things and combined reading of sec 93,94 and sec 103 Cr.P.C would empower the District Magistrate, Chief Judicial Magistrate, Court of Sessions or Hon'ble High Court to issue search Warrants and consequently seize the article found. If we see the scheme of Search in the Code of Criminal Procedure, Search can be made of a Place and secondly, of Body (Personal Search). Such search can be with or without warrant. Thus, four important points that emerge in the code, for search, are as follows: -

- The Court/Magistrate, may issue search warrent under section 93 of Cr.P.C. unon a reasonable cause. The search warrant can either be general search or personal search or house search.
- Station House Officer/Investigating Officer, if there appears any reasonable cause for believing and such thing cannot be obtained otherwise without any delay(this is in reference to sec 93 Cr.P.C),after recording the grounds of his belief in writing, he may search any place or part of it or personal search on the body of an individual.
- A Personal Search with or withour warrant may lead to seizure of an article for example any electronic evidence such a floppy, CD, Pen-drive, Cell phones, Computer etc.
- A Search of Place like House or part of it under sec 165/sec 93 under the Code may lead to seizure of an article.

Sec 100 of Cr.P.C lays down detailed safeguards, which a Police Officer or other person conducting search has to follow in order to provide authenticity to such search. The Object is to ensure checks and balance. Hon'ble Supreme Court has made important observation in **Director of Revenue v. Mohammed Nisar**¹⁴ Holia that *".....a declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non- compliance of the said provision would not render the search a nullity. A distinction therefore must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance....."*The aforesaid provisions, apply to searches of electronic Evidence as well, so it was imperative to discuss these provisions. Apart from this, the Code also provides for procedures in case documents may be required to be seized from any place outside India. Since the cyber offences are triggered and travels beyond borders in just a click of a button, the information travels from one place to thousand kilometers away in split of seconds. Under such circumstances if it's necessary to produce any documents (including Electronic record) outside India, Letter Rogatory under sec 166A Cr.P.C is issued keeping in consideration the MoU as well as MLAT exits between the two countries. For Search of place in pursuit of any document, letter rogatory along with warrants in duplicate can be issued to the Jurisdictional Court/Magistrate of another country under sec 105-B of the Code. As per sec 105 B of the Code, Ministry of Home Affairs, Internal Security Division has issued Circular No. 25016/14/2007-Legal Cell dated 31st December, 2007 as guideline for issuing Letters Rogatory (Investigation/search/seizure) of documents outside India. Currently, only 37 countries are signatory to MLAT (Mutual legal assistance treaty) with India.

CHAIN OF CUSTODY: SAFE CUSTODY OF ELECTRONIC RECORD

Chain of Custody is a term coined for a process where the custody of documents is transferred from one person to another as well as one place to another and finally to court in such a way that it ensures no tampering/manipulation of evidence. The term has been used since ages across the world for authenticating documents to rule out manipulation. The continuity of possession of evidence or custody of evidence and its movement and location from the point of discovery and recovery (at the scene of crime or from a person), to its transport to the laboratory for examination and until the time it is allowed and admitted in the court, is known as the chain of custody or chain of evidence. A record of the chain of evidence must be maintained and established in the court whenever presenting evidence as an exhibit. Otherwise, the evidence may be inadmissible in the court leading to serious questions regarding its legitimacy, integrity, and the examination rendered upon it. It is imperative for the chain of custody to document every transmission from the moment the evidence is collected, from one person to another person, to establish that nobody else could

14. (2008)2SCC 370.

have accessed or possessed that evidence without authorization. Although there is no limit on the number of transfers, it is prudent to keep this number as low as possible. The concept of chain of custody is not alien to Indian Law as well. Indian Evidence Act, after amendment vide Information Technology Act, has made proper amendments to take care of this Principle for courts to conform to principle of chain of Custody. Sec 81A and sec 90A of Indian Evidence Act 1872 sets out provision for proper custody of Electronic records. Explanation to sec 90 A states that proper Custody of Electronic Records is in the place in which and under the care of the person, with him it naturally belongs. Sec 81 A of the Act reads as :The Court shall presume the genuineness of every electronic record purporting to be the Official Gazette or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody. Thus, as per Indian Evidence Act, a presumption is always raised when evidence is produced from safe custody. The Act, in clear terms sets out statutory recognition to chain of Custody. It is also relevant to note that electronic evidence by its very nature is susceptible to tampering and/or alteration and requires sensitive handling. A breach in the chain of custody or improper preservation of such evidence render it vitiated and such evidence cannot be relied in judicial proceedings.

On importance of sealing and safe custody of Electronic record in Criminal Trial, Hon'ble Bombay High Court has held in **Mrs. Havovi Kersi Sethna v. Mr.Kersi Gustad Sethna**¹⁵, “that requirement is of essence in a criminal case where during investigation the conversation of a party is recorded by the investigating officer. He would certainly be required to seal the tape-recorded conversation and keep it in a safe custody so as to play before the Court at the time of trial”. An Explanation to sec 90 A states that proper custody in case of electronic record means that record is in place under the care of which it naturally belongs. For instance, emails would either be in Custody of the originator or addressee of such emails or in custody of persons who may have copied it. The above provision does not limit the applicability of proper custody. If the email is proven to have a legitimate origin and circumstances are such to make it probable then it is not improper custody. If the electronic record were produced from the custody not of author of such record but for instance the company where the author was working, where the electronic record was created, then the custody of the company would be proper custody. Applicability of this explanation has been extended to sec 81 A, which also relies on the concept of proper custody. Another Important issue with respect to safe custody of Electronic Record is its preservation when Evidence has been produced in Court on filing of charge sheet or during trial. The matter however is not Res Integra.

Hon'ble Madras High Court in **K. Ramajayam @ Appu vs The Inspector Of Police, 2016 (2) CTC 135** observed in its Judgment safe custody of Electronic record during trial: there will be instances where, by the time the case comes up for trial in one court, the electronic record, produced in court, would have had a natural death for want of proper storage facilities in the Court

15. 2011(3)Mh.LJ 564.

property room. To obviate these difficulties, we direct that, on a petition filed by the prosecution, the Judicial Magistrate, who receives the electronic record, may himself view it and take a backup, without disturbing the integrity of the source, in a CD or Pen drive or any other gadget, by drawing proceedings. The backup can be kept in safe custody by wrapping it in anti-static cover and should be sent to the Sessions Court at the time of committal. The present generation of Magistrates are computer savvy and they only require legal sanction for taking a backup. They can avail the service of an expert to assist them in their endeavour.

PRESERVATION / RETENTION, PRODUCTION OF ELECTRONIC RECORD

Preservation of Electronic Record is important component of Safe custody of Electronic record. Preservation of Electronic record is necessary, for example an offence is committed and from the call data of accused, his location is sought to be traced. As such, the call data saved in the server of the service provider need to be saved for a period of time because the Investigation agency might need it any time during the investigation. To understand it, first we have to relook at the definition of Electronic record. Sec 2(t) of the I.T Act 2000 within its definition includes image and sound records stored in electronic form apart from the data which is generated or created in electronic form. Thus, every data saved in the server of the service provider/Internet service provider becomes an essential component of electronic record, which in turn, need to be saved and preserved. Being a potential evidence, its preservation becomes important part of Proper/ Safe Custody. As per Information technology (intermediaries Guideline) rules ,2011 35 by virtue of which all internet service providers have been mandated to preserve the Electronic record and Information which is subject to investigation, for at least 90 days. It is strongly debated that the preservation period is too short for the purpose of investigation but there are some more rules which extend the time limit of preservation otherwise. Such as, the License Condition No. 39.20 of License agreement for Unified license issued by Department of Telecommunication, Government of India under sec 4 of The Telegraph Act, stipulates that all the operators have to preserve CDRs³⁶ at least for one year “for scrutiny by the licensor for security reasons”. There is also one more important reason why CDRs have to be preserved for more than one year because it is a financial document as such in compliance to Income tax Laws, the same is to be preserved for eight years. On the basis of call records, they have to maintain book of accounts of loss and profit hence essentially CDRs becomes a financial document. As per sec 10 D of Income Tax rules,1962, financial documents are maintained for a period of eight years from the end of the relevant assessment year. Therefore, the Call data records/Exchange Detail Record (EDR)/ IP Detail Record (IPDR) can be sought by Courts from the Service Providers even when the service providers take the shield of License Condition Number 39.20 of the License agreement (Discussed supra) and Rule 4 of Information technology (intermediaries Guideline) rules ,2011.

Service providers must maintain and make available:

- Numbers: Called/calling party mobile/PSTN numbers when required.

- Telephone numbers of any call-forwarding feature when required
- Interception records: Time, date and duration of interception when required
- Location: Location of target subscribers. For the present, cell ID should be provided for location of the target subscriber when required.
- All call records: All call data records handled by the system when required This includes:
 - ❖ Failed call records: Call data records of failed call attempts when required.
 - ❖ Roaming subscriber records: Call data records of roaming subscribers when required.
 - ❖ Commercial records: All commercial records with regards to the communications exchanged on the network must be retained for one year
 - ❖ Outgoing call records: A record of checks made on outgoing calls completed by customers who are making large outgoing calls day and night to various customers
 - ❖ Calling line Identification: A list of subscribers including address and details using calling line identification should be kept in a password protected website accessible to authorized government agencies.
- Location: The service provider must be able to provide the geographical location of any subscriber at any point of time.
- Remote access activities: Complete audit trail of the remote access activities pertaining to the network operated in India for a period of six months. It includes:
 - a. Numbers: Called/calling party mobile/PSTN numbers
 - b. Interception records
 - c. Location
 - d. All call records
 - e. Failed call records
 - f. Roaming subscriber records
 - g. Commercial records
 - h. Location

OTHER DATA TO BE STORED BY SERVICE PROVIDER

Sec 7 of Information Technology Act,2000 also provides for guideline for retention of Electronic records. It reads as :-

- (1) Where any law provides that documents, records or information shall be retained for any

specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, –

- (a) the information contained therein remains accessible so as to be usable for a subsequent reference;
- (b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;
- (c) the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record:

Provided that this clause does not apply to any information which is automatically generated solely for the purpose of enabling an electronic record to be dispatched or received.

Hon'ble Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**¹⁶ has issued directions to frame rules with regard to retention, preservation, chain of custody of electronic records. It has held that:-

1. Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption.
2. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.
3. General directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the concerned period (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period.

An important issue with regard to production of Electronic Evidence in court comes for interpretation is sec 131 of Indian Evidence Act. It reads as follows: -

Production of documents or electronic records which another person, having possession, could refuse to produce.— No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production. Production of documents or electronic records which another

16. Supra Note 6.

person, having possession, could refuse to produce.— No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.

A bare perusal of the provision would suggest that the person having the custody of the electronic record can refuse to produce the document in court. Whether sec 131 of evidence Act restricts the scope of sec 91 of Cr.P.C or sec 165 Evidence Act. Hon'ble Supreme Court has also held in **State of Gujarat v. Shyamlal**¹⁷, that a document can't be sought under sec 91 of Cr.P.C from an accused. However, that does not limit the scope of sec 165 of the Evidence act⁴¹. As far as sec 131 of Evidence act is concerned, the same does not limit the powers of court to summon documents/electronic records. Hon'ble Kerala High Court in **M/S. Kuriland (P) Ltd v. P.J. Thomas**,¹⁸ has held that No doubt, the right of the accused against testimonial compulsion under Article 20 (3) of the Constitution is a greater right, in content, then the right of a person, who is entitled to claim privilege. But in circumstances where mere production will not amount to testimonial compulsion, it may not be open to the accused to resist a direction to a witness to attend the court and produce the documents and say that Section 131 stands in the way of the court in summoning the witness and requiring the production of the document. Thus sec 131 of Evidence act does not come as a shield to the accused/persons/witness to refuse to produce electronic record if summoned by the Court.

DISCOVERY AND FURNISHING OF ELECTRONIC EVIDENCE

The Concept of e- discovery of electronic records can be equated with document disclosure process in civil litigation in India. E-discovery is basically a concept prevalent in United States. Growing dependency on electronic gadgets and dependency of life on technical tools, necessitates that, every human conduct is recorded in some form or other in electronic form. The biggest stalker of an individual is now his Mobile -Phone, which can precisely disclose his location, one's texts, call record, his way of living, the area of interest of an individual, his shopping interest etc. A GPS location fitted in one's car can precisely point out his location. CCTV camera installed for security in homes can reveal one's entire lifestyle. So, the internet and electronic gadgets are the modern virtual shadows of human being. Therefore, discovery in terms of litigation means the initial phase of litigation where the parties in a dispute are required to provide each other relevant information and records, along with all other evidence related to the case. E-Discovery means discovery of electronic records which has saved the data in the form of evidence. It encompasses what most often is referred to as electronically stored information, or ESI. Examples of the types of ESI included are emails, instant messaging chats, documents, accounting databases, CAD/CAM files, Websites, and any other electronic information that could be relevant evidence. E-Discovery Process followed in U.S is as follows:-

17. [1965] 2 SCR 457

18. 2009 Criminal Law Journal 763.

- Data is identified as relevant by attorneys and placed on legal hold.
- Attorneys from both sides determine scope of discovery, identify the relevant ESI, and make e-Discovery requests and challenges. Search parameters can be negotiated with an opposing counsel or auditor to identify what is being searched and to ensure needed evidence is identified and non-evidence is screened out, thereby reducing the overall effort required to search, review, and produce it.
- Evidence is then extracted and analysed using digital forensic procedures, and is usually converted into PDF or TIFF form for use in court. It often can be advantageous to use pattern and trend identification and other analytical search techniques here so these tasks can be performed more efficiently and make less use of expensive human resources.

Now the question that need discussion is that whether Indian Laws are sufficient to adopt the principle of e-discovery. Though in criminal cases, an investigation by Police is sufficient to able to discover documents by process of search and seizure but in civil litigation, the procedure is different and party themselves produce evidence in courts. Therefore, discovery of documents becomes extremely relevant. Civil Procedure code provides for discovery of documents under Order XI rule 12-14 of CPC. The party seeking discovery of documents and its non-production shall invite adverse inference by courts. So, the question that arise is whether e-discovery is relevant in India? Since technology law are still growing in India there are lots of grey areas, however, the most notable feature of Indian Judicial System is its adaptability to best accepted and reasoned rules of the world. 253rd Report of Law Commission of India paved way for establishment of commercial Courts vide new legislation called The Commercial courts Act ,2015. The act provides for a Schedule which has made amendments in Civil procedure code. The amendment has been made under Order XI of CPC and notable feature of such amendment is an illustration of adoption of essential feature of e-discovery. The amendment is extracted below: -

Electronic Record- (1) In case of disclosures and inspection of Electronic Records (as defined in the Information Technology Act, 2000), furnishing of printouts shall be sufficient compliance of the above provisions.

(2) At the discretion of the parties or where required (when parties wish to rely on audio or video content), copies of electronic records may be furnished in electronic form either in addition to or in lieu of printouts.

(3) Where Electronic Records form part of documents disclosed, the declaration on oath to be filed by a party shall specify— (a) the parties to such Electronic Record; (b) the manner in which such electronic record was produced and by whom; (c) the dates and time of preparation or storage or issuance or receipt of each such electronic record; (d) the source of such electronic record and date and time when the electronic record was printed; (e) in case of email ids, details of ownership, custody and access to such email ids; (f) in case of documents stored on a computer

or computer resource (including on external servers or cloud), details of ownership, custody and access to such data on the computer or computer resource; (g) deponent's knowledge of contents and correctness of contents; (h) whether the computer or computer resource used for preparing or receiving or storing such document or data was functioning properly or in case of malfunction that such malfunction did not affect the contents of the document stored; (i) that the printout or copy furnished was taken from the original computer or computer resource.

(4) The parties relying on printouts or copy in electronic form, of any electronic records, shall not be required to give inspection of electronic records, provided a declaration is made by such party that each such copy, which has been produced, has been made from the original electronic record.

(5) The Court may give directions for admissibility of Electronic Records at any stage of the proceedings.

(6) Any party may seek directions from the Court and the Court may of its motion issue directions for submission of further proof of any electronic record including metadata or logs before admission of such electronic record.

A bare perusal of the aforesaid provision reveal that e- discovery of documents are now, well acknowledged by Indian legislation and with time such recognition shall form part of regular civil litigation because with giant technological advancement, where data saved and stored ,form essential lifestyle of human being, parties to litigation shall start relying on e- discovery of electronic record for their success in suit. Second Issue relates to furnishing of electronic record to the accused under Sec 207 of Cr.P.C. Whether accused is entitled to copy of the electronic record or they are entitled to get mirror image/forensic image of the electronic record on which the prosecution is relying? The issue is no longer Res Integra with pronouncement of two important Judgments on this Point. Hon'ble Delhi High Court in **Dharambir v. C.B.I.**,¹⁹ has held that tape recorded conversation saved directly in Hard Disc comes under the category of "Documents" within the meaning of sec 3 of the Evidence Act read with sec 173(5)(a) and sec 207(v) of Cr.P.C, and forensic image/mirror image has to be furnished to the accused. If they are voluminous, it can be inspected by them. Hon'ble Court also clarified that they are entitled to be furnished forensic clone of the electronic record and simply copying it on CD and furnishing it to the accused shall not serve the purpose of sec 207 of Cr.P.C. The Hon'ble Supreme Court in **P. Gopalkrishnan @ Dileep v. State of Kerela**²⁰ has held on the same issue that the accused persons are entitled to forensic clone/mirror image of the electronic record submitted by the Police on which the prosecution rely. In the same case it has been held that if furnishing such document to accused shall be against the "dignity" of women then in that case instead of furnishing such electronic records, the same can be directed to be inspected in court.

19. 148(2008)DLT 289.

20. Supra Note 5.

6. APPRECIATION OF EVIDENCE DURING TRIAL

Electronic Evidence by nature is different from other piece of evidence and that is the reason, Indian legal system has provided special provision for its admissibility. I.T Act, 2000 has made amendments in The Indian Evidence Act 1872 at several places, so as to appreciate the electronic evidence and decide on its admissibility as Evidence. The aforesaid changes speak volumes about the sea change in appreciation of electronic evidence. The changes brought are imperative, keeping in tune with the facts that such evidence is fragile in nature and can be damaged, altered, manipulated, hacked, deleted, disappeared easily. Three things which is necessary for appreciation of any evidence: -

- Authenticity
- Integrity
- Non-Repudiation

These three tests are vital for any evidence whether its Electronic or any other documentary evidence. So, the Court has to always keep these time-tested processes for appreciation of evidence while evaluating electronic evidence. To admit an evidence in course of trial, the Evidence Act provides for provision of Primary Evidence, Secondary Evidence, Law of conclusive proof, admission, confessions, Public documents, Presumption, taking Judicial Notice, etc. I.T Act, 2000 introduced changes in Evidence act to raise some presumption in relation to Electronic record. It has also introduced some peculiar provision contained in sec 65A and Sec 65B of Evidence act for admissibility of Electronic Evidence.

DOCUMENTARY EVIDENCE GENERATED BY A COMPUTER CAN BE BROADLY CATEGORISED INTO THREE CATEGORIES

1. First is Analysis, which is in digital form in a computer. In this there is no human intervention because the digital evidence is by-product of a machine operation which uses for its input statements entered into the machine and is generated solely by electronically and mechanical program /operation of a Computer 48 .For Example a mathematical calculation of precise distance by satel5.1lite GPS obtained by a terrorist through a computer programme is an example of Analysis digital evidence.

2. Second category of Evidence needs human intervention by which the data is fed into a computer and there is no programming involved. For Example, a write-up typed and saved on a computer or record of business accounts saved in a computer.

3. Third category is Derived digital evidence which is an evidence fed into computer which is derived from another source by human intervention. A copy of information from internet source and saved into a computer is an example of Derived Digital Evidence.

PRIMARY, REAL AND SECONDARY EVIDENCE IN ELECTRONIC EVIDENCE

Electronic Evidence can be Primary/Real where the device (Computer /Electronic record) is itself produced before the court. For Example, Cell phone is seized and sent to court, Hard disc where the call recording was directly saved are seized and sent to court, computer /Laptop /iPad are seized and sent to court as evidence. They are Primary Evidence and can be proved without any requirement of certificate under sec 65B of evidence Act. However, suppose through the help of memory stick, CD, pen drive, VCD, VCR, Floppy etc, contents of electronic record are copied and transferred to these devices then in that case it becomes computer output as such they are secondary evidence. Similarly, printouts of emails, computer generated printouts are secondary evidence. These computer output needs certification under sec 65B of the Evidence Act to be admissible as electronic evidence in Courts during trial.

Hon'ble Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**,²¹ has recently made important observation on Primary and Secondary Evidence with respect to Electronic Evidence that. However, Section 65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made there from – the former being primary evidence, and the latter being secondary evidence.(Para 31) Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced (Para 32)

PRE-2000 INTERPRETATION OF EVIDENCE PROCURED THROUGH TECHNOLOGICAL ADVANCEMENT

Before the introduction of amendment by I.T Act to introduce appreciation of Electronic Evidence, Hon'ble Courts had on several occasions decided the authenticity of evidence on touchstone of aforementioned three vital legs (Authenticity, Integrity and Non-Repudiation) to decide the probative value of electronic evidence. In **Ziyouddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra and others**,²² Hon'ble Supreme Court has held that tape recorded conversation are documents within the meaning of Evidence Act. In **Yusufalli Esmail Nagree v. State of Maharashtra**²³, it was held that since the tape-recorded conversation are done contemporaneous with main even, it forms part of same transaction and thus relevant under sec 6 as Res gestae. Further in **R. v. Maqsood Ali**,²⁴ it was held that tape recording of speech was admissible in evidence on performance of specific condition inter alia voice verification by

21. Supra Note 6

22. AIR 1975 SC 1788

23. AIR 1975 SC 1788.

24. 1965 2 ALL ER 464

producer of record or another person. In **Mahabir Prasad Verma v. Dr Surinder Kaur**,²⁵ it was held that tape recorded conversation are corroborative in nature and that can be relied only when an oral evidence to that effect has been led by the party in court. Pre 2000 era, an outsource of computer was treated as secondary evidence and it was appreciated accordingly though the courts would always test the authenticity of such documents. The aforesaid judgments beautifully illustrate the fact, that Indian Judiciary allowed the benefit of new techniques and new devices by allowing to interpret Evidence act, accordingly. It could not have been possible if the Statute as framed was not dynamic enough to accommodate new technological advancements even now, after 150 years of its coming into force. The definition of document still encompasses contents of electronic record within its fold, so even if, the electronic record was not inserted in the definition of evidence under sec 3, the same would have been read “as documents” on its interpretation by our courts, such is the dynamism of our statutes

POST 2000 APPRECIATION OF ELECTRONIC EVIDENCE

Electronic record is considered as documentary evidence as per the amended definition in the Evidence act. So, if a printout of an exchange of WhatsApp messages is produced before a court, such printout is a computer output. Being a computer output, it is necessarily a document first as per the definition outlined in the Evidence Act. However, since such documents needs special treatment in view of sec 65A and sec 65 B of evidence act for its admissibility, the same can be proved in evidence, only if, mobile user having the custody of mobile, supply a certificate under sec 65 B of evidence Act, which essentially is a documentary certificate, to check its authenticity and source of the device. Such computer output is “secondary evidence”. Suppose in the same facts, instead of printout of WhatsApp messages, mobile itself is produced in court physically. In such case, it becomes a “primary evidence” and court could see the messages and in that way the contents could be proved without any necessity of compliance of certification under sec 65B of the act.

Another question which comes, instantly in our mind is whether oral evidence can be given to prove the contents of electronic record to say as per the above illustration, whether oral evidence as to exchange of WhatsApp messages can be given? Sec 22 A of the Evidence Act has been inserted in the year 2000 after amendment which sets out that oral contents of electronic record can be given only when the original submitted is in dispute as such the oral evidence in normal circumstances is impermissible. Sec 65 A and sec 65 B has been interpreted many times by Hon’ble Courts. Let us first look at sec 65A of IEA: -

65A. Special provisions as to evidence relating to electronic record. —The contents of electronic records may be proved in accordance with the provisions of section 65B. Sec 65B starts with Non obstante clause.

65B. Admissibility of electronic records. —(1) Notwithstanding anything contained

in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Hon'ble Delhi High Court in **Kundan Singh v. State**²⁶ has interpreted these two provisions in detail which is reproduced below for an overview as Hon'ble Court has very lucidly explained each and every word occurring in the provision as stated above. Section 65-B of the Evidence Act, consists of four sub-sections. Sub-section (1) begins with non-obstante clause and gives primacy and overriding effect to the said provision. A dissection of that sub-section would reveal that it consists of distinct parts. The first part stipulates that any information contained in the electronic record in the form of paper print output or optical or magnetic media output, i.e. the electronic record copied, stored or recorded on an optical or magnetic media from another source, shall be deemed to be a document. The first part, therefore, deals with the paper printout or optical or magnetic media on which the electronic record has been copied, stored or recorded as distinct from the original media on which the data or information is created, or recorded, stored or copied. Media and paper print outs are tangible articles. Paper print outs can be seen and read. Media can also be seen and read, when viewed with appropriate equipment and paper printouts taken. Noticeably and pertinently, the paper printout output or the optical or magnetic media output, on satisfaction of the conditions stipulated in Section 65B is treated as a document by itself. The conditions would relate to the information and the computer from which the printout on paper or optical or magnetic media has been produced by copying, recording or storing the files. The following part, states that when the conditions mentioned in the section in relation to (a) information (b) computers are satisfied, the document i.e. the printed paper or the optical or magnetic media on which the files have been copied, stored and recorded, shall be admissible in evidence, without further proof or production of the original. In such circumstances, production of the original computer or equipment from which the paper prints out or media was produced by copying, recording or storing the files is not required to be produced. Once the requirements are satisfied, the printed document or the optical or magnetic media would be evidence of the contents as to what was stored in the computer from which the print out, or media was created by way of copying, recording or storing files. The last part therefore deals with the effect, when the requirements stated in Section 65B are satisfied.

The computer output - when provisions of section 65-B are satisfied is treated as evidence of the contents of the original or facts therein of which direct evidence is admissible. The secondary evidence in the form of a paper print out or media output produced by copying, recording or

26. 2015 SCC Online Del 13647.

storing files is treated as a document and are admissible and bear the same status as "direct evidence" on the question of admissibility. The provision, therefore, negates and does not require production of the original computer/equipment/media, on which the data was stored and from which computer output be it in the form of printed paper or optical or magnetic media data has been obtained. The expression "direct evidence" as strictly understood in the Evidence Act, has been explained below.

Sub-section 2 to Section 65B explains and elucidates the term „computer output? and in a manner expounds and expands what is meant by the original device or computer from which output is obtained. As per sub-clause (a) to sub-section 2 computer output can consist of information produced by the computer during the period the computer was regularly used to store or process the information for the purpose of any activity regularly carried on over "that period" by a person, having lawful control over the use of the computer. Clause (b) states that information contained in the electronic record or derived from should be regularly fed into the computer in ordinary course of the said activities. Clause (c) postulates that the computer during the relevant period should have operated properly and if it had not operated properly or was out of operation for a part of the period, such failure should not affect the electronic record or the accuracy of its contents. Lastly, sub-clause (d) recognizes that electronic record could consist of data or information collected or fed into the computer. The word "derived" used in Sub- section 2 of Section 65B finds its meaning and exposition in the explanation. The said expression for the purpose of section 65B would mean, derived as a result of calculation, operation or any other process. The word derive, therefore, has been given a specific and affirmative meaning for Section 65B. Sub-section (3) to Section 65B elucidates and explains sub-section (2) and provides that the output produced could be of data stored or information processed by combination of computers operating simultaneously during that period or different computers in succession over the period in question or even multiple computers operating in succession over the period. Sub-section acknowledges and accepts that the computer, i.e., device from which "computer output" is obtained, may be one in the combination of computers used or even one operating in succession. The provisions recognise that information or data is easily and frequently for convenience, business or technical reasons transferred, copied, recorded or stored in different machines/equipment simultaneously or in succession. The importance and relevancy of information could arise subsequently and long after it is created. Back- up or archives are maintained to store specific and important information. In such cases, all computers used for the purpose during the period in question from the beginning till the period where the output is obtained, are treated and regarded as the single computer for the purpose of the Section.

Before we advert to sub-section (4), it may be advisable to first expound sub- section (5) for the said Section is relevant for interpreting sub-sections (1), (2) and (3). As per sub-clause (a) to sub-section (5), information is taken to have been supplied to a computer when it is supplied in any appropriate form and whether it is done directly, i.e. as in the case of call record data which gets

recorded in the computer/server without any interference, or with human intervention, as where a data entry operator gives commands or uses a key board to feed the data or when the sales man punches in details of the sales made. Importantly, the information or data could be supplied to the computer from which the computer output is taken, by means of an appropriate equipment. This transfer can be with or without human intervention. For example, data or information stored in one computer can be transferred to another computer as a result of pre-fixed or standard commands after particular period of time or as a result of specific commands given as a result of human interference. Sub-clause(a) to sub-section (5) recognises that data or information can be created and then transferred, copied and stored to the computer from which output is obtained by different modes and ways. Transfer of information or data in form of files after they are first created are frequent and a common occurrence. The impact of sub-clause (a) to sub-section (5) is to be noticed and given effect to when we interpret and apply sub-sections (2) and (3) of Section 65B to a factual matrix of a given case. Sub-clause (c) to sub-section (5) is clarificatory in nature and states that computer output can be produced directly as it can happen when data or information stored in the computer is printed as a result of pre-existing commands. It can happen also when a command to take print out or to copy, store or record is given with human intervention. The computer output may be a result of appropriate equipment attached to the computer. Sub-clause (b) to sub-section (5) is rather ambiguously uses the expression "any official" without explaining what is meant by the said term. However, when we read sub-section (4) to Section 65B, the meaning to be given to the expression "any official" emerges. Sub-clause (b) applies when information is supplied to "any official" in the course of activities carried on by him, i.e., in the course of "official" activities with a view that the said information shall be stored and processed for the purpose of the activities carried on by that officer or official. It is also elucidated that the information could be beyond or otherwise in the course of the said activities. Even in such cases the information is treated as supplied in the course of the activities of the official. We clarify that the word "official", as used in clause (b) of sub-section (5) of Section 65B, is not intended to mean or be restricted to a person holding an office or employed in public capacity. It connotes, as exemplified by the use of the same expression (albeit in its adjective form) in sub-section (4), a person primarily responsible for the management or the use, upkeep or operations of such device. It would, thus, cover a computer device containing electronic records in the hands or control of a private individual or entity.

In a nutshell, what the combined effect of sec 65A and sec 65 B has done with respect to electronic Evidence is that it has made computer output in the form of printout, copy of contents in CDs, Pen drive ,DVD ,memory stick ,floppy etc as admissible in evidence provided conditions mentioned in sec 65 B is complied. Sec 65B propels authenticity to the electronic evidence because as already discussed, the electronic evidence are fragile in nature and easy prone to manipulation. According to Sec 65B, Electronic documents are sufficient to prove what the original could legally prove without producing its original in court when the computer output

pertains to the period when the computer was regularly used to store data or process information in order to carry out routine business by a person having lawful control over the computer. In the material part of the said period, the computer should have operated properly and if not, then the malfunctioning did not affect the electronic record in any manner.²⁷ It is also important to mention here that the special provision under sec 65 A and 65B has in fact narrowed down the scope of definition of Document under sec 3 of Evidence act as earlier copies from the computer system would have been admitted in evidence as documents but now it would fall under definition of documents and admissible in evidence only when it satisfies the condition mentioned in sec 65 B. However, the global trend is otherwise. The British Parliament from where such provision has been taken in fact now has repealed that provision. In U.S as well there is no synonymous provision like sec 65 A/B in their legislation hence our system has adopted something which is not in global trend.

Being unique, the provision was interpreted for years differently by our courts but finally in 2014, the matter seem to have rested with the pronouncement of judgment of Hon'ble Supreme Court in **Anvar v. Basheer**²⁸. It has been held that sec 65B starts with non obstante clause and it is complete code in itself for proving electronic evidence and that general rules for proving secondary evidence will not be applicable with respect to electronic records. Hon'ble Supreme Court further clarified in this Judgment that procedures set out in sec 65 B applied only with respect to leading secondary evidence of electronic record and not in cases where the Primary evidence was itself produced.

This Landmark Judgment overruled the Judgment passed by Hon'ble Court in **State (N.C.T of Delhi) v. Navjot Sandhu**,²⁹ which has held that non-compliance of certifying under sec 65B of secondary evidence shall not disqualify electronic records submitted in evidence. Anvar. Basheer case however reiterated the categorisation in Navjot Sandhu's case that proof in cases of copies in any form of electronic record amount to secondary evidence which would have to be proven through procedures set out in sec 65 B. Thus, after the Anvar PV case, the position of law came to be well settled that any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. However the unrest that was settled in 2015, revived once again when Hon'ble Supreme Court in **Shafhi Mohammad v. State of Himachal Pradesh**³⁰, wherein a Division Bench of the Hon'ble Supreme Court differed from the Anvar PV case and held that the requirement of certificate under Section 65B is not always mandatory and can be dispensed with, in the interest of justice.

The Hon'ble Supreme Court held that "The applicability of procedural requirement under

27. P. Padmanabh v. Syndicate Bank Ltd, AIR 2008 Kant 142

28. 2014(10) SCC 473

29. AIR 2005 SC 382

30. 2018(3) RCR (Criminal) 388.

Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory Hon'ble Punjab and Haryana High Court in *Jatinder Pal Singh v. Krishan Kishore Bajaj* has held considering the above controversy resurfaced by the latest decision in *Shafhi Mohammad* case;- *Sahfhi Mohammad's* case which holds that the requirement of the certificate under Section 65-B(4) is not always mandatory; is by a Bench of two Hon'ble Judges of the Hon'ble Supreme Court, whereas the earlier judgment in *P.V. Anvar*, making the certificate to be mandatory, is by a Bench of three Hon'ble Judges of the Supreme Court and the three Judges' Bench judgment was delivered by specifically overruling the earlier judgment of the Supreme Court itself. Therefore, in the considered opinion of this Court, the three Judges' Bench Judgment would be binding precedent for this Court, as held by Hon'ble Supreme Court in case of **National Insurance Company Limited v. Pranay Sethi and others**³¹. Even if the judgment in **Shafhi Mohammad** (*supra*) is considered to be a precedent; then this judgment also has emphasised upon the record being authentic and relevant. Therefore, the authenticity of the information remains the core aspect in case of electronic evidence. Unless the authenticity of the electronic record is pleaded and established by the party seeking to lead in evidence the electronic record, the same cannot be permitted by the Court.

As per the above said verdict of Hon'ble Punjab and Haryana Court, relying on the principle of binding precedent, it has been held that the larger Bench Judgment in *Anvar vs Basheer* ought to be followed by Courts. The matter was, however, referred to larger bench with respect to question relating to compulsory requirement of sec 65 B by order dated 26th of July, 2019 passed by Hon'ble Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**³². Hon'ble Supreme Court on 14th Of July, 2020 delivered the much-awaited verdict and has finally settled the issue. It has been held that "...the certificate required under Section 65B(4) is a condition precedent to the Other admissibility of evidence by way of electronic record, as correctly held in **Anvar P.V.** (*supra*)".

Computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act.³³ Merely because a certificate containing

31. 2017(4) RCR (Civil) 1009

32. *Supra* Note 6

33. *Supra* Note 27.

the details in sub-Section (4) of Section 65B is not filed in the instant case, does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65 of IEA.³⁴ Statements during evidence in line with the requirements under sec 65 B were sufficient compliance with requirement of the said provision for providing electronic record.³⁵ Mere print out of email would not satisfy sec 65B of Evidence act.³⁶ Call record details are valid if it is accompanied by certificate under sec 65B.³⁷ Compact Disc containing electronic record of a conversation can be produced in evidence within the amended definition of sec 3 as it is similar to photograph and can be produced under sec 8 of Evidence Act. CDs and hard disc are electronic records and admissible as documents in legal proceedings for the purpose of section 173(5)(2) read with section 207(v) of Code of Criminal Procedure, 1973. Recording of television telecast admissible in evidence to judge conduct of members in parliament.³⁸ Electronic record as computer output must be certified in accordance with sec 65 B of evidence act. Call records not supported with a certificate under sec 65B are called rickety evidence. Where primary evidence in electronic form has been produced, no certificate under Section 65B would be necessary.³⁹

STAGES OF FILING OF CERTIFICATE UNDER SEC 65 B OF EVIDENCE ACT

The act is silent on the point that what is the proper stage for supplying the certificate under sec 65B of the Act. Whether it should be filed along with charge sheet or before framing of charge or before evidence is led in the case. This issue is now, no longer Res Integra Hon'ble Supreme Court recently in case of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**⁴⁰ has clarified the law and has held that “.....the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial” Hon'ble Court has further held that in case if the circumstances suggest that due to mistake or likewise due to any plausible cause such certificate was not filed, the same can be admitted in evidence provided accused is not prejudiced. The extract of the relevant paragraph of the aforesaid Judgment is produced below: -

Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting

34. Supra Note 28.

35. 2007 SCC Online Bom 663.

36. 2007(10) AD Delhi.

37. 2010 (6) SCC 1.

38. (2010) 9 SCC 189

39. (2017) 8 SCC 518

40. Supra Note 6.

evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the co , in examining any application by the prosecution under Sections 91 or 311 of the Cr.P.C or Section 165 of the Evidence Act . Depending on the facts of each case, and the Court exercising discretion after seeing the accused is not prejudiced by want of a fair trial the Court may in appropriate cases allow the prosecution to produce such certificate at a later point . If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law.(Para 54) Hon'ble Court, sums up this issue in following words: - Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon.⁴¹

In Antar Singh v. State of M.P.⁴² Hon'ble High Court has reiterated that the non-filing of the certificate of 65-B of the Evidence Act on an earlier occasion is a curable defect which can be cured by filing the certificate of 65-B at a later stage during trial. Hon'ble Bombay High Court in **Avadut Waman Kushe v. The State of Maharashtra**,⁴³ has explained in detail the stage of supplying the certificate in following words "Perusal of the provision of Section 65B (4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. If at all anything, the indication therein is in fact otherwise. Firstly, the provision of Section 65B is about admissibility of electronic record and not production of it. Next the opening words of Section 65B (4) are 'In any proceedings where it is desired to give statement in evidence'. This can only be the stage at which the record is tendered in evidence for being considered its admissibility. This definitely cannot be the stage of filing of the charge sheet which is absolutely the preliminary stage of the proceedings. Therefore, I find no substance in the submissions advanced on behalf of the petitioner. The certificate need not be filed at the time of production of the electronic record. It can be filed at the time; the record is tendered in evidence. The subsequent filing of the certificate cannot reduce its effectiveness as a safeguard against tampering etc.". The ratio mandates that the said certificate must accompany the electronic record when the same is "produced in evidence". To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65B". In **Union of India v. Ravindra V. Desai**,⁴⁴ Hon'ble Supreme Court has held that "Non-production of the certificate

41. Supra Note 6.

42. 2019 SCC Online M.P 1981

43. 2016 SCC online Bom 97

44. (2018)16 SCC 272

under Section 65-B of the Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured”.

In a nutshell, the certificate under sec 65B, generally be accompanied along with charge sheet/before trial begins but if the same is not filed, mere non filing at earlier stage shall not create an incurable defect. On plausible reasons and without causing prejudice to the accused, such certificate filed at later stages, is enough compliance of the provision.

RESPONSIBLE AND PROPER PERSON TO ISSUE SUCH CERTIFICATE

As per sec 65(B)4(c) of IEA, a certificate is to be issued by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. Often Courts faces questions raised generally by Defence that certifying authority is not a responsible person to issue such certificate. Some queries and vexed questions that need to be addressed in the discussion are as follows: -

- Whether a controller/Manager of server rooms is responsible Officer to issue certificate particularly when the computer is not managed and operated by a particular person.
- Who will issue certificate in case the work is outsourced to another organisation?
- Whether in cases where the responsible officer is transferred from the company and another person has joined the same post is responsible officer to issue such certificate if during his tenure the former was unable to give any certificate.
- In cases of online marketing sites, whether admins of online company would issue such certificate on a document pertaining to sale on the site.
- What will be fate of those printouts where the persons responsible is himself an accused who refuses to issue such certificate?
- Who will issue certificate when the original device is not in control of person in possession of the computer output?

Hon'ble Madras High Court in **K. Ramajayam @Appu v. The Inspector of Police**,⁴⁵ has explained in detail some of the issues raised above:-

- a. In case of outsourcing of works to other organisation, admins of server can issue such certificates although he is not staff of parent organisation but device is under his control.
- b. Even Forensic Experts can give certificate under sec 65B, in proper cases.
- c. It is not necessary to examine the person issuing the certificate anytime unless authenticity and integrity of electronic record is in question.

45. 2016 SCC Online Mad 451.

- d. Huge servers from data as retrieved by forensic experts can issue certificate under sec 65B of IEA.
- e. Person In charge of huge server can also issue such certificate.

Recently Hon'ble Supreme Court **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantya**⁴⁶ has overruled **K. Ramajayam @Appu**⁴⁷ to the extent it has held that person In charge in place of responsible persons can give certificate under sec 65B of Evidence Act. Hon'ble Supreme Court has held in respect of the subject(Person who can give certificate) under discussion that :- "It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time)".

ROLE OF PRESUMPTION & ORAL EVIDENCE IN ELECTRONIC EVIDENCE.

Information technology Act, 2000 has introduced by amendment certain species of presumptions, which can be raised by courts to appreciate the probative value of an evidence. Relevance of presumptions under Evidence act is that the court understands such documents as trust worthy. It is no doubt true that the recording of evidence through the process of video conferencing is not specifically referred to in these provisions". In this way, presumptions are important component of appreciation of evidence. Some Presumptions with respect to Electronic records are as follows:-

1. Any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf. Explanation. — Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable. This Explanation applies also to section 81A. With respect to Electronic messages like e-mails, Sec 88 A of IEA prescribes a presumption with respect to the authenticity

46. Supra Note 6.

47. Supra Note 44.

of the contents of such emails. According to Sec 11 of I.T Act ,2000 ,an electronic record is attributed to the originator if it was sent by the originator or by a person authorised to act on his behalf of the originator or by an information system which is authorised

2. The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

A combined reading of both the provisions suggest that if an e mail is sent by a law firm to another company then in any dispute arising with respect to such email then it shall be presumed that contents of electronic message sent by the law firm and which was received by the company is same unless it is proved otherwise but it shall not be presumed who has sent the email because no such presumption is raised ,as per law ,as regards the person who has sent the electronic message. Thus, even if the email is sent by Managing Director of the firm himself, law does not allow to prescribe any presumption that electronic message was sent by him. In **Niranjan Singh v. Unknown**⁴⁸, Hon'ble Rajasthan High Court has held that sec 88A of IEA,1872 only establishes merely sending and receiving of an electronic record and not of whom the originator was and that in a case relying on circumstantial evidence, the above alone would not suffice. A combined reading of Sections 22A and 59 of the Indian Evidence Act would unmistakably show that the contents of electronic records are not expected to be proved by oral evidence. The provisions also say that oral admissions of the contents of electronic records are not relevant, unless its genuineness in question. Hon'ble Delhi High Court in **Kundan Singh v. State**⁴⁹ has held that section 22 A specifically provides that when genuineness of an Electronic Record is in question, oral admissions are relevant and could be examined.

Digital Signature and its relation with Appreciation of Electronic Evidence

Indian law uses two terms, one is Electronic and another is Digital Signature. Term Electronic Signature has been added after 2008 Amendment. Electronic Signature is wider term than digital signature. Sec 2(1)(ta) of I.T Act defines Electronic Signature as:-Authentication of any electronic record by a subscriber by means of the electronic technique specified in the second schedule and includes digital signature. The purpose of putting signature either in ink and paper or electronic signature is the same i.e. intention of person to approve the text/to authenticate the documents. Electronic Signature is a broader term than Digital Signature as it includes within itself lower level of security for example scanning the signature and affixing on any document is also electronic

48. 2015 SCC Online Raj 1625.

49. Supra note 25.

signature but it is least secure. Similarly, when signature is made in a specified format like “###/name” is also electronic signature but cannot be said to be a secure electronic signature. Digital Signature is extremely secure and I.T act provides for rules for authenticating such signature. Central Government has framed rules for issuance of digital signature certificates (DSC) acting as third party to authorise and identify digital signature. One of the important methods of authenticating electronic signature is PKI i.e. Public Key Cryptography. Another form is symmetric key cryptography. PKI uses public key and private keys; both are mathematically linked to each other. A person signs with Private key and recipient decrypts it using public key which assures reliability and source of origin of message. Hash value matches on decryption however if the same is tampered there shall be variation in hash value. Digital /Electronic Signature certificates are issued by Certifying authority, who certify the authenticity and integrity of digital signature. The Digital Signature is like putting fingerprint on an electronic record. On appreciation of evidence, digital signature has a probative value as it raises a presumption under sec 85C of IEA. However, the presumption is rebuttable. As per sec 85 B of IEA, Court shall presume that subscriber affixed digital signature with intention of affixing it. Sec 67A of IEA, provides that except for secure digital signature all other forms of signature have to be proven to belong to the subscriber, who has raised a plea of affixing it. Court under sec 73A of IEA can ask the Controlling authority to provide the Digital Signature certificate to prove subscriber details or for verification by use of public key mentioned in DSC. Under sec 85A of IEA, agreements signed in electronic form using digital signature certificate is correct. However certain documents as set out in schedule I as per sec1(4) of Information Technology act, does not admit of any electronic signature i.e. Power of Attorney, Trust, Wills, any contract of Sale or conveyance of Immovable property or any interest in such property. Thus, an e-document of the nature of documents as stated above, even if signed electronically, would not make them valid.

HEARSAY EVIDENCE AND ELECTRONIC EVIDENCE

Rule against hearsay forms one of the important principle of evidence globally particularly in US, UK, India and Canada. One Question often linked to Electronic record is: when specially it allows a computer output to be proved as Electronic Evidence then why not such computer output is hearsay evidence? In the **State v. Armstead**⁵⁰, the court held that all the electronic evidence is hearsay, as the digital evidence is not the statement by a person but it is a by-product of the machine operation. Electronic Data that is offered for the truth of the matter asserted is typically hearsay and thus generally ought to be inadmissible under the evidential rules. To admit the files stored in hardware and the emails as direct evidence, the proponent needs to satisfy the court that it comes from the exception to the hearsay evidence maintained in the ordinary course of business. Under Indian Context, a requirement of certification under sec 65B can be said that it meets the aforesaid requirement of the exception to hearsay rule but strictly speaking, the law in India with

50. So.2d 837,839(La.1983)/United States.

respect to Documentary evidence is different. It's different because in India, there is provision beside primary evidence to prove a document by secondary documentary evidence.

Thus, in a way it somewhat dilutes the principle of exception of hearsay rule but the idea is to reconcile the fact that when original document is lost then even secondary evidence which itself ensures its accuracy and trustworthiness, is better evidence than oral evidence as to the contents of document. As far as sec 22A read with sec 59 of IEA is concerned the same allows that except when genuineness is not in question of electronic record, no oral evidence can be given of its content. This provision is in matching tune with normal rule of appreciation of documentary evidence, which means rule against hearsay still exists. As far as documentary evidence is concerned, the truth or accuracy of the oral evidence cannot be compared to the document. That is why perhaps documentary evidence provides for both primary as well as secondary evidence. In cases of Electronic record, there is special provision under sec 65B, which provides for certification for admissibility of such evidence. In such sense, it can be said that even in case of Electronic Record, the rule against hearsay is still preserved.

ROLE OF HACKERS AND ELECTRONIC EVIDENCE

There can be circumstance when some data are searched by hacking and thereafter such data might be used as evidence against the owner of device from whom it was hacked for prosecution relying on the hacked data as evidence. The question which arise is: Can such data be used as evidence? Law in respect of illegally acquired evidence is not *res integra*. Hon'ble Supreme Court in **Magraj Pataudia v. R.K. Birla**⁵¹ has held that Court is not considered with how evidence is obtained if otherwise it is relevant to the fact in issue and admissible in evidence. Hon'ble Supreme Court in **R.M. Malkani v. State of Maharashtra**,⁵² the Court applying this principle allowed the tape-recorded conversation to be used as evidence in proof a criminal charge. Recently in **Yashwant Singh v. Central Bureau of Investigation**⁵³, popularly known as "Rafale Deal case" it has been held by Hon'ble Supreme Court that "An issue has been raised by the learned Attorney with regard to the manner in which the three documents in question had been procured and placed before the Court. In this regard, as already noticed, the documents have been published in 'The Hindu' newspaper on different dates. That apart, even assuming that the documents have not been procured in a proper manner should the same be shut out of consideration by the Court? In **Pooran Mal v. Director of Inspection (Investigation) of Income- Tax, New Delhi** it⁵⁴ was held that that the "test of admissibility of evidence lies in its relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out". Applying the settled law in the

51. [1971] 2 SCR 118.

52. 1973] 2 SCR 417.

53. 2019 SC 1802.

54. AIR 1974 SC 348.

case of Hacking of data, the aforesaid settled principles would apply as such, if the same is otherwise admissible in evidence, mere fact that it has been obtained by illegal search vide hacking computer will not make such evidence liable to be rejected.

ROLE OF THIRD-PARTY SEARCH AND ELECTRONIC EVIDENCE

Electronic records may in certain circumstances searched by third parties. Some of the instances are: -

- When search of data is made through ethical Hacking.
- When search of data is made in repair shop and the information is passed on to Law Enforcement Agency.
- When with consent to use the computers for other purpose by third party, he has revealed some incriminating data, which is passed on to enforcement agency.

In case of Ethical hacking, it has been dealt already that where evidence is procured by illegal means it will not make such data to shut provided it is admissible otherwise in evidence. In United States 'Private search' generally are not applicable to The Fourth amendment as such even an unreasonable search or seizure is valid.⁵⁵ In **United States v. Runyan**,⁵⁶ it was held on question that if suppose one file is searched by third party and the same informed to Police then can the Law enforcement agency search the entire content in that computer? It was held that, a third- party search of a single file on a computer allows a warrantless search by Police/Law enforcement agency of the computer to search the entire content. In Indian context, third party search would though reveal some data but at the same time, they are a potential threat to breach of privacy. However, if there are reasonable cause to search something, having nexus with object shall not cause breach of privacy. Because right to privacy is not an absolute right. Therefore, even third-party search will not make ipso facto the electronic evidence to be rejected in as evidence.

BEST EVIDENCE RULE AND ELECTRONIC EVIDENCE

With growing technical advancement, where technology is omnipresent in the form of Satellite surveillance, CCTV footages and Mobile tower locations, CDR, mobile recordings ipso facto makes them best evidence in many cases. As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption under Section 114 of the

55. *United States v. Jacobsen*, 446 U.S. 109,113(1984)

56. 275 F.3D 449,464- 65(5th Cir. 2001)

Evidence Act. Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

ARTICLE 20(3) OF CONSTITUTION AND ELECTRONIC EVIDENCE

As far as production from accused of electronic record/document is concerned, mere search of documents shall not bring it under the purview of self-incrimination as it has been held by Hon'ble Supreme in **State of Bombay v. Kathi Kalu**⁵⁷. "To be witness" occurring in article 20(3) cannot be equated with "furnishing of evidence" as such when documents/Electronic records furnish information, it shall not be self-incrimination of accused. Hon'ble Court has held that it is well-established that cl. (3) of Art. 20 is directed against self-incrimination by an accused person. Self-Incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. Hon'ble Madras High Court in **Swarnalingam Chettiar v. Asst. Labour Inspector**⁵⁸ has explained effect of search warrant and seizure of documents thereon, which is extracted below: -

"Now, though by reason of Article 20(3) of the Constitution, a court is precluded from issuing summons to an accused person to produce any document or thing in his custody..... It is easy to see where a different view would lead us. A person may commit a murder and bury the body in the backyard of his house and they would all be safe as if they had been lodged in the Bank of England. The constitution is not intended to be a charter for the lawless and there is nothing in Article 20 of the Constitution or in any of its other articles to prohibit the police from searching either the person of the accused or the premises in the manner laid down by the Criminal Procedure Code. Nor have the power of the magistrate to issue a search warrant in the circumstances set out in the Code been abrogated by the Constitution."

The immunity against self- incrimination extends to any incriminating evidence which the accused may be compelled to give. It does not extend to cover such situation as where evidence which may have tendency to incriminate the accused is being collected without in any manner compelling him or asking him to be a party to the collection of the evidence. Search of the premises occupied by the accused without the accused being compelled to be a party to such search would

57. AIR 1961 SC 1808

58. A.I.R. 1955 Mad. 716.

not be violative of the constitutional guarantee enshrined in Article 20(3).⁵⁹ Hon'ble Madras High Court in **M/S. Kuriland (P) Ltd v. P.J. Thomas**⁶⁰ had occasion to deal with a situation when it has to decide on the legality of order where search warrant was to be issued for production of some documents. The Hon'ble Court has held that, "Once this position is accepted, mere production of a document without compelling the accused to be a witness as such, will not amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution, even if it is assumed that the direction to the Accountant of the 1st accused company to attend and produce the documents would amount to a direction to the accused to produce the documents because they are actually, in law, deemed to be in custody of the documents. The direction to the Accountant to produce the documents by itself cannot be considered as illegal. Hon'ble Supreme Court, recently in **P. Gopalkrishnan @ Dileep v. State of Kerala**,⁶¹ has held that Content of Electronic record is a "document". Thus, the ratio of aforesaid decision of Hon'ble courts equally apply to Electronic records.

WHETHER CERTIFICATE UNDER SEC 65 B CAN BE SUMMONED BY COURT & MISCELLANEOUS CONCEPTS

This issue is no longer *Res Integra* and Hon'ble Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**,⁶² has held that court must summon such certificate. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65B(4) in cases in which such person refuses to give it. Hon'ble court has pointed to Sec 165 of evidence act, sec 91, sec 349 of Cr.P.C as well as Rule 6,7 & 10 of order XVI of CPC referred as powers to be used by court in obtaining such certificate.

CCTV footage now a days have become most important tool in investigation and being an electronic record, it becomes an important evidence in a case. A Court has the power to view CCTV footage and video recordings, be it primary or legally admissible secondary evidence, in the presence of the accused for satisfying itself as to whether the individual seen in the footage is the accused in the dock. The trial Court should also specifically put questions to the accused when he is examined under Section 313 Cr.P.C. about his overt acts appearing in the footage and record his answer.

Screenshot refers to an image wherein the display on a screen of a mobile or electronic gadget having a display of data in screen is captured. Almost all smart devices have the option of screenshot now a days. Screenshot taken of any display of screen is saved in the memory of cell phone or device. It is processed by a particular software in a device. So, it is covered under the definition of Electronic record which encompasses within itself image or sound stored in electronic form. As per Statute, the screenshot falls under the category of Electronic Evidence.

59. AIR 1980 SC 185

60. A.I.R. 1955 Mad. 716.

61. Supra Note 5.

62. Supra Note 6.

7. HINDRANCE IN APPRECIATION OF ELECTRONIC EVIDENCE AND CONCLUSION

Appreciation of Electronic Evidence, will always remain a challenge for Courts and Judiciary as the evidence apart from being delicate, it also needs to raise the scientific temper of stakeholders, right from Investigation agency to the Courts, for understanding and thereby appreciating evidence on correct lines. With huge technical advancement, where electronic record is omnipresent, failure to handle it with care, right from its seizure, extraction and safe custody to its forensic examination and production to Courts will throttle justice to litigants. With poor rated infrastructure to handle investigation in India, lack of training in cyber laws to law enforcement agency, often result in botched up investigation where electronic records are involved. By the time it is produced for appreciation of evidence, the data is already compromised, which often results in accused taking benefit of such lacunae. So, proper training of Investigating Officers handling criminal cases is an utmost necessity. Judges also needs to be trained regularly to properly appreciate the challenging and fast changing law. With regard to Electronic Evidence, statutes must be interpreted as if it is outgoing, vibrant and dynamic. Legislature could not gauge all the circumstances when it is drafted but interpretation of statute must be in the line which adopts the technological advancement. For example, there is recent trend to outsource data in external server or clouds. In that case it is difficult to get certification under sec 65B (2) of IEA. Obviously draftsman cannot gauge every technical advancement.

Similarly, in cases where device is not in control of a person who wishes that such electronic evidence to be produced before court, can a court coerce the owner to give certificate? In the light of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal** judgment now the court can require the owner to give certificate. India has adopted special provision for appreciation of electronic evidence vide sec 65 B of evidence act which in fact has been taken from United Kingdom but such provision, now no longer exist there, as they have repealed such law. Hon'ble Supreme Court in fact in **Anvar V. Basheer**,⁶³ case has made some simplification of the provision and the criteria listed out gives ample direction for formulation of certificate. Procedures are handmaid of Justice and for Justice to prevail, judiciary must evolve a process by which such evidence must not be thrown out due to non-compliance of technical procedure.

The issue of safe custody of Electronic Evidence at the stage of investigation is surely a hindrance in appreciation of electronic evidence but one more issue even more disturbing is its safe custody during trial before the Court. Courts also lack good infrastructure and proper training of subordinate staffs regarding preservation /safe custody of Electronic record. This is a very important direction which surely will address the issue of preservation of electronic record and appreciation of electronic Evidence. On this issue, Hon'ble Supreme Court very recently on 14th July, 2020 has observed in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**,⁶⁴ in its Judgment, the need to frame rules, as such has given direction to frame rules for retention,

63. Supra Note 27.

64. Supra Note 6.

preservation of electronic record which will in turn obliterate many hindrance which comes in way in appreciation of electronic evidence.

It was observed that Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016

As the technology develops, we must be aware that collection, preservation and retrieval of electronic evidence will become more and more challenging and scientific. So, adaptation, to withstand the test of such advancement for admissibility of electronic evidence by correct interpretation of statute and its legal admissibility, is the need of the hour. Science and law have good, as well as, bitter relation as while with scientific precision, the laws seem to have upheld the majesty of Justice but at the same time, the loopholes that even science is not immune to, often propels courts not to be blindfolded in its appreciation. India has made several reasonable amendments to keep abreast with scientific advancement but it cannot be said that it is comprehensively adequate and it can never be, with Electronic evidence, which changes with times very fast. So, the role of Judiciary becomes paramount to fill the chasm.

I would conclude the discussion with some valued statements by Hon'ble Justice Krishna Iyer which he endorsed in his Judgments that speaks volumes about how a Statue must be interpreted and how a procedural law must be understood: -

"Ordinarily, a criminal legislation must be so interpreted as to speak futuristically"

"Our judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and of formlessness on the other. Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever- changing conditions the never-changing principles of freedom" ---(He quoted Hon'ble Justice Earl Warren's statement in one of his Judgment)

We must always remember that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. it has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non- compliance, though procedural, will thwart fair hearing or prejudice be doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After, all courts are to do justice, not to wreck this end product on technicalities."

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Topic No. – 27

***Relation and effect of sufficiency of evidence, and standards
of proof in a criminal trial.***

By
Sri Dipankar Pandey,
Additional District & Sessions Judge,
Bhagalpur.

Sri Dipankar Pandey,
Additional District & Sessions Judge, Bhagalpur.

Topic : Relation and effect of sufficiency of evidence, and standards of proof in a criminal trial.

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Relation and Effect of Sufficiency of Evidence & Standard of Proof in a Criminal Trial

INTRODUCTION

In a Criminal trial, the prosecution adduces evidence of the charged offence/s (i.e., Crime) and the accused usually challenges the evidence. Sometimes, the accused mounts a plea of alibi or insanity or other kind of defense and asks the judge to believe on such defense. At the end of trial, the judge decides whether the prosecution has proved its case beyond reasonable doubt or whether the defense has been able to prove its version of incident.

As regards criminal cases the charge constitutes and includes the facts in issue. As defined in Section 3 of the Indian Evidence Act, 1872 “Facts in issue” means and includes, “Any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Any fact asserted or denied in answer to an issue of fact recorded under the civil procedure code”.

A fact in issue is called the “principal fact” or *factum probandum*. It is the fact which is sought to be proved by the prosecution in a criminal trial.¹ In the Evidence Act section 5 to 55 there are description of the various ways in which one fact may be so related to another as to be relevant to it. The word ‘relevant’ in the Act means admissible.² Principal fact and relevant facts are proved by the party who asserts the existence of such facts by leading evidence.

ANALYZING THE MEANING AND SCOPE OF “EVIDENCE”

As per Section 3 of the Evidence Act, “Evidence” means and includes, “all statement which the court permits and requires to be made before it by witnesses, in relation to matters of fact under inquiry (i.e., oral/ ocular - evidence). All documents including electronic records produced for the inspection of the court (i.e., documentary evidence).

Thus, in proving the guilt of an accused, the investigating agencies are duty bound to collect the best possible evidence and the public prosecutor is bound to present the best possible evidence to prove an alleged fact or circumstance leading to the commission of the offence. A failure to lead the best evidence thus makes the prosecution vulnerable to an adverse inference being drawn against it, as such failure amounts to suppression of the best evidence.³ Evidence

1. Sudipto Sarkar and VR Manohar, I Law of Evidence 35 (Wadhwa, Nagpur, 14th Edition, 1993)

2. Lakhmi v. Haider, 3 CWN 268 n, per Lord Hobhouse; Sudipto Sarkar and VR Manohar, vol. I Law of Evidence 35 (Wadhwa, Nagpur, 14th Edition, 1993)

3. Madhav Khurana & Ankit Bhatia, The rule of Best Evidence in Criminal Jurisprudence, available at: <https://www.barandbench.com/columns/the-rule-of-best-evidence-in-criminal-jurisprudence> (Last visited on January 24, 2021.)

other than the best evidence which is admissible under the Act is bound to be considered by the court.⁴ Whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense.⁵ So, in a criminal trial direct and circumstantial evidence both stands on same footing.

Accordingly, it crystallizes that definition of the word “Evidence” does not cover everything that the court has before it in arriving at any decision. Reason being, apart from deposition taken in court and documents which come under the head of evidence, the Judge may have other materials on which to found his conclusions, such as: -

1. Material objects may be produced in the court, because as per Section 60 of Indian Evidence Act, 1872 it is provided that if oral evidence refers to the existence or condition of a material thing, other than a document, the court may require the production of it.
 - (a) Certain facts do not require proof because the court is said to take judicial notice of them.⁶
 - (b) The demeanor and the appearance of the witnesses are facts which may be properly taken into account by the Judge.⁷
 - (c) Local inspection by a magistrate may supply material for a decision.⁸
 - (d) It is settled principle now as consistently held in Catina of decisions that answer given by the accused to question put to him under Section 313 of the Criminal Procedure Code, 1973 may be used against an accused as an additional link to the already proved prosecution case, even though they are not evidence, not being made by a witness. However, they ought not to be used to fill up gaps in the evidence for the prosecution.
 - (e) Evidence of an accused as witness recorded.⁹
 - (f) A confession made by a co-accused under Section 30 of the Indian Evidence Act, 1872 may be taken into consideration against another co-accused tried jointly with him for the same offence.

Thus, in addition to the depositions of witnesses and documents all the aforementioned materials are matters which court has to consider in arriving at a conclusion in a criminal trial.

4. Hardayan v. Gangadhar, AIR 1963 Calcutta 500

5. Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184

6. Section 56 & 57, Indian Evidence Act, 1872

7. Section 280, Criminal Procedure Code, 1973

8. Section 310, Criminal Procedure Code, 1973

9. Section 315, Criminal Procedure Code, 1973

RELATION BETWEEN EVIDENCE OF FACT & ITS PROOF

Evidence should not be confused with proof. As soon as a document, an invoice in this case is produced for the inspection of the court it becomes evidence, it could be acted upon, when it is proved, when it is found acceptable and then it is to be considered in conjunction with other items of evidence.¹⁰

Evidence of fact and proof of a fact are not synonymous terms. Proof is the effect of evidence. “Proof” means the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the court and is affected by: (i) Evidence or statements of witnesses, confession of the accused, production of documents (ii) Presumption (iii) Judicial notice and (iv) inspection.

In the definition of proved, no distinction is drawn between circumstantial and other evidence. In **State of Maharastra v. Md. Yakub**¹¹ it was pointed that the word ‘proved’ does not draw any distinction between direct & circumstantial evidence. In criminal cases the court requires a proof beyond reasonable doubt for a matter to be proved. What is meant by direct evidence and by circumstantial evidence is that as proof, the former goes directly to establish the culpability of the accused person in the commission of the offence, while the latter brings the guilt home to him by placing certain circumstances from which the inference is absolutely irresistible that the accused has committed the offence. It is as proof that circumstantial and direct evidence is to be dealt with.¹² The Principal fact or factum probandum may be proved by direct evidence or indirectly by means of certain inference drawn from factum probans, that is, the evidentiary facts.¹³ The extent to which a particular evidence aids in proving the fact in controversy is called as the ‘Probative force.’

It would be relevant to see that the word “matters” and not word “evidence” is used in the definition of the term “proved” and “disproved”. It is because of the use of this wider term that a court can attach due weight to the demeanor of a witness i.e., the manner in which he gives evidence in the court.

Section 3 of the Evidence Act, while explaining the meaning of ‘proved’ ‘disproved’ and ‘not proved’ deals with the degree or standard of proof. “Proof” does not mean proof of rigid mathematical demonstration with absolute certainty or accuracy of statement, because that is impossible. It must mean such evidence as would induce a prudent and reasonable man to come to the conclusion.¹⁴ It is trite law that suspicion cannot take the place of proof nor moral belief of the judge in the guilt of the accused.

10. *M/s Parrys Confectionery Ltd. v. Food Inspector*, 1989 Cri LJ 642, 646

11. AIR 1980 SC 1111

12. *Makbul Ahamad Mallik v. Abdul Rahman Akhand*, AIR 1952 Cal 494: 1952 CRLJ 944

13. *Vilas Pandurang Patil v. State of Maharastra*, AIR 2004 SC 3562

14. Justice C.K. Thakker, *Law of Evidence* 274, (Whytes & Co., New Delhi, 5th Edition, 2018)

[3.1] PROOF IN CIVIL AND CRIMINAL CASES

In general, the rule of law of evidence for civil and criminal cases are same.¹⁵ But there are some Sections of Indian Evidence Act, 1872 which apply only to the civil cases e.g., Sections 115 to 117 which deals with estoppel and some only to the criminal cases e.g., Sections 24 to 30 dealing with confessions.¹⁶ The burden of proof is on the prosecution in a criminal trial, whereas in a civil suit such burden of proof lies upon plaintiff. However, such burden of proof is same in both but there is substantial difference as to the effect of evidence or weight of evidence in civil and criminal cases.

In civil cases mere preponderance of probability is sufficient to give a finding; whereas, in criminal cases, charge must be proved beyond any shadow of reasonable doubt.¹⁷ The rule is based upon the maxim of English law that “It is better that ten guilty men should escape, rather than one innocent should suffer.”¹⁸ With regard to the standard of proof in civil and criminal cases, in Denning J. observed in **Bater v. Bater**.¹⁹ - “It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best CJ and many other great judges have said, in proportion as the crime is enormous, so ought the proof to be clear’. So also, in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter.”. The Hon’ble Supreme Court has also observed that civil cases are decided on the basis of preponderance of evidence while in a criminal proceeding the entire burden is on the prosecution and proof beyond reasonable doubt has to be given.²⁰

With regard to proof in “Criminal Cases” the following general rules have to be observed²¹ - (I) the accused is always presumed to be innocent till the prosecution proves him to be guilty. (II) The guilt of the accused must be proved to a moral certainty beyond reasonable doubt. (III) In case of any reasonable doubt as to the guilt of the accused the benefit of doubt should always be given to the accused. (IV) There must be clear & unequivocal proof of corpus delicti i.e. substance of the offence. (V) The hypothesis of delinquency must be consistent with all the facts proved.

15. Ratanlal & Dhirajlal, The Law of Evidence (PB) 46, (Lexis Nexis, 27th Edition, 2020)

16. Source: Vepa P. Sarathi, Law of Evidence 5, (Eastern Book Company, 8th Edition, 2010)

17. Source: Justice C.K. Thakker, Law of Evidence 137, vol.1, (Whytes & Co., New Delhi, 5th Edition, 2018)

18. Daniel Epps, “The Consequences of error in Criminal Justice”, Harvard Law Review, Volume 128, Number 4, February 2015.

19. Dr. Rangin Pallav Tripathy, Standard of Proof in Inquiry against Judges: A Case for a Lower Threshold 93; available at <http://www.nlujlawreview.in/wp-content/uploads/2019/10/5-2-NLUJ-Law-Review-85-2018-2.pdf> (Last visited at 26th January 2021); [1951] 2 All ER 458-459 (The United Kingdom)

20. Iqbal Singh Marwah v. Meenakshi Marwah, AIR 2005 SC 2119

21. Source: Justice C.K. Thakker, Law of Evidence 257, (Whytes & Co., New Delhi, 5th Edition, 2018) 257; Ratanlal & Dhirajlal, The Law of Evidence (PB) 47, (Lexis Nexis, 27th Edition, 2020)

[3.1.1] HON'BLE SUPREME COURT'S VIEW ON PROOF IN CIVIL AND CRIMINAL MATTERS: CASE ANALYSIS

The 'Standard of proof' required in criminal cases is proof beyond reasonable doubt, yet there is no absolute standard of reasonable doubt. A reasonable doubt is a fair doubt based on reason and common sense and must grow out of evidence in the case. Concept of probability cannot be expressed with mathematical precision as it involves subjective element and it rests on common sense.²² Judicial evaluation of totality of evidence and not isolated scrutiny is necessary. 'Proof beyond reasonable doubt' is not perfect proof. It is a guideline and not a fetish.²³

This aspect has been elaborately discussed in **Vijayee Singh & others v State of U.P.**²⁴ by the full court of Hon'ble Supreme Court in paragraph 27 and 28 of the judgment as-

"[Para 27]- It can be argued that the concept of "reasonable doubt" is vague in nature and the standard of "burden of proof" contemplated under section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The "reasonable doubt" is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved" "disproved" and "not proved" lays down the standard of proof namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is thus degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by "a prudent man".

[Para 28]- There is difference between flimsy or fantastic plea which is to be rejected altogether. But a reasonable though incompletely proved plea which casts a genuine doubt on the

22. State v. Dharkash, (2004) 13 SCC 308; AIR 2005 SC 44; 2005 Cr LJ 108

23. 1978 CR LJ 766 (SC)

24. AIR 1990 SC 1459

prosecution version indirectly succeeds. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to “separate the chaff from the grain”. It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence. It is not a doubt which occurs to a wavering mind.”

Further in **Iqbal Moose Patel v State of Gujarat**,²⁵ it is observed by the Hon’ble supreme Court in paragraph 23 and 24 of the judgment as - “[Para-23]- It is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. The principle as to what degree of proof is required is stated by Lord Denning in his inimitable style in **Miller v. Minister of Pensions**²⁶ “..... that degree is well settled. It need not reach certainly but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt.”

It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubts is not the law of the land.²⁷

Reference may also be made to the decisions of this court in **Sucha Singh v. State of Punjab**²⁸ where this court has reiterated the principle in the following words: “Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defense. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law.²⁹ The prosecution is not required to meet any and every hypothesis put forwarded by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial, if a case has borne inevitable flaws because human beings are prone to err, it is argued that it is too imperfect.

One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from

25. (2011) 1 SCC Cri 654

26. AII ER P. 373 H; (1947) 2 AII E R 372

27. Lal Singh v. St of Gujarat, (2001) 3 SC 221 at para 88

28. (2003) 7 SCC 643

29. Gurbachan Singh v. Stapal Singh, AIR 1990 SC 209

being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline not a fetish.”

4. LAW OF EVIDENCE ON QUALITY AND SUFFICIENCY OF WITNESS

It is also trite as per Section 134 of the Indian Evidence Act, 1872 that to prove any fact in a given case no particular number of witnesses are required. On the aspect of quality and sufficiency of evidence, it would be relevant to mention that in **Vadivelu Thevar v The State of Madras**,³⁰ Hon’ble full court of the Supreme Court has held that- “the contention that in a murder case, the court should insist upon plurality of witnesses, is much broadly stated. The Indian legislature has while on laying down that “no particular number of witnesses shall, in any case, be required for the proof of any fact” has enshrined the well-recognized maxim that “Evidence has to be weighed and not counted.” It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses’ cases, where the testimony of single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstance of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forth coming to testify to the truth of the case for the prosecution”.

[4.1] CLASSIFICATION OF ORAL TESTIMONY

Generally speaking, oral testimony in this context may be classified into three categories namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony

30. AIR 1957 SC 614

open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in case of sexual offences or of the testimony of an approver, both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable.³¹

5. ON PRESUMPTIONS UNDER THE INDIAN EVIDENCE ACT, 1872

In criminal trial presumption as defined in Section 4 of the Evidence Act is also one of the means of effecting proof of alleged facts. When the court presumes the existence of a fact that is known as a ‘presumption’ i.e., a thing taken for granted. It means a rule of law that courts and judges shall draw a particular inference from a particular fact or from a particular evidence unless and until the truth of such inference is disproved.³² Presumptions hold the field in the absence of evidence but when facts appear, presumptions go back. Presumption indicates the party on which the burden of proof lies except in the cases of conclusive presumption. Thus, presumption and onus of proof are two faces of the same coin. A rule of burden of proof is actually a rule of presumption.

A presumption is a legal or factual assumption drawn from the existence of certain facts; presumption raised under a statute has only an evidentiary value.³³ Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court undertakes a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Unless presumption is disproved or dispelled or rebutted, Court can treat the presumption as tantamount to proof.³⁴

In **Syad Akbar vs State of Karnataka**³⁵ the Hon’ble Supreme Court has elaborately discussed about the types of presumptions and their distinct effect on the burden of proof, as “Presumptions are of three types: -

- Permissive presumptions or presumptions of fact, (ii) compelling presumptions or presumptions of law (rebuttable), (iii) irrebuttable presumption of law or “conclusive proof”. Clauses (i), (ii) and (iii) are indicated in Clauses (1), (2) and (3) respectively, of S.4, Evidence Act.

[5.1] PRESUMPTION OF FACTS

With regard to presumption of facts, law gives absolute discretion to the court to presume the existence of any fact, which it thinks likely to have happened. In that process the court may have

31. *Vadivelu Thevar v The State of Madras*, AIR 1957 SC 614

32. *Ratanlal & Dhirajlal, The Law of Evidence* (PB) 71, (Lexis Nexis, 27th Edition, 2020)

33. *M.S. Narayana Menon v. State*; (2006) 6 SCC 39

34. *State v. K. Vasudeva*, AIR 2004 SC 960

35. AIR 1979 SC 1848

regard to common course of natural events, human conduct, public and private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act.³⁶ It is not obligatory for the court to draw a presumption of facts. In respect of such presumptions, the Act allows the judge a discretion in each case to decide whether the fact which under Section 114 may be presumed has been proved by virtue of that presumption. In case of a 'presumption of law' no discretion has been left to the court, and it is bound to presume the fact as proved until evidence is given by the party interested to rebut or disprove it.³⁷ Instances of such presumptions are to be found in Sections 79, 80, 81, 83, 85, 89 and 105 of The Indian Evidence Act, 1872.

The distinction between the effect of the first and second kind of presumption on the burden of proof is important. Presumptions of fact merely affect the "burden going forward with the evidence". 'Presumptions of law', however, "go so far as to shift the legal burden of proof so that, in the absence of evidence sufficient to rebut it on a balance of probability a verdict must be directed." (Fleming)."

Therefore, a presumption of fact is wholly in the discretion of the court. The court may or may not presume the existence of the fact in question. For example, where a person is shown to be in possession of stolen goods soon after the theft, the court may presume that he was the thief himself or had knowledge of the fact that the property in question was stolen. All presumption stated in Sections 86, 87, 88, 90, 113-A and 114 of the Indian Evidence Act, 1872 come under this clause. It is merely a provisional proof. It is valid until disproved. Presumption of fact are rebuttable as their evidentiary effect can be negated by a contrary proof. In **Tulsi Ram Sahadu v. State of Maharashtra**³⁸ it is observed that it is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct etc. in addition to the facts of the case. In these circumstances, the principles embodied in section 106 of the Evidence Act can also be utilized. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

36. Source: Justice C.K. Thakker, Law of Evidence 299, (Whytes & Co., New Delhi, 5th Edition, 2018)

37. Ibid at page 296

38. (2013) 1 SCC (Cri) 193

[5.2] PRESUMPTIONS OF LAW

With regard to presumptions of law (rebuttable)- “The court shall presume a fact” means that the court must regard such fact as proved unless and until it is disproved. It raises a rebuttable presumption. Expression shall be found in Sections 79 to 81, 83, 85, 89, 105, 113B and 114A of the Indian Evidence Act, 1872. All the presumptions stated in Section 118 of the Negotiable Instrument Act are presumptions of law. So, the burden is on the accused to rebut the presumption. These presumptions are always obligatory i.e. the court has no option in the matter and is bound to take the fact as proved, unless the party interested in disproving it produces sufficient evidence for that purpose. So, if the accused is successful in disproving it, the court shall not presume the fact.

The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the courts of law in respect of assessing the evidence in criminal cases. Section 105 places “burden of proof” on the accused in the first part and in the second part we find a presumption which the court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the section as a whole the “burden of proof” and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence, then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt.³⁹

[5.3] IRREBUTTABLE PRESUMPTION OF LAW OR “CONCLUSIVE PROOF”

“Conclusive proof” in this section is equivalent to irrebuttable presumption. An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view to combat that effect. These cases generally occur where it is against the policy of government or the interest of society, that a matter should be further open to dispute,⁴⁰ for example- a child under 7 years of age is incapable of committing any crime (Sec. 82 IPC). There is no difference between conclusive proof and conclusive evidence.⁴¹

Presumption is so strong that the court always takes a fact to be conclusively proved. Evidence is not admitted to challenge the fact.⁴²

6. CONCLUDING OBSERVATIONS

Accordingly, in view of the aforesaid discussion, it would be apt to sum up this topic with the following observation of the Hon’ble Supreme Court that although the court’s conscience must be

39. Vijayee Singh & others v. State of U.P., AIR 1990 SC 1459

40. Source: Justice C.K. Thakker, Law of Evidence 301, (Whytes & Co., New Delhi, 5th Edition, 2018)

41. Smt. Somavati v. State of Punjab, AIR 1963 SC 151

42. Source: Justice Khastgir, Criminal Major Acts at page 720, (Kamal Law House, Kolkata, 12th Edition 2019, New Print 2020)

satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard of proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.⁴³

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43. State of West Bengal v. Orilal Jaiswal; (1994) 1 SCC 73

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Topic No. – 28

Exercise of power u/s 311 Cr.P.C. and u/s 165 of the Indian Evidence Act by the courts to secure the best evidence rule and for the just decision of a case & summoning of document u/s 91 of Cr.P.C..

By
Sri Saurav Kr. Singh,
I/C Research Officer,
Juvenile Justice Secretariat,
Patna High Court.

Sri Saurav Kr. Singh,

I/C Research Officer,

Juvenile Justice Secretariat, Patna High Court.

Topic : Exercise of power u/s 311 Cr.P.C. and u/s 165 of the Indian Evidence Act by the courts to secure the best evidence rule and for the just decision of a case & summoning of document u/s 91 of Cr.P.C..

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EXERCISE OF POWERS u/s 311 Cr. P. C AND u/s 165 OF INDIAN EVIDENCE ACT BY THE COURTS TO SECURE THE BEST EVIDENCE RULE AND FOR THE JUST DECISION OF A CASE & SUMMONING OF DOCUMENT u/s 91 of Cr.P.C.

INTRODUCTION

Amongst the various rules of evidence that have developed over the course of time, the Rule of Best Evidence is one of the foundation stones on which our criminal justice system rests. This rule gains immense prominence in criminal trials, as under the Indian Criminal Justice System, an accused is considered to be innocent until proven guilty and the guilt of the accused has to be proved beyond reasonable doubt and not on a mere preponderance of probabilities, thus imposing upon the prosecution the obligation to adduce the best possible evidence to prove the guilt of the accused.

The rule has been defined to mean - so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it.

In the case of **Mohanlal Shamji Soni vs. Union of India & Anr.**,¹ it has been held by the Supreme Court that -

“...it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue.”

While a duty is cast upon the courts to arrive at the truth by all means possible, a duty is also cast upon the parties to come to court with clean hands, i.e. to make a complete disclosure without suppression of any material facts/evidence. In proving the guilt of an accused, the investigating agencies are duty bound to collect the best possible evidence and the public prosecutor is bound to present the best possible evidence to prove an alleged fact or circumstance leading to the commission of the offence. A failure to lead the best evidence thus makes the prosecution vulnerable to an adverse inference being drawn against it, as such failure amounts to suppression of the best evidence.

The principle behind adverse inference being drawn is based on a simple and obvious question that the court will pose to itself i.e. 'Why would the prosecution not lead the best evidence available to establish its case? Thus, the inference is grounded in the assumption that the best evidence is not relied upon as it may be detrimental to the prosecution's case and may benefit the accused. Section 114 of the Act gains relevance here.

“114. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

1. 1991 Supp. (1) SCC 271:1991 SCC (Cri) 595.

Thus, Section 114 allows for the courts to presume certain facts from the facts of a particular case and in aid of the Section, the Act also provides a number of illustrations to assist in the presumptions that a court may draw. Of these, Illustration (g) is of relevance to this rule.

“(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

Supreme Court, in a catena of judgments has relied upon Illustration (g) to hold that it is the duty of the prosecution to lead best evidence and adverse inference can be drawn when the best evidence is not produced before the Court.

Thus, the illustration clearly explains the intention of the Legislature and acts as a guiding tool for the courts. In fact, it has now become a settled principle of law that a failure on the part of the prosecution to produce the best evidence raises serious doubts on the prosecution’s case.

A relevant dictum of the Supreme Court in relation to this principle is the judgment in the case of **Tomaso Bruno & Anr. vs. State of Uttar Pradesh**², wherein the Court held that CCTV footage was the best piece of evidence to prove the presence of the accused at the scene of crime and it was for the prosecution to have produced such evidence. A failure to do so raised serious doubts about the case of the prosecution.

Interestingly in that case, the argument advanced by the prosecution was that the onus to prove that the accused were not at the scene of crime was on the accused by virtue of Section 106 of the Act which places the burden of proving a fact especially within the knowledge of a person upon such person. However, the Supreme Court held that to invoke Section 106 of the Act against the accused to prove their alibi, the prosecution first had to establish the presence of the accused and since the witnesses themselves made a reference to the CCTV footage, a failure to produce the same raised serious doubts about the prosecution’s case.

The Rule is attracted not only in cases pertaining to non-production of documents or seized goods but also extends to oral testimonies and witnesses. It has been held by the Hon’ble Supreme Court that the failure to examine the best witness waters down the testimony of other witnesses.

In the case of **Vijender vs. State of Delhi**³, the Hon’ble Supreme Court discarded the post mortem report not only because the original had not been produced (and thus falling foul of S. 64 of the Act), but also because it had been proved through the evidence of the record clerk of the hospital where the post mortem had been conducted. The Court, relying upon S. 60 of the Act, held that the prosecution was bound to lead the best evidence available, which was to examine the doctor who conducted the post mortem examination, especially since he was still employed with the hospital. In light of the non-examination of the doctor, the Court held the post-mortem report to be legally inadmissible.

2. Criminal Appeal No. 142/2015.

3. Criminal Appeal No. 769 of 1996.

Recently, in the case of **Digamber Vaishnav vs. State of Chhattisgarh**⁴, a three-judge bench of the Hon'ble Supreme Court observed that no attempt had been made by the prosecution to examine the witnesses who were present at the scene of the incident at the relevant time and who had first seen the deceased persons and thus held that the best evidence had been withheld.

Keeping in view of the role of prosecution in any trial in any criminal case and the possibility of miscarriage of justice in cases of lack of duties performed on the part of the prosecution the criminal law specifically the Code of Criminal Procedure and the Evidence Act has empowered the criminal courts to exercise their inherent powers in order to secure the justice to the parties. Amongst numerous provisions of such a kind section 311 and 91 of Cr.P.C and section 165 of the Indian Evidence Act finds its place at a different footing. The conjoint reading of these sections reflects that the criminal courts are not at the mercy of the evidences produced by the prosecution or the defence and empowers them to ensure that justice is rendered by an active role played by the criminal courts.

CHAPTER-1

CONCEPT OF FAIR TRIAL vis-à-vis POWERS OF COURT UNDER SECTION 311 OF Cr.PC & SECTION 165 OF INDIAN EVIDENCE ACT

Before we advert to the ambit and scope of Section 311 Cr.P.C, it is imperative to dwell upon the concept of “fair trial”. There is no denial of the fact that fair trial is an insegregable facet of Article 21 of the Constitution. Hon'ble Supreme Court on numerous occasions has emphasized on the fundamental conception of fair trial as the majesty of law so commands.

A three-Judge Bench speaking through Krishna Iyer, J. in **Maneka Sanjay Gandhi and another v. Rani Jethmalani**⁵, though in a different context, observed:-

“Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate when the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances.”

The aforesaid principle has been stated in the context of transfer of a case but the Court has

4. Criminal Appeal Nos. 428-430 of 2019.

5. (1979) 4 SCC 167.

laid emphasis on assurance of fair trial. It is worthy to note that in the said case, the Court declined to transfer the case and directed the Magistrate to take measures to enforce conditions where the Court functions free and fair and agitational or muscle tactics yield no dividends. However, liberty was granted to the appellant therein to renew prayer under Section 406 Cr.P.C. Stress was laid on tranquil court justice. It was also observed that when the said concept becomes a casualty there is collapse of our Constitutional order.

In **Ram Chander v. State of Haryana**⁶, while speaking about the presiding Judge in a criminal trial, Chinnappa Reddy, J. observed that if a criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. The learned Judge reproduced a passage from Sessions Judge, **Nellore v. Intha Ramana Reddy**⁷ which reads as follows:-

“Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial.”

While saying so, it has been further held that the Court may actively participate in the trial to elicit the truth and to protect the weak and the innocent and it must, of course, not assume the role of a prosecutor in putting questions.

In **Rattiram and others v. State of Madhya Pradesh**⁸ speaking on fair trial the Court opined that:-

“... Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.”

The purpose of citing above judgements is just to highlight that the powers vested in criminal Courts under sections 311 of Cr.PC or under section 165 of Indian Evidence Act are not arbitrary powers of the Courts rather it is coupled with the corresponding duties towards the litigant and the society at large to use such discretionary powers in order to ensure fair trial and justice by obtaining the best evidence in any criminal trial.

6. (1981) 3 SCC 191

7. 1972 Cri LJ 1485

8. (2012) 4 SCC 516

CHAPTER-2**POWER OF COURT TO SUMMON MATERIAL WITNESS or EXAMINE PERSON PRESENT****{Section 311 of Cr.PC}**

Before entering into the intricacies of law involved in section 311 of Cr.P.C i.e. power to summon material witness or examine person present by the competent Court, let us briefly see what it states. Section 311 states –

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

The section is almost a reproduction of section 540 of the 1898 Code with only a minor change. In order to enable the Court to find out the truth and render a just decision the salutary provisions of section 311 are enacted where any Court by exercising its discretionary authority at any stage of the enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute⁹. The aid of this section should be invoked only with the object of discovering relevant fact or obtaining proper proof of such facts for a just decision of a case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. It should not be used for filling up the lacuna by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties¹⁰.

It is the cardinal rule in the law of evidence that the best available evidence should be brought before the court. Section 60, 64, and 91 of the evidence act are based on this rule. The court is not empowered under the provisions of the code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence the court can take note of the fact that the best available evidence has not been given and draw an adverse inference. This is generally a matter of considerable difficulty for the court. The court will often have to depend on interested allegations made by the parties or on

9. Mohanlal Shamji Soni vs. Union of India, AIR 1991 SC 1346.

10. Supra.

inconclusive inferences from facts elicited in the evidence. In such cases, the court has to act under this section, the second part of which lays a duty on the court to summon and examine a witness, whose evidence appears essential to the just decision of the case. The fact that police gave a list of witnesses in the charge-sheet does not disabled prosecution from examining any other witness. In any case, the power vested in the court under this section is not subject to any restrictions, because the court is empowered to summon any person as witness or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examine, if his evidence appears to it essential to the just decision of the case.

Section 311 is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, that first part gives purely discretionary authority to the criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case¹¹. Where in a trial of dowry case, the Public Prosecutor fails to produce material witnesses, it is the bounden duty of court to summon them on its own¹².

When the legislature has used the words “may” and “shall” in the same provision, it means the legislature did not leave it to the discretion of the Court to interpret both the expressions. It is clear that the word ‘shall’ in the second clause is mandatory and imperative in nature and character while the word ‘may’ in the first clause is directory.

i. Power of Court Whether Unfettered:

Under the section, a court has unrestricted powers of summoning a witness. The only restriction is that this power should not be exercised to save parties from trouble and expense. Subject to this, it is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice. The very usage of the words such as “any Court”, “at any stage” or “any inquiry, trial or proceedings” and “any such person” clearly spells out that this section is expressed in its widest possible terms and do not limit the discretion of the Court in any way¹³.

There is no limitation as to the power of the Court arising from the stage to which the trial may have reached, provided the Court is bonafide of the opinion that for the just decision of the case, the steps must be taken. This section confers a wide discretion on the Court to act as the exigencies of justice require¹⁴.

11. *Jamatraj Kewalji Govani v. State of Maharashtra*, AIR 1968 SC 178; *Avtar Singh Bhasin v. Hari Pal Singh*, 1995 (1) Crimes 841 (HP) ; *Pradeep Kumar Agarwal v. State*, 1995 (1) Crimes 390 (Ori).

12. *Govind Ram v. State of U.P.*, 1999 Cr LJ 1955 (All); 1999 (1) Crimes 101.

13. *Mohan Lal v. Union of India* (1991 Supp (1) SCC 271).

14. *Zahira Habibullah H. Sheikh vs. State of Gujrat* (2004) 4 SCC 158

There is a duty cast upon the court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak to important relevant facts. The court cannot evade its statutory responsibility by omitting to consider whether the evidence of any witness left out by the parties is essential or not. The court may summon witnesses, and if the prosecution declines to examine them, the court may thereupon, acting on its own initiative, cause them to be produced. Such witnesses may there upon be regarded as called under section 311. The power of the court to examine a witness as conferred by section 311, cannot be curtailed in any manner or beyond any stage, so long as the court retains seizes of the matter. The object underlying section 311, is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. While exercising power under this section, be it discretionary under first part or obligatory under second part of the section, the court is not to be guided by the fact that by not exercising power case of prosecution or the accused would be damaged. What it has to see is whether it is essential to the just decision of the case. The order to be passed under this section, being a judicial act should be passed on sound principles of justice and equity.

Section 311, consists of two parts the first part, which is discretionary, enables a court at any stage of an enquiry, trial or other proceeding to summon anyone as a witness or to examine any person present in court or to recall and re-examine any witness. The second part of the section, which is mandatory, compels a court to take in all the said three steps if new evidence appears to be essential for the just decision of the case. The discretion in the first part is very wide but at the same time the court must be very circumspect and cautious in acting under this section. The court cannot in the course of judgment permit the prosecution to produce evidence to cover up lacuna. It would appear that the statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or to examine one present in the court or to recall a witness already examined and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be on the ground that whether the accused has brought anything unexpectedly or suddenly but it should be on the fact that whether the court is right in thinking that the new evidence is needed by it for a just decision in the case.

Courts Discretion How To Be Exercised:

The first part of the section does not confer a right on any party to examine, re-examine or cross examine a witness. It only needs a discretion in the court to summon any person as a witness, a discretion which should, as a matter of course, be exercised judicially. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers necessary for doing justice between the state and the subject. It would not be improper exercise of the power of the court under this section merely because the evidence taken supports the case of

the prosecution and not of the accused. Rules which the court must bear in mind when examining court witnesses are-

- a. That the prosecution and the accused or both equally entitled to cross examine a court witness, and

That if the evidence of the Court witness is prejudicial to the accused, opportunity to rebut the evidence should be given to the accused.

The section gives wide powers to the court to require any person to give evidence at any stage of an enquiry, trial or other proceeding. Obviously, the power is given to the court in order that it might do complete justice between parties. The right of the court to exercise the powers given by this section is unrestricted. Therefore when the trial court is of the view that the evidence of certain witnesses is essential to the just decision of the case, it does not deserve to be interfered with. Whenever any application is made for examining any witness and recalcitrant, then the court must give its careful and anxious consideration to it and ponder over the seriousness of the offence; as to whether the witness to be examined is a material witness; what will be the impact on the result of the case, and what will be the consequence of acquittal on the society as a result of non-examination of the said witness. If this care is not taken off by the court, then it has no right whatsoever to subsequently blame the prosecution for its own wrong. All this had to be pointed out in order to indicate to them as to where lies the salt of wisdom and where lies the salt of conscience while conducting in criminal trial.

The court would be justified in rejecting the application under section 311 for recalling a witness for re-examination when recalling of that witness is only to get the evidence recorded in court effaced and eschewed and thereby to sabotage prosecution. The judicial discretion has to be exercised on the basis of tangible and concrete material. It maybe that a witness has not been cross-examined with reference to some important aspects of his evidence and that this has occurred by oversight. It is possible that, having regard to the matter involved in the case, the court might exercise its discretion under this section and recall such witness for further cross examination. But the party who applies to the “for the exercise of its powers under the section has to give some indication of the existing lacuna or of the circumstances which justify the exercise of such discretion. This does not mean that the line of cross examination has to be closed. Otherwise, the position would be that the court has to exercise its powers under the section not by applying its own mind but by excepting the bare statement of the accused that circumstances do exist justifying the examination of a witness or the recalling of a witness for further examination. This is not the way in which judicial discretion can be exercised. Indeed, it would not be the exercise of any discretion at all.

This section confers very wide powers upon a court. But the wider the powers, the greater the exercise of jurisdiction is required of the magistrate; If section 311 is read with section 244 of the Cr.P.C, it is apparent that by this section, it was not intended that the magistrate should exercise

his powers at the bidding of any person, but that the powers are given to prevent any danger or miscarriage of justice, just because some particular witness has not been called. The power under section 244 is not intended for the purpose of calling witnesses when the prosecution case has not been concluded. After the closing of the case, the magistrate can exercise the power. Nor the discretion given to the magistrate under this section should be exercised in the middle of the prosecution evidence. Under the section the magistrate may summon any person as a court witness at any stage of proceedings, but in fairness to the parties and with a view to afford them an opportunity of proper cross examination, he should generally inform them beforehand of the names etc. of those witnesses.

Witness Whose Evidence is Essential to Just and Proper Decision of the Case or Ends of Justice:

By using the word “essential” and qualifying the word “decision” by the adjective “just”, the legislature has clearly indicated that the power should be exercised very cautiously and only where, the court thinks the evidence absolutely necessary in the interest of justice. In other words, the statute arms the court with the powers to make any evidence it likes *ex debito justitiae*. The words just decision do not necessarily imply that the decision should be either in favour of the prosecution or the defence. They merely confer a duty. But by using word just the court has been cautioned against taking any action which may result in injustice either to the accused or to the prosecution.

It is difficult to lay down a general rule as to what in the circumstances of a particular case would be essential evidence necessary for the just decision of the case. But a few particular instances would indicate the nature of the jurisdiction possessed by a court under the section. A very material witness, for instance, the sole witness in the riot case, is not produced by the prosecution, or a very material document which conclusively decides the case one way or the other or clinches the issue has been overlooked. In such circumstances it will be the duty of the court to summon the witness or call for the document. The test of just decision is not of the accused only. It is equally applicable to the case of prosecution. Section 311 confers a wide discretion on the court to act as the exigencies of justice may require. Another power complementary to it is to be found in section 165 of the evidence act. These two sections between them confer jurisdiction on court to act in aid of justice and intended to arm the court with extensive powers required for the purpose of getting at the truth. Their effect is that in order to get to the bottom of the matter the court will be able to look at and inquire into every fact whatsoever.

Once the Court reaches a conclusion that the evidence of any particular witness neither examined by the prosecution nor by the defence, appears to the Court essential to the just decision of the case, the Court in order to perform the paramount duty cast upon it, namely to do justice between the parties, must examine such a witness untrammelled and unfettered by any other provision of the Code. The determinative factor under section 311 is whether the summoning/

recalling of the witness is essential to the just decision of the case. The test of “just decision” is not only limited for the benefit of the accused and it will not be an improper exercise of the powers of the Court to summon a witness under this section merely because the evidence supports the case of the prosecution and not that of the accused. Where in a case of dowry death, neighbours were material witnesses, refusal to summon them under section 311 on the mere ground that under section 161 Cr.P.C, they did not depose anything was improper¹⁵. Where documents filed with the charge-sheet have not been proved, important documents, relevant for the just decision of the trial have not been filed, the Court would direct their production exercising powers under section 311 of the Cr.P.C r/w section 165 of the Evidence Act.

It is worthy to mention that there is no provision in the Cr.P.C which empowers the Court to direct prosecution to examine certain witnesses as prosecution witnesses. On the contrary, section 311 empowers the Court to examine witnesses as Court witnesses, if necessary¹⁶.

A trial continues till the delivery of judgement and the court has authority to examine witnesses even though the witness of both sides has been closed and the arguments were concluded. The object of the section is to enable the court to arrive at the truth by calling for the production of what it considers to be relevant evidence. Under section 311 of the code the court has power to recall any witness only when the court is satisfied that it is essential for the just decision of the case. It cannot be said that the court can examine a witness under the section only if the matter arises ex improvis which no human ingenuity can foresee. The powers should be interpreted by the words used in the section itself. All that the section requires is that the court shall examine any person if his evidence appears to it essential to the just decision of the case. It stands to reason that if the appellate court can examine necessary witness under section 391, the trial court can also examine necessary witnesses under this section¹⁷. It is in the interest of justice that a guilty person should be convicted just as it is that an innocent person should be acquitted.

Meaning of ‘At Any Stage of Inquiry, Trial’:

The section gives the Court ample powers to summon any material witness at any stage of any inquiry, trial or other proceeding. When the trial Court is of the opinion that summoning a witness is essential to the just decision in the case, the objection that the application to summon the witness under this section moved by the complainant, is belated by more than nine months, cannot prevail.¹⁸

Even after both parties have closed their cases it is open to the Magistrate to summon any person as a witness if his evidence appears to him to be essential to the just decision of the case.¹⁹

15. Syed Firozuddin vs. State of Rajasthan 1993 CrLJ 1169 (Raj.).

16. State of Gujrat vs. Manzooralib Alibax, (1985) 1 Crimes 542 (Guj.)

17. Saghir Hussain versus State AIR 1958 All 312 at 312

18. Hukum Chand Kaushal vs. Subash Sikri; 1975 CLR 360.

19. Manoj Jha vs. State of Jharkhand, AIR 2003 Jhar HCR 1025.

The Court can summon the witness under section 311 at any stage of the trial. Such a witness has to be called as a prosecution witness, if summoned on behalf of the prosecution and likewise defence witness if summoned on behalf of defence and not Court witness.²⁰ However, it is improper to recall witness after the final arguments were heard. The power should be exercised only in suitable cases when the exigencies of the situation impel the Court to proceed under this section. Similarly, when the case is posted for judgement it is not illegal for the Magistrate to order issuance of summons to a person to be examined as a Court witness, though it has been held that where a case is posted for judgment, the trial of the case stands terminated within the meaning of section 353 of Cr.P.C and the witness cannot be examined under section 311.²¹ On the other hand, when the case is posted for arguments and for judgement the trial of the case is not terminated and the witness can be examined under section 311.²²

It is important to note that the Court has power to summon witnesses under section 311 even at the stage of taking cognizance of the offence for the just decision of the case. Where the Court summons a witness under section 311 at the time of taking cognizance of the offence, the accused has no right to cross-examine such witness.²³

Ordinarily the Court may intervene under this section after the closure of evidence, and not before that, for it may not be possible for the Court to form a bona fide opinion as to the necessity of calling a witness before evidence is closed on the side of the prosecution. There is nothing, however, in the language, of the section to say, that the Court cannot make an order under it even before the prosecution evidence is closed.

Examination of Essential, Material Witness:

The court should exercise its inherent power under the section in the interest of justice and to serve the cause of justice to examine the essential witnesses,²⁴ for ex. doctor or a investigation officer in a murder case. The section gives a power to the Court to summon a material witness or to examine a person present in Court or to recall a witness already examined. It is not only the power rather the duty of the Court to examine all material witnesses for the just decision of the case.²⁵ Where a witness is a material witness, where adjournments were not granted earlier for producing the witness, rejection of prosecution prayer for summoning the witness is not proper.²⁶

20. Vijay Kumar vs. State of UP, 2012 CrLJ 1696.

21. K.Sanjeedram vs. Secretary, Thalikulathur Gram Panchayat, 2004 CrLJ 555 (Ker).

22. P.T.Josep vs. K.K.Rajappan, 2004 CrLJ 727.

23. Sk. Siraj vs. State of Orissa, 1994CrLJ 2410.

24. Nagina vs. State of Bihar ; 1991 Cr LJ 1195 (Pat-DB)

25. State of Gujrat vs. Senma Savabhai Bhikhabhai; 1995 CrLJ 3061 (Guj-DB)

26. Pradeep Kumar vs. State; 1995 CrLJ 76.

Court Not to Fill up Omission by the Prosecution:

Section 311 should not be invoked by the Court to fill the lacuna in the prosecution case. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case, but an oversight in the management of the prosecution cannot be healed as irreparable lacuna.²⁷ Where the prosecution did not examine a single witness during a period of five years and as such the prosecution evidence was closed and the statements of the accused persons were recorded, the Magistrate was fully justified in rejecting the informant's application under section 311 for summoning the prosecution witness.²⁸ However where a witness has done mistake in giving evidence, he can be summoned under section 311 of Cr.P.C, for rectifying it's mistake and it does not amount to filling up gap in prosecution case.²⁹ But on the other hand, the prayer at defence stage to examine a witness to prove a document shall be refused.

Whether Application u/s 311 Can Be Permitted in the Appellate Court :

Power to summon material witnesses or recall or re-examine any person already examined, as contemplated under section 311 of Cr.P.C can be exercised by the trial court as well as by the appellate court. Wordings of section 311 indicate that such power could be exercised by any court at any stage of any enquiry, trial or other proceedings under this code. This is for all intents and purposes would also include hearing of the appeal by the Court of Session. Mere fact that section 311 is incorporated under chapter XXIV which deals with general provisions applicable to enquiries and trial would not be sufficient to hold that such power can only be exercised at the stage of any enquiry or trial and not at appellate stage.

Other Proceedings:

The power under the section may be exercised in any enquiry, trial or other proceedings under the Code. The section is quite general and applies to all proceeding and is not limited in its operation by any other provision in the court. The words other proceeding includes proceedings under section 145.³⁰ A witness may be examined under the section in such proceedings, even though his affidavit may not have been filed by either side;³¹ but this power should not be so used as to enable a party to circumvent The provisions of subsection (4) of section 145. It is a special power that should be used sparingly on appropriate occasions.³²

Any Person as a Witness:

There is no restriction as to the person who may be examined as a witness under this section.

27. Rajendra Prasad vs. Narcotic Cell, Delhi: AIR 1999 SC 2292.

28. Saraswati Devi vs. State of Jharkhand; 2004 Cr LJ 1512.

29. Valsamma vs. Satheesh Kumar, Cr LJ 1574.

30. Bishedhar Prasad vs. Mahadeo, 1961 All LJ 611.

31. *supra*

32. Harihar Pati vs. BodaPitel Naik, (1962) 1 CrLJ 60.

The Court is competent to summon any person as a court witness at any stage of the proceedings but he should inform the parties before hand of the names of such witnesses, so as to afford them an opportunity of proper cross-examination. The expression any person includes:

- a. **Witness present in the court:** When witnesses are present in court and the party wants to examine them and there is not even a suggestion that the party wants to delay the proceedings then the court should not refuse to examine them.³³

A party to the case: A party to the case may be examined as a court witness, if his evidence is considered essential to the just decision for the case not of course including an accused person.

Police officials: If it becomes necessary to examine a police official in respect of the statement of the witnesses recorded by him, then even though the defence may not have named them, the court should not refuse to summon them as court witnesses.

Discharge persons: There is no law or principle which prevents a person who has been suspected and charged with an offence but discharged by the magistrate for want of evidence, being afterwards admitted as a witness for the prosecution.³⁴

Medical Witness: When the defence is based on section 84 of the Indian Penal Code the sessions judge may acting under the section 84 and section 165 of the Evidence Act, ascertain the behaviour exhibited by the prisoner during the years of his life previous to the homicide and if the accused has been kept in a lunatic asylum, record material evidence of the facts observed there.

Accused or Accomplice: This section does not seem to authorise the examination of the accused as a witness, not even at the stage of an appeal, as the appeal is nothing but the continuation of the original case. However, an accomplice if not accused in the same case is a competent witness and can be examined under this section.³⁵

Witness Previously Given Up: Court cannot refuse request - The prosecution by merely making an endorsement that a particular witness is given up is not stopped from examining that witness later on before it closes its case. Therefore, upon a request made by the prosecution, to examine such witness the court will not be justified in refusing the request unless it gives reason as to why the examination of such witness, who were given up, is not necessary for a just decision of the case. Even otherwise the court can examine these witnesses as Court witnesses under this section.³⁶

Court may Suo Moto Summon :

If the conditions of section 311 satisfied, the court can call the witness not only on the application of either party, but on its own motion. The court may suo moto to summon on a public

33. Harblas vs. Krishan Devi, 1982 CrLT 453 (P & H).

34. Queen vs. Behary Lall Dose, 7WR 44.

35. Re B.K.Narayan Reddy, AIR 1941 Mad. 324.

36. Syed Mohammad vs.K.C. Raman, (1964)1 CrLJ 100 at 101 (Ker.).

analyst where examination is necessary to rectify mistake and if no prejudice is being caused to the accused. Where the prosecution has not examined the informant and investigating officer who were material witnesses, the Court should of its own motion summon such material witnesses for the just decision of the case³⁷.

Court Has No Power to Discover Witnesses by Personal Inquiry:

Section 311 simply provides that a Magistrate may summon any witness whose evidence appears to be necessary but the power to summon a witness does not by any means imply a power to discover such witness by personal inquiry out of court. Where the Magistrate makes a personal inquiry out of court without notice to the parties and as a result summons certain witnesses, his action is improper and not in accordance with law and disqualifies him from conducting the trial

CHAPTER-3

SECTION 165 OF THE INDIAN EVIDENCE ACT, 1872

Section 165 of the Indian Evidence Act, 1872 (in short 'IEA') reads:

“The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

This Section invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before it, the Court will be able to

37. Palacharla Rama Rao vs. State of A.P , 2002 CrLJ 4189 (AP).

look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

The Judge contemplated by Section 165 is not a mere umpire at a combat between the lawyers for the parties, whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses so that every point is brought out, is not fulfilling his duty.

The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not. The framers of the Act, in the Report of the Select Committee published on 31st March, 1871 along with the Bill settled by them, observed as follows: -

“Passing over certain matters which are explained at length in the Bill and report, I come to two matters to which the Committee attaches the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses; the second, to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.

That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases – probably the vast numerical majority – the Judge has to conduct the whole trial himself. In all cases, he has to represent the interests of the public much more distinctly than he does in England. In many cases, he has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter. ...”

“With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the various cases in which, as appears to us, the questions of the improper admission or rejection or omission of evidence can arise; and have provided that whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly.

Cunningham, Secretary to the Council of the Governor General for making Laws and Regulations at the time of the passing of the Indian Evidence Act, explained the Section as under:—

“It frequently happens that the parties do not, in their questions, elicit all the facts necessary to sound a view of the merits of the case. A plaintiff may have some weak points in his case which he is afraid of betraying and so dexterously avoids or a defendant may fail to perceive the import of some answers given and allow it to pass uncriticised: in any case it is highly important that the Judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without Court's permission to cross-examine on the answers given. This general power, however, is very closely restricted. In the first place, the judgment must be based on relevant facts and those relevant facts must have been duly proved: next the Judge cannot compel a witness to answer any question, or to produce any document, which he (witness) would be entitled to refuse to answer or produce at any instance of the opposite party : nor may the Judge ask any of the questions as to credit which would be improper if asked by the adverse party : nor can he dispense with primary evidence of a document unless the facts of the case show that secondary evidence is admissible. A Judge accordingly, cannot, by the exercise of the powers conferred by this section import into the decision of the case any fact which is not relevant under the Act nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit, accept such as would be permitted if asked by the parties. Thus restricted, the power of asking questions is of obvious utility in a country like India, where in the vast majority of cases, no advocate is employed, but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witnesses.”

Under Section 165, the Court has ample power and discretion to interfere and control conduct of trial properly, effectively and in a manner as prescribed by law. While conducting trial,

Court is not required to sit as a silent spectator or umpire but to take active part within the boundaries of law. The Supreme Court in **Ramchander v. State of Haryana**³⁸ observed as follows:—

“1. What is the true role of a Judge trying a criminal case? Is he to assume the role of a referee in a football match or an umpire in a cricket match, occasionally answering, as Pollock and Maitland (Pollock and Maitland: The History of English Law) point out, the question 'How is that', or, is he to, in the words of Lord Denning 'drop the mantle of a Judge and assume the robe of an advocate? (Jones v. National Coal Board, [1957] 2 All. E.R. 155). Is he to be a spectator or a participant at the trial? Is passivity or activity to mark his attitude? If he desires to question any of the witnesses, how far can he go? Can he put on the gloves and 'have a go' at the witness who he suspects is lying or is he to be soft and suave? These are some of the questions which we are compelled to ask ourselves in this appeal on account of the manner in which the Judge who tried the case put questions to some of the witnesses.

The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may 'ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Cr.P.C enables the Court to send for the police- diaries in a case and use them to aid it in the trial.

The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. (Session Judge, Nellore v. Intha Ramana Reddy, ILR 1972 AP 683: 1972 Cri LJ 1485).

With such wide powers, the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not' assume the role

38. (1981) 3 SCC 191.

of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the Judge, by descending into the arena, as it were. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a Judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:

People accustomed to the procedure of the Court are likely to be over-awed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence they may wish, but the parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite eventually"

(Extracted by Lord Denning in Jones v. National Board [1957] 2 All. E.R. 155).

In **Jones v. National Coal Board, [1957] 2 All. E.R. 155**, Lord Justice Denning observed:

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well.

We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (Section 165 Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the Judge. The Judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the) old'."

In **Ritesh Tewari v. State of Uttar Pradesh**,³⁹ the Supreme Court held that every trial is a voyage of discovery in which truth is the quest. The power under Section 165 of the Indian Evidence Act is to be exercised with the object of subserving the cause of justice and public

39. (2010) 10 SCC 677.

interest, and for getting the evidence in aid of a just decision and to uphold the truth. The relevant portion of the judgment is reproduced hereunder: -

“37. Section 165 of the Evidence Act, 1872 empowers the Court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the Court that the question put to him is irrelevant or the facts the Court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the Court is to be based on relevant facts which have been duly proved. A Court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the Court to elicit the truth and to act in the interest of justice.

A wide discretion has been conferred on the Court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the Court can ask the question to the parties concerned at any time and in any form. "Every trial is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the Court can put questions to the parties, except those which fall within exceptions contained in the said provision itself. (Vide: Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178; 1968 Cri LJ 231 and Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors. 2004 (4) SCC 158; 2004 SCC Cri 999)".

CHAPTER-4

INTER SE RELATION BETWEEN SECTION 311 Cr.P.C & SECTION 165 OF

THE INDIAN EVIDENCE ACT

Section 311 of Cr.PC and section 165 of the Indian Evidence Act, 1872 are intended to arm the Court with extensive powers required for the purpose of getting at the truth. The effect is that in order to get the bottom of the matter the Court will be able to look and inquire into every fact whatsoever. It should, however, be borne in mind that Courts must act within the limits which the law places upon their powers in dealing with cases before them. Just as it is not open to a Court in civil litigation to compel a party to make a particular kind of pleading or to amend its pleading, so also it is beyond its competence to virtually oblige a party to produce and examine any particular witness. It is no doubt the duty of the Court not only to do justice but to ensure that justice is done. It has to bear in mind that it must act only in accordance with the law and not otherwise.

In **Zahira Habibulla H. Sheikh v. State of Gujarat**,⁴⁰ the Supreme Court held that

40. (2004) 4 SCC 158.

Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The relevant portion of the judgment reads: -

“43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary when the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India* (AIR 1991 SC 1346), this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. The object of the section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the

Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.

Ultimately, as noted above, *ad nauseam* the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case.”

“51. Need for circumspection was dealt with by this Court in *Mohanlal Shamji Son's case* and *Ram Chander v. State of Haryana*, [(1981) 3 SCC 191: 1981 SCC (Cri) 683] which dealt with the corresponding Section 540 of Code of Criminal Procedure, 1898 (in short the “old Code”) and also in *Jamatraj's case*. While dealing with Section 311 this Court in *Rajendra Prasad v. Narcotic Cell, Delhi*, [(1999) 6 SCC 110: 1999 SCC (Cri) 1062] held as follows:

“7. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not ‘fill the lacuna in the prosecution case’. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials

or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.""

"54. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lie before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The Courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mockfight and making a mockery of the criminal justice administration itself.

As pithily stated in **Jennison v. Baker**, [1972 (1) All E.R.1006: (1971) 2 QB 52: (1972) 2 WLR 429 (CA) (All E.R. p.1006d)].

"The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope".

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See *Shakila Abdul Safar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.*, (2003) 7 SCC 749: 2003 SCC (Cri) 198)."

"62. In *Paras Yadav and Ors. v. State of Bihar*, (1999) 2 SCC 126 :1999 SCC (Cri) 104 (para 8), it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of Courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty."

As was also observed in **Ram Bihari Yadav v. State of Bihar and Ors. (1998 (4) SCC 517)** if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice in the hands of Courts. The view was again reiterated in **Amar Singh v. Balwinder Singh and Ors. (2003 (2) SCC 518)**.

In **State of Rajasthan v. Ani**,⁴¹ the Supreme Court held that section 165 of the Indian Evidence Act confers vast and unrestricted powers on the Court to elicit truth. The relevant portion of the judgment is reproduced hereunder:-

"10. Shri Sushil Kumar, learned senior counsel criticized the manner in which the trial Judge had put the question. Counsel submitted that when the cross-examiner has successfully elicited a pivotal answer from PW-3 it was improper for the Court to have interjected to upset the trend.

11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant "in order to discover relevant facts. The said Section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled

41. AIR 1997 SC 1023.

power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief- examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross- examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised."

In **Mohanlal Shamji Soni v. Union of India**,⁴² referring to Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure, the Supreme Court stated that the said two sections are complementary to each other and between them, they confer jurisdiction on the Judge to act in aid of justice. Referring to a situation where best available evidence is not brought before the Court for one or the other reason by either of the parties, it was observed thus:

"10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a factor the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the Presiding Officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties to take an active role in the proceedings in finding that truth and administering justice? It is a well-accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory – according to law in dispensing

42. 1991 Supp. (1) SCC 271:1991 SCC (Cri) 595.

justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted where under any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

“15. Besides the above specific provisions under the Cr.P.C and Code of Civil Procedure empowering the criminal and Civil Courts as the case may be, to summon and examine witnesses, a Judge in order to discover or to obtain proof of relevant facts is empowered under section 165 of the Indian Evidence Act to exercise all the privileges and powers subject to the proviso to that section which power he has under the Evidence Act. Section 540 of the old Code (Section 311 of the new Code) and Section 165 of the Evidence Act may be said to be complementary to each other and as observed by this Court in *Jamatraj Kewalji Govani v. State of Maharashtra* “these two sections between them confer jurisdiction on the Judge to act in aid of justice”.

In *Jamatraj Kewalji Govani v. State of Maharashtra*,⁴³ the Supreme Court held that Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure, 1898 confer jurisdiction on the Judge to act in aid of justice. In criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it.

In **Jai Prakash v. National Insurance Company**,⁴⁴ the Supreme Court held that the Motor Accident Claims Tribunal should take an active role in deciding and expeditiously disposing of the applications for compensation and make effective use of Section 165 of the Indian Evidence Act to determine the just compensation.

In **Somari Devi v. Ragwar Singh**,⁴⁵ the Delhi High Court has discussed the scope of Section 165 of the IEA.

In **Sessions Judge Nellore Referring Officer v. Intha Ramana Reddy**,⁴⁶ the Andhra Pradesh High Court held as under: -

43. AIR 1968 SC 178.

44. (2010) 2 SCC 607.

45. III (2010) ACC 147.

46. 1972 CriLJ 1485.

“1. In this case we are presented with a difficult problem and faced with a strange situation quite unprecedented, arising out of an unusual attitude adopted by the accused, who quite unmindful of the serious charge of murder made against them, refused to participate in the proceedings before the lower Court and persist in their refusal in this Court also. In the committal Court as well as in the Court of Session, when examined by the presiding Magistrate and the Judge respectively, they plainly and bluntly stated that they had no faith in the law Courts of the land, established according to them to protect the interests of the landlords, capitalists and the like, they professed to be 'Naxal barites.' As they had not engaged any counsel to defend them and as they had refused to answer the question whether they were possessed of sufficient means to engage a counsel, the learned Sessions Judge thought it desirable to appoint a counsel at the cost of the State to defend them. He requested a senior practitioner of the Court to defend them but the accused would have none of it and told the Sessions Judge that they did not want the services of a lawyer. The case therefore proceeded without the accused being defended by a lawyer. The prosecution examined twenty witnesses. At the end of the examination of each witness, the accused were asked by the Sessions Judge whether they wished to cross-examine the witness. They declined to cross-examine any witness. Instead they shouted slogans. When examined by the Sessions Judge at the conclusion of the evidence for the prosecution, they reaffirmed their lack of faith in Court and the present social system. At the close of the trial the learned Sessions Judge convicted the three accused under Section 302 read with Section 34 and sentenced A-1 and A-2 to death and A-3 to imprisonment for life. While A-3 has preferred an appeal through counsel, A-1 and A-2. it is reported by the Jail Superintendent, have refused to prefer an appeal. Their case also is however before us in the reference made by the learned Sessions Judge under Section 374 Cr.P.C. for confirmation of the sentences of death. They have refused to be represented by any counsel at the hearing of the reference.

2. We may at once state that the learned Sessions Judge who tried the case adopted a negative and a passive attitude at the trial. It was as if he was spectator and not a participant in the trial. In a case where the charge is of a capital nature and where the accused are undefended, be it by choice, one would expect the presiding Judge to evince an active interest and participate in the trial by putting questions to witnesses in order to ascertain the truth. Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) Criminal Procedure Code enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions

Judge to further aid him in the trial. In the present case there were certainly several matters which required clarification and elucidation.

“5... We are prepared to go so far as to say that in every capital case and in every case of a complicated nature it is the duty of the Court to assign a counsel to defend an undefended accused. In other cases also, it is the duty of the Court to assign a counsel to defend the accused. If in such cases no counsel is assigned it can perhaps be urged with force that there is a violation of the Constitutional right, not to be deprived of life or liberty except according to procedure established by law. But where the accused refuses to have a counsel assigned to him it cannot be said that there is any such violation. The Constitutional right may extend in appropriate cases to being asked whether the accused would like to have a counsel assigned to him and to the assigning of a counsel if he desires but it cannot extend to have a counsel imposed on an unwilling accused. As pointed out by us earlier no Court can appoint a counsel to represent an accused if the accused does not want a counsel to represent him. That is clear. The Court may perhaps appoint a counsel to act as *amicus curiae* but such a counsel does, not represent the accused and cannot cross-examine witnesses since cross-examination must be by the adverse party. The only way in which the Court may protect the accused in such a situation is to put necessary questions itself to the prosecution witnesses on all matters requiring clarification. We have already pointed out that the learned Sessions Judge failed to do this. In the circumstances of the case we do not think that we will be justified in quashing the conviction and ordering a retrial. We think that the interests of justice will be adequately served if, in exercise of our powers under Section 375 of the Code of Criminal Procedure we recall and examine the, material witnesses ourselves by putting necessary questions. On such an examination the accused will naturally have a right to cross-examine the witnesses if they so choose and the prosecution will have the right to re-examine the witnesses. Summons will therefore be issued forthwith to PWs. 1 to 3. 5, 6, 13, 14, 17 and 20 to appear in this Court on 22-2-1971. The accused will be produced in this Court on that day.”

PROVISO I: [Judgment to be Based on Relevant Facts Duly Proved] - The first proviso emphasizes the width of the powers of the Court to question a witness. The general power given by this section is restricted by this proviso, which declares that the judgment must be based on relevant facts, and those relevant facts must have been duly proved. The judgment of the Court must be based upon facts declared by the act to be relevant and duly proved.

PROVISO 2: [Prohibition to Ask Questions or to Compel Production of Documents Protected by Law]- The second proviso preserves the privileges of witnesses to refuse to answer certain questions and forbids the Judge to ask questions or to compel production of documents in contravention of sections 121 to 131, 148 and 149. Subject to these restrictions, the Judge has ample and unfettered power to ask any question, in any form, at any stage and of any person. The fullest power has been given by this section to explore all avenues for the discovery of truth

including the asking of questions about irrelevant facts with the purpose of getting any information which may lead to the discovery of relevant fact and to prevent justice being defeated by technicalities or rigid rules. It supplements similar powers of Court under special enactments, e.g. Order X Rule 4 (I), Order XI Rule 14, Order XVI Rules 7 and 14, Order XVIII Rules 17 and 18 of CPC and Section 311 of Cr.PC. The powers of a Court under Section 311 of Cr.PC are also very wide. Section 310 of Cr.PC makes provisions for local inspection by Court. Section 311 Cr.PC and Section 165 Indian Evidence Act confer a wide discretion on the Court to act as the exigencies of justice required. An improper or capricious exercise of the power may of course lead to undesirable results. But all discretionary powers must be used judicially and not capriciously or arbitrarily. It should be borne in mind that the aid of this section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts.

CHAPTER-5

POWER OF COURT TO SUMMON TO PRODUCE DOCUMENT OR OTHER THING

{SECTION 91 of Cr.PC}

The section corresponds to section 94 of the 1898 Code. It produces the old section with some changes. Under section 91 the Legislature has endowed the courts with wide powers of ordering production of documents necessary for the determination of matters before the court and for directing inspection of those document. But an order directing a person to produce or to give inspection of his book in a dispute to which he is not a party involves a serious inroad upon his normal rights as a citizen and the Courts have always set their faces against giving anything in the nature of roving or fishing commission to inspect documents. It is incumbent upon the Courts to satisfy itself as to whether the production of a particular document or book is necessary or desirable for the purpose of investigation, inquiry or trial of any case, before it passes any order for the production of the said document.⁴⁷ Section 91 does not confer absolute right on the accused.⁴⁸

The powers conferred under section 91 are enabling in nature, aimed at arming the Court or any officer in charge of a police station concerned, to enforce and to ensure the production of any document or other things, necessary or desirable, for the purpose of any investigation, enquiry, trial or other proceeding under the Code, by issuing a summons or a written order to those in possession of such material. The language of section 91 would, no doubt indicate the width of the powers to be unlimited but inbuilt limitations inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsion of necessity and desirability, to fulfil the task or achieving the object. The question before the trial court would be to address itself to find whether there is sufficient ground for

47. Sanjay Kumar Chaudhary vs. State of Jharkhand, 2011 (1) JCR 275 (Jhar)

48. Dr. Kuldeep Kaushik vs, State of UP, 2016 (4) Crimes 504 (All).

proceedings to the next stage against the accused. If the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart averting an exercise in futility at the expense of valuable judicial time.

Scope of section 91 of the Code of Criminal Procedure is very wide. If a document is believed to be in possession of a person and if the Court considers it relevant and desirable for purpose of enquiry it can summon the person to produce that document.⁴⁹

The document or thing called for must have some relation to or connection with the subject matter of investigation, enquiry or trial and throw some light on the proceedings or some link in the claim of evidence.⁵⁰ The sine qua non of an order under this section is a consideration by the court that the production of the document concerned is desirable and necessary for the purposes of the trial. Section 91 is not subjected to section 172 and 173 of the Code, the prohibition contained in section 172 and 173 of the Code do not crib, cabin and confine the powers of the court.

The jurisdiction under section 91 of the Code when invoked by accused, the necessity and desirability would have to be seen by the Court in the context of the purposeful investigation, enquiry, trial or other proceedings under the code. At the time of framing charge or taking cognizance, accused has no right to produce any material.

CHAPTER-6

INTER SE RELATION BETWEEN SECTION 91 OF Cr.PC AND 165 OF INDIAN EVIDENCE ACT

So far as sec 91 of the Cr.PC is concerned, the legal position is well settled by the Hon'ble the Apex Court in the case of **State of Gujarat vs. Shyamlal**⁵¹ wherein, the Apex Court laid down that the words "to the person" used in the said section do not cover an accused thus, while exercising powers under Sec. 91 Cr.P.C. the Court cannot direct for summoning of any document from the accused. However, ***the questions which this court has to examine is as to whether the Court can direct the accused u/s 165 of the Evidence Act to produce any document.***

Section 165 of the Evidence Act gives unbridled powers to the Court to compel any of the parties to the case to produce a document or to put a question to a party, when the Court is of the opinion that the production of such a document or the putting of the question to the witness is essential for eliciting the truth. This section does not give a right to any of the parties to request the Court to summon the document or to put the question. Under this section suo-moto powers are provided to the courts which are to be exercised only when the Court is convinced during the trial

49. Kamal Ahmed Mohammad Vakil vs. State of Maharashtra, 2013 (2) Bom. CR 217.

50. Subhashini Jena vs. Commandant of 6th Battalion, (1988) 65 CLT 551.

51. AIR 1965 SC 1251

of the case that the putting of the question or the production of the document is essential for the just decision of the case.⁵² Also Section 165 of the Evidence Act cannot be held to be overriding the fundamental rights against self incrimination available to the accused under article 20(3) of the Constitution of India so as to empower the Court to direct the accused to produce any document. Clothing the Court with such a power would run contrary to the rights against self incrimination available to every accused under article 20(3) of the Constitution of India.⁵³

In the case of **Kanhaiyalal vs. Anil**,⁵⁴ an application was filed by the accused for production of books of accounts rejected by the trial court on the ground that there was no provision in Criminal Procedure Code and the complainant could not be compelled to produce the same.

At Para-6 of the said Judgment Court observed that the Court is not devoid of any power to call upon any party to produce a document. Section 165 of the Indian Evidence Act is a provision empowering a judge which he may exercise to obtain proper proof of fact and for that purpose at any time order any witness or party production of any document. In this case complainant was in possession of the original account book which he had brought in the Court and therefore the petitioner-accused had every right to inspect the original account books and put questions to the witness in his cross- examination so as to demonstrate that the entry therein would not be relevant and admissible either under section 32(2) or 34 of the Evidence Act. *To that extent, accused gets right of inspection of the account books and putting questions to the witness.*

The effect of Section 165 Evidence Act is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The court is not, however, permitted to find its Judgment on any but relevant statements. The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth.⁵⁵

In one of the latest Judgment of Apex Court in **Nitya Dharmananda vs. Gopal Sheelum Reddy**,⁵⁶ the issue was that respondent approached the High Court with the prayer that the entire material available with the investigator which was not made part of the Charge-sheet ought to be summoned under Section 91 Cr.P.C. In the present case court discussed the law relating to Sec.

52. Govind Puri vs. Laxmi Narayan, 2013 SCC Online Raj 3847

53. Supra

54. 2010 SCC Online Bom 168.

55. JAG Fashion (P) Ltd. Vs. Krishna Kumar Khanna, 2011 SCC Online Del 1209

56. (2018) 2 SCC 93.

91 Cr.P.C. It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the Court being under the obligation to impart Justice and to uphold the law, is not debarred from exercising its power, if the interest of Justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the Court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge.

At para 6, Hon'ble Court has referred the earlier decision of **State of Orissa vs. Debendra Nath Padhi**,⁵⁷ on the question of invoking Sec 91 Cr.P.C "Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that same is '*necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the code*'.

The first and foremost requirement of the section is about the document being necessary and desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of charge would not arise since defence of the accused is not relevant at that stage. When this section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under this section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of section 173 of the Code; the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof."

At para 8, Court held that it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same

57. (2005) 1 SCC 568.

even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 Cr.P.C de hors the satisfaction of the Court, at the stage of charge.

Insofar as Section 91 is concerned it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of the proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object.⁵⁸ But before the Court allows an application for production of a document in the possession of a party complainant or accused, the other party must be issued notice and given hearing.⁵⁹

In the case of **Om Prakash Sharma vs. CBI**,⁶⁰ at Para 6, the Hon'ble Apex Court discussed the scope and stage of Section 91 Cr.P.C and observed:

The powers conferred under Section 91 are enabling in nature aimed at arming the Court or any officer in charge of a Police Station concerned to enforce and to ensure the production of any document or other things necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the Code, by issuing a summons or a written order to those in possession of such material. The language of Section 91 would, no doubt, indicate the width of the powers to be unlimited but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. The question, at the present stage of the proceedings before the Trial Court would be to address itself to find whether there is sufficient ground for proceeding to the next stage against the accused. If the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time. It is trite law that the standard of proof normally adhered to at the final stage is not to be insisted upon at the stage where the consideration is to be confined to find out a *prima facie* case and decide whether it is necessary to proceed to the next stage of framing the charges and making the accused to stand trial for the same. This Court has already cautioned against undertaking a roving enquiry into the pros and cons of the case by weighing the evidence or collecting materials, as if during the course or after trial.⁶¹ Ultimately, this would always depend upon the facts of each case and it would be difficult to lay down a rule of universal application and for all times. The fact that in one case the Court thought fit to exercise such powers is no compelling circumstance to do so in all and every case before it, as a matter of course and for the mere

58. *State of Orissa vs. Debendra Nath Padhi*, (2005) 1 SCC 568).

59. *Sethuraman vs. Rajamanickam*, (2009) 5 SCC 153).

60. (2000) 5 SCC 679

61. *Union of India vs. Prafulla Kumar Samal & Anr.*, 1979 3 SCC 4.

asking. The Court concerned must be allowed a large latitude in the matter of exercise of discretion and unless in a given case the Court was found to have conducted itself in so demonstrably an unreasonable manner unbecoming of a judicial authority, the Court superior to that Court cannot intervene very lightly or in a routine fashion to interpose or impose itself even at that stage. The reason being, at that stage, the question is one of mere proprieties involved in the exercise of judicial discretion by the Court and not of any rights concretised in favour of the accused.

Therefore, it is to be only seen as to whether the Trial Court has judiciously and judicially exercised its discretion.

In short, the Courts are vested with vast powers under section 165 of the Indian Evidence Act and section 311, section 91 of the Code of Criminal Procedure in order to ensure not only the best evidence is placed before the Court but also by using these powers the Courts are duty bound to not to sit merely as a mute spectator or a referee but to take active participation in any criminal trial and to ensure justice at any cost.



Topic No. – 28(a)

Exercise of power u/s 311 Cr.P.C.. and u/s 165 of the Indian Evidence Act by the courts to secure the best evidence rule and for the just decision of a case & summoning of document u/s 91 of Cr.P.C..

By
Sri Rohit Shankar,
Additional District & Sessions Judge,
Bhagalpur.

Sri Rohit Shankar,

Additional District & Sessions Judge, Bhagalpur.

**Topic : Exercise of power u/s 311 Cr.P.C.. and u/s 165 of the Indian Evidence Act by the
courts to secure the best evidence rule and for the just decision of a case &
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Exercise of power u/s 311 Cr.P.C.. and u/s 165 of the Indian Evidence Act by the courts to secure the best evidence rule and for the just decision of a case & summoning of document u/s 91 of Cr.P.C..

Introduction:

It is often understood in legal field that the inherent powers are vested only with High Court, but a detailed overview of some of the sections as envisaged under the Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872 suggests that the trial court are also empowered and are having discretion to exercise their power accordingly in different exigencies. Some of such sections are Section 311 Cr.P.C, Section 165 Indian Evidence Act and Section 91 of the Cr.P.C. The object of the various legal authorities has always been to dispense and secure justice to all the sections of society by procuring best evidence so that just decision can be arrived. The "doctrine of profert in curia" is closely related to the best evidence rule. Earlier In case of profert in curia, if original documents are not produced by party, then all the rights created by the documents are extinguished. The best evidence rule is also called the original document rule meaning thereby that original document must be produced and if the party fails to produce the same or cannot give account for non-production, then he was not allowed to give evidence through secondary sources such as hand written copy. The rule originated because in that period document copying was done by the court clerks manually and there was always a significant chance of error in the copied document. However, in the 20th Century due to technological advancement of printing machine, Xerox machine and computer, now the originals can be reproduced without any error and from here exception of the best evidence rule began to develop. It is cardinal principle of evidence that a document need not only be produced before the court, but should be duly exhibited. Because non exhibition of document as per rules may hamper the case of the party and the court will not take into account such non exhibited document, while passing its judgment.

In India, the best evidence rules are not particularly mentioned anywhere but it is the basis of section 91 and 92 of the Indian Evidence Act. The principle can also be seen imbibed in section 60-64 of the Indian Evidence Act. Therefore, requirement of filing best evidence in the Court is indispensable and directly affects the intelligentsia of the Judicial Officer in passing a judgment and it is not out of place to mention that non filing of the same by the party will affect his trial and can give adverse inference against him.

The complete procedure of Code of Criminal Procedure is based upon the **principle of justice and fairness**. One of the fundamental principles of legal jurisprudence and natural law is that any person, who is accused of any offence should be given an equal chance to be heard and

to defend himself in the Court of justice. Courts have to take a participatory role in a trial. They are not expected to be a tape recorder to record whatever is being stated by the witnesses. Section 311 of Code and section 165 of Evidence Act confers vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The power of Section 165 of the Evidence Act is in a way complimentary to its power u/s 311 of the code as held in **Himanshu Singh Sabharwal v. State of M.P. & Ors. [AIR 2008 SC 1943]**

Section 311 Cr.P.C. :

Section 311 Cr.P.C. enumerates power to summon material witness, or examine person present. This section specifically provides that the Court can at any stage of enquiry trial or other proceeding, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person, if his evidence appears to it to be essential to the just a decision of the case. Besides section 311 Cr.P.C. there is another provision namely section 165 of the Indian Evidence Act, which invest the Court with a wide discretion to call and examine anyone as a witness, if the Court is of the opinion that his examination is necessary for just decision of the case. As observed by the Hon'ble Supreme Court in the case of **Zahira Habibulla Sheikh and Anr. v. State of Gujarat and Ors.(7) reported in (2004)4 SCC 158** and in the case of **Zahira Habibulla Sheikh (5) and Anr. v. State of Gujarat and Ors. (8) reported in (2006)3 SCC 374** "A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to meet out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine, by becoming a participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the correct conclusions, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators". The Hon'ble Supreme Court has further observed 'the Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice often referred to as the duty to vindicate and uphold the 'majesty of law'. It is further observed that "due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as court of law in

the future as in the case before it." It is further observed by the Hon'ble Supreme Court that "Courts have to ensure that the accused persons are punished. A criminal trial should not be reduced to be mock trials or shadowboxing or fixed trials."

Therefore, it can be said that the provision of Section 311 Cr.P.C as well as Section 165 of the Indian Evidence Act are the tools to secure the best evidence and provides Judges with the discretion to ensure fair trial. These two sections between them confer jurisdiction on the court to act in aid of justice [**Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178**]. The court have to take participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. The provision as provided under section 311 Cr.P.C. is imbibed with the objective that the best evidence should come before Court and the Court can allow such evidence at any stage, meaning thereby there is no limitation for exercising such power, but the only guideline which is to be followed by the Courts is that such exercise of calling or recalling or re-examining any witness and recording his statement, even though not summoned as a witness must be in the interest of justice and the essential to the just decision of the case. The best part of section 311 Cr.P.C. is that it does not distinguish that whether prosecution or defence has filed the application and therefore, provide equal opportunity to both the parties to give their best evidence before the Court and also assist the Court in arriving at the just decision. This section corresponds to section 540 of the Code of 1898 and there were little changes as the words "to be" have been added after the words "appears to it" and before the words "essential to it", which laid emphasis that the evidence of witness sought to be examined under this section must be essential to the just decision of the case.

Recently, the Hon'ble Apex Court held in the case titled as **Manju Devi v. State of Rajasthan, (2019) 6 SCC 203** that long duration of a case cannot displace the basic requirement of ensuring the just decision. In other words, the age of a case, by itself cannot be decisive of the matter when a prayer is made for examination of the material witness.

An overview of section 311 Cr.P.C would depict that it consists of two parts; one giving a discretionary power to the court and the other imposing an obligation. The Hon'ble Apex Court in **Hanuman Ram v. State of Rajasthan, (2008) 15 SCC 652** also observed that the section 311 Cr.P.C. is manifestly in two parts. Whereas the word used in the first part is "may" the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code to: (a) to summon any one as a witness, or (b) to examine any persons present in Court, or (c) to recall and re-examine any persons whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps, if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court a duty of examining a material witness who would not be brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with

regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord, when for certain obvious reasons either party is not prepared to call witnesses, who are known to be in a position to speak important relevant facts. The Court also observed that the object underlying section 311 Cr.P.C of the code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statement of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section benefits the prosecution as well as accused and applies to all proceedings, enquiries and trials under the Court. But conferring such power on the Court brings with it the responsibility on the court to exercise the discretion judiciously, as the wider the power the greater is the necessity for application of judicial mind. The Hon'ble Apex Court also highlighted that if a witness is called by Court and gives evidence against the complainant, an opportunity to cross examine should be given [**Jagat Ravi Vs. State of Maharashtra (AIR 1968 SC 178), Rama Paswan and others Vs. State of Jharkhand (2007{11} SCC 191)**].

In recent years, it is seen that the tendency of filing successive application for recalling witness has become a common feature, therefore, while dealing with this issue, the Hon'ble Supreme Court in landmark judgment titled as **Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328** has observed clearly and convincingly that filing of successive application for recall of a witness under section 311 of Cr.P.C. should not be encouraged.

Recently Hon'ble Apex Court in **AG Vs. SHIV KUMAR YADAV & ANR. (2015 SC dated 10/09/2015)** dealt with the provision of Section 311 Cr.P.C. in detail. In this case the issue raised for consideration was whether recall of witnesses, at the stage when statement of accused under Section 313 of the Code of Criminal Procedure has been recorded, could be allowed on the plea that the defence counsel was not competent and had not effectively cross-examined the witnesses. The Hon'ble Apex Court while disapproving the view of the High Court in that case observed that:

- (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel was given due opportunity and had duly conducted cross-examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;
- (vii) Mere change of counsel cannot be ground to recall the witnesses;
- (viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;
- (ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;
- (x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

Accordingly, appeals were allowed and the Hon'ble Apex Court set aside the impugned order passed by the Hon'ble High Court and dismissed the application for recall.

The Hon'ble Apex Court in **Rajaram Prasad Yadav Vs. State of Bihar (4 July 2013)** has interpreted the several decisions of the Apex Court which highlighted the basic principles to be born in mind while dealing with an application under section 311 Cr.P.C.

A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311

Cr.P.C. and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier.

The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. In so far as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution." After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

- Whether the court is right in thinking that the new evidence is needed by it?
- Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?
- The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
- If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
- The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
- The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
- The wide discretionary power should be exercised judiciously and not arbitrarily.
- The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

- The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.
- The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.
- Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.
- The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
- The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
- The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
- The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

In Shailendra Kumar v. State of Bihar, (2002) 1 SCC 655 : 2002 SCC (Cri) 230 at page 656, After examining two or three formal witnesses, the learned Sessions Judge closed the evidence of prosecution on the ground that APP has not made any prayer, either oral or written for adjournment or for examining other witnesses. The prosecution evidence was declared to have been closed and the matter was fixed for recording the statement of accused. Learned counsel for the accused-respondent however submitted that in this case there is no question of referring to Section 311 Cr.P.C. in view of the earlier order dated 1-2-2000 passed by the High Court setting aside the order dated 20-9-1995 passed by the Additional Sessions Judge recalling the order dated 3-9-1994 by which the prosecution evidence was declared to have been closed. This submission was found without any substance. The Apex Court held that the bare reading of the

Section 311 Cr.P.C reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired. In **Rajendra Prasad v. Narcotic Cell [(1999) 6 SCC 110 : 1999 SCC (Cri) 1062]** Supreme Court observed that "After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Also in **Amarinder Singh v. Parkash Singh Badal, (2009) 6 SCC 260 : (2009) 2 SCC (Cri) 971 at page 278**, it was held that ultimately, it is upon the Presiding Officer/Special Judge and not this Court to evaluate those witnesses and arrive at a conclusion one way or other depending on the charges levelled against the accused. It would not be fair on the part of this Court either to assess and arrive at an opinion about the same. Even after closing of the prosecution side by the Public Prosecutor, if the court wants to examine some more witnesses from the list furnished by the prosecution, it is for the Presiding Judge to take a decision in accordance with the law and issue appropriate direction.

Section 165 Evidence Act :

Besides 311 Cr.P.C. another provision which is vital for obtaining best evidence and for just decision of the case is section 165 of the Indian Evidence Act, which is Judge's power or right to put questions to witnesses related to a particular case. A Judge is expected and indeed it is his duty to explore all avenues open to him in order to discover the truth. If therefore, the Judge finds that the examination of a witness is not being conducted in such a way as to unfold the truth it is not only his right but his duty to intervene with his own questions. It is the duty of the Judge to be well aware of all the evidence presented before him to discover the truth and for which, provision of section 165 of Indian Evidence Act was incorporated. As per the mandate of the section 165 of Indian Evidence Act, the Judge may ask any question at any time to witness about any fact relevant or irrelevant, but without trespassing the function of the counsel and without appearing to frighten the witness. Further, there is no limit in asking question and the Judge can go in depth examination and ask as many questions as he things appropriate to disclose the truth. Therefore, the width of power under of Court under Section 165 of the Evidence Act is almost plenary and no party can possibly raise an objection thereto. The significant part of section 165 of Indian Evidence Act is that neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor without the leave of the Court, to cross examine any witness upon any answer given in reply to such question. It is the discretionary power of the Judge to give permission for cross examination of the witnesses. Thus there is nothing in section 165 debarring or disqualifying a party to a proceeding from cross examining any witness summoned by the Court. Under Section 165 of Evidence Act, a Judge has the power of asking irrelevant questions to a witness if he does so in order to obtain proof of relevant facts.

In **Sanjay Kumar v. State of Bihar, (2014) 9 SCC**, the Apex Court held that under Section 165 of the Evidence Act, 1872, court has a right to ask the party even relevant or

irrelevant questions and the parties or their counsel cannot raise any objection to any such question. Though theoretically the powers of the Judge are limitless and unfettered, certain principles have come to be recognized which he must follow as to the manner in which he exercises the power. He must not take side, but, he must not also "descend into the arena" and forsake the judicial calm for the zeal of a combatant [**AIR 1968 SC 178**]. Also court cannot compel party to examine any particular witness and also the Judges and Magistrates power of questioning witnesses is not absolute and he must not unduly trespass upon the functions of Public Prosecutor or defence counsel particularly when the accused or the witness is unrepresented. But a Judge in exercise of power cannot ask question which may confuse a witness. [**AIR 2010 SCW 4302**]

All criminal trials in India are based on the maxim "**nudus cum nuda iacebat**" which means an accused is deemed innocent until proven guilty. Indian Judicial and Legal System is adversarial in nature. However, in case of Criminal Trial Courts seems to have adopted a hybrid of adversarial and inquisitorial system. In criminal cases, the Judges are bound by duty to ask the question in their own power and for which section 165 of the Indian Evidence Act is enacted. Normally production of evidence and bringing witnesses is the duty of both prosecutor and defendant. However, there are some circumstances when only selective evidence is presented before court in order to protect either the accused or possible culprit and in that case, it is the duty of judge to demand proper evidence or to bring required witness on their own behalf. Before Malimath Committee, the pendency of cases was the question of concern. The inactivity of judges in the examination of witnesses was a concern and advocates were clever enough to not bring any substantial information before the Court. Malimath Committee in their reformative suggestions advised shifting into an inquisitorial system for better justice. The new duty was given to judges to question or demand documents or witness for judicial purpose. This view was also taken by Supreme Court in the **Mohanlal Vs. Union of India [(1991) Supp(1) SCC 271]** where the Supreme Court observed that production of the best evidence that the Court can ask for perfect justice is primary ideal of any trial. Judge not asking for evidence in order to remain neutral opts to remain passive rather seen as casual. Therefore, the judge who is not satisfied with the examination of witnesses taken by advocates is free to ask the question on Courts behalf under section 165 of the Indian Evidence Act. Moreover, ban imposed by Section 162 Cr.P.C. does not operate against powers of Court under Section 165 Evidence Act. [**AIR 1974 SC 463**]. Therefore it can be said that "A Judge, who at trial merely sits and records evidence without caring so to conduct the examination of the witnesses so that every point is brought out, is not fulfilling his duty". **Ved Prakash Kharbanda vs. Vimal Jindal, 198 (2013) DLT 555.**

Section 91 Cr.P.C.

Now with respect to Section 91 Cr.P.C, the principle supporting the legal jurisprudence was first mentioned in the Fifth Amendment of **American Constitution** which states that "no person shall be compelled in any criminal case to be a witness against himself". The same principle has

been embodied in the Indian Constitution under **Article 20(3)** but with some different words. **Article 20(3)** states that "No person accused of any offense shall be compelled to be a witness against himself". "The protection against self-incrimination as has been provided in Article 20(3) is based on the following principle: "nemo tenetur prodere or nemo tenetur scripsum accusare" which means that an accused should not be compelled to furnish any evidence against him. It is the duty of the State/ prosecution to prove him guilty, beyond reasonable doubt.

The issue of power under section 91(1) has been dealt in detail by the apex court of the country in case of **M.P. Sharma & others v Satish Chandra, 1954 AIR 300; State of Bombay v Kathi Kalu Oghad, 1961 AIR 1808** and **State of Gujarat v Shyamlal Mohanlal Chowksi**. However, The Hon'ble Supreme Court in Kalu Oghad's case has narrowly interpreted the expression "to be a witness" which has created situation where a very narrow space is available for the actual protection of this right in respect of production of documents.

Sec. 91 of Cr.P.C. provides that a police officer or a court may, under certain circumstances, issue an order or a summons for the production of any document or thing if such production is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceedings under the code. As seen from reading of the above provisions, "inquiry" being conducted by the magistrate carries possibility of getting application under section 91 of Cr.P.C. seeking documents from the custody of the accused. In order to compel the production of a document or thing it is essential that such production is considered necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the code by or before such court or officer. **[AIR 1935 Sind 13, (FB)]**. It is also not necessary that the investigation, inquiry, trial or other proceeding should be pending before such court or officer, at the time the process for production is issued. **[(1912) 13 Cri.L.J. 581 (FB)]**.

However, with regard to type of documents which can be sought from the accused which are self-incriminating and based upon personal knowledge of the accused has been a subjective and disputed question which is to be decided either by the magistrate or by the police officer and such ambiguity was dealt by a Constitution bench of the Supreme Court in "**Shyamlal Mohanlal v State of Gujarat**" which observed - "If, after a thing or a document is produced, its admissibility is going to be examined and the document or thing in question is not going to be admitted in evidence, if it incriminates the accused person, the order to produce the thing or document would seem to serve no purpose.

Section 91 of Cr.P.C. 1973, which was section 94 in old Cr.P.C. 1898 has a history which is ambiguous. To put it briefly, in The **State of Bombay v Kathi Kalu Oghad [1961 Cri LJ 856]** the majority observed - "The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying

his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of S. 139 of the Evidence Act". Therefore, to maintain justness it was observed that, "it does not matter how much substantive the document is or how much is relevant for proving the fact without reasonable doubt, if it is incriminating then it should be inadmissible".

Till the time the SC clarifies the ambiguity surrounding the interpretation of section 91 because of the conflicting judgements in Oghad and Shyamlal, the application under section 91 of Cr.P.C. calling an accused to bring any document should not be entertained while the inquiry under section 202 of the CrPC is on because the Supreme Court judgements with regard to Section 202 makes it categorically clear that there should be no role of accused in the inquiry proceedings in the pre-issuance of summons stage. Such an interpretation will be a balancing act too as the bar for such an application will just be in the pre-issuance of summons stage during which time the Magistrate will need to form his opinion only on the basis of the complaint and statements of complainant & his witnesses, if any. Post issuance of summon under section 204 CrPC, such an application can be entertained till the time a larger bench of the SC gives a clearer ruling regarding the ambit of section 91 Cr.P.C. with respect to the accused. It's also harassment for the accused to be "compelled" to be part of the pre-issuance of process proceedings on the basis of notice issued by the magistrate on an application under section 91 of CrPC.

Recently in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1**), where despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned willfully refused, on some pretext or the other, to give such certificate, the Court observed "that in such fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, C.P.C. or Cr.P.C. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused."

In **State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568**, wherein the Hon'ble Apex Court held that at the stage of framing of charge roving and fishing inquiry is impermissible.

If the contention of the accused is accepted, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge, the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage, which is against the criminal jurisprudence. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police. Therefore, at the time of framing charge or taking cognizance the accused has no right to produce any material. The Apex Court held that insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object.

The Hon'ble Apex Court in **Parmeshwari Devi v. State, (1977) 1 SCC 169**, held that Chapter VII of the Code deals with process to compel the production of documents. Sub-section (1) of Section 94, which deals with summons to produce any document, merely authorises the court to issue a summons to the person in whose possession or power such document is believed to be, requiring him to "attend and produce it, or to produce it, at the time and place stated in the summons". According to sub-section (2), a person required under the section merely to produce a document shall be deemed to have complied with the requisition if he "causes such document to be produced instead of attending personally to produce the same". There is nothing in the chapter to provide that the person who appears in the court, in pursuance of its summons under sub-section (1) of Section 94, thereby becomes a witness and can be examined and cross-examined by the court, although he has not been cited as a witness in the proceedings. Even if a person produces the document for which a summons has been issued to him, Section 139 of the Evidence Act clearly provides that he does not thereby become a witness by the mere fact that he produces it, and he cannot be cross-examined, unless and until he is called as a witness.

Conclusion :

In **Rekha Murarka v. State of W.B., (2020) 2 SCC 474**, the Hon'ble Apex Court held that even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channeling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his

powers under Section 311 Cr.P.C. or Section 165 of the Evidence Act, 1872. Therefore, the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the court or the prosecution, but not putting them by himself.

Before concluding, I deem it necessary to highlight that the Hon'ble Apex Court in the case of '**Sethuraman Vs. Rajamanickam, 2009 (65) ACC 607 (SC)**', and '**Asif Hussain Vs. State of U.P., 2007 (57) ACC 1036 (AII-D.B.)**', held that Order summoning or refusing to summon witnesses u/s 311 Cr.P.C. is an interlocutory order within the meaning of Section 397(2) Cr.P.C. as it does not decide any substantive right of litigating parties. Hence, no revision lies against such orders, thus the aggrieved party is to not file revision but to prefer petition under Article 226/ 227 of the Constitution of India read with Section 482 Cr.P.C. Thus we can say that though the criminal court is not having any inherent jurisdiction like 482 Cr.P.C. but the provision of section 311 Cr.P.C. and Section 165 of the Indian Evidence Act as well as Section 91 of the Cr.P.C. gives wide discretion to the trial court Judges to arrive at the best evidence for the just decision of the case.



Topic No. – 29

***Schemes of compensation under the Cr.P.C.. : Practice and
Procedure / Rights of victim & their restitution under
Indian criminal law.***

By
Sri Manoj Kumar,
Additional District & Sessions Judge,
Patna City.

Sri Manoj Kumar,
Additional District & Sessions Judge, Patna City.

**Topic : Schemes of compensation under the Cr.P.C.. : Practice and Procedure /
Rights of victim & their restitution under Indian criminal law.**

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Schemes of compensation under the Cr.P.C.. : Practice and Procedure / Rights of victim & their restitution under Indian criminal law

Compensation U/s 357 Cr.P.C. :

Under Section 357 Cr.P.C., a mechanism has been provided to pay compensation to the person who suffered a loss or an injury due to an offence committed. Under subsection (1) of Section 357 Cr.P.C., the court is empowered to pay compensation from the part or whole of the fine imposed and recovered, while pronouncing the judgment after conclusion of trial. Such fine realized or part of it may be ordered to be paid to the person who bore the expenses of the prosecution, to the person who suffered loss or injury caused by the offence committed when compensation of such loss or injury, in the opinion of the court, is recoverable from the convicted person through the process of the civil court.

This fine imposed and recovered, or part of it, may be ordered to be paid to the person who is/are, under the Fatal Accident Act, 1855 entitled to recover the damages from the person sentenced for the loss resulted to him/them due to the death of his relations.

It may also be ordered to be paid to the person who is a bonafide purchaser of the property which has been restored to the person entitled and remained a subject matter of the offence of theft, criminal appropriation, criminal breach of trust, cheating, or having dishonestly received or retained or of voluntarily assisted in the disposal of the stolen property knowingly or having reason to be believed the same to be stolen.

Specifically, in the **State of Bihar**¹, proviso to section 357(1) provides that in case the victim belongs to the Scheduled Caste or Scheduled Tribe, it is mandatory for the court while passing judgment in a criminal trial that recovered amount of the fine or part of it shall be ordered to be paid to the victim of the offence committed, by way of compensation; unless the court refuses to do so with a reason recorded.

The Proviso to Sub-section (1) of Section 357, generally, leaves no scope to the court to avoid passing an order of paying a fine in favour of the victim who belonged to the SC/ST category.

Sub-section(2) of Section 357 states that the payment shall not be made to the victim, in case the order of imposing fine is an appealable order, before the period allowed for presenting the appeal has been elapsed, or if an appeal is presented before the decision of the appeal. It means the court is free to make the payment from the fine realized immediately to the victim, in case of the order of imposing fine is not appealable.

Sub-section (3) of Section 357 Cr.P.C.. empowers the court to pass an order directing the convict to pay compensation to the victim who suffered an injury by the act of the convict, even in the case the fine has not been imposed while sentencing the convict. It means that the order of

1. State Amendment, Bihar.

compensation may be passed against the convict even if the sentence of the fine is not a part of the punishment.

Sub-section (4) of Section 357 Cr.P.C. empowers the appellate court as well as the revisional court to pass appropriate order under this section while hearing appeal or revision.

The compensation paid under this section to the victim shall be taken into account in any subsequent civil suit regarding compensation.

Not only the victim but his dependents are also entitled to receive compensation.

Section 357(A) Cr.P.C. imposes an obligation on every State Government, in coordination with the Central Government, to prepare a scheme for providing funds for the victim or his dependents who has/have suffered loss or injury as a result of crime and who require rehabilitation. The state of Bihar has enacted the Bihar Victim Compensation Scheme 2014.

The court while passing Judgement in the matter may recommend for compensation to the victim to the District Legal Services Authority(DLSA) or the State Legal Service Authority(SLSA) and when such recommendation is made by the court, the DLSA or the SLSA shall decide the quantum of compensation to be awarded under the scheme made by the State Government in compliance of sub-section(1) of section357(A).

Such recommendation may be made by the court when it thinks the compensation awarded u/s 357 Cr.P.C. is not sufficient for rehabilitation. It is immaterial, for making the recommendation, whether the case resulted in acquittal or discharge of the accused if the victim required rehabilitation.

Under sub-section(4) of Section 357 (A) Cr.P.C.:- where the offender is not traceable or identified but the victim is identified and where no trial takes place, the victim or his dependents may make an application for awarding of compensation to the SLSA or to the DLSA, which shall after due inquiry award adequate compensation within two months.

Sub-section(6) of Section 357(A) empowers the DLSA or the SLSA, for alleviating the suffering of the victim, to order for immediate first aid facility or medical benefits to be made available free of cost to the victim on the certificate of the police officer in charge of the police station or above rank, or the Magistrate of the area concerned. The authority may pass an order of any ad-interim relief as it deems fit.

Section 357(B) Cr.P.C. provides that the compensation payable by the State Govt. U/s 357(A) Cr.P.C. shall be in addition to the payment of fine to the victim u/s 326(A) or section 376(d) IPC.

Section 357(C) imposed a legal obligation on all hospitals whether public or private or run by person or authority to provide first aid or medical treatment free of cost, immediately, to the victim of any offence covered u/s 326(A),376(A),376(B),376(C), 376(D) or 376(E) IPC and hospitals are also bound to inform the police to such incident immediately.

Eligibility for compensation as per the Compensation Scheme of 2014²

A victim shall be eligible for the grant of compensation when following conditions are fulfilled-

2. Bihar Victim Compensation Scheme 2014

- A recommendation is made by the court under subsections 2 and 3 of section 357A of the Act, or the offender is not traced or identified, and no trial takes place, on an application of the victim under subsection 4 of section 357A.

- The victim/claimant should have reported the crime within 48 hours of the occurrence to the officer in charge of the police station or any judicial magistrate of the area. The delay in reporting the crime may be condoned by the DLSA with a reason to be recorded in writing.

- The offender is traced and identified and where the trial has taken place, the victim has cooperated with police and prosecution during the investigation and trial of the case. The crime should have occurred within the jurisdiction of State of Bihar.

In Case Of A Victim Of Acid Attack, A Time Schedule For Compensation Has Been Prescribed In The Scheme Of 2014³- One lac rupees shall be paid to the victim within 15 days of the information of occurrence and 2 lakhs shall be paid within 2 months from the aforesaid payment, rest amount, if any, shall be paid within 3 months from the second payment aforesaid. Such an order of compensation will be passed by the DLSA on the recommendation of the chairman of the District Criminal Injury Compensation Board. The quantum of compensation shall be decided by taking into account the loss caused to the victim, medical expenses to be incurred in the treatment and minimum sustenance amount required for rehabilitation. The quantum shall be as per the schedule of the scheme 2014.

But the cases covered under the Motor Vehicle Act shall not come under the scheme and compensation received by the victim from the government or an insurance company concerning the crime in question shall be considered as a part of compensation under the scheme.

Special provisions for women victim- In cases, a woman is a victim, the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2019 will be applicable.

The compensation shall be paid from the Women Victims Compensation Fund by the SLISA or the DLSA as per the Schedule attached to the scheme, it will be 3 to 8 lac rupees as prescribed in the schedule but in case of an Acid Attack victim, the compensation shall be determined by the District Criminal Injury Compensation Board. A woman victim or her dependents shall be eligible for grant of compensation from multiple schemes applicable to her, however, the compensation received by her in other schemes concerning section 357-B Cr.P.C.. shall be taken into account in determining the quantum in the subsequent application.

While determining compensation, factors enumerated in rule 8 of the scheme 2019, shall be taken into consideration. If the victim is a woman victim of an acid attack, she will be entitled to additional one lac rupees under the Prime Minister's National Relief Fund. Along with this, she will also be entitled to Special Financial Assistance up to Rs. 5 lacs if needed for treatment expenses over and above compensation paid by the state.

3. *ibid*

Compensation under the P.O.C.S.O Act

Subsection 8 of section 33 of the Pocso Act, 2012 provides that while passing the judgement of conviction, the Special Court may pass an order of compensation to be paid to the child for any physical or mental trauma caused to him/her for immediate rehabilitation of such child.

Interim compensation

Rule 9(1) of the POCSO Rules 2020 empowered the Special Court in appropriate cases, even without an application of the victim, to pass the order of interim compensation at any stage after registration of the F.I.R to meet the needs of the child for relief or rehabilitation. Under Rule 9(2) the Special Court may, on its own or an application of the victim, recommend for an award of compensation, even in the case of acquittal, discharge, or when the accused is not traced or identified, if the child has suffered any loss or injury due to the offence.

Special relief- Special relief for contingencies such as food, clothes, transport and other essential needs, may be granted by the Child Welfare Committee under Rule 8 of the POCSO Rules 2020.

The compensation awarded under this act by the Special Court shall be paid by the State Government from the Victim Compensation Fund or other scheme or the Fund established under section 357A of Cr.P.C.. or any other law. Final compensation may be awarded by the Special Court.

The victim of the atrocities punishable under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989 have other rights under section 15A.

The State is duty-bound to protect victims against any kind of intimidation or coercion or inducement or violence or threats of violence.

A victim shall be treated with fairness, respect and dignity and his special need that arises because of his age or gender or educational disadvantage or poverty shall be considered.

A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

A Victim shall have a right to obtain relocation or travelling and maintenance expenses during the investigation, inquiry and trial.

The state is duty-bound to specify an appropriate scheme to ensure implementation of following rights and entitlements of victims and witnesses in accessing justice so as- to provide, copy of F.I.R free of cost, immediate relief in cash or in-kind to victims or their dependents, necessary protection to atrocities victim, relief in respect of death or injury or damage to property,

maintenance expenses and other kinds of assistance to the victim as mentioned in subsection 11 and 12 of section 15A of the SC/ST Act.

It is also relevant to mention here that the victim of the offence under the SC/ST Act will also be entitled to get the benefit of the provisions of the code of Criminal Procedure regarding the compensation.

Disbursement of awarded compensation-

75% of the final compensation shall be put in a fixed deposit for a minimum period of three years and the remaining shall be available for utilization and initial expenses of the victim.

If the victim is minor, 80% of the final compensation shall be deposited in a fixed deposit account for at least three years.

In exceptional circumstances, the amount deposited for a fixed term may be withdrawn for education, medical or other pressing and urgent needs of the beneficiary at the discretion of the SLSA/DLSA.

The Limitation for claiming compensation under this scheme is 3 years from the date of occurrence or conclusion of the trial.

Practice and procedure

Despite ample power and procedure provided by the statute, the courts rarely passed the order of awarding compensation to the victim due to various reasons, such as lack of evidence, assistance from the bar and lack of proper awareness amongst the victims of their rights etc.

Sometimes subordinate courts also feel difficulty in passing the order of awarding compensation, in a case where fine does not form part of the punishment for the offence such as dowry death under section 304B of the I.P.C. under this section, as the fine does not form part of the punishment, and if a person is convicted for this offence and ordered to pay compensation to the dependents of the deceased victim then recovery of the compensation amount not being part of fine will be a tough job for the beneficiary. It appears to be a conundrum. This aspect as well as such cases in which the trial court did not pass the sentence of fine, where the punishment of fine was optional, is required to be settled by the Honourable Supreme Court or High Courts.

Awarding compensation to the maximum victims, in proper cases, is deemed to be the identification of a developed and civilized society, the court should inculcate the practice of awarding compensation and they should not remain silent on the point of awarding compensation to the victim or their dependents as the case may be. If the court does not award the compensation it must give reasons for not awarding compensation to the victim.

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Topic No. – 29(a)

***Schemes of compensation under the Cr.P.C. : Practice and
Procedure / Rights of victim & their restitution under
Indian criminal law.***

By
Sri Shashank Sheakhar
&
Sri Prabhat Kumar Ranjan,
Probationer Civil Judge Junior Division.

**Sri Shashank Sheakhar & Sri Prabhat Kumar Ranjan,
Probationer Civil Judge Junior Division.**

**Topic : Schemes of compensation under the Cr.P.C. : Practice and Procedure / Rights
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Schemes of compensation under the Cr.P.C. : Practice and Procedure / Rights of victim & their restitution under Indian criminal law

Introduction

“What happens to the right of a victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or a fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury?”¹

It is a settled notion of criminal jurisprudence that a crime, primarily, affects the society at large, then it affects the individual who has been subjected to the crime and his dependents. Society is affected by the commission of a crime because such an offence disturbs the balance of peace, law and order. The person who was subjected to the crime falls second in line and his dependents are also remote victims of a criminal act. It is the responsibility of the State to maintain harmony, law & order in society. In its quest to maintain a peaceful and just society, the State is endowed with a duty to punish and reform the criminals. The idea of justice from a State's point of view mainly concerns the punishment of guilty and to a certain extent, reformation of criminals.

In this context, justice to the State does not necessarily mean justice to the victims of crime or their dependents. To achieve holistic justice State must take into consideration the ordeal of victims. It needs to provide them with reasonable compensation for loss, injury or trauma suffered due to the criminal act, rehabilitation in case of certain offences and reparation to the extent possible.

In *Maru Ram v. Union of India*², Justice V.R. Krishna Iyer observed, “While social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty and victimology must find fulfilment not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn”.

Thereafter, Hon'ble Justice Y.V. Chandrachud (then Chief Justice of India) in the case of *Rudal Sah v. State of Bihar*³, emphasized upon the aspect of compensation vis-à-vis fundamental rights of victims, he observed that “Art 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of relief from illegal detention. One of the telling ways in which the violation of that right can

1. Dr. Justice V.S. Malimath, Committee on Reforms of Criminal Justice System, page 77-78, Government of India, Ministry of Home Affairs, March 2003.
2. Para 79, (1981) 1 SCC 107.
3. (1983) 4 SCC 141.

reasonably be prevented and due compliance with the mandate of Art 21 secured is to mullet its violators in the payment of monetary compensation”. This judgement paved way for the compensatory jurisprudence even in matters of violation of fundamental rights. In several other cases, the Hon’ble apex court granted compensation to the victims.⁴

As a significant part of the justice delivery system, a judge must bear in mind to impart all-inclusive justice to every victim of crime viz., State, actual victim or his dependents. It must not be misconceived that the duty of courts ends after signing a judgment. Rather, to uphold the idea of justice delivery in a true sense, courts must never hesitate in walking an extra mile.

The law of victim compensation in India and more specifically, within the State of Bihar could be better understood considering the relevant provisions of the Criminal Procedure Code, 1973, Schemes & Rules framed by the State government from time to time, pronouncements of the Hon’ble Supreme Court of India and Hon’ble High Court of Judicature at Patna. This paper attempts to throw light upon the evolution of victim compensation jurisprudence in India, its practice and procedure with special reference to the State of Bihar.

Understanding the Statutory Scheme concerning victim compensation

Compensation or reimbursement to the victim has been adopted as an effective punitive measure since ancient times. The custom required the offender to compensate the victim for loss incurred due to the act of the offender. However, the idea of such compensation was in essence to protect the offender from vengeance or retribution of the victim or his family members. It was a sort of agreement to retain peace in society rather than aimed towards protecting the victim or his dependents.

The first legal provision as to restitution in Indian law can be found in sub-clause (1)(b) of Section 545 in the Code of Criminal Procedure of 1898, which provided that courts may direct:

“payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court”. The law commission of India in its 41st report discussed at length the provisions of Section 545 of the Criminal Procedure Code, 1898 and recommended sweeping reforms. Based on its recommendation, Section 357 of the Criminal Procedure Code, 1973, as it stands today, was inserted.

In essence, Sub-clause (1) of Section 357 deals with four circumstances where compensation may be awarded by the court at the time of passing of the judgement or order. Firstly, the court may award compensation for defraying the costs incurred during prosecution. Secondly, compensation for any loss or injury caused by the offence. Thirdly, in cases of death, the court may

4. Bhim Singh v. State of Jammu & Kashmir, 1985; Dr. Jacob George v. State of Kerala, 1994; Manju Bhatia v. N.D.M.C. AIR 1998 SC 223; Paschim Bangal Khet Mazdoor Samity v. State of West Bengal & Ors.; People’s Union for Democratic Rights Thru. Its Secy. v. Police Commissioner, Delhi Police Headquarters, n.d.; People’s Union for Democratic Rights v. State of Bihar, 1987).

award compensation which must be recovered from the convict. Lastly, in cases of theft, criminal misappropriation, criminal breach of trust etc., a court can order compensation to a bona fide purchaser of the property, which has become the subject of theft, criminal misappropriation, criminal breach of trust etc. and which is ordered to be restored to its rightful owner. While Section 357 (1) could be invoked only where fine forms part of the sentence, in cases of the sentence in which fine doesn't form part, the court may grant compensation for loss or injury to the victim under Section 357 (3). The State of Bihar vide an amendment added a proviso to the sub-clause (1) of section 357, making it mandatory for the courts to order compensation in cases where victims belonged to Schedule Caste and Schedule Tribes⁵.

However, on careful analysis of Section 357, it transpires that this provision could be triggered only upon successful conviction of the accused. Further, compensation under this section might be inadequate in many instances. The entire onus of paying compensation under this section is upon the convicted person and does not address the situation where the convict defaults on payment of compensation. In a nutshell, the fate of the poor victim largely depends upon the convict rather than it being a matter of State responsibility. It is due to these limitations that Section 357 in itself was found to be insufficient to further the cause of victims. In addition to this, section 358 provides compensation to persons who have been groundlessly arrested.

Amidst the increasing concern for compensation to victims of crimes, section 357-A of the Criminal Procedure Code, 1973 was inserted in 2009 to provide for an effective victim compensation Scheme. The scheme made way for payment of compensation to the victim by the State for any loss or injury caused to him by the offender. The responsibility has been imposed on the States to create and maintain a fund for the purpose. Whereas, section 357-B clarifies that the compensation to victims of acid attack and rape shall be in addition to fine imposed under Sections 326-A & 376-D of the Indian Penal Code respectively. Further, section 357C makes it obligatory upon the hospitals, public or private to provide prompt free treatment to victims of acid attack or rape and inform the police about such incident. Non-compliance with this provision might attract punishment up to one year under section 166-B of the Indian Penal Code.

The idea behind Section 357-A has been aptly discussed by Hon'ble Supreme Court of India in **Ankush Shivaji Gaikwad v. State of Maharashtra**⁶, "*The amendments to Cr.P.C. brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357-A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or*

5. Bihar Act 9 of 1985, Section 2 (w.e.f. 13.08.1985)

6. Para 46, (2013) 6 SCC 770.

District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively”.

Section 357-A made it mandatory for state governments to prepare a scheme of providing funds for compensation to victims. The State of Bihar in the light of legislative mandate and directions of Hon’ble apex court has prepared a scheme for compensation to victims.

As per recent statistics updated by the Bihar State Legal Service Authority (BSLSA) for the State of Bihar, a total number of fifteen hundred and thirty-two victims of the acid attack, offences under the POCSO Act, Rape, death, human trafficking and other offences have been compensated by the District Legal Service Authority from the year 2013 to 2021.⁷ There has been a gradual rise in the number of victims who have been compensated by the State for various crimes. In the year 2020-21, even during the pandemic, a total number of one hundred and sixty-four victims were compensated by the State. It is pertinent to mention that in recent years, the highest number of victims who have been compensated are the ones under the POCSO Act.

A tabular representation of compensation trends for various offences has been depicted below

Year	Number of Victims	Total compensation allotted to DLSA
2013-14	12	3,10,000/-
2014-15	26	50,50,000/-
2015-16	81	1,67,94,000/-
2016-17	203	4,34,37,373/-
2017-18	240	3,61,42,960/-
2018-19	449	11,38,78,000/-
2019-20	357	10,04,40,707/-
2020-21	164	5,00,42,000/-

**Source: Bihar State Legal Service Authority’s data updated until 29.01.2021*

It is undoubtedly a positive trend that the Hon’ble Supreme Court, Patna High Court and State Legal Service Authority in coordination with the District Legal Service Authority have made deep inroads into the victim compensation scheme and so far, have done a remarkable job.

7. Bihar State Legal Services Authority, Year wise victim compensation, <http://patnahighcourt.gov.in/bslsa/pdf/Publication/212.pdf> (Last visited on March 1, 2021).

Bihar Victim Compensation Scheme under Section 357-A, Cr.P.C.

The criminal procedure code was amended to pave way for a victim compensation scheme and respective State governments were to frame their schemes for compensation to victims. The first victim compensation scheme of Bihar⁸ was framed as per the directions of Hon'ble Supreme Court in **Laxmi v. Union of India**⁹ in 2011. However, there were huge disparities in compensation offered by various States which prompted the Hon'ble apex court to direct certain changes in victim compensation schemes of various States. Thus, superseding the Bihar Victim Compensation Scheme of 2011, a fresh scheme with enhanced compensation was rolled out in the year 2014. This scheme is known as Bihar Victim Compensation Scheme, 2014.

Further, Central Victim Compensation Fund guidelines were framed by the Union Home Ministry, Government of India.¹⁰ The Bihar victim compensation scheme was amended to incorporate the guidelines of the central government.¹¹

The journey of various victim compensation schemes framed in the State of Bihar is in itself a manifestation of the pivotal role played by Hon'ble Supreme Court of India in ensuring justice to victims. In **Nipun Saxena v. Union of India**¹², the Hon'ble Court directed the State governments to insert Part-II exclusively for women victims of sexual assault into the already existing schemes. Therefore, the Bihar Victim Compensation Scheme, 2014 was amended and Part-II meant exclusively for women victims was inserted in 2019¹³. Apart from this, minor victims of sexual offences could be granted compensation by the special court as per the rules framed under the POCSO Act.

Due to the increasing instances of mob violence and lynching in India, the Hon'ble Supreme Court in **Tehseen Poonawala v. Union of India**¹⁴, directed the State governments to frame rules for compensation to such victims and ensure speedy trial. In consequence, a scheme for compensation to mob violence victims has been framed under Section 357-A of the Criminal Procedure Code, 1973.¹⁵

The Bihar Victim Compensation Scheme, 2014

The Bihar Victim compensation Scheme, 2014 came into effect on 24th March 2014 in the exercise of powers conferred under Section 357-A of the Criminal Procedure Code, 1973 by the

8. Bihar Victim Compensation Scheme, 2011.

9. Writ Petition (Crl.) No. 129 of 2006.

10. Central Victim Compensation Fund Guidelines, 2016, https://www.mha.gov.in/sites/default/files/CVCF_revised_27072017_0.PDF (Last visited on March 1, 2021).

11. Bihar Victim Compensation (Amendment) Scheme, 2018 (w.e.f. 19.07.2018).

12. 2018 SCC OnLine SC 2772.

13. Bihar Victim Compensation (Amendment) Scheme, 2019 (w.e.f. 23.07.2019).

14. Writ Petition (Civil) No. 754 of 2016.

15. The Bihar Lynching and Mob Violence Victim Compensation Scheme, 2018 (w.e.f., 17.09.2018).

Governor. This scheme aims to compensate the victims or their dependents who have sustained damage or hurt due to the offences or are otherwise in need of rehabilitation.

The scheme has been laid down in two parts. The first part of this scheme lays down provisions for the compensation of victims in general. Whereas the second part of the scheme lays down detailed provisions of compensation and rehabilitation for the women victims of sexual assault and other offences.

Meaning and Scope of term “Victim”

Section 2 (wa) of the Criminal Procedure Code, 1973 defines a victim as, *“a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression included his or her guardian or legal heir”*. Under Rule 2 (g), the definition has found a place in the Bihar Victim Compensation Scheme, 2014.¹⁶ Further, the scheme has endeavoured to give an expansive meaning to the term “dependent” and “family” which has not been separately defined under the Criminal Procedure Code, 1973.

The term dependents mean *“wife/husband, father, mother, unmarried daughter, minor children, widow daughter, divorcee daughter, son and daughters-in-law and include other legal heirs of the victim who, on providing sufficient proof, is found fully dependent on the victim by the District Legal Services Authority”*¹⁷. The word dependent has been given an expansive meaning and it extends beyond the immediate family of a victim. Whereas, family means *“parents, children and includes all blood relations living in the same household”*¹⁸.

Interestingly, the Part-II of this scheme as inserted in 2019, for the first time has defined “sexual assault victims”¹⁹ and “women victims/survivor of other crimes”²⁰ as females who have suffered mental or physical injury or torture due to the offence.

Victim Compensation Funds

Presently, four funds have been constituted to provide relief to the victims of crime, viz., Central Victim Compensation Fund, State Victim Compensation Fund, District Victim Compensation Fund and Women Victim Compensation Fund.²¹

A central victim compensation fund has been established by the Ministry of Home Affairs, Government of India for aiding the State governments and removing the disparities in compensation

16. Paragraph 2 (g), Bihar Victim Compensation Scheme, 2014.

17. Paragraph 2 (d), Bihar Victim Compensation Scheme, 2014.

18. Paragraph 2 (f), Bihar Victim Compensation Scheme, 2014.

19. Paragraph 2 (o), Bihar Victim Compensation (Amendment) Scheme, 2019.

20. Paragraph 2 (p), Bihar Victim Compensation (Amendment) Scheme, 2019.

21. Central Victim Compensation Fund Guidelines, 2016.

across the States. This fund has been set up with an initial corpus of Rs. 200 Cr in the year 2016, out of which Rs. 7.22 Cr has been allotted to the State of Bihar for its State Victim Compensation Fund.

A State Victim Compensation Fund and District Victim Compensation fund has also been constituted as per the scheme. The State Victim Compensation Fund shall consist of budgetary allocations, receipt of the amount of fines imposed under section 357, Cr.P.C., grant received from Central Victim Compensation Fund and Amount of cost imposed by courts and directed to be deposited in victim compensation fund etc.²² Whereas, the District Victim Compensation Fund shall be constituted in all districts in which costs imposed by courts of that district and directed to be deposited in The Victim Compensation Fund shall be credited. All expenses made in providing immediate first aid facility to victims under section 357 A (6) shall be made out of this fund. The maximum amount which may be kept in this account at a time shall be Rs. 2,50,000/- (Two Lakh Fifty Thousand) and the excess amount shall immediately be transferred to the account of State Victim Compensation Fund. This fund shall be operated by the Secretary, DLSA on sanction made by the Chairman of the concerned DLSA.²³

Apart from this separate Women Victim Compensation Fund has been carved out from the State Victim Compensation Fund to provide compensation to women victims of sexual assault or other crimes.²⁴

Nature of offences and quantum of compensation

The schedule appended to both Part I and Part II of the scheme provide for the categories of offences, the minimum and maximum compensation that could be awarded to the victims of various crimes. Presently, over twenty categories of offences have been inserted in both the schedules for which the range of compensation has been provided. It is pertinent to mention that the Schedule annexed in part II shall apply exclusively to the women victims. As the Schedule for women victims has been inserted vide an amendment in the year 2019, it is apparent that some offence already covered in schedule I overlap with the Schedule for Women victims. Both the schedules must be interpreted harmoniously to give effect the spirit of the scheme and since greater compensation has been provided to women victims under the new schedule, it shall prevail over schedule I, in case of overlapping.

The table below attempts to make a comparative analysis between Schedule I and Schedule for Women Victims. It is evident that the latter schedule has been drafted more comprehensively and provides new categories of offences such as pregnancy as a result of rape, unnatural sexual assault, gang rape etc. which has not been covered in the previous schedule. The quantum of

22. Paragraph 3, Bihar Victim Compensation Scheme, 2014.

23. Paragraph 3A, Bihar Victim Compensation Scheme, 2014.

24. Paragraph 3, Bihar Victim Compensation (Amendment) Scheme, 2019

compensation for women victims has also been significantly revised as compared to the previous schedule.

NATURE OF OFFENCES	SCHEDULE-I	PART- II (WOMEN VICTIMS)
Acid Attack		
Disfigurement of face	Rs. 3 lakhs to 7 lakhs	Rs. 7 lakhs to 8 lakhs
Injury more than 50%	Rs. 3 lakhs to 7 lakhs	Rs. 5 lakhs to 8 lakhs
Injury less than 50 %	Rs. 3 lakhs to 5 lakhs	Rs. 3 lakhs to 5 lakhs
Injury less than 20%	Not Applicable	Rs. 3 lakhs to 4 lakhs
Burning		
Disfigurement of face	Not Applicable	Rs. 7 lakhs to 8 lakhs
Injury more than 50%	Not Applicable	Rs. 5 lakhs to 8 lakhs
Injury less than 50 %	Not Applicable	Rs. 3 lakhs to 7 lakhs
Injury less than 20%	Not Applicable	Rs. 2 lakhs to 3 lakhs
Greater than 25% of body	Rs. 2 lakhs to 4 lakhs	Not Applicable
Disability (Loss of limb or parts)		
Above 80%	Rs. 2 lakhs to 4 lakhs	Rs. 2 lakhs to 5 lakhs
Between 40-80%	Rs. 1 lakh to 2 lakhs	Rs. 2 lakhs to 4 lakhs
Between 20-40%	Not Applicable	Rs. 1 lakh to 3 lakhs
Below 20%	Not Applicable	Rs. 1 lakh to 2 lakhs
Gang Rape	Not Applicable	Rs. 5 lakhs to 10 lakhs
Rape	Rs. 3 lakhs to 7 lakhs	Rs. 4 lakhs to 7 lakhs
Pregnancy on account of rape	Not Applicable	Rs. 3 lakhs to 4 lakhs
Physical abuse of minor	Rs. 2 lakhs to 3 lakhs	Not Applicable

Human trafficking	Rs. 1 lakh to 2 lakhs	Not Applicable
Sexual assault excluding rape	Rs. 50,000 to 1 lakh	Not Applicable
Unnatural Sexual assault	Not Applicable	Rs. 4 lakhs to 7 lakhs
Death/Loss of life	Rs. 5 lakhs to 10 lakhs	Rs. 5 lakhs to 10 lakhs
Grievous physical or mental injury	Not Applicable	Rs. 1 lakh to 2 lakhs
Loss of foetus	Rs. 50,000 to 1 lakh	Rs. 2 lakhs to 3 lakhs
Loss of fertility	Rs. 1.5 lakhs to 2 lakhs	Rs. 2 lakhs to 3 lakhs

**Source: Schedule I & Schedule for Women Victims, Bihar Victim Compensation Scheme, 2014.*

***Not Applicable means that the compensation for the said offence has not been provided in the given schedule. The compensation amount depicts the mandatory minimum and maximum compensation that could be awarded. For example, under Schedule-I, in case of loss of fertility, a minimum compensation of Rs. 1.5 lakhs must be awarded and the maximum compensation that could be awarded is Rs. 2 lakhs.*

Procedure for applying and relevant factors for grant of compensation

Compensation under this scheme could be claimed upon recommendation of the trial court as per Sub-Clause (2) & (3) of Section 357-A, upon application of the victim or his dependents as per Sub-Clause (4) of Section 357-A.²⁵ The recently inserted Part-II of the scheme for women victims provides for suo moto grant of an interim compensation in certain offences by the DLSA or SLISA. Further, in case of sexual assault on women victims, an application for compensation could be made even by the SHO of the police station concerned.²⁶

It shall be submitted in the form 'I' along with a copy of the First Information Report (FIR) or criminal complaint of which cognizance is taken by the Court and if available Medical Report, Death Certificate, wherever applicable, copy of judgment/recommendation of Court if the trial is over.²⁷

Now, once the trial court makes a recommendation or an application is filed before the DLSA, it shall carefully examine the case, assess the genuineness of claims, call for material or records relevant in determining the same and award compensation within two months from the date of application or recommendation by the trial court. The compensation shall be awarded as

25. Paragraph 4, Bihar Victim Compensation Scheme, 2014.

26. Paragraph 5, Bihar Victim Compensation (Amendment) Scheme, 2019

27. Paragraph 5, Bihar Victim Compensation (Amendment) Scheme, 2019

per the Schedule taking into consideration various factors such as loss suffered, medical expenses, rehabilitation costs, funeral expenses etc.²⁸

The District Criminal Injury Board comprising of the District Judges as its chairman, District Magistrate, Superintendent of Police, Civil Surgeon, CMO or their nominee members shall assess the claim concerning loss or injury and the Chairman DLSA shall award compensation accordingly.²⁹ If the victim is below 14 years of age, the compensation shall be increased by 50% where in certain cases of acid attack causing disfigurement of face or eye or rape of disabled person, the District Criminal Injury Board has been empowered to award compensation to the extent of Rs. 10,000 for the lifetime of the victim or any period as it deems fit.³⁰

In the case of women victims of sexual assault or other crimes, a provision for immediate interim compensation has been made to attend the urgent medical need of the victim as well as providing prompt monetary relief up to 25% of the maximum compensation that could be awarded as per the schedule. Further, for the victims of an acid attack, the DLSA shall pay an amount of one lakh within fifteen days of notice of the occurrence and thereafter an amount of Rs. 2 lakhs shall be paid to the victim at the earliest, within two months.³¹ If a woman victim of sexual assault/acid attack is covered under one or more category of the schedule, she shall be entitled to be considered for the combined value of the compensation.³²

The DLSA or SLSA shall take into account the gravity of the offence, the severity of the injury, expenses incurred by the victim due to the offence, loss of educational opportunity, loss of employment, nature of abuse if continuous, pregnancy due to rape, medical termination of pregnancy, victim contracting sexually transmitted disease (STD) or HIV, the financial condition of victims and other relevant factors.³³

However, it has been clarified that this scheme for women victims of sexual offences does not apply to a minor victim under the POCSO Act, 2012 in so far as their compensation issue is to be dealt with only by the Learned Special Courts under Section 33(8) of POCSO Act, 2012 and Rules (9) of the POCSO Rules, 2012.³⁴

Provision for appeal

If the DLSA denies compensation to the victim an appeal may be preferred within ninety days to the SLSA.³⁵ Further, in the case of women victims of sexual assault, if the victim is not

28. Paragraph 5, Bihar Victim Compensation Scheme, 2014.

29. Sub-para (2) of Paragraph 5, Bihar Victim Compensation Scheme, 2014.

30. Note (1), Schedule-I, Bihar Victim Compensation Scheme, 2014.

31. Paragraph 12, Bihar Victim Compensation (Amendment) Scheme, 2019.

32. Schedule applicable to women victims of crime, Bihar Victim Compensation (Amendment) Scheme, 2019.

33. Paragraph 8, Bihar Victim Compensation (Amendment) Scheme, 2019.

34. Paragraph 18, Bihar Victim Compensation (Amendment) Scheme, 2019.

35. Paragraph 9, Bihar Victim Compensation Scheme, 2014.

satisfied with the quantum of compensation awarded by Secretary, DLSA, an appeal may be preferred within 30 days to the Chairman, DLSA.³⁶

Period of limitation

An application made by the victim or dependents under Sub-Clause (4) of Section 357-A shall be made within six months of the occurrence of the crime.³⁷ In cases of women victims of crime, this period has been extended up to 3years. The delay in applying may be condoned by the SLSA in appropriate cases.³⁸

The Bihar Lynching and Mob Violence Victim Compensation Scheme, 2018

The scheme has been framed to provide compensation to the victims of mob violence and it shall be implemented in pursuance of the prevailing Bihar Victim Compensation Scheme, 2014. However, this scheme aims to provide an exclusive schedule of compensation for the victim of mob lynching and speedy trial of such offences in special designated courts. The rules also provide for interim relief within thirty days of occurrence.³⁹

Concluding Observations and the way forward

The progress and acceptance of victimology as a branch of criminal justice system has been widely acknowledged since past decade and undeniably the Hon'ble Supreme Court of India has played a pivotal role in shaping the future of victim compensation jurisprudence in India. However, there are only certain exclusive nature of offences for which the state of Bihar has rolled out compensation schemes under Section 357-A of Criminal Procedure Code, 1973. The government commits to compensate for these handful of severe offences where the victims are most affected and vulnerable. It is suggested that more and more offences must be incorporated in the schedule and victims must be compensated.

After thorough analysis of the legal provisions, it is evident that emphasis of compensation schemes is mostly upon monetary compensation rather than rehabilitation of victim and regular monitoring of the same. Specially, the victims of sexual offences and acid attack who would require good deal of rehab measures to be taken. The victim compensation schemes of various states shall keep progressing with ever evolving constitutional values of a welfare state such as India.



36. Paragraph 17, Bihar Victim Compensation (Amendment) Scheme, 2019.

37. Paragraph 8, Bihar Victim Compensation Scheme, 2014.

38. Paragraph 16, Bihar Victim Compensation (Amendment) Scheme, 2019.

39. Paragraph 4, The Bihar Lynching and Mob Violence Victim Compensation Scheme, 2018

Topic No. – 30

Sentencing principles in theory and practice in India with special reference to awarding of a death sentence; disparity and discrimination in sentencing. Imprisonment in default of payment of the fine.

By
Sri Abhishek Kumar Das,
Additional District & Sessions Judge,
Araria.

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Sentencing principles in theory and practice in India with special reference to awarding of a death sentence; disparity and discrimination in sentencing. Imprisonment in default of payment of the fine.

“It is the power of punishment alone which, when exercised impartially in proportion to guilt and irrespective of whether the person punished is the king's son or the enemy, that protects this world and the next.”

-Kautilya•

Introduction.

The sentence is the logical conclusion of successful completion of a criminal trial, in the aftermath of an accused found guilty. It is a necessary corollary to a successful trial. A sentence must be adequate and proportionate, which should voice the angst of a victim who is often voiceless, it should speak of the authority of law which the state has to uphold, and it should also utter the collective conscience of society that, yes, justice has been served. Sentencing is one of the fundamental components of the criminal justice delivery system.

In Shastras, great emphasis was given to the power of the King to punish the lawbreaker and protect the law-abider. The King was declared as the upholder of Danda (Punishment) and Chhatra (Protector).¹ To penalise and abolish the evil and the sinful was upheld to be the sovereign function, and for the legitimate exercise of this jurisdiction and punishment, certain factors viz. place, time, age, learning of the parties and the seat of injuries etc. were prescribed.² For Manu, the punishment was the essential characteristic of law. He was of the view that penalty preserves law and command and it guards the body of a person and his belongings. Thus, the impact of sentencing i.e. the fear caused which creates a deterrent effect on the accused as well as other members of the society is an essential characteristic of the legal phenomena. Law cannot be isolated from the sentence of punishment.

Aims and objectives of the sentence.

The aims and objective of the sentence can be categorised in four-folds, viz. (i) Deterrence, (ii) Prevention, (iii) Retribution, and (iv) Reformation. In the first category, Sentence acts as deterrence for the convict as well as for the potential wrongdoer. A potential wrongdoer may change his mind about committing an offence when a perpetrator of a similar act is punished in his

● Kautilya, Arthashastra, verse {3.1.42}, p.493, 1992, Penguin Books India (P) Ltd., New Delhi, India.

1. U. N. Ghoshal, A History of Indian Political Ideas, p.20, Oxford University Press, 1959, New Delhi, India.

2. Vishnu, III 34 and V, I0 and I4, as referred in U. N. Ghoshal, A History of Indian Political Ideas, p.50, Oxford University Press, 1959, New Delhi, India.

knowledge, as it is a natural human tendency to avoid pain. It serves the purpose of state and society as well, and at the same time, a potential victim is also saved, with or without his knowledge. But at the same time, there are shortcomings to this theory also. Many times, human beings ignore or become indifferent to the treatment given to other person and in such circumstances, the punishment will not act as a deterrence. The sentence, in the second category, acts as a preventive measure as it prevents the convict from repeating the offence for the period of incarceration. But it cannot be said that after release the convict shall not repeat the offence. Thus, the preventive object of the sentence is very narrow and for a limited time. Thereafter, comes the third category, wherein Retributory theory finds its place. The Retributory theory of sentencing is most basic and finds its root in primordial society and also in the Code of Hammurabi, which provides for 'eye for an eye' and 'tooth for a tooth' (lex talionis). It is victim-centric justice that takes care of the angst of the victim alone. The purpose of punishment, according to this theory, is "to satisfy the community's retaliating sense of indignation that is provoked by justice."³ This theory is not in sync with the norms of the modern welfare state. Lastly, the Reformatory theory, which is considered as the most modern⁴ and also in sync with Gandhian philosophy. The reformatory theory is based on the principle that crime is to be abhorred and not the criminal. It finds it's a belief in the concept that every saint has a past and every sinner has a future. The theory professes that no one is beyond reform and everyone should be allowed to reform himself. It treats the criminals as patients and crime as a corollary to the psychological, sociological, environmental and prevalent circumstances of the society. Hence, the proponents of the theory assert that the sentence should not be too harsh and need not be corporeal as it will not facilitate in the reformation of the convict.

Forms of Punishment.

The history of countries, across the earth, reveals that each one of them has a brutal policy of sentencing of punishments wherein the culprits were awarded various punishments like corporeally tortuous, harsh and brutal. Flogging, mutilation, branding, pillories, etc., simple or rigorous imprisonment, forfeiture of property and fine were the commonly prevalent punishments given to the accused during those days. It was only towards the end of the 18th century, when the thinkers and jurists like **Beccaria** and **Bentham**, the proponents of the humanitarian approach in punishment, emphasized that in any punishment brutality or harshness to be avoided or kept at as minimum as possible, the wheel of change started to spin, and nations started to adopt the civilised

3. Bryan A. Garner, Black's Law Dictionary, 7th Ed., P.1248

4. N.V. Paranjape, Criminology and Penology, 12th Ed., P. 207, Central Law Agency, Allahabad.

After the retributive, deterrent and preventive theories couldn't reduce crime in society, a new theory called reformatory theory was introduced at around 18 century. Especially after the humanist movement under thinkers like Beccaria and Bentham the new theory began to evolve. The distinct feature of the theory is that unlike others it focuses on the criminal rather than crime and seeks to bring about a change in the attitude of the offender so as to rehabilitate him/her as law abiding member of society.

way of punishment. Many international conventions and treaties popped up, signed in, ratified and entered into, by the nations, in the direction and for the purpose.

In India, the forms of punishment are codified in chapter III under Section 53 of the Indian Penal Code, 1860, which provides for following kinds of punishments-

- Firstly : Death;
- Secondly : Imprisonment for life⁵;
- Thirdly : [Penal Servitude] now repealed;
- Fourthly : Imprisonment, which is of two descriptions, namely:-
 - (1) Rigorous, that is, with hard labour;
 - (2) Simple;
- Fifthly : Forfeiture of property;
- Sixthly : Fine.

Mere perusal of the section enumerated above highlights the abandonment of the brutality into the punishment, prescribed for the culprits, for various offences committed by him, which not only underlines the sort of commitment India has for humanity but also brings the Indian policy of punishment at par with the other modern civilised nations, except the punishment of Death Sentence. Therefore, to further investigate and also for this article, it becomes pertinent to deal with death punishment or sentence.

Death Sentence.

Capital punishment or the death penalty is the extreme penalty of law and stands at the forefront of the category of punishments. The idea behind the conception of awarding this penalty to a culprit is, to punish a culprit who has become a threat to society at large, so severe and beyond the repairable condition, that to eradicate the threat, his elimination is the only way left. It is the most controversial penalty, since the omega of the 18th century, as the debate has never been settled between jurists and moralists that whether the State has the right to take away a man's life when no one but God only can give one. Reformists are always of the view that it is a barbaric relic of the past when the idea of justice was primitive and guided by vengeance underlying the "eye for an eye" sentiment prevalent in the society at that time. Despite the prolonged debate over its continuation and deletion from the statute books, the penalty remains in the statute. The State is of the view that, though seldomly used⁶, during pre⁷ and post-independent India, the retention of the

5. Before 1955 it was transportation for life.

6. Pandurang v. State of Hyderabad, (1955) 1 S.C.R. 1083, para 37. Judges who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty, unless there are compelling reasons. The Supreme Court of India in this case reduced the sentences of death of two persons (to transportation for life) in view of the fact that in the High Court, there was difference of opinion regarding them, not only as to guilt but also as to sentence.

7. For instance see- Tola Ram v. Emperor, A.I.R. 1927 Lah. 674 - I.L.R. 8 Lahore 684; Emperor v. Gedka Goala, A.I.R. 1937 Pat. 363 - I.L.R. 16 Pat. 333; Ramadhan v. Emperor, A.I.R. 1932 Oudh 18 - I.L.R. 7 Lucknow 341, Mahavir Singh v. Emperor, A.I.R. 1946 Calcutta 36--I.L.R. (1944) 2 Calcutta 287.

death penalty has a deterrence effect merely by its existence in statutes. The Supreme Court of India, adopting a humanitarian approach and keeping in view the conscience of the moralists and jurists, legitimised the practice of seldomly awarding of punishment of death penalty by propounding the doctrine of ‘rarest of the rare case’ and laid down that “life imprisonment is the rule and death sentence an exception.”⁸

The Scheme of Death Penalty in India.

A close perusal of the penal statutes of India informs us that the punishment of the death penalty has been prescribed for very few offences, mostly contained within the provisions of IPC and some are in other Acts. The provisions are being reiterated, for further discussions, and are as follows:

Section under IPC or any other Act	Offence
Sec.120B, IPC	Being a party to a criminal conspiracy to commit a capital offence
Sec.121, IPC	Waging, or attempting to wage war, or abetting waging of war, against the Government of India
Sec.132, IPC	Abetting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny
Sec.194, IPC	Giving or fabricating false evidence with intent to procure a conviction of a capital offence
Sec.302, IPC	Murder
Sec.305, IPC	Abetting the suicide of a minor
Sec.364A, IPC	Kidnapping, in the course of which the victim was held for ransom or other coercive purposes
Sec.376A, IPC	Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state, or is a repeat offender

8. *Ediga Anamma v. State of Andhra Pradesh*, 1974 (4) SCC 443 and *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, para 209, in the concluding remarks the SCI observed- “It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”

Sec.396, IPC	Banditry with murder – in cases where a group of five or more individuals commit banditry and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.
Section 4 of The Commission of Sati (Prevention) Act, 1987	Aiding or abetting an act of Sati
Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985	Drug trafficking in cases of repeat offences
Sec.6 POCSO Act, 2012	Committing aggravated penetrative sexual assault
Sec.3(b) Explosive Substance Act, 1908	Causing explosion by special category explosive substance

Thus, out of all the penal statutes, which declare certain acts to be criminal acts to be punishable, only thirteen criminal offences are there wherein such offences are punishable with the death sentence.

Procedures of awarding Death Sentence.

In India, like most of the other constitutional countries, the right to life is a fundamental right and according to the Constitution of India, no person can be deprived of his life except in accordance with the procedure established by law,⁹ and since the result of the award of death sentence takes away the life of the culprit so awarded, it is pertinent to see the procedures being followed for awarding death sentence.

The procedure for awarding a death sentence has never been uniform in India and has been subject to many changes. As per the Code of Criminal Procedure, 1898, which remained in force till the enactment of the new code in the year 1974, it was mandatory to award death punishment when found guilty, in the prescribed offences, and in case of departure from the award of the death penalty, the Court needed to record the reason of such departure, in the judgment.¹⁰ But Section 367(5) of Cr.P.C., 1898 was repealed in the year 1955 vide Act no. 26 of 1955 and thus it was left totally upon the discretion of the Courts to award the death penalty when one of the sentences for the convicted offender is the death penalty.

Later on, in the year 1974, the new Code of Criminal Procedure was enacted wherein under

9. Art.21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

10. Section 367(5), the Code of Criminal Procedure Code, 1898- If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

Section 354 (3) it was prescribed that “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.” Moving on further, in Chapter III, under Section 28(2) it was provided that “A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court,” thus the enactment stresses on the great cautions to be adopted while awarding a death penalty which is to be further verified and ratified by the High Court of jurisdiction.

It is remarkable to see the paradigm shift in the intent of the legislature, which prescribes for the Court awarding death penalty for being double sure of such sentence to the convicts, gets further highlighted by the whole new and dedicated chapter in the new Cr.P.C. i.e. Chapter XXVIII, dedicated to submission of death sentences for confirmation. The relevant provisions are being reiterated for further discussion. Firstly, Sec.366 which provides for-

“Sentence of death to be submitted by Court of Session for confirmation. (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. (2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.”

Secondly, Sec.367 which provides for-

“Power to direct further inquiry to be made or additional evidence to be taken. (1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into or additional evidence is taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session. (2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken. (3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court.”

Thirdly, Sec.368 which provides for-

“Power of High Court to confirm sentence or annul conviction. In any case submitted under section 366, the High Court- (a) may confirm the sentence, or pass any other sentence warranted by law, or (b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, (c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period until such appeal is disposed of.”

Fourthly, Sec.369 which provides for-

“Confirmation or new sentence to be signed by two Judges- In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall when such Court consists of two or more Judges, be made, passed and signed by at least two of them.”

Fifthly, Sec. 370 which provides for-

“Procedure in case of difference of opinion- Where any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case shall be decided in the manner provided by Section 392.”

Lastly, Sec. 371 lays down that-

“Procedure in cases submitted to High Court for confirmation- In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his official signature, to the Court of Session.”

Thus, it is evident, through the enumerated provisions under various sections of the Code, above discussed, that though the legislature intended to the seldom use of death sentence in the appropriate and unavoidable cases, the power is to be exercised with extreme caution, largely remained unguided and full of discretion, solely in the domain of judiciary i.e. Session Court and High Court.

Enormous discretion is causing disparity in sentencing.

The discretion so vested in the Court has been under consideration time and again,¹¹ in the aftermath of a long-felt need to have a structured statutory guideline on the sentencing policy of the

11. For example in 35th Report of Law Commission of India on Capital Punishment, September 1967, Ministry of Law, Government of India, wherein the following questions, among others, were for consideration:-

4. The relevant provisions in the Indian Penal Code vest in most cases a discretion I the court to award the sentence of death or the lesser sentence of imprisonment for life. Is the vesting of such discretion necessary and are the provisions conferring such discretion working satisfactorily? If not, have you any suggestions to make in this behalf?

5. If the vesting of such discretion is necessary, what should be the considerations which should weigh with the court in awarding the lesser punishment of imprisonment for life? Is it possible to codify such considerations?

The Commission, after due diligence and deliberations, was pleased to recommend:-

(1) The Code of Criminal Procedure, 1898.- A provision requiring reasons for imposing either sentence (death or imprisonment for life) for an offence which is punishable with death or imprisonment for life in the alternative, should be inserted in the Code.

(2) Indian Penal Code.- Persons below 18years of age at the time of commission of the offence should not be sentenced to death.

See- Appendix XLIV, Recommendations for Amendments in Certain Central Acts.

death penalty. But till date, neither the legislature nor judiciary has been able to issue structured sentencing guidelines. The wide discretion so vested in the Court lacks uniformity in the sentencing policy in the death penalty. In the circumstances, the sentence largely depends upon the approach of the Court. The issue of vesting wide discretion causing disparity in sentencing policy was also recognised in the report submitted by the Committee on Reforms of Criminal Justice System (Malimath Committee), which started the report with the quote of Andre Gide, the French Thinker and writer, as quoted, *“Everything has been said already, but as no one listens, we must always begin again.”* The Committee, among others, emphasised the need to introduce sentencing guidelines to minimise uncertainty in awarding sentences, stating-

“the Indian Penal Code prescribed offences and punishments for the same. For many offences, only the maximum punishment is prescribed and for some offences, the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge regarding selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion according to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is a need for such law in our country to minimise uncertainty in the matter of awarding sentence. There are several factors which are relevant in prescribing alternative sentences. This requires a thorough examination by an expert statutory body.”¹²

With the strong observation, abovementioned, the Committee further advised that to bring uniformity and “predictability in the matter of sentencing,” a statutory committee ought to be established “to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.”¹³

Further, in the year 2008, the Committee on Draft National Policy on Criminal Justice (Madhava Menon Committee) reiterated the need of sentencing guidelines “to make the system consistent and purposeful,” in following words :

“There has to be a radical change in the law and practice of sentencing if punishment should serve the cause of criminal justice. A set of sentencing guidelines may be statutorily evolved to make the system consistent and purposeful. Fixing mandatory minimum sentences may not be a worthwhile solution.”¹⁴

12. Dr. Justice V. S. Malimath, Committee on Reforms of Criminal Justice System, Ministry of Home Affairs, Government of India, Report Vol.1, p 170. March 2003.

13. Dr. Justice V. S. Malimath, Committee on Reforms of Criminal Justice System, Ministry of Home Affairs, Government of India, Report Vol.1, p 171, March 2003.

14. Prof. (Dr.) N.R. Madhava Menon, Report of the Committee to Draft a National Policy on Criminal Justice System, Ministry of Home Affairs, Government of India, p.18, July 2007.

Followed by the reports, observations and recommendations, abovementioned, the Union Minister for Law and Justice announced that the government is planning for a “uniform sentencing policy” on the line of the United States of America and the United Kingdom so that judges do not hand down varied sentences.¹⁵ Ten years have passed, since then, the said policy is yet to see the light of the day.

Thus, it is evident from the above discussions and reports that there exist a vacuum of statutory guidelines for sentencing policy, which gives wide discretion to the judges pronouncing judgments, hence, causing great disparity in the sentencing, which largely depends on the approach of the judges, so deciding.

Death Sentencing Policy and the Supreme Court of India.

The Constitution of India provides for a unified judicial system, the Supreme Court of India sitting at the apex. The Constitution vests the Supreme Court of India with vast powers to regulate the whole judicial system of the nation. And being the Court of Record, the judgment of the Court amounts to precedent, which has a force of law.¹⁶ Thus, whenever there exists a legislative vacuum, the People’s Court attempts to fill it with the judicial pronouncement. Therefore, in the light of the above observations, this author finds it imperative to investigate the observations of the Supreme Court of India, in regards to the guidelines for sentencing policy.

A liberal view of the Supreme Court of India, towards the sentence of death punishment, can be seen, as early as in the year 1960, in the matter of **Narendra Kumar v. Union of India**.¹⁷ The words of conscience expressed by the Court finds worth mentioning herein-

*“In these pathless woods, we must seek light from the Constitution regarding ‘special reasons’. After all, no Code can rise higher than the Constitution and the Penal Code can survive only if it pays homage to the suprema lex. The only correct approach is to read into Section 302 IPC and Section 354(3), Cr.PC the human rights and humane trends in the Constitution. So examined, the right to life and fundamental freedoms is deprived when he is hanged to death, his dignity is defiled when his neck is noosed and strangled. What does Section 302 do by the death penalty to the sentencee? It finally deprives him of his fundamental rights. True, fundamental rights are not absolute and may be restricted reasonably, even prohibited totally, if social defence compels such a step. Restriction may expand into extinction in extreme situations.”*¹⁸

“Punishment by deprivation of life or liberty must be validated by Articles 21, 19 and 14 —

15. Reported on October 07, 2010. Available at:- https://zeenews.india.com/news/nation/govt-for-a-uniform-sentencing-policy-by-courts_660232.html, last visited on- August 03, 2020.

16. Article 141. Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

17. AIR 1960 SC 430

18. Narendra Kumar v. Union of India, AIR 1960 SC 430, para 51.

the first guarantees fair procedure, the second is based on the reasonableness of the deprivation of freedom to live and exercise the seven liberties and the last is an assurance of non-arbitrary and civilized punitive treatment. But in the connotation of these and other Articles of Part III, the social justice promise of Part IV and the primordial proposition of human dignity set high in the Preamble must play upon the meaning.”¹⁹

Thereafter, early guidelines for the sentencing policy can be seen in the case of **Ediga Anamma v. State of Andhra Pradesh**,²⁰ wherein Justice Krishna Iyer took into consideration the factors like age, gender, socio-economic background and psychic compulsions of the accused and commuted the death sentence to life imprisonment. Justice Iyer further laid down in the case that apart from looking into the details of the crime and deciding on the base of the extent of violence committed, the judges should also look into the criminal and his condition or haplessness while committing the crime. The observation of the Court is pertinent to reiterate, as he said-

“A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.”

The Court, further, also laid down that “when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, special reasons for such sentence.”²¹

A similar stance of Justice Krishna Iyer happened to be seen in the case of **Rajendra Prasad v. State of Uttar Pradesh**.²² However, in his dissenting judgment, Justice Sen cited his concern over the wide scope for interpretation of Section 302 of the IPC and Section 354 of the Cr.PC left to the judiciary. He expressed his observation as- *“It is not necessary for this Court to attempt to analyse the substantive merits of the cases for and against the death penalty for murder. It is in my view, essentially, a question for the Parliament to resolve and not for this Court to decide.”*

These cases witnessed three important developments. Firstly, Section 354 (3) was added to the Code of Criminal Procedure, 1973 which laid down that in conviction for cases which are punishable either with death or life imprisonment, the judgment shall state the reasons for the award of the punishment and if it is death sentence mention the special reasons for that decision. This made the lesser punishment the rule and the death penalty the exception, as opposed to the previous situation. Secondly, in 1979, India ratified the International Covenant on Civil and

19. Narendra Kumar v. Union of India, AIR 1960 SC 430, para 52.

20. 1974 (4) SCC 443 .

21. Ediga Anamma v. State of Andhra Pradesh, 1974 (4) SCC 443, para 354

22. 1979 (3) SCC 646

Political Rights (ICCPR). Article 6 (2) of the ICCPR says: “*In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.*” Further, Subsection 5 of the same Article says that no sentence of death shall be imposed on anyone under the age of 18 years and none can be carried out on pregnant women. Thus, India was now committed to the progressive abolition of the death penalty. Lastly, in the case of **Maneka Gandhi v. Union of India**,²³ it was held that every law of punitive detention must pass the reasonability test obtained from the collective reading of the “Golden Triangle” i.e. Articles 14, 19 and 21. These developments proved to be a climacteric point in regards to the sentencing policy of death sentence in India, which not only left a watershed mark in the policy-making of the legislature but also put the Indian judiciary on an unreturnable path, where the lesser punishment was preferred over the death sentence.

Further, in **Bachan Singh v. State of Punjab**,²⁴ the Supreme Court of India, through a constitutional bench with a ratio of 4:1, the majority view pronounced by Chandrachud, CJI, reiterated the guideline “life imprisonment is the rule and death sentence an exception” observed that though “we cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society,” it went on further observing,

“..... the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accordance with the sentencing policy writ large in section 354 (3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency—a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by the Supreme Court, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of the legislative policy outlined in section 354 (3), viz., that for persons convicted of murder life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through the law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”²⁵

23. (1978) 1 SCC 248

24. (1980) 2 SCC 684

25. (1980) 2 SCC 684, Para 13, at p.8

To further elucidate the “rarest of the rare rule” situations, where the application of death sentence could be justified, the Supreme Court of India, in the case of **Macchi Singh v. State of Punjab**,²⁶ through Hon’ble Justice M.P. Thakkar gave the following illustrations, which is pertinent to reiterate herein:

“I. Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for Commission of murder

When the murder is committed for a motive that evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, (c) a murder is committed in the course for the betrayal of the motherland.

III. Anti-Social or Socially abhorrent nature of the crime

(a) When a murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed to terrorize such persons and frighten them into fleeing from a place or to deprive them of or make them reverse past injustices and to restore the social balance.

(b) In cases of ‘bride burning’ and what are known as ‘dowry-deaths’ or when murder is committed to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of Crime

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

V. The personality of the Victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided

26. (1983) 3 SCC 470

even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when a victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.”²⁷

In the subsequent cases of **T.V Vatheeswaram v. State of Tamil Nadu**²⁸ and **Sher Singh v. State of Punjab**,²⁹ the question before the Hon’ble Supreme Court was whether a prolonged delay in execution of death sentence was reason enough to commute the death sentence to life imprisonment. While the first case laid down that such a situation gave reason enough for the convict to invoke section 21 and get the lesser punishment, the majority in the latter case differed on this point.

In **Allauddin v. State of Bihar**,³⁰ Justice Ahmadi said that “Where a sentence of severity is imposed, it is imperative that the Judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment the Judge would not award the death sentence. It may be stated that if a Judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences his choice should fall on the lower sentence.”

The death sentence was awarded to the accused in **Laxman Naik v. State of Orissa**,³¹ wherein the accused was found guilty of sexually assaulting his 7-year-old niece, after recording the evidence and the degree of injuries of the victim according to the judges were sufficient to prove the gross brutality with which the rape and murder had been committed and hence it was a case fit to fall under the category of the “rarest of rare” cases.

Again, in **Soman v. State of Kerala**,³² the Hon’ble Apex Court observed the decisions of this Court in battery of cases³³ and held that principles such as deterrence, proportionality, and rehabilitation need to be taken into account while sentencing. The proportionality principle also

27. See *Macchi Singh v. State of Punjab*, (1983) 3 SCC 470

28. (1983) 2 SCC 68

29. (1983) 2 SCC 344

30. AIR 1989 1456

31. AIR 1995 SC 1387

32. (2013)11 SCC 382

33. See *Ramashraya Chakravarti v. State of M.P.* [(1976) 1 SCC 281 : 1976 SCC (Cri) 1], *Dhananjay Chatterjee v. State of W.B.* [(1994) 2 SCC 220 : 1994 SCC (Cri) 358], *State of M.P. v. Ghanshyam Singh* [(2003) 8 SCC 13 : 2003 SCC (Cri) 1935], *State of Karnataka v. Puttaraja* [(2004) 1 SCC 475 : 2004 SCC (Cri) 300], *Union of India v. Kuldeep Singh* [(2004) 2 SCC 590 : 2004 SCC (Cri) 597], *Shailesh Jasvantbhai v. State of Gujarat* [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499], *Siddarama v. State of Karnataka* [(2006) 10 SCC 673 : (2007) 1 SCC (Cri) 72], *State of M.P. v. Babulal* [(2008) 1 SCC 234 : (2008) 1 SCC (Cri) 188], *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150].

includes factors such as mitigating and aggravating circumstances. The Hon'ble Court, further lays down the principle of proportionality analysis and observes:

“In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. The question is whether the consequences of the offence can be taken as a measure for determining its harmfulness? In addition, quite apart from the seriousness of the offence, can the consequences of an offence be a legitimate aggravating (as opposed to mitigating) factor while awarding a sentence? Thus, to understand the relevance of consequences of criminal conduct from a sentencing standpoint, one must examine: (1) whether such consequences enhanced the harmfulness of the offence; and (2) whether they are an aggravating factor that needs to be taken into account by the courts while deciding on the sentence.”³⁴

In **Swamy Shraddhananda @ Murali Manohar Mishra v. State of Karnataka**,³⁵ the Court observed that “the truth of the matter is that the question of the death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.” For the first time, in this case, the Court identified the dilemma judges face because the term for a life sentence after remission usually was cut down to 14 years.³⁶ This was in some cases considered to be grossly inadequate and so the Court held that in some such cases it can order that the convict shall not be released for the rest of his life. So it was held that executive clemency doesn't mean that the Court cannot award imprisonment beyond 14 years.

One of the most recent cases which are pertinent to mention herein, to further our discussion, is that of **Santosh Kumar Bariyar v. State of Maharashtra**.³⁷ In this case, for the first time, a division bench of the Supreme Court, comprising Hon'ble Justice S.B. Sinha and Hon'ble Justice Cyriac Joseph, ruled that previous judgments of the Court, in which 13 death sentences were

34. (2013)11 SCC 382, para 17.

35. Criminal Appeal No. 454 of 2006

36. “The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28 March, 1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior Courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh and others vs. State of Punjab*, (1979) 3 SCC 745.” See Criminal Appeal No. 454 of 2006, para 38, at p 33.

37. Criminal Appeal No. 1478 of 2005

validated, were rendered per incuriam, or in other words, were rendered in ignorance of the law laid down in Bachan Singh's case. The Court reiterated the wide scope of insufficiently guided discretion in pronouncing death sentence and observed that-

“..... it is now clear that even the balance-sheet of aggravating and mitigating circumstances approach invoked on a case by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the Bachan Singh threshold of “rarest of rare cases” has been most variedly and inconsistently applied by the various High Courts as also this court. At this point, we also wish to point out that the uncertainty in the law of capital sentencing has a special consequence as the matter relates to the death penalty – the gravest penalty arriving out of the exercise of extraordinarily wide sentencing discretion, which is irrevocable in nature. This extremely uneven application of Bachan Singh (supra) has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle. The situation is unviable as legal discretion which is conferred on the executive or the judiciary is only sustainable in law if there is any indication, either through law or precedent, as to the scope of the discretion and the manner of its exercise. There should also be sufficient clarity having regard to the legitimate aim of the measure in question. Constitution of India provides for safeguards to give the individual adequate protection against arbitrary imposition of criminal punishment.”³⁸

Thus, through the above judicial observations and discussion, it is apparent that, in India, there exists a legislative vacuum in regards to the sentencing policy of the death sentence. The prevalent legislative policy lacks a guiding principle of objectified criteria in awarding death sentence, consequently vests vast discretion in the judges presiding over the trial and subsequent confirmation of the sentence, which varies from judges to judges and their respective outlook and approaches. Despite the legislative vacuum, the judiciary, particularly, the Supreme Court of India, has been doing a commendable job towards filling the vacuum, in the light of limited resources and expertise. The principle of ‘rarest of rare’ and propounding of ‘aggravating and mitigating circumstances’ are certain apparent examples in the direction.

However, such innovation and propagation of principles, tilting towards life imprisonment over the death penalty could not bring a clean chit for the judiciary and has often been a subject of criticism on the ground of alleged discrimination. Therefore, it becomes obvious to examine the alleged discrimination and their kinds, if any.

Discrimination in sentencing the Death Penalty.

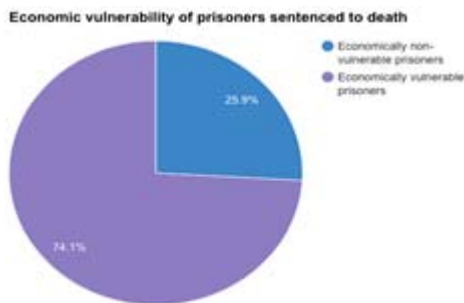
Virtually, no part of the earth exposed to the light of the sun remains untouched from the experiences of some or the other kind of grounds to discriminate. The signs of discrimination can

38. Criminal Appeal No. 1478 of 2005, p 62

be traced in every nation. India, being no exception to the normative fact, there remain some grounds of discrimination too herein viz. Gender, Region, Place of Birth, Caste, Religion, Race, Colour, Literacy, Wealth, Poverty etc. It exists amid the provision of a non-discrimination article³⁹ in our suprema lex i.e. the Constitution of India. For this article, we will confine our discussion to the alleged discrimination about the sentence of the death penalty, each ground separately.

Economic vulnerability.

The economy plays a vital role in determining the legal rights and liabilities of a person. Since, the better economic condition of a person ensures better legal representation of one's case, the people with vulnerable economic background loose the opportunity of a good representation of one's case. A recent data collection by one of the reputed legal institutions in Delhi highlights the trend.⁴⁰



Source: Death Penalty India Report, Volume I

Social profile.

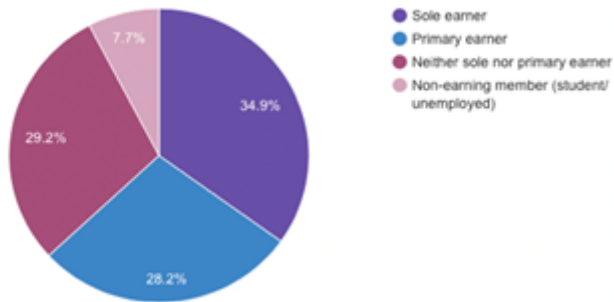
Similarly, an analysis of the Social profile of the death row convicts reveals that most of such prisoners belong to the marginalised section of the society, comprised of scheduled castes, scheduled tribes and religious minorities, mostly suffering social and economic vulnerability simultaneously.⁴¹

39. Art. 14. Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

40. Most death row prisoners interviewed were economically vulnerable, calculated based on occupation and landholding. Of the states with more than 10 death row prisoners, Kerala had the highest proportion of economically vulnerable, 14 out of the 15 prisoners (93.3%). Maharashtra had 88.9% economically vulnerable prisoners, Delhi 80%, Gujarat 78.9% and Bihar and Chhattisgarh had 75% each. This is not an accident. According to the report, the economic status of an accused is linked to his participation in the criminal justice system in various ways, such as getting bail, legal representation, etc. In addition, the impact is not solely on the prisoner's themselves, but also to a large extent on their families. The wage lost when a prisoner is convicted is a huge loss to economically vulnerable families, heightened by the fact that death row prisoners, unlike other prisoners, are not allowed to work in prison – meaning they have no income to send home.

41. Death Penalty India Report Summary, Centre on Death Penalty, National Law University, Delhi. Of the prisoners currently on death row in India, 76% (279 prisoners) are from lower castes or religious minorities. The all-India proportion of SC/ST death row prisoners is 24.5%, but this number is significantly higher in certain states – Maharashtra (50%), Karnataka (36.4%), Madhya Pradesh (36%), Bihar (31.4) and Jharkhand (30.8%).

Status of family dependence for economically vulnerable prisoners



Source: *Death Penalty India Report, Volume I*

Further, it is an undeniable fact that Caste is a dominant factor of various facets of Indian life, though it has never been a part of major discussion, especially judicial discussion and being more specific in sentencing in capital cases. Among the other possible reasons, one of it could be the little availability of caste being a factor in the factual matrix. However, few capital cases that have been informed by the caste question have often concerned mass caste-based killings where the Court has been unable to ignore the issue.

In **Subbiah Thevar v. State of Tamil Nadu**,⁴² the Supreme Court of India commuted the death sentence because the accused, belonging to the lower caste, felt humiliated by a woman of a higher-caste, beating one of the accused with a broomstick and the deceased made a sarcastic remark about the attack. The Court noted that in such a case the death sentence was not called for. In **Mahesh v. State of Madhya Pradesh**⁴³ however, where the accused killed five persons of one family in an attack driven by considerations of the ‘evils of untouchability’, the Supreme Court used the logic of ‘social necessity’ and ‘mockery of justice’ to uphold the death penalty.

In **Kannan v. State of Tamil Nadu**,⁴⁴ and **Baddi Venkata Narasayya v. State of A.P.**,⁴⁵ both cases involving group attacks on ‘Harijan’ colonies, the Supreme Court did not

Religious minorities, for whom the all-India proportion is 20.7%, saw a disproportionate share of convicts in Gujarat, where 15 out of the 19 (79%) prisoners sentenced to death were Muslim. According to the 2011 census, 9.67% of the state is Muslim. In Kerala, 60% of death row prisoners were from religious minorities (relative to 42.25% of the population, according to the 2011 Census) – five Muslims and four Christians amongst 15 death row prisoners. Karnataka too saw a large proportion of religious minorities on death row, 31.8% of the total. This is relative to 16.01% of the state being from religious minorities.

Of the SC/ST prisoners, 85.4% were also economically vulnerable. For religious minorities, this proportion was 76%, compared to 64.4% for the general category. This intersectionality mirrors contemporary society, and meant that the experiences of certain categories of death row prisoners and their families were also different.

“The Musahars are considered to be Mahadalits, the poorest amongst the Dalits. In 2009, 10 people belonging to the Musahar community were sentenced to death for the massacre of 16 people from the OBC community. Of this group, nine prisoners were illiterate and never went to school. ... The family of Ramrang, one of the Musahar prisoners sentenced to death, recounted that Ramrang’s 10-year-old son had to start working after his arrest. The child was the sole earner for his mother and five brothers and sisters,” reads a narrative from the report.

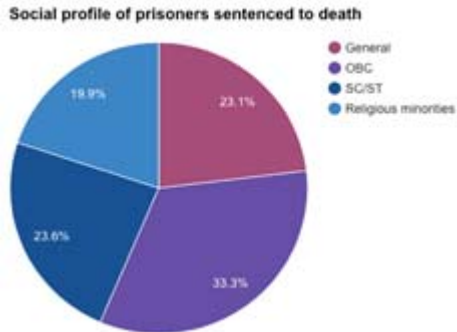
42. (1973) 3 SCC 480

43. (1987) 3 SCC 80

44. AIR 1989 SC 396

45. (1998) 2 SCC 329

resort to the death sentence. While in the former, the Court commuted the sentence of three of the attackers on grounds of ‘parity,’ in the latter the Supreme Court upheld the commutation of the death sentence of the main accused by the High Court.



Source: *Death Penalty India Report, Volume I*

Age.

‘Age is just a number’ the proverb does not go well when it comes to judicial trial, as it is often seen as an important factor when deciding on punishment for an accused, once guilt has been established. The Constitutional bench of the Supreme Court of India laid down that “if an accused is young or old, he shall not be sentenced to death.”⁴⁶ For, it is a general belief that young people have an entire life ahead of them and there is time for reformation and rehabilitation. Besides, they are also assumed to be more vulnerable. For very old people, the logic is that they cannot be said to pose an unacceptable risk to society.

Many prisoners are unable to prove their age due to lack of appropriate documentation, such inability is often directly and substantially connected to economic and social vulnerability.⁴⁷

46. *Bachan Singh v State of Punjab*

47. *Death Penalty India Report Summary*, Centre on Death Penalty, National Law University, Delhi. Of the prisoners interviewed for the study, 18 claimed to have been below 18 years of age at the time of the incident. In many cases, it is hard to find precise documentation of a person’s age. Because of the nature of the lawyer-client relationship and the lack of interaction with their lawyers, many of the prisoners also did not get a chance to argue this point in court.

Inability to prove age is also often directly connected to economic and social vulnerability resulting in the lack of appropriate documentation.

“Six members of the More’ family were arrested for the murder of four people, and rape and murder of a girl. The More’ family belongs to a Scheduled Tribe. After the Supreme Court confirmed their death sentences, one of the six brothers, Gopal, was declared to be a juvenile by the sessions court on the basis of his school leaving certificate, which had not been previously considered by any court. At the time of this decision, Gopal had already spent nine years in prison, six of them on death row. Of the remaining brothers, Bhairav stated that he was, in fact, younger than Gopal, and had been only 11 years of age at the time of the incident. However, he had never been to school and therefore had no proof of age. Before the incident, all brother were working as labourers, digging gutters and lifting sand bags,” another experience listed in the report says.

Across the country, 54 of the 310 prisoners for whom age- related information is available were between 18 and 21 years old, and seven prisoners were above the age of 60 when the incident took place.

Religion.

The number of criminal cases associated with religious riots or communal clashes wherein the death sentence has been pronounced is very few, hence they rarely reach up to the ladder of the Supreme Court of India.

The Apex Court, in **Dharma Rama Bhagare v. The State of Maharashtra**,⁴⁸ upheld the death sentence awarded to the accused wherein the latter killed unarmed members of one family attempting to escape a mob during communal riots in Gujarat. The Court concluded with the observation that such killings are “not only destructive of our basic traditional social order founded on toleration in recognition of the dignity of the individual and other cherished human values, but also tend to mar our national solidarity.” However, in **Kishori v. State of Delhi**⁴⁹ and various other capital cases connected to the 1984 anti-Sikh riots, the Courts found the fact of killings, committed by a mob, as a mitigating factor and not an aggravating factor, consequently, the Apex Court commuted the sentence of one accused who had been sentenced to death by a trial court after putting on record his six previous convictions for a murder committed during the riots. But, during the appeal, the Supreme Court argued that of the seven convictions, the accused was acquitted in four, by the High Court and the other two were also before the Supreme Court on appeal and further that since all were alleged to have taken place on the same night, he could not be said to be a “hard-boiled criminal.” The Court went on observing that, “We may notice that the acts attributed to the mob of which the appellant was a member at the relevant time cannot be stated to be a result of any organised systematic activity leading to genocide” and therefore commuted the sentence. In **Manohar Lal v. State of Delhi**,⁵⁰ the Supreme Court also relied on *Kishori v. State of Delhi* as a precedent in commuting the sentence. Further, ignoring evidence that the attacks on Sikhs had been planned and orchestrated, the Court argued that while the killings were most gruesome, the accused were berserk and “on a rampage, unguided by sense or reason and triggered by a demented psyche.”⁵¹

Thus, from the above discussions, referred reports and shown data, it is apparent that the Indian society is plagued with various discriminations, biases and notions, and since the institutions are manned with the same set of men from the society, despite cautious approach, some or the other sort of discriminations percolates in the discharge of the functions, consciously or subconsciously, be it judiciary. Though, it is also an undeniable fact that when such discriminations are sorted across the institutions, the judiciary finds its place at the last of the ladder.

Taking out the discussion further, and for this article, now it is pertinent to examine the circumstances when a fine is also awarded along with the death penalty and the pecuniary fine has not been paid to the convicted person.

48. (1973) 1 SCC 537

49. AIR 1999 SC 382

50. (2000) 2 SCC 92

51. Lethal Lottery: The Death Penalty in India, A study of Supreme Court judgments in death penalty cases 1950-2006, Amnesty International India and People's Union for Civil Liberties, May 2008.

Imprisonment in default of payment of a fine.

Section 64 of IPC confers the general power on the court to award the sentence of imprisonment in default of the fine. It contemplates cases where the offence is punishable with:

- (a) Imprisonment with fine, or
- (b) Imprisonment or fine, or
- (c) Fine only

And the offender is sentenced to

- (1) Imprisonment, or
- (2) Fine, or
- (3) Both.

Thus, under this section, the court may sentence the offender to a term of imprisonment in default of the fine. It is also pertinent to mention that Section 64 IPC applies not only to offences under the Indian Penal Code but also to offences under Local and Special laws (Section 40 IPC). Thus the section applies to the offenders of Municipal Corporation Acts, Gambling Act, Excise Act, and other penal acts which provides sentences of imprisonment in default of payment of fine.

The following rules regulate the character and duration of the sentence of imprisonment in default of payment of fine:

(1) When an offender is sentenced to a fine, the court may direct that the offender shall, in default of payment, suffer a term of imprisonment, which may be in excess of any other imprisonment to which he may have been sentenced for the offence, or to which he may be liable under a commutation of a sentence (Section 64).

(2) When the offence is punishable with imprisonment as well as fine, the imprisonment in default of payment of fine shall not exceed $\frac{1}{4}$ of the term of imprisonment which is the maximum fixed for the offence (Section 65); such extra imprisonment may be of any description to which the offender might have been sentenced for the offence (Section 66).

(3) When the offence is punishable with fine only the imprisonment in default of payment of fine shall be simple and according to the scales below

For fine	Imprisonment
Rs. 50 or less	2 months or less
Rs. 100 or less	4 months or less
Above that sum	6 months or less

(4) Such imprisonment shall terminate whenever a fine is either paid or levied by the process of law (Section 63). A proportional payment or levying of the fine causes the proportional reduction of the term of imprisonment (Section 69).

It should be remembered that imprisonment in default is not a substitute for the payment of a fine it is a punishment for default and not for the offence committed. So, if a person is fined Rs. 100 and in default undergoes imprisonment for four months, he is not thereby exonerated from paying the fine, which shall be realized from him by distress and sales of this property, notwithstanding the fact that he suffered jail for four months

Under Section 65 the maximum is fixed as 1-fourth of the term of imprisonment, so that it may not be exceeded. Where for instance, in a case of assault under Section 352 IPC, the offender was fined Rs. 50, he could not be sentenced to a month's imprisonment for that period would exceed one fourth of the maximum period of three month's imprisonment prescribed for the offence.

The following examples would further illustrate the application of these sections:

The punishment prescribed for criminal trespass (Section 447) is imprisonment not exceeding a term of three months or fine which may extend to Rs.500 or both. A person convicted of this offence may be sentenced to pay fine and in the alternative to undergo imprisonment not exceeding three-fourth of a month; for the maximum period for which imprisonment can be awarded as substantive sentences i.e. only three months. Of course, the court has rightly sentenced him to 2 months and a fine of Rs. 400 and in alternative three-fourth month imprisonment. The total period of imprisonment should not exceed three months, the maximum prescribed for the offence.

A person convicted of criminal conspiracy under Section 120-B, (clause 2) may be sentenced to six months imprisonment alone or he may be sentenced to a fine of Rs.500 alone, or he may be sentenced to imprisonment for four months and a fine of Rs.100 and in default one more month more. Even when he is sentenced to pay a fine of Rs.500 he may be directed to undergo imprisonment for one month when he defaults to pay the fine. So also, when the offender is sentenced to four months imprisonment and a fine of Rs. 500, it may further be directed that on default of the payment of fine he should undergo imprisonment for the further period of one month.

In the case of offences punishable with both imprisonment and fine, an additional period of imprisonment can be given on default of the payment of the fine. For example, the maximum punishment prescribed for giving false evidence under section 193 is seven years, imprisonment of either description and fine. In the case of a person convicted under this section, the court may award a sentence of two years, imprisonment and a fine of Rs. 500 and a further period of imprisonment for three months on default of payment of the fine. But the court could not award a further period of twenty-two months on non-payment of fine for it would exceed one-fourth of the maximum term of imprisonment prescribed for the offence, viz., 7 years (84 months), one-fourth

of which is only 21 months. Hence the alternative period of imprisonment for non-payment of fine should not exceed 21 months.

It should be noted that section 67 and the scales mentioned therein are only applicable to offences that are punishable with fine alone and not to offences that are punishable with fine or imprisonment which are covered by Section 65. For example, the punishment prescribed for conducting a lottery (Section 294-A, para 2) is only a fine not exceeding the maximum of Rs.1000. Suppose a person, found guilty of this offence under Section 294-A is sentenced to pay a fine of Rs. 800 and undergo rigorous imprisonment for 8 months in default of payment of fine, the latter portion relating to rigorous imprisonment will be illegal as being contrary to Section 67 under which the imprisonment can only be simple not exceeding six months in any case.

Conclusion

Thus, given the above discussion, two facts pop up. One, there is a legislative vacuum in the sentencing policy relating to the death penalty, which imposes a wide discretion in the Courts, and because of the obvious nature, it causes disparity and discrimination in the sentencing of the death penalty. Further, it is a matter of academic curiosity and research despite the recommendation of various committees, viz. Malimath Committee, Menon Committee etc., the Legislature preferred not to act upon those recommendations, and let the judiciary to decide the boundary of the unsettled area.

Though various committees recommended to legislate upon the unfettered discretion to provide guidelines for sentencing policy on the death penalty, to which the legislature, for the reasons better known to it, left undecided, the judiciary and particularly, the Supreme Court of India, did a commendable job in providing guidelines for sentencing a death penalty. The Supreme Court of India, since its inception, took a pro-humanitarian approach on the death penalty, and time to time propounded various pro-people principles starting from the ‘rarest of the rare case’ principle to the principle of ‘aggravating and mitigating circumstances.’ The journey so started, portrayed the image of the Supreme Court of India, before the people of India, as the Peoples’ Court of India. By acting so, the Court not only realised the conceptualisation of the Founding Fathers of the Indian Constitution but also relive constitutional guarantees confined within the black and white texts of the Constitution of India.

Further, the two opposite approaches, one, wherein the question of the death penalty has to take into considerations factors such as public sentiments, and two, wherein involves the tussle of the moral issue of the “eye for an eye” principle, with the former, the Supreme Court of India has carved a niche of balancing wheel among the two contradicting and most difficult positions to take side with.

Still, the debate between the two set of people like Bernard Shaw, who holds the view as-

“Criminals do not die by the hands of the law. They die by the hands of other men.

Assassination on the scaffold is the worst form of assassination because there it is invested with the approval of the society.....Murder and capital punishment are not opposites that cancel one another but similars that breed their kind."

and Margaret Thatcher who expresses her mind on death penalty as-

"If we execute murderers and there is, in fact, no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers, and doing so would, in fact, have deterred other murders, we have allowed the killing of innocent victims. I would much rather risk the former. This, to me, is not a tough call.....All over the country news stories bemoan and hype the countdown to execution number 1000, but where are the stories regarding the ripple effect of the heinous crimes that these murderers were executed for committing?"

will continue to rock the debate, in the times to come, before various fora, only God knows, till when.

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Topic No. –31

***Conspiracy: Essential ingredients of criminal conspiracy, and
modes of proving criminal conspiracy.***

Submitted by
Sri Gurvinder Singh Malhotra,
Additional District & Sessions Judge,
Patna.

Sri Gurvinder Singh Malhotra,
Additional District & Sessions Judge, Patna.

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Conspiracy : Essential ingredients of Criminal conspiracy and modes of proving criminal conspiracy.

Introduction

This Chapter has introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It came into existence by the Criminal Law (Amendment) Act, 1913. The offence of criminal conspiracy is an exception to the general rule where intent alone does not constitute a crime. It is the intention to commit the crime and joining hands with persons having the same intention (**State through Superintendent of Police, CBI/SIT Vs. Nalini & Others, reported in (1999) 5 SCC 253**). Making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means (**Pratapbhai Hamirbhai Solanki Vs. State of Gujarat and Anr., (2013) 1 SCC 613**). A criminal conspiracy must be put to action since so long a crime is generated in the mind of an accused, it does not become punishable. What is necessary is not thoughts, which may even be criminal in character, often involuntary, but offence would be said to have been committed thereunder only when that takes concrete shape of an agreement to do or cause to be done an illegal act or an act which although not illegal by illegal means and then if nothing further is done the agreement would give rise to a criminal conspiracy (State of M.P. Vs. Sheetla Sahai, (2009) 8 SCC 617)

1. Definition of Criminal Conspiracy (Indian Law).—

Section 120A. When two or more persons agree to do, or cause to be done,-

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

2. Essential ingredients of Criminal Conspiracy:-

- (1) that there must be an agreement between the persons who are alleged to conspire;
and
- (2) that the agreement should be
 - I. for doing an illegal act, or
 - II. for doing by illegal means an act which may not itself be illegal.

The most important ingredient of the offence is the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the Court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy, some kind of physical manifestation of the agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence that continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the Indian Penal Code (**Pratapbhai Hamirbhai Solanki Vs. State of Gujarat and Anr., (2013) 1 SCC 613**).

(a) Agreement:-It will be observed that there can be no conspiracy without an agreement which is an advancement of the intention which each has conceived in his mind, which then passes from a secret intention to the stage of mutual consultation and concert., proof of which may be available in the evidence of an accomplice which must, however, be definite as to the agreement 'to do or cause to be done' the act charged; which again, must be shown to be illegal within the meaning ascribed; to that term in Section 43, I.P.C. which generally follows the English law (**Rowlands, 17Q.B. 671; Parnel, 14 Cox. 505**). It is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental of that object (**Rash Behari Shaw Vs. Emperor, A.I.R. 1936 Cal. 153 at p. 160**). It is similarly immaterial that the offence agreed on is one which one of the conspirators could, not singly commit. So in an English case where a woman who erroneously believed herself with child conspired with another to procure abortion, she was held liable to be convicted of conspiracy to procure abortion although if she had merely done the act to herself with like intent she could not have been convicted (**Withchurch, 24 Q.B.D. 420**). It will be observed that many acts of conspiracy to be found in the law books would be punishable here as amounting to abetment, for example, conspiring to obtain money (**Narain Vs. State of Rajasthan, 1984 Cr. L.J. 1495 at p. 1504 (Raj.)**) or goods by false pretences, conspiring to defraud the public by mock-action or by forcing up the price of sharing by circulating false rumours, and the like.

Criminal conspiracy as defined in Section 120-A of the Indian Penal Code is an agreement by two or more persons to do or cause to be done an illegal act or an act that is not illegal by illegal means. The agreement is the gist of the offence. To constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for the advancement of the common plan. A general conspiracy must be distinguished from a number of plans. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of this group only (**Mohd. Hussain Umar Kochra Vs. Dalipsinghji, A.I.R. 1970 S.C. 45**).

It is true that in the instant case there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act the agreement may be proved by necessary implication, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do or cause to be done the said illegal act, for, without such an agreement that act could not have been done for such a long time (**Mohammad Usman Mohammad Hussain Maniyar Vs. State of Maharashtra, A.I.R. 1981 S.C. 1062 at p. 1067**).

(b) Act illegal:- To amount to the offence of criminal conspiracy an agreement must be to do that which is contrary to or forbidden by law. Being a highly technical offence, this ingredient of the crime is essential and must be strictly proved (**Amritlal Hazra Vs. Emperor, A.I.R. 1916 Cal. 188**). An agreement which is immoral or against public policy, or in restraint of trade or otherwise of such a character that the Courts will not enforce it, is not necessarily illegal. But since an act may be illegal without being criminal it follows that an agreement to do an illegal act may amount to criminal conspiracy though it may not be punishable as such. It may be an offence to conspire with another to do an act with, if done alone, would not be criminal. Merely associating with people known to be involved in crime does not make you a co-conspirator. For instance, just because your friend tells you he is going to burglarize a house does not mean you are part of the conspiracy.

Not unless you also agree to participate by acting as a gateway driver or helping him scoop out the property ahead of time.

(c) Means illegal—The end does not justify the means in criminal law. If, therefore, one conspires with another to employ illegal means to achieve a legal purpose one may be convicted of conspiracy. It is not difficult to conceive of such cases. For instance, it is not illegal to undersell a rival trader, but it would be illegal for the latter to combine to ruin the seller of cheap goods by inducing to give credit to the bankrupt purchaser and thereby cause him a loss.

(d) Overt act—Provisions of Sections 120-A and 120-B I.P.C. have brought the law of conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence (**Kehar Singh Vs. State (Delhi Administration, 1989 Cr.L.J. 1 at p. 70 (S.C.))**). The doing of an over act, independent of the agreement, is a step further in the prosecution of the object of the conspiracy and stamps it as criminal within the meaning of this section. This overt act here must be something distinct from that tending to prove merely the agreement. The question is one of the fact dependent upon the circumstances of each case. For instance, if A and B agree to murder C. letters passed between them as to the movements of C may either prove the agreement or be overt acts in furtherance of its purposes. It all depends upon their nature and consent. So, where the accused were found to have conspired to import firearms and ammunition in contravention of the Arms Act, they were held guilty of this offence (**Kalidas Basu, 39 C.L.J. 151**).

An agreement that is alleged to be a criminal conspiracy need not and cannot often be proved by direct evidence and it often happens that participation in overt acts in pursuance of the alleged agreement provides good grounds for the inference of participation in the agreement itself. But where the only overt act is the issue of a cheque towards the payment of the price of shares sold by a company, such overt act by itself would not be sufficient material for inferring that there was participation in the criminal conspiracy (**Rameshwar Daga Vs. State of West Bengal, A.I.R. 1965 Cal. 38 at p. 42**).

3. Principles governing the Law of Conspiracy summarized- Rajiv Gandhi assassination case. State Vs. Nalini (1999) 5 SCC 253.

As per Wadhwa, J. some of the broad principles governing the law of conspiracy may be summarized though, as the name implies a summary cannot be exhaustive of the principles.

- (i) Under Section 120-A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means over act is necessary. The offence of criminal conspiracy is an exception to the general law where intent alone does not constitute a crime. It is the intention to commit the crime and joining hands with persons having the same intention. Not only the intention but there has to be an

agreement to carry out the object of the intention, which is an offence. The question of consideration in a case is - did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy where some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

- (ii) Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.
- (iii) Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.
- (iv) Conspirators may, for example, be enrolled in a chain – A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the centre does the enrolling and all the other members are unknown to each other, though they know that there are to be other members. These are theories and in practice, it may be difficult to tell which conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of a single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.
- (v) When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and even though no step is taken by any such person to carry out their common purpose, a crime is committed by each and everyone who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that the intended crime was committed or not. If committed it may further help the prosecution to prove the charge of conspiracy.
- (vi) Not all conspirators need to agree to a common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.
- (vii) A charge of conspiracy may prejudice the accused because it forces them into a joint

trial and the Court may consider the entire mass of evidence against every accused. The prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement of the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. The introduction of evidence against some may result in the conviction of all which is to be avoided. Employing evidence in the conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always a difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand “ this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.”.

- (viii) It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. The offence of criminal conspiracy is complete even though there is no agreement as to how the purpose is to be accomplished. It is the unlawful agreement that is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declaration, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but maybe reached by successive actions evidencing their joining of the conspiracy.
- (ix) It has been said that a criminal conspiracy is a partnership in crime and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after the termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

(x) A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect is guilty though he intends to take no active part in the crime (para 583)

4. Difference between Section 34 and Section 120-A IPC:-

There is not much substantial difference between conspiracy as defined in Section 120-A and acting on a common intention, as contemplated in Section 34. While in the former, the gist of the offence is bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under Section 34 is the commission of a criminal act in furtherance of a common intention of all the offenders, which means that there should be unity of criminal behaviour resulting in something, for which an individual would be punishable if it were all done by himself alone (**Dinanath, 1939 Nag 644**). Another point of difference is that a single person cannot be convicted under Section 120-B and, therefore, where all the accused except one were acquitted, the Supreme Court ordered the acquittal of the sole accused also (**Vinayak Vs. State of Maharashtra, AIR 1984 SC 1793**), whereas under Section 34, read with some other specific offence, a single person can be convicted because each is responsible for the acts of all others.

5. Difference between Section 107 and Section 120-A IPC:-

The distinction between the offence of abetment as defined in Section 107 (Chapter V) and the offence of criminal conspiracy as defined in Section 120-A (Chapter V-A). Under Section 107, second clause, a person abets the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and to the doing of that thing. Therefore, to constitute the offence of abetment by conspiracy, there must first be a combining together of two or more persons in the conspiracy, secondly, an act or illegal omission must take place in pursuance of that conspiracy, and to the doing of that thing, the abettor doesn't need to concert the offence with the person who committed it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Something more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and to the doing of the thing for which the conspiracy was made. Before the introduction of (Chapter V-A) conspiracy, except in cases provided by Sections 121-A, 311, 400, 401 and 402 of the Indian Penal Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of the conspiracy and amounted to a distinct offence. Chapter V-A, however, introduced a new offence defined by Section 120-A. That offence is called the offence of criminal conspiracy and consists of a mere agreement by two or more persons to do or cause to be done, an illegal act, or an act which is not

illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The position, therefore, comes to this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act that is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act that is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offences of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and to the doing of the thing conspired for. But in the offence of criminal conspiracy, the very agreement or plot is an act itself and is the gist of the offence.

(II) How Criminal Conspiracy is proved:-

Modes of proving criminal conspiracy:-

How proved (Section 120-A IPC and Section 10 Evidence Act):-

To prove a criminal conspiracy which is punishable under Section 120-B, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence (**State (Delhi Administration) Vs. V. C. Shukla, AIR 1980 SC 1382**).

The essence of criminal conspiracy is an agreement to do an illegal act and such agreement can be provided either by direct evidence or by circumstantial evidence or by both but direct evidence is rarely available. Inference from proved circumstances concerning the guilt of the accused may be drawn only when such circumstances are incapable of any other reasonable explanation. An offence of criminal conspiracy cannot be deemed to have been established on mere suspicion and surmise or inference that is not supported by cogent evidence. In this case, a police officer was killed as a consequence of a conspiracy hatched by certain other police officials and a doctor conducting postmortem also got himself involved in it. Widow of deceased filed a writ petition in High Court which directed the Session Judge or magistrate concerned to proceed against the persons involved in his criminal conspiracy (**Joydeb Das alias Jogi Vs. State of W.B., 1999 Cr. LJ 1816 (Cal)**). Where circumstantial evidence prima facie showed that the alleged criminal conspiracy was executed with ingenuity, dexterity and adroitness, the framing of charge against accused persons would be proper, that is why pending proceedings of the accused

charged under Section 409 and 420/120-B were refused to be quashed. The special judge was held to have jurisdiction to try such offences which were committed in the course of the same transaction (**Tuncay Alankus Vs. Union of India, 2000 CrLJ 3280 (Del).**

In an earlier case, the Supreme Court held: A conspiracy from its very nature is generally hatched in secrecy. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases, proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once the reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by any one of them in reference to their common intention after the same is entertained becomes, according to the law of evidence relevant for proving both conspiracy and the offences committed pursuant thereto (**Noor Md. Vs. State of Maharashtra, AIR 1971 SC 885**). Direct proof of a conspiracy is, of course, seldom available. In a case of conspiracy when there is no direct evidence, inferences from the proved facts and circumstances, to a larger extent, form the basis of the Court's conclusion. In dealing with such cases, based, on circumstantial evidence, an inference of guilt need only be drawn when the circumstances are such as to be incapable of being reasonably explained on any other hypothesis than the guilt of the accused. Where the only circumstance appearing against the accused is his thumb-impression, found to exist on the actual payee's receipt which is found to be forged, and when this circumstance stands reasonably explained by the accused and there is no other circumstantial evidence, it is not possible to infer guilt of the accused of an offence under Section 120-B IPC (**Hari Ram Vs. State of H.P., 1982 CrLJ 294**).

In case of conspiracy in which the prosecution relies only on circumstantial evidence to establish a criminal agreement between the accused persons to commit an alleged offence, the prosecution must prove and establish such circumstances as would lead to the only conclusion of the existence of a criminal conspiracy. If there are circumstances compatible with the innocence of the accused persons the prosecution cannot succeed based on such circumstantial evidence. There are cases of criminal conspiracy in which evidence adduced by the prosecution for proving criminal conspiracy is the same as evidence for establishing the offence which is alleged to be the object of the criminal conspiracy. In such cases, if the prosecution is not able to establish its case so far as the main offence, constituting the object of criminal conspiracy, is concerned, it will be extremely unsafe to find the accused persons guilty of abetment of the said offence with the aid of Section 120-B IPC., unless by unimpeachable evidence, circumstances, incompatible with the non-existence of criminal conspiracy, are established by the prosecution (**Dada Saheb Bapusaheb Naik Vs. the State of Maharashtra, 1982 CrLJ 856**).

As conspiracy is hatched in secrecy direct evidence to prove conspiracy is rare. It is to be proved largely on the inference drawn from illegal act or omissions committed by the conspirators in pursuance of common design- which has been properly proved (**Shivnarayan Vs. State of Maharashtra, AIR 1980 SC 439**). Conspiracy may be proved by necessary implication. The fact that accused persons were possession and selling explosive substance for a long time leads to such an inference because without an agreement the act could not have been done for such a long time (**Mohd. Usman Vs. The state of Maharashtra, 1981 CrLJ 588 (SC)**). Conspiracy is usually hatched in secrecy – when evidence is that they did so in a crowded hotel, it is held that it is not believable (**Budh Singh Vs. State of M.P., 1979, CrLJ (NOC) 189 (MP)**). Of sheer necessity this section has to be read in conjunction with Section 10 of the Indian Evidence Act which runs as under :

“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them is a relevant fact against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was party to it.”

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: which can be established by direct evidence or by circumstantial evidence. But Section 10 of the Evidence Act introduces the doctrine of agency and if the condition laid down therein are satisfied, the act done by one is admissible against the co-conspirators. But this section will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists anything, said done or written by one of the conspirators in reference to the common intention, after the said intention was entertained is relevant against the others not only for the purpose of proving, the existence of the conspiracy but also for proving that the person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression “ in reference to their common intention” in section 10, is very comprehensive and is designedly used to give it a wider scope than the words “in furtherance of” in English Law, with the result, anything said, done or written by a co-conspirator after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. It can only be

used to prove the existence of the conspiracy or the other person was a party to it. It cannot be used in favour of the other party or to show that such a person was not a party to the conspiracy (**Bhagawan Swaruplal Vs. State of Maharashtra, AIR 1965 SC 682**).

Section 10, Evidence Act does not include a statement made by one conspirator in the absence of another with reference to past acts done in the actual carrying out of the conspiracy, after the conspiracy has been concluded. Accordingly, a statement made before the examining Magistrate by a fellow conspirator, after his arrest is not admissible under the section. The common intention referred to in Section 10, is an intention existing at the time when the thing was said, done or written by one of the co-conspirators in order to be admissible, the latter must occur when the conspiracy is on foot and be either an act done in the course of the conspiracy or a declaration accompanying an act and indicating that act to be an act in such course. A thing said, done or written by one conspirator after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against another. Accordingly, the confessional statement of the accused recorded by the Magistrate after the accused's arrest after the conspiracy has been concluded is not admissible under Section 10 of Evidence Act against co-conspirators (**Bani Bhattacharya Vs. State of W.B., 1989 CrLJ NOC 4 (Cal)**).

Although the gist of conspiracy is an agreement, there need not be proof of direct meeting or combination; the agreement may be inferred from circumstances raising a presumption of a concerted plan to carry out the unlawful design. The charge of conspiracy is thus capable of being proved either by direct evidence or by proof of circumstances from which a legitimate inference of the existence of an agreement can be drawn. In estimating the evidence, the rule of practice that an accused cannot be convicted on the evidence of an accomplice without independent corroboration has to be followed as in the case of any other offence. This rule is particularly essential in cases of conspiracy to commit crimes as the crime of criminal conspiracy is established the moment an agreement between the accused persons is proved and the evidence of a mere agreement can easily be concocted and manufactured. There must, therefore, be clear corroboration of the evidence of interested persons or accomplices bearing not only on the crime itself but also on the persons who are alleged to have committed it (**B.N. Mukherjee Vs. Emperor, AIR 1945 Nag 163**). In the same tune also an earlier case held that to establish a charge of conspiracy, the agreement is very often to be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. It is unavoidable in such cases to have a large mass of evidence which taken separately may not appear to be relevant against every person accused of the offence, but taken in conjunction with the other evidence in the case may establish the conspiracy (**C.E. Ring Vs. Emperor, AIR 1929 Bom 296**).

When there is absolutely no evidence to connect the accused with the alleged conspiracy, the accused cannot be convicted on a charge under section 120- B (**State of U.P. Vs. Phera Singh, AIR 1989 SC 1205**). In this case, the Supreme Court reversed an acquittal taking a contrary view on presumption. A part of the prosecution version was that a police jeep passed along a

bridge. But the Registration number of the jeep was not recorded in the check post register. The High Court took the view that in the normal course the number ought to have been recorded and non-recording shows that the portion of the prosecution case was false. Before the Supreme Court the prosecution invited to find that as it was a public jeep, non-recording of the registration number of the vehicle could be omitted. The Supreme Court in exercising jurisdiction under Article 136, Constitution refused to take a contrary view on the mere presumption (**State of U.P. Vs. Phera Singh, AIR 1989 SC 1205**). Since conspiracy is often hatched up in utmost secrecy it is mostly impossible to prove a conspiracy by direct evidence. It has oftener than not, to be inferred from the acts, statements and conduct of the parties to the conspiracy (**Bhagwandas, 1974 CrLJ 751 (SC)**). The nature of the offence of criminal conspiracy is such that it is practically impossible to furnish direct evidence of the same. Direct evidence is regarded by the Courts indeed as the most effective species of evidence for the proof of any fact and yet resort must be had in cases like those of conspiracy to circumstantial evidence. To substantiate a charge of criminal conspiracy it is unnecessary to prove any overt acts because for making out the first mentioned offence proof of agreement to commit the last-mentioned offence is by itself sufficient (**N.S. Jain (Dr.) Vs. State, 1978 Raj LR 442 (440)**).

As held in the Rajasthan case conspiracy is hatched up in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution often relies on evidence of acts of various parties to infer that acts were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial, but the Court must inquire whether the two persons are independently pursuing the same and/or they have come together to the pursuit of the unlawful object. The former does not render them co-conspirators but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement (**Khalid Vs. State of Rajasthan, 1990 CrLJ NOC 176 (Raj)**).

Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them, conspirators, but the latter does. It is, however, important that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor proof of actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. The relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an

appearance of coherence (**Kehar Singh Vs. State (Delhi Administration), AIR 1988 SC 1883**). That two or more persons conspired together to do an unlawful act may be collected from collateral circumstances. The direct evidence will be seldom forthcoming and it is, therefore, necessary to look at the circumstances to see whether a conspiracy actually existed which is largely inferential. Another remarkable circumstance of the conspiracy is that “it renders it possible by a sort of fiction to convert an act innocent in itself into a crime by charging it in the indictment as an overt act of a conspiracy of which there is no other evidence than the act itself. In the off-quoted language, the circumstantial evidence is “just like a rope made of many strands to stay together. The rope has strength more than sufficient to bear the stress laid upon it though no one of the filaments, of which it is composed, would be sufficient for that purpose” (**Mathura Prasad Vs. State of U.P., 1980 CrLJ NOC 140 (All)**). The charge of conspiracy can be proved by either direct evidence or by proof of circumstances which irresistibly lead to an inference of the existence of an agreement between the accused persons to do an illegal act or a legal act by illegal means or by both. As criminal conspiracy are generally hatched up in secrecy, direct evidence is seldom available to prove them and they have to be inferred from the conduct of the parties and overt acts done in pursuance of the agreement.

Where the complaint clearly brings out the basic features leading up to the conspiracy, it is sufficient and cogent corroboration of the conspiracy disclosed by the approver in his evidence (**Sumer Singh Vs. State of Haryana, 1977 CrLJ NOC 32 (Punj)**). If it is proved that the accused pursued, by their acts the same object, often by the same means one performing one part of the act and the other another part of the same act to complete it with a view to the attainment of the object which they were pursuing, the court may draw the inference that they conspired together to achieve that object. Proof of overt act committed by all the accused or any one of them is not strictly necessary on this charge, but proof that they or some of them were concerned in the overt acts alleged would go to establish that the agreement alleged was in fact made between them (**Madhukar Darsath Mandekar, 1972 CrLJ 978 (1980) (Mys)**). Generally, conspiracy is a matter of inference to be deducted from the criminal acts committed by the accused Acts and declarations of conspirators in furtherance of the common ‘design or anything said or done or written by any one of such persons in reference to their common intention and the evidence of the conduct of the accused and the surrounding circumstances, both before and after the commission of the offence, may be given in evidence to support the offence of conspiracy (**A.M. Desai Vs. State of Mysore, AIR 1956 Mys 46 (47)**). Where there was ample evidence to show that the two accused A and B were not only neighbours but also were closely connected, and A at the request of B prepared and wrote a large number of documents with dishonest and/or fraudulent intention during a period spread over a few months intending to defraud the Government and such documents were so used that there can be no doubt that this was done with an understanding between them a criminal conspiracy to defraud Government can be inferred.

Thus if it is proved that the accused pursued, by their acts, the same object often by the same

means, one performing one part of the act and the other another part of the same act to complete it with a view to the attainment of the object which they were pursuing, the Court is at liberty to draw that inference that they conspired together to effect that object. It should, however, be remembered that where there is no direct evidence, for example through the evidence of an approver, and the case for the prosecution is dependent on circumstantial evidence alone, it is necessary for the prosecution to prove and establish such circumstances as would lead to the only conclusion of the existence of a criminal conspiracy and rule out the theory of innocence (**D.B. Naik, 1982 CrLJ 856 (Bom)**). If the combined effect of all the proved facts establishes conspiracy, by circumstantial evidence, it is decisive, although any one or more of those facts by itself is not decisive (**State of A.P. Vs. I.B.S. Prasad Rao, AIR 1970 SC 648**). Thus chairman of a large co-operative society cannot be punished vicariously for the acts of others as mens rea cannot be excluded in a criminal case. As a chairman, he had to deal with various matters and it would have been impossible for him to look into every detail to find out if someone was committing any criminal breach of trust (**Jetshur Surangbhai, 1984 CrLJ 162 (SC)**). Similarly, a case of conspiracy to misappropriate cash entrusted to the accused is not made out merely from the audit report without any evidence of shortage on actual verification of cash as mistakes and even double entries may be made bona fide while preparing the account (**Ajoyadha Prasad, 1985, 1985 CrLJ 1401 (Ori)**). The onus is on the prosecution to prove the charge of the conspiracy by cogent evidence, direct or circumstantial (**State Vs. V.C. Shukla, 1980 CrLJ 965 (SC)**).

When a large quantity of opium is discovered from the house of the accused and it is further found that its existence there is not possible unless each of the accused knew it and took each of them into confidence, it is held all the accused persons are guilty of conspiracy to commit an offence under Section 9(1), Opium Act (**Ashiq Mian Vs. State of M.P., AIR 1969 SC 4**). In a Supreme Court case, the accused persons were charged for being parties to a criminal conspiracy to fraudulently deprive an illiterate woman of her agricultural lands by deceiving her into affixing her thumb- mark on a document under misrepresentation and for the offence under various other provision. It was held that the charge cannot be sustained when the prosecution has failed to establish beyond a reasonable doubt that a fraud has been committed on the woman in question (**Lal Chand Vs. State of Haryana, AIR 1984 SC 226**). In a Delhi case, the allegation was that A conspired with B to cheat an officer and get an import license by forging a document. But there was no evidence of forgery or cheating against A. It was held that the accused person should be acquitted (**State (Delhi) Vs. Dilbag Rai, 1986 CrLJ 138**). In another case conspiracy to murder was sought to be proved through the evidence of a chance witness overhearing the accused persons. It was held that it is hazardous to base conviction (**Jatha Alias Aziz Khan Vs. State of M.P., (1986) 3 Crimes 163 (MP)**). It is difficult to support the charge of conspiracy with direct evidence, but if the prosecution relies upon circumstantial evidence, a clear link has to be established and the chain has to be completed; otherwise, it would indeed be hazardous to accept part of the link as a complete one and based on such incomplete evidence, the allegation of conspiracy cannot be accepted (**Param Hans Yadav Vs. State of Bihar, AIR 1987 SC 955**).

In a Supreme Court case, the charge against the respondent was that they in agreement with three other people forged a slip purporting to be a note of a gentleman and was successful in getting an entry into the house of the deceased. To substantiate a charge under Section 120-B of the Code, there should be a criminal conspiracy at least between two or more persons. There was not an iota of evidence to establish that the three accused prior to the commission of the offence had conspired together with the respondent and got forged the said slip from him. There was nothing to show that he had been associating with the other accused. The respondent was held to be rightly acquitted by the High Court (**State of U.P. Vs. Sukhbasi, AIR 1985 SC 1224**).

As already said direct proof of conspiracy is scarce. It is generally proved by circumstantial evidence. But circumstantial evidence must form such a chain that would exclude any reasonable hypothesis compatible with his innocence. In a Supreme Court case, the accused-appellant was found peeping into the flat which was being watched by the Customs Officials under orders of authorities that he tried to run away on seeing the customs officials. Searching the premises, that he was in possession of duplicate keys of the flat and that he was found wearing a bandi which was a special type of bandi suitable for carrying gold slabs secretly are not incompatible with his innocence. He was a close relative of one who was the person really in charge of the flat. On these circumstances, he was sought to be roped by an offence punishable under the Customs Act and Gold Control Act. It was held that it was natural for him to share the flat of his relative (here brother-in-law). In so living with his brother-in-law he might have been given to wear the bandi found on his person not for the purpose of carrying gold but just for use as ordinary raiment. Again, in a city like Bombay, it was not unusual for persons sharing a particular accommodation to be provided with separate sets of keys for each to facilitate ingress or egress at will. Further, an innocent man finding his premises being watched by persons in authority might well feel funky at the prospect of a false implication based on mere suspicion (which might or might not be well-founded) and might try to make himself scarce. Without more, the above circumstances, therefore, could not be regarded as incriminating circumstances. The conviction was set aside (**Sevantilal Vs. State of Maharashtra, AIR 1979 SC 705**). Merely that a person was an associate of the persons who were parties to a criminal conspiracy, is not of itself sufficient for the foundation of the conviction of the person; nor can the fact that the person was endeavouring to extricate himself from being accused of anything connected with the conspiracy held the case against such person (**Rakhal Chandra Das. Vs. Emperor, AIR 1930 Cal 647**) Where the only witness produced by the prosecution to establish conspiracy was an interested witness and his uncorroborated evidence was found untrustworthy, the conviction of accused persons under Section 120-B(1) was set aside (**Kandi Sahu Vs. State of Orissa, 1972 CrLJ 219**).

Evidence rejected for conspiracy cannot be used for proving common- intention:-

Evidence to prove conspiracy when has been rejected, the same evidence cannot be used to bolster a charge of common intention under Section 34, I.P.C. (**Ramnath Vs. State of M.P., AIR 1953 SC 420**).

Three appellants were charged under Section 120 B and 302/34 for committing the murder of the deceased but the charge under Section 120B could not be proved and they were convicted under section 302/34 by the trial Judge. The High Court having confirmed the charge the appeal was sent to Supreme Court which acquitting the appellants held that evidence as to conspiracy under Section 120B having been rejected, the same evidence could not be used for finding a common intention. In this case, the common intention was proved and the accused wanted his acquittal by using evidence under which charge of the conspiracy was not proved (*Ram Nath Madho Prasad Vs. State of M.P.*, AIR 1953 SC 420).

Evidence of association: simpliciter: proof of a conspiracy. -

A conspiracy cannot be established by mere proof of association of a person with guilty persons, nor by evidence raising a mere suspicion of guilt; for suspicion and conjecture, however strong or reasonable, cannot supersede or take the place of legal proof.

Thus, where beyond the doubtful record of a dying declaration about a conversation which might never have occurred, there was no other evidence to connect the accused with the crime, such as his presence at the spot and hour, or shortly before the occurrence or of any letter or message, or of any material object acquired by him to further the conspiracy, it is held that there being no adequate legal evidence to connect the accused with the crime he was entitled to acquittal upon the benefit of doubt. In a Supreme Court case, there was no evidence of a conspiracy as to bribery except a conversation in a guest house. The word “bribe” or “illegal” gratification was never used by the accused in this connection. He no doubts talked about the third party offering Rs. 50,000 for obtaining the lease from the State. But that could as well have been a premium for obtaining the lease and was not necessarily illegal gratification to be offered to the accused. The Supreme Court refused to spell out the conspiracy from this evidence and ordered acquittal (**Shri Bahadur Singh Vs. State of U.P.**, AIR 1954 SC 322).

Abetment of charge of conspiracy:-

When the conspiracy is not limited to only two persons the death of one during the trial operates not To abate the entire proceeding. Where a will has been forged for the benefit of the two brothers pursuant to a conspiracy between them and certain others or with the common intention of all or some of them and the mutation was secured based on such document and prejudiced evidence and impersonation, the death of one of them would not put an end to the cause for criminal action against the surviving accused (**Mystilal Vs. Totaram**, 1984 CrLJ 1338).

Conviction having a plurality of objects: procedure. -

A conspiracy may have a plurality of objects, a charge-sheet may show various objects of conspiracy including the commission of the offence of forging passports and fraudulently using

them as genuine for enabling passengers to go abroad. No distinction can be drawn between primary and secondary objects (**Manhoman Singh Vs. State of Punjab, AIR 1969 Punj 225**). But trial and conviction for another offence in respect of the same conspiracy are not maintainable. The conspiracy was hatched to defraud the shareholders whose share money was not returned but was diverted towards the projects. On being prosecuted under Section 409 read with Section 120B, all accused persons along with certain employees were convicted and awarded imprisonment ranging from 2 years to 6 months. On appeal, the High Court reduced the sentence as there was an inordinate delay of 48 years (**Sushil Kr. Sanghi Vs. State, 1995 CrLJ 3457 (Del)**).

Can a single accused be convicted under Section 120-B:-

When two persons are charged under Section 120-B read with Section 302 and when there is no case that they did not conspire with anybody else, the acquittal of one entails the acquittal of the other (**Osman Sardar Vs. Emperor, 24 CrLJ 1048**). When two persons have been charged with conspiracy allegation being not that they conspired with any other person and when one of the two is acquitted, the other is also entitled to an acquittal (**Bhagat Ram Vs. State of Rajasthan, AIR 1972 SC 1502**). But when one conspirator is acquitted on the technical ground the other can be convicted of conspiracy (**Pradumna Vs. State of Maharashtra, 1981 CrLJ 1873**). Shortly stated when several persons are charged with the offence of criminal conspiracy and all the accused except one are acquitted, the conviction of the remaining one accused on that charge is illegal. The reason is that the definition of conspiracy requires that there must be an agreement to commit the act complained of between two or more persons, and one person cannot conspire with himself. (**Topan Das Vs. State of Bombay, AIR 1956 SC 33**). But this principle will apply only when the prosecution case is that the conspiracy was committed between the accused before the Court and none else and that no person other than the accused, known or unknown was concerned in the offence. The principle cannot apply when according to the prosecution, persons other than the accused before the Court were also concerned in the conspiracy which is the subject-matter of the charge under Section 120-B. In other words, the conviction of two or more persons is not always necessary for a charge under Section 120-B, and the conviction of a single accused on that charge is perfectly legal when the Court is satisfied that two or more persons of whom the accused is one was actually concerned in the conspiracy (**Bimbadhar Pradhan Vs. State of Orissa, AIR 1956 SC 469**).

Can a company be prosecuted for Criminal Conspiracy? :-

A corporation is virtually in the same position as an individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons are so

intense that a corporation may be said to think and act through that person or the body of persons (**Iriduum India Telecom Ltd. Vs. Motorola Incorporated, (2011) 1 SCC 74**).

Hooch Tragedy Case:- Allegation was that all the accused persons hatched a criminal conspiracy and they created a well-oiled machinery for importing methyl alcohol to make spurious liquor. Accused diluted the spirit by adding water and sold it through their outlets. Many people died due to the consumption of spurious liquor. Some persons lost their eyesight and several others sustained grievous injuries. Supreme Court said that the whole business itself was a conspiracy. It may not be the conspiracy to mix the noxious substance but the fact of the matter is that in order to succeed in the business, which itself was a conspiracy, they mixed or allowed to mixed methanol and used it so freely that ultimately resulted in the tragedy. Conviction was upheld (**Chandran Vs. State, AIR 2011 SC 1594**).

Previous Sanction: -

Section 196 (2) of the Code of Criminal Procedure 1973 is relevant here which reads as “No court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding: Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary

Conclusion:-

I would like to conclude the Law on Criminal Conspiracy by quoting few words from one of the landmark judicial pronouncements of the Hon'ble Supreme Court which has crystallized the Law on criminal conspiracy as applicable in India.

In **Rajiv Kumar Vs. State of U.P. (2017) 8 SCC 791 (at paras 45 and 46)** the Hon'ble Supreme Court has said that- “ the essential ingredients of the offence of criminal conspiracy are : (I) an agreement between two or more persons, (ii) the agreement must relate to doing or causing to be done either (a) an illegal act, or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. It is extremely difficult to adduce direct evidence to prove a conspiracy. The existence of a conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. In some cases, indulgence in the illegal act or legal act by illegal means may be inferred from the knowledge itself.

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Topic No. – 32

Test identification parade.

By
Sri Santosh Kumar-I,
Civil Judge Senior Division,
Manjhaul, Begusarai.

Sri Santosh Kumar-I,
Civil Judge Senior Division, Manjhaul, Begusarai.

Topic : Test identification parade.

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Test Identification Parade*

INTRODUCTION:-

The test identification parade assumes significance when an offence is committed & offenders are not traceable. There is no provision either in the Criminal Procedure Code or the Indian Evidence Act for holding test identification parades. The role of the witness is very important in establishing the identity of the accused. One of the methods of establishing the identity is the “Test Identification Parade” required Under Section 9 of the Indian Evidence Act. Section 9 makes relevant all such explanatory or introductory facts. This section includes within its ambit all such relevant facts. (i) which explain or introduce a fact in issue or relevant fact. [Illustrations (a), (b), (d) and (f)] or; (ii) which support or rebut an inference suggested by a fact in issue or relevant fact. [Illustration, (e)]; or (iii) which establish the identity of a person or thing whose identity is relevant; or (iv) which fixes the time or place at which any fact in issue or relevant fact happened or (v) which show the relations of parties to the transaction in question in so far as they are necessary for that purpose.

Identification of the accused for the first time in Court is permissible in law. But the said principle has to be applied in the facts and circumstances of each case.¹ The idea of the parade is to test the veracity of the witness on the question of his capability to identify from among several persons, an unknown person whom the witness had seen in the context of an offence. When a witness says that he can identify accused persons or others connected with the case under investigation, the Investigating Officer shall record in the case diary their description in detail, noting the following points:

- their descriptions;

- the extent of prevailing light at the time of the offence (daylight, moonlight, flashing of torches, burning kerosene, electric or gas lights, etc.,);

- details of opportunities of seeing the accused at the time of the offence; anything outstanding in the features or conduct of the accused which impressed him (identifier);

- distance from which he saw the accused; and

- the extent of time during which he saw the accused. When a parade has to be held for the identification of a person or persons by a witness such person or persons shall be carefully kept out of the view of the witnesses and mingled with a considerable number of other persons of a like class.

Facts which establish the identity of any person or thing whose identity is relevant, are, under section 9 Indian Evidence Act, relevant. Section 9 in The Indian Evidence Act, 1872 reads as

1. Justice C.K.Thakker Law of Evidence,375(whytes & co) Ashoka Law House New Delhi,5th edn,2018.

under- **Facts necessary to explain or introduce relevant facts.** — “*Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.*” Section 9 dealing with a large number of facts that are either introductory or explanatory in nature are relevant.

These are as follows:

1. Facts that are necessary to explain a fact in issue or relevant fact.
2. Facts that are necessary to introduce a fact in issue or relevant fact.
3. Facts that support or rebut an inference or relevant fact in issue or relevant fact.
4. Facts that establish the identity of anything or a person whose identity is relevant.
5. Facts that fix the time or place of the fact in issue.
6. Facts which show the relation of parties by which any fact was transacted. The term used in police investigation is test identification? i.e. a process by which the identity of persons, things, or animals concerned in the offence under investigation is established as enumerated in section 54A of Cr.P.C.

With regard to criminal offence, the identification has two-fold objectives:

It is to satisfy the Investigating officer that the investigation is proceeding in right perspective

It is to enable the informant who is the real culprit behind the occurrence.

The evidentiary value of such a proceeding is very high as it enables the court to find out the truth. Statements made by the witnesses in course of identification proceedings are admissible both for corroboration under section 145 and 155 of the Indian Evidence Act. A memorandum prepared by the Magistrate is admissible in evidence under section 80 Indian Evidence Act without any proof. It means that the magistrate need not come to the Court to prove the memo unless the accused points out ambiguity, defects or lacunae in the test identification parade.

2. Meaning.—According to the dictionary² meaning Identification means an act or the process of identifying or of being identified. Identification means proving or finding before the court that a person, article or animal is the very same that he or she alleged, charged to be. Test identification is a process by which the identity of the persons, things or animals concerned in the offence under investigation or trial is established, through a test parade. The test is used in the actual meaning of an examination in which the witness is to find out the person, thing or animal in a test identification parade.

2. Chambers 21 st Century Dictionary Allied Chambers(India)Limited New Delhi reprinted 2001 p 669

3. Types of Identification Parades:

Identification parades are held in criminal cases to identify
the persons living or dead known or unknown
movable articles including firearms
handwriting, photographs, finger and footprints etc.

4. Purpose:

The purpose means the object or aim in doing something³. The very purpose of identification parades as held in criminal cases to prove or disprove the guilt or innocence of the accused whether it is held in respect of persons or articles. Identification parades in criminal cases are held specially at the stage of the investigation. The purpose of the identification parade is to test the veracity/trustworthiness of the evidence of the witness and to ensure that investigation is going on the right track.⁴ The main object of conducting a Test Identification Parade is to satisfy the court that the person arrested, who was not previously known to the witness, was one of those who committed the crime and he is the culprit. The whole idea behind the test identification parade is to test whether or not the witness who claims to have seen the culprit/culprits at the time of occurrence/commission of the offence is thoroughly reliable and can identify the culprits from the midst of other individuals without any aid and/or other sources. This practice of test identification parade is not borne out of the procedure, but out of prudence.

5. Sanctity of identification:

The sanctity of law attached to the Test Identification Parade is section 9 Evidence Act 1872 & section 54-A of code of criminal procedure 1973. Section 9 of the Indian Evidence Act, 1872 makes the identification of proper accused and properties admissible and relevant facts in a court of Law, but there is no specific provision to direct the suspected to be present for the identification parade by the Investigating Officer, but recently Section 54 A was introduced in the Code of Criminal Procedure, 1973, to meet this situation, according to which, the court can direct the person arrested to be present for a test identification parade on the request of the investigating police officer.

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit.⁵

3. Supra page 1825

4. Sheikh sintha Madhar @ jaffer @ sintha v.state Rep.By Inspector of police(SC),2016(4)JT84

5. Section 54-A of Code of criminal procedure 1973.

6. Identification of person and property:-

The subject matter of crime may be the person or property. The identification of a person and property may include their identity during the course of an investigation and the identification during the trial. Concerning the probative value, the identification during the trial has more evidentiary value in comparison to identification during an investigation. The identity of a person may be ascertained by observations of the voice, special and unique feature, utterances, fingerprints, footprints, photographs and even by family likeness or resemblance.

7. Test identification parade - self-incrimination: -

Article 20(3) of the Constitution of India is also not violated by compelling before sending a case for trial to the court, that the person arrested but not previously known to the witnesses was one of those who committed the crime, or the property concerned was the subject of such crime. Second, to satisfy the court that the accused was the real offender or the article was concerned with the crime which is being tried". During the investigation of a crime, the police have to hold identification parades to enable witnesses to identify the properties which are the subject matter of the offence or to identify the persons who are concerned therein.

OBJECT:

They have thus a twofold object; First, to satisfy the investigating authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or a particular property was the subject matter of the crime. Secondly, it is also designed to furnish evidence to corroborate the testimony which the witness concerned renders before the court. When the accused is not previously known to the witness concerned, then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigation agency an assurance that the investigation is proceeding on the right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view, it is a matter of great importance both for the investigating agency and for the accused.

8. WHY TEST IDENTIFICATION PARADE:

Usually, there is a stretched time gap between the commission of an offence and the trial of the offence, and quite naturally if the accused is not known to the eyewitness, then, how can it be expected of the eyewitness to remember minute details such as general appearance, physical structure, stature and complexion of the accused, and as a necessary corollary, how can it be expected of the eyewitness to identify the accused with exactitude in the court of law; thus, to resolve this anomaly, soon after the commission of the crime, if any eyewitness is available then test identification parade should be conducted as a matter of priority, prudence and propriety and not

just procedure, so that the eyewitness can depose about the accused and the crime scene when his memory is fresh and unsullied. It is important to note that, evidence of test identification parade conducted by police cannot be tendered in the court of law because such identification amounts to a statement made to the police and accordingly as per the purport of Section 162 of the Criminal Procedure Code, 1973, such evidence being in the nature of statement made to the police during investigation it cannot be tendered as evidence in the court of law. To make test identification parade admissible in the court of law, so that it can be used to corroborate the oral evidence that would be given in the court of law, test identification parade must be conducted in the presence of a magistrate (judicial or executive).

Once the witness identifies the accused at the test identification parade conducted before the magistrate, then, the magistrate becomes a witness and is to tell the court about the various precautionary steps that the magistrate took to see that the witness actually picked out the concerned accused/suspect at the test identification parade without any police help. If a witness clearly and correctly identifies the accused at the test identification parade but not before the court of law, then, the evidence of the magistrate, who conducted the test identification parade holding that the witness identified the accused at the test identification parade, supported by remarks of the trial judge regarding the demeanour of the witness, that, the witness was frightened and was thus unable to recognize the accused at the trial, would be relevant and sufficient to convict the accused.

The holding of the test identification parade is one of the important steps during the investigation of a criminal case. It is held that; “Now, identification parades are ordinarily held at the instance of the investigating officer to enable the witnesses to identify either the properties which are the subject-matter of the alleged offence or the persons who are alleged to have been concerned in the offence.”⁶ Such tests or parades belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on the right lines.⁷ It is accordingly desirable that Test Identification Parade be held at the earliest possible opportunity to identify the accused. This also tends to minimize the chances of the memory of the identifying witness fading away because of the long lapse of time. But much more vital factor in determining the value of such identification parades is the effectiveness of the precaution taken by those responsible for holding them against the identifying witnesses having an opportunity of seeing the persons to be identified by them before they are paraded with the other persons and also against the identifying witnesses being provided by the investigating authority with other unfair aid to assistance to facilitate the investigation of the accused concerned”. To sum up, in a criminal offence identification serves two-fold objects; firstly it is meant to satisfy the investigating

6. *Hasib v. State of Bihar* 1972 Crilj 233 SC.

7. *G. Prabhakar & g. Bhupal Reddy*, Conduct of Test Identification Parades for Suspects and property recovered during investigation workshop held in 2017-18 at District Judiciary Guntur (High Court of Judicature at Hyderabad available at <http://districts.ecour.gov.in> last visited on 30th April 2020.

authorities before sending up a case for trial to the court that the person arrested, but not previously known to the witness, was one who committed the crime, or the property concerned was the subject of such crime; secondly, it is to satisfy the court that the accused was a real offender or the article was concerned with the crime which was under trial, Identification proceedings, therefore, are as much in the interest of prosecution as in the interest of the accused.⁸

9. When test identification parade should be considered necessary to be held:

In case the identity of an accused is disputed, when the victim did not know the accused before the occurrence of crime test identification is very much required. Where the culprits are unknown to the witnesses but the witnesses say in course of their examination by the Investigating Officer that they would be able to recognize some of the criminals if shown, a test identification parade of the suspects ought to be held at the earliest possible opportunity whenever possible before a Magistrate.⁹

The following points to be taken into consideration to decide for test identification parade;

1. The accused is not known to the witness or victim before the occurrence of the crime.
2. When the witnesses gave a vivid description of the accused in their statements or the F.I.R.
3. When the witnesses say in the examination by the investigating officer that they would be able to recognize some of the criminals.
4. When the accused was seen for a sufficient time by the witnesses and picked up his distinctive features etc., to recollect later on.
5. Surrounding circumstances like the condition of light etc. were sufficiently favourable showing features of the accused.
6. When there were peculiar features with respect of the accused and a mention was made in the FIR or statements etc.

10. TIP is a must for unknown accused

Where the culprits are unknown to the witnesses but the witnesses state in course of their examination by the Investigating Officer that they would be able to recognize some of the criminals, if shown, a test of identification parade of the suspects ought to be held at the earliest possible opportunity whenever possible before a Magistrate.¹⁰

11. Non-holding of the test of identification parade: Failure to hold Test of Identification Parade is not fatal in all cases. In **Awadh Singh V. State**¹¹ it was held that non-holding of a test

8. Ibid

9. Biray Singh V.State 1953 Cri lj 1817(Allahabad)

10. Ibid

11. 1954Cri Lj 1546 (patna)

identification parade, though may not be a ground to vitiate the trial, but is undoubtedly a very important feature in considering the credibility of the witness on the point of identification. It was held that the purpose of the identification is to test the statement of witnesses made in the court, which constitutes substantive evidence, it being the safe rule that the testimony of the witness in court as to the identity of the accused requires corroboration in the form of earlier identification proceedings.¹² Such parades, which belongs to the investigation stage, serve to provide the authority with material to assure themselves if the investigation is proceeding on the right lines and therefore it is desirable to hold them at the earliest opportunity. A further reason is that an early opportunity to identify also tends to minimize the chances of memory of the identifying witnesses fading away due to a long lapse of time. It was held that identification of the accused by the witnesses soon after the former's arrest is of vital importance in the interest of justice or fair play, both to the accused and the prosecution.¹³

12. Can accused demand TIP

Test identification parade is held in the course of the investigation. Generally speaking, the accused cannot demand TIP as a matter of right but if demanded, never turn down such demand. If the prosecution turns down the request of the accused for identification, it runs the risk of the veracity of the eyewitnesses being challenged on that ground¹⁴ It was held that some times it happens that witnesses claim to know an accused person, but they contend that they do not know him and applies to the court for holding of his test identification to check the veracity of the witness.¹⁵ During the investigation of a crime, the police have to hold test identification parades to enable witnesses to identify the properties which are the subject matter of the offence or to identify the persons who are concerned therein. It is a matter of great importance both for the investigating agency and for the accused as well.

13. General guidelines for conducting Test Identification parade:-The Test of Identification Parade should be held soon after the arrest. It is not a ground for rejection of bail.

1. The police should take steps to arrange a Test of Identification Parade by Magistrate only.
2. It is desirable to get identifiers' statements recorded u/s. 164 Cr.P.C., before the investigation.
3. Identifier should also identify accused or property in Court, as Identification proceedings are not substantive evidence,
4. Identification of persons differs from the identification of the property.

12. Khalak Singh v. State of M.P 92CriLJ 1150

13. Rameshwar Singh vs. State of Jammu & Kashmir AIR 1972 SC 102

14. Lajja Ram vs. State 1955 Crilj 1547

15. Asharfi Vs.State AIR 1961 All.153

5. There should not be any delay in arranging TIP, after the arrest of the accused since delay may lead to grant of bail to the accused. Even if the accused is released on bail, he has to attend the TIP but its sanctity will be lost.
6. The TIP should not be held by police, as it is hit by section 162 Cr.P.C.
7. There is no bar that a private person should not conduct TIP but it is not advisable.
8. Do not show the suspects to the witnesses.
9. Do not show the photographs of the suspects to the witnesses.
10. The police officer should see that the photographs of the accused are not published in the newspapers.
11. Do not allow the presence of a police officer during the TIP.¹⁶
12. General precautions and procedures held by the Magistrate during the TIP.

After making all arrangements, police should completely leave the place to conduct actual identification proceedings.

The accused, as far as possible, be mingled with persons of similar description, status, build and age in the proportion of minimum of 1: 5 and maximum of 1: 10 and they must be made to take their positions around with the persons with whom they are mingled or in the line.

The suspects should not be made to stand together.

The Magistrate or other person should satisfy that there are no other persons or police officer at the time of TIP.

The witnesses are kept out of view from the premises where the parade is taking place and that it is not possible to communicate with them by signals or other communications.

If a witness makes a statement, it can be recorded.

Further details which took place at the time of identification should be recorded in the proceedings.

After the identification of one witness is over, care should be taken to see that the witness does not mingle or communicate with other witnesses for whom the identification parade is yet to be conducted.

If the identification by one witness is over, the whole parade will be re-shuffled and the accused can take different positions.

If the accused is willing to change their dress, they should be allowed to do so.

If any accused makes any objection, it should be recorded.

If there are any visible marks available on the accused, which are likely to facilitate his

16. *Supra* at 7

identification, then it is the duty of the personnel conducting the investigation either to cover up such marks or mix that accused with several other persons having similar marks, failure to take this precaution is sufficient to take away the value of the identification. After the completion of the identification parade and drawing up all the proceedings, a certificate must be appended duly signed by the Magistrate or the person conducting the parade, as the case may be.

The accused generally will not demand a Test of Identification Parade, but if any such demand is made by the accused, the police should arrange the same.

Other precautions:

(a) Mixing of suspects and innocent persons [non-suspects]:

The proper way to hold identification proceedings is to put up each suspect separately for identification mixed with some innocent men as possible, in any case not less than 9 or 10. When several suspects are required to be identified and they are put up for identification separately, care should be taken to see that the innocent persons mixed up or changed with every change of suspect, for otherwise, the benefit of holding separate identification proceedings would vanish.¹⁷

(b) Concealment of distinctive marks:

The covering of marks should be with reasonable limits and should not be carried out to such an extent as to disfigure the face or to make its identification practically impossible or extremely difficult and thereby defeat the very object of identification (**AIR 1959 All 504, State v. Madan Lal Jaggi**).

(c) Same age group and of similar built and appearance:

The suspect should be mixed up with persons of the same age group and similar built and appearance.

14. Procedure of Test Identification Parade:

Test identification is of great significance which shall also appear from the fact that in the Bihar Police Manual, 1978 (Vol. 1). The Manual lays down an elaborate procedure for this instead of leaving it to the whims and caprice of Police officials. As the Manual consists of rules framed with the authority of the State Government under Sections 7 and 12 of the Police Act, 1861 and therefore have the force of law. Rule 236 of the Manual lays down the procedure for holding of Test Identification Parade. Relevant portion of the rule is as follows:-

Rule 236(a) Whenever it is necessary that a person suspected of having been concerned in any offence should be identified by a witness, the following instructions shall be complied with word by word.

17. AIR 1953 All.385

- (1) These suspects shall be kept at a place where identification witness cannot have access to him.
- (2) At the time of taking the suspects to the court from the jail, precaution shall be taken that none is able to see them and hence they shall be taken in closed vehicle or if such vehicle is not available, their face shall be covered in such a manner that they cannot be recognized.
- (3) As far as possible, the photographs of suspected persons shall not be published before identification.
- (4) The investigating officer shall not keep suspected persons in Police custody before holding test identification.
- (5) The prosecutor shall request the Magistrate that these persons should not be released on bail before identification.
- (6) If the physical characteristics of any suspected person are such that on account of these he can be searched in a group then as far as possible such persons shall be assembled for mixing up who have similar characteristics or the characteristics shall be covered. The investigation shall see before the identification parade begins that the suspected person is available on it.
- (7) For identification, one suspected person is to be mixed with 8-10 persons and not that ten suspected persons shall be mixed in a small group.
- (8) Identification should be done without delay because identification done with delay is not fully acceptable to the Courts.
- (9) Where the description of suspected persons in the first information report or in the statements of witnesses are so explicit that there is no suspicion left of any kind, it is not essential to hold an identification parade.
- (10) The investigating officer though his presence may be essential outside shall not be present while the identification is in progress.
- (11) If a witness is unable to attend an identification parade and identification is considered necessary, this may be arranged with reference to photograph.
- (12) When suspected persons are brought for identification, its chart:-
 - (a) shall be prepared in P.M. form No. 42. An indication of the above facts should be given in the case diary and identification chart.
 - (b) The identification parade shall be conducted as far as possible before a Magistrate but for any reason, a Magistrate can not be available then before any other responsible officer.

- (c) The witnesses shall have to certify in the prescribed columns of the chart that the methods in which identification has been carried out were correct.

15. IDENTIFICATION BY PHOTOGRAPH¹⁸:

Section 22 of the Terrorist Disruptive Activities (Prevention) Act, 1987 stated that: “Where a person been declared a proclaimed offender in a terrorist case, the evidence of his identification by witnesses based on his photograph shall have the same value as the evidence of the test identification parade.” In the case of, **Kartar Singh v. State of Punjab**¹⁹ validity of Section 22 of TADA was challenged before the Apex Court. The Hon’ble Supreme Court of India held that, Section 22 of TADA was opposed to the fair and reasonable procedure enshrined in Article 21 of the of India Constitution,

In the case of, **Rabinder Kumar Pal v. Republic India**²⁰ the Hon’ble Supreme Court of India held that identification of accused and test identification parade are only aides to an investigation conducted by the investigating officer and these do not form evidence. Substantive evidence is the evidence in the court of law. The logic behind the test identification parade, which includes photographs- lies in the fact that it is only an aid to the investigation, where it is not known to the witnesses; the I.O. conducts test identification to ensure that he has caught hold of the right person as the accused.

16. IDENTIFICATION BY VOICE:

In the case of, **Mohan Singh v. State of Bihar**²¹ the trial pertained to an offence concerning murder; here, the witness heard the accused while the accused was demanding money from the victim, and subsequently, the witness identified the accused by the voice of the accused. Even prior to the happening of the incident, the witness had some acquaintance with the accused. The court held that the evidence tendered by the witness, identifying the accused by his voice was reliable.

17. TEST IDENTIFICATION PARADE-SAFEGUARDS:

Identification parade must ideally be conducted as soon as possible to avoid mistake on the part of the witnesses. The judicial/executive magistrate who is to conduct the test identification parade must first acquaint himself with the facts of the case, and thereafter he must take note of the suspects who have to be identified and the witnesses who shall be identifying the suspects; Where the prosecution- witness is well-acquainted with the accused/suspect, holding of test identification parade is a complete waste of public time and money; Ideally, before conducting test identification

18. Supra at 7

19. (1993) 4 SCC 569

20. (2011)2 SCC 490

21. (2011)9 SCC 272

parade, two independent thought of individuals (not connected/associated with police officials) be called-up by the police officials to participate in the test parade. The judicial/executive magistrate should brief independent individuals about the facts of the case, and, as to who to be identified (suspect) and who all are to come forward to identify eyewitnesses);. All police officers and constables must be asked to completely withdraw from the room where the test identification parade is to be held; Ideally, a test identification parade must not be held in a police station but rather separate rooms must be reserved for holding test identification parade in a separate building; In the case of, **Bhaskar Virappa Kanchan vs. State of Maharashtra**²² it was held that at time test identification can be conducted even in a police station, provided, the place is completely separate from the police office; police officials have no access to the place where test identification parade is being held; there is no opportunity for the identifying witnesses to see accused/suspect before the test identification parade, and there is no record to state that the accused/suspect was shown to the witnesses prior to the test identification parade; Before the commencement of the test identification parade, the two-well-thought-of individuals (panch witnesses) must bring the accused/suspect from the room where the accused or suspect is held in custody, and the executive magistrate must state in the identification memo that, accused was brought to the room where test identification parade to be conducted by the respective two independent individuals panch witnesses);. When the accused/suspect is brought before the judicial/executive, then, it is incumbent upon the judicial/executive magistrate to allow the accused/suspect to take any place he likes in the parade. place the accused/suspect selects to stand at must be mentioned in identification memo by the judicial/executive magistrate; The accused/suspect has no right to cover his face while the test parade is going on; thus, an adequate number of dummies must be made to stand with accused/suspect in the test parade, and ideally, each accused must be put to disjointedly. The parade begins, the judicial/executive magistrate must allow the accused/suspect to alter his/her dress; if, the accused/suspect changes his/her dress, then, the fact of his/her altering the dress must be recorded by the judicial/executive magistrate in the memo of identification prepared by him. The /executive Magistrate must mention in the identification memo, whether the identifying-witnesses identified the suspect straightway, or, after some hesitation, or, after pointing the wrong person and then later correcting themselves²³ The following are the other safeguards to be followed by the authorities conducting TIP.

- (1) Police authorities must ensure that delay in conducting test identification parade should not result into exposure of identity of the accused to the witnesses as this will be fatal to the very premise of test identification parade;
- (2) Appreciation of evidence obtained vide the test identification route depends upon the strength and trustworthiness of the material;

22. Bom CR (Cri)1648

23. Supra at 7

- (3) If the manner of holding test identification parade throws doubt/suspicion on the police officials, then, test identification parade will have no evidentiary value. However, the mere presence of police officials and or public prosecutor at the place where the test identification parade is conducted will not vitiate it, especially when no prejudice is shown to have been caused to the accused.²⁴
- (4) Witnesses should be prevented from seeing the suspect before he is paraded; if there is only one suspect who is to be identified, then, at least half a dozen of other individuals must be placed in the parade, however, if there are two suspects that are to be identified then there should be at least ten (or twelve) of other individuals that must be placed in the parade. Not more than two suspects are to be placed in any single test identification parade;
- (5) The suspect must be placed among persons of similar height, weight, age, physical structure and complexion as far as possible;
- (6) If there are more witnesses than one, then, witnesses should be introduced one by one and should be asked to identify the suspect; witnesses must be allowed to touch any of the persons paraded before them;
- (7) If parade takes place in a prison then the prison officer should be present throughout the parade;
- (8) The identification memo prepared by the judicial/executive magistrate must contain the details as regards the time, place and date of the parade; details of the panch witnesses (two independent individuals); names of the persons standing in the parade; and statements made by the identifying witnesses;
- (9) In the case of, **Krishnarayana Babu v. State 1996 Cri L.J. 4484 (Mad)** it was held that, it is the duty of judicial/executive magistrate to take note of every objection which is made by an accused/suspect at the time of test identification parade so that the court which has to appreciate the evidentiary value of the test identification parade can take into consideration those objections and in the light of those objections can understand the contents of the identification memo;
- (10) After the test identification parade is complete then, the judicial/executive magistrate must read over the contents of the identification memo to the panch witnesses and they must sign the memo, stating that they agree with the details of the test identification parade contained in the memo;
- (11) Identification memo must be written in the language of the court²⁵ If a First Class

24. L.Devi Rathna Kumari, Test Identification parade, paper presented on workshop held in the 2016-17 available at <http://districts.ecourt.gov.in> last visited on 1st May 2020.

25. Ibid

Magistrate or Second Class Magistrate specially empowered on this behalf by the State Government holds identification, then, Section 164 of the Criminal Procedure Code, 1973 applies and the identification memo prepared is admissible in evidence under Section 80 of the Indian Evidence Act, 1872 without proof.

- (12) Court identification of the accused/suspect for the first time by an identifying witness is generally an evidence of inherently weak character
- (13) There are no minimum number of witnesses that are required to identify the suspect/ culprit in test identification parade; and,
- (14) There is no statutorily prescribed time limit within which the test identification parade must be conducted. Prudence demands that the test identification parade must be conducted as soon as possible.
- (15) Where the accused is not named in the F.I.R. and was not previously known to the witnesses, TIP must be held²⁶.

18. Appraisal of evidence on Test Identification Parade:

Their Lordships of the Hon'ble Supreme Court in the case of **Kanta Prasad vs. Delhi Administration, reported in AIR 1958 SC 350**, and connected matters, have held that failure to hold an identification parade does not make inadmissible the evidence of identification in the Court. Their lordships have held as follows: "As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this Court to re-assess the evidence unless exceptional grounds were established necessitating such a course."²⁷

In the case of **State of Madhya Pradesh vs. Sunder Lal**²⁸ their lordships of the Hon'ble Supreme Court have held that the girl who was 13 years old could not have forgotten the face of a man who committed a ghastly crime upon her. It has been held as follows: "We have perused the judgments of both the courts and also have evidence of PWs- 2 and 4. We are of the opinion that the High Court was in error in disbelieving the testimony of PW-2 with respect to the identity of the accused. The girl was 13 years old and she could not have forgotten the face of the man who committed such ghastly crime upon her. It is not the case of the defence that there was no light. On

26. Mohd. Saleem v.State 1992,CR LJ 1959(Delhi)

27. Supra 24

28. 1992 Cri lj 2519

the contrary, the prosecution evidence is that accused himself made PW-4 prepare lamps and light them, before taking away PW-2. It is not a case where PW-2 had a mere fleeting glimpse of the accused. We are, therefore, of the opinion that the identity of the accused has been amply established by the evidence of PWs- 2 and PW-4. Accordingly, we set aside the judgment of the High Court and restore that of the learned Trial Judge.”

The Apex Court in the case of **State of Maharashtra V. Suresh**²⁹ while considering the scope of test identification parade categorically held and laid down the law of land that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two-fold. The first is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is the real one who has been seen by them in connection with the commission of a crime. The second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses have seen in connection with the said occurrence. Thus, merely because the test identification parade was not arranged by the Investigating Agency, would not discredit the clear, cogent and trustworthy evidence of Vijay Kumar Shrivastava who firmly said that he had an occasion to see the accused for a considerable time in broad daylight he had also seen the accused/appellant who had fired by Katta to the deceased. This witness had seen the entire act of appellant right from very beginning. Thus, the argument in this regard advanced by learned Counsel for the appellant can not be accepted. Some more important case laws on TIP:

Identification of the accused through a photograph can take the place of a formal TIP³⁰

Failure to hold TIP would not make inadmissible the evidence of identification of the accused in the court of law if such court identification of the accused is found to be reliable, trustworthy and dependable³¹.

The Hon’ble Supreme Court of India categorically held that the sole purpose of TIP is to lend corroboration to the court identification of the accused, and, identification before the court should not normally be relied upon if the name of the accused is neither mentioned in the First Information Report nor, is stated before the police, holding TIP is not obligatory and accused has no right to insist upon the holding of TIP.³² Delay in holding TIP although is not fatal, but, efforts must be made to hold it as soon as possible to avoid the mischief of accused being shown to the witnesses.³³ Court identification of the accused by the witness is useless when the witness has already failed to identify the accused at the TIP.³⁴ Incorrect identification of the accused by a witness in the court of law has no bearing if the case of the prosecution stands proved by other evidence.

29. (2000)1 SCC 471

30. Laxmi Raj Shetty Vs State of Tamil Nadu AIR 1988 SC 1274.

31. Malkhan Singh Vs.State of M.P AIR 2003 SC 2669

32. Dana Yadav vs State of Bihar(2002)SCC 295

33. Anil kumar Vs.State of U.P(2002)3 SCC 569

34. Hare kishan Singh vs. State of Bihar AIR 1988 SC 863 37 AIR 2004 SC 2775

In the case of, **Simon vs. State of Karnataka** the court held that there can be a variety of reasons for failure to identify, that is, the witness might have been won over, or, might have lost memory because he had seen the accused on the crime scene several years ago; If the accused is caught red-handed from the scene of crime then no question of TIP arises.³⁵ it was held that if the accused refuses to appear for TIP then an adverse inference of guilt can be drawn against him³⁶ (Section 54A of the Criminal Procedure Code, 1973). It has also been held that a suspect cannot be compelled to participate in TIP if he is undergoing treatment.³⁷ No one can be compelled to line-up for TIP and if the accused/suspect refuses to submit himself for TIP, he does so at his own risk³⁸. If the court believes that regard being had to the facts of a particular case, bail should be granted to the accused, then, bail cannot be rejected simply because TIP is still to be conducted. The court is empowered to grant bail by imposing some limited conditions on the accused such as that the accused shall not appear in public or interact with media for a limited time; give thumb impression, or, foot impression, or, palm/finger impression, or, a specimen of handwriting, or, exposing parts of the body for the purpose of identification, is outside the periphery of “to be a witness” so far as the mandate of Article 20(3) of the Constitution of India, 1950 is concerned.³⁹ It has been held by the Hon’ble Supreme Court that the approach required to be adopted by the Courts in rape cases has to be different. The ground realities are to be kept in view. Moreover, it was further held that the identification of the accused either in Court or in the test identification parade is not a sine qua non for conviction. In every case, the guilt can be proved from other circumstances. Many a time, crimes are committed under cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In a defective investigation, the only requirement is extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of a defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.⁴⁰ The Honorable Hyderabad High Court has held that identification of the accused in the open Court by the prosecutrix cannot be disbelieved on the ground of lapse of time and absence of identification parade.⁴¹

The Apex Court in a case while considering the scope of test identification parade categorically held and laid down that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The Honorable Madhya Pradesh High Court has held that the

35. Kishore Prabhakar Sawant Vs. State of Maharashtra (1999)2SCC 45

36. Kiwan Prakash Pandurang V. State of Maharashtra ILR 1974 Bom 337

37. SatyaNarayan V.State of A.P. 1994 CriLj 37(AP)

38. Surajpal V.State of Haryana (1995) 2 SCC 64

39. State of Bombay V. Kathi Kalu Oghad AIR 1961 SC 1808

40. Visveswaran V. State Represented By S.D.M AIR 2003 SC 2471.

41. Toorpati Majsaiha and Another vrs. State of A.P., reported in 2005 cri. l.j. 568

object of conducting the test identification parade is two folds. First, is to enable the witness to satisfy themselves that the prisoner whom they suspect is actually the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses have seen in connection with the said occurrence. Thus, merely because the test identification parade was not arranged by the Investigating Agency, would not discredit the clear, cogent and trustworthy evidence of the witness.⁴² A three-Judge Bench of the Supreme Court reiterated that it is only the identification of the accused in the Court which is a substantive evidence and the test identification parade is held during the investigation to minimize the chances of memory to identifying witnesses fading away due to long lapse of time.⁴³ While referring to its earlier judgments the Hon'ble Supreme Court observed that mere failure to hold a test identification parade is not fatal to the prosecution case but the Trial Judge will need to be circumspect in accepting the identification of an accused by a witness in the Court if the accused is a stranger to the witness.⁴⁴ It has been decided that holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration⁴⁵; for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant⁴⁶. Honourable High court of Judicature at Hyderabad in its Division Bench Judgment ruled that after the arrest of the accused if he was shown in a press conference or produced before the public through electronic media, it was said that as the police had already presented the accused before public media, subsequent identification in test identification parade would loose its credibility.⁴⁷ Honourable High court of Judicature at Hyderabad in its Division Bench Judgment ruled that mere wearing mask by the suspect at the time of committing the offence is not a ground to reject the identification of the accused by the victim at the test identification parade, because the victim who suffered in the hands of accused got no difficulty identifying the accused suspect, based on broad features like height, age, behave and the way in which they were talking etc.⁴⁸ The Honourable Supreme court held that there is no invariable rule but two accused person cannot be made part of the same TIP as joint TIP.⁴⁹

42. *State of Maharashtra v. Suresh*, (2000) 1 SCC 471,

43. *Mohd. Jamil Vrs. State Of Madhya Pradesh*, 2005 Cri. L.J. 1470

44. *Sheikh Hasib V. State Of Bihar*, (1972) 4 SCC 773

45. *Vijay @ Chineer V. State Of Madhya Pradesh* (2010) 8 Scc 191

46. *Ronny @ Ronald James Alwaris V. State Of Maharashtra* (1998) 3 Scc 625 And In *Kunjumon @ Unni V. State Of Kerala* 2012 (11) Scale 212

47. *Rajamoori Ram Reddy Vs Andra Pradesh* 2016 (2) Alt (Criminal) 91

48. *Potteti Yellaiah Vs State Of Andra Pradesh* 2016 (2) Alt (Criminal) 111

49. *Shaik Santhai Madar @ Jaffar @ Sinha Etc., Vs. State Represented By Inspector Of Police Reported In* 2016 (1) Ald (CRIMINAL) 903 (SC)

Conclusion

Finally, it can be concluded that the purpose of the TIP is to ensure that the investigation is going on the right track. It is merely a piece of corroborative evidence. Actual Identification is to be done in a court and that is a piece of substantive evidence.

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Topic No. – 33

Drawing of adverse inference due to non-examination of an important witness, due to non-explanation of injury sustained by the accused at the time of occurrence in a murder trial.

By
Sri Dinesh Kr Pradhan,
Additional District & Sessions Judge,
Aurangabad.

Sri Dinesh Kr Pradhan,
Additional District & Sessions Judge, Aurangabad.

**Topic : Drawing of adverse inference due to non-examination of an important witness,
 due to non-explanation of injury sustained by the accused at the time
 of occurrence in a murder trial.**

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Drawing of adverse inference due to non-examination of an important witness, due to non-explanation of injury sustained by the accused at the time of occurrence in a murder trial

Introduction:

Adverse inference is a legal inference, adverse to the concerned party, drawn from silence or absence of requested evidence. While a duty is cast upon the court to arrive at the truth by all means possible, a duty is cast upon the parties to come to the court with clean hands i.e. to make a complete disclosure with suppression of any material facts or evidence.

A failure to lead the best evidence thus makes the prosecution vulnerable to any adverse inference being drawn against it. The principle behind adverse inference being drawn is based on a simple and obvious question that the court will pose to itself with “why would the prosecution not lead the best evidence available to establish its case. Thus the inference is grounded in the assumption that the best evidence is not relied upon as it may be detrimental to the case of the party withholding it.¹ Section 114 Indian Evidence Act 1872 by way of illustration (g) states that if a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

In a recent case of **Tomaso Bruno & Anr. vs. State of Uttar Pradesh**,² the court observed that the drawing of the presumption depends upon the facts of each case. The court laid down the following factors to be taken into account while deciding whether or not to draw an adverse inference :

- (a) The nature of facts required to be proved and its importance in the controversy.
- (b) The usual mode of proving such evidence.
- (c) The nature and quality of cogency of the evidence not produced.
- (d) Accessibility of the evidence to the party concerned.

The Rule of Evidence vis a vis murder trial

Thus for the topic at hand, we are guided by the precedents forming an important source that has enjoyed high authority at all times and in all countries. Even if we take the statutory law, assuming but not conceding, laying the law on drawing an inference-adverse in the given circumstance in the murder trial, the law is given contemporaneous-expositor i.e. the statutory law is interpreted on the date and not at that point of time when it was legislated. Thus much learning goes to influence the interpretation.

1. Madhav Khurana & Ankita Bhatia : “The rule of Best Evidence in Criminal Jurisprudence” available at www.barandbench.com, last visited 7 March 2021.

2. (2015) 7 SCC 178.

It is thus apparent and therefore undeniable that we need to look to the precedents as far as the guidance in connection with the non-explanation of injury or injuries in a murder trial is concerned. However, the other part of the subject i.e. drawing an adverse inference in case of non-examination of the important witness does have statutory sanction contained in illustration (g) to section 114 of the Indian Evidence Act. Hence, the discussion hereafter would have references to both, the precedents as well as the statutory law, whenever and wherever found relevant for the purpose.

Drawing of Adverse inference due to non examination of important witnesses in a murder trial

Before we go to inference, we need to know the presumption. It is noted that the presumption is not itself evidence. It is a rule concerning evidence. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from connection, relations and co-incidence of the facts and circumstances.¹ Question of inference arises post the presumption. Cambridge English Dictionary gives the meaning of inference as ‘a guess that you make or an opinion that you form based on the information that you have.’ Illustration (g) of section 114 of the Indian Evidence Act, 1872 reads, ‘that the evidence which could be and is not produced, would, if produced, be unfavourable to the person who withholds it.’ This illustration of this section of the Act helps the Court in deciding on whom is the burden of proof in certain situations. A presumption of facts is to be raised to assist the Court in determining as to the burden of proof in a set of circumstance, it would be in a position to fix up the responsibility on one or the other party to the case with the burden to reverse such presumptions.² Under this section, the Court can draw only inferences. It does not authorize to legislate as to the manner in which human beings should conduct themselves in given circumstances.³ The effect of the provision is to make it clear that the Courts of Justice are to use their own common sense and experience in judging the effect of particular facts and that they are to be subjected to no particular rules whatever on the subject. It is borne in mind that presumption is not evidence or proof. It only shows on whom the burden of proof lies. Under section 114 of the Indian Evidence Act, 1872, the Court may presume the existence of any fact of which it thinks likely to have happened regard being had to the common course of natural events.

In **Shrichand K. Khetwani v. State of Maharashtra**,⁴ the Court dealt with the presumption arising from withholding the evidence. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence if produced, would

1. Sodhi Transport Co. v. State of U.P., AIR 1996 Cal 246.

2. Net Raj Singh v. State of M.P., 1997 SCC (Cri) 506.

3. State of Rajasthan v. Bhera, 1997 Cr.LJ. 1237 (Raj)

4. AIR 1967 SC 450

operate against him. An adverse inference can be drawn against a party if there is a withholding of evidence and not merely on account of the failure of the party to obtain evidence.⁵

In **Sawal Das v. State Maharashtra**,⁶ the Court held that if the prosecution fails to examine important witness an adverse inference against the prosecution can be raised. It is noted that illustration (g) in section 114 of the Indian Evidence Act, 1872 is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate inference, the drawing of an adverse inference, should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness, even if it is an important witness.

In **Ram Kumar v. State of Maharashtra**,⁷ Supreme Court observed, 'All the circumstances vouched by the eye witness unerringly and irresistibly led to the conclusion that the two contusions and the head injury were received by the accused after he had stabbed the deceased, non-production of any other witness, loses its significance.

In **Bali Ram Prasad v. State of Mysore**,⁸ it was held that non-production of an important witness would not introduce infirmity in the prosecution case where the prosecution case is based entirely on documentary evidence.

Failure of the prosecution to produce eye witness, may lead to the presumption that they were not prepared to support the false case.⁹

Prosecution not producing material witnesses court is entitled to draw an adverse inference.¹⁰

From the discussions above, it is clear that at a murder trial the quality of the testimony of the witnesses matters much either to draw a presumption for non-production/ non-examination of an important witness or when the prosecution fails to explain the injuries on the body of the accused. If the witnesses are credible and their testimony is reliable no adverse inference could be drawn in both of the conditions. There are four factors to test the credibility of a witness:

1. His knowledge of the facts he testifies;
2. His disinterestedness;
3. His integrity; and
4. How he stood the test of cross-examination.

Now before we go further, there seems a need to understand who is an interested witness. A witness may be called an interested witness only when he or she derives some benefit from the result of litigation i.e. under a decree in a civil case or in seeing accused persons punished.

5. Shrichand K. Khetwani v. State of Maharashtra, AIR 1967 SC 450

6. 1974 Cr. LJ. 664

7. AIR 1996 SC 3185

8. AIR 1973 SC 506

9. Mharaj Singh v. State of U.P., (1994) 5 SCC 188

10. Ravindra Kumar Dey v. State of Orissa, AIR 1977 SC 170

An important witness is one who in the normal course of nature is supposed to know the facts. If the prosecution does not examine such a witness, there is an inference that the case of the prosecution is either false or not true in toto or at any rate the prosecution is trying to corrugate. Similar is the case when the prosecution, having known of the suffered serious injuries on the body of the accused and also the material or witness hitherto produced do not raise confidence in the mind of the Court, adverse inference would ensue.

Non Explanation of Injuries sustained by the accused

The first case for practical purposes could be traced to **Bhagwan Tana Patil v. State of Maharashtra**.¹¹ In this case, the appellant was tried along with his brothers, Sahadu Tana Patil and Atmaram Tana Patil and his cousin, Bhimrao Dagadu Patil by the Additional Sessions Judge, Jalgaon, on charges under sections 307, 323, and 325 read with Section 34 of IPC, and got convicted. On appeal, the High Court of Bombay reappraised the evidence of the prosecution and noted that the prosecution witnesses had failed to give any satisfactory explanation of the incised injury found on the appellant (accused 1) and Bhimrao (accused 4). It was observed '*that the prosecution witnesses cannot be said to have given the true version of the incident in all its particulars.*' It was further found that the prosecution witnesses had tried to give a 'highly exaggerated' account, in as much as they said that several stick blows and iron-bar blows were inflicted on the person of Maharu Baliram though according to the medical evidence, there was only one simple injury on his person. It concluded that 'the word of the prosecution witnesses could not be accepted unless the same was corroborated independently in material particulars.' Appreciating from this point, the Hon'ble High Court found that the evidence of the prosecution, so far as it related to the assault by the appellant on Baliram Ukha, was cogent, reliable and corroborated in material particulars by other evidence. As against the remaining accused, such corroboration was not forthcoming; instead, there were several suspicious circumstances, which made the case against accused 2 to 4 doubtful. The Hon'ble High Court, therefore, while maintaining the conviction and sentence of the appellant, acquitted the other accused, giving them the benefit of doubt.

The Supreme Court on the point observed vide para 15, that "P.W. Bhagwan Parsharam did explain his statement at the trial of the incised injuries found on the right hand of the appellant. He had described in detail the process, by which he had wrenched out the Jambia from the hand of the appellant, and said that the injuries might have been sustained by the appellant during that struggle with the same Jambia. A similar explanation was given by Baliram Ukha in his deposition at the trial. It is, therefore, not correct to say that the courts below had themselves invented an explanation for the injuries of the appellant, which the witnesses had not given. True that the explanation given was not found impeccable, but there is no hard and fast rule that simply because the prosecution witnesses did not explain the injuries on the person of the accused, their entire

11. AIR 1974 SC 71

evidence should be discarded. The evidence of Bhagwan Parsharam could not be brushed aside merely because he had not given a flawless explanation of the injuries of the appellant, which, according to Dr. Gune, P.W. 8 were very superficial and could be suffered by consent, with a razor-blade. Bhagwan Parsharam's evidence, which was found by the courts below to be fully trustworthy qua the appellant- and we think rightly- was by itself sufficient to fix beyond doubt the identity of the appellant as the assailant of Baliram Ukha.” From these observations of the Supreme Court, it is clear that the explanation has to be there but the quality of the explanation is not of higher degree and must not be fully flawless in all circumstances. Thus no adverse inference could be drawn, if the explanation to the injuries to the accused are not flawless however there has to be some explanation.

In **Ram Sunder v. State of Bihar**,¹² the questions which have been referred by two-judge Bench to a larger Bench, were on point that whether the prosecution is obliged to explain the injuries sustained by the accused in the same occurrence and whether failure of the prosecution to so explain would mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence? The above questions arose in the context of divergent views expressed in **Jagdish v. State of Rajasthan [(1979) 2 SCC 178: 1979 SCC (Cri) 436]** and **Hare Krishna Singh v. State of Bihar [(1988) 2 SCC 95: 1988 SCC (Cri) 279]**. In the former, a two-Judge Bench laid down the proposition that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to satisfy the court as to the circumstances under which the occurrence originated but before the obligation is placed on the prosecution, two conditions must be satisfied:

- (i) That the injury on the person of the accused must be very serious; and
- (ii) That it must be shown that these injuries must have been caused at the time of the occurrence in question.

In the other case, another two-Judge Bench of the Hon’ble Supreme Court held that it is not the law or invariable rule that whenever the accused sustains an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so, the prosecution case be held to be doubtful.

The bench also referred to an earlier three Judge Bench decision in **Bhaba Nanda Sarma v. State of Assam**¹³ wherein it was held that the prosecution is not obliged to explain the injuries on the person of the accused in all cases and all circumstances and according to the learned Judges, it is not the law. It was also brought to the notice of the Bench hearing the reference above that same question again had come up for consideration before another three-Judge Bench of the Court in **Vijayee Singh v. State of U.P.**¹⁴, wherein it has been held as under:

12. (1998) 7 SCC 295

13 (1977) 4 SCC 396

14. (1990) 3 SCC 190

‘In Mohar Rai case [Mohar Rai v. State of Bihar, AIR 1968 SC 1281 : (1968) 3 SCR 525] it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in the Lakshmi Singh case [Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394: 1976 SCC (Cri) 671] also it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case.’ As the questions were answered by a larger Bench, the appeal was dismissed.

Thus till 1998 the two cases **Mohar Rai** (*supra*) and **Laxmi Singh** (*supra*) held the ground that-

- (a) when the explanation to the injuries on the body of the accused or accused persons is not offered by the prosecution there shall be adverse inference drawn by the court that either the case is not true or not wholly true; and
 - (i) the injury on the body of the accused or accused persons must have been of serious nature and not merely superficial; and
 - (ii) it must have been established that the injuries occurred to the accused or accused persons at the time of occurrence in question.
- (b) there is no invariable rule to draw the adverse inference against the prosecution when the prosecution fails to explain the injuries to the accused or accused persons when the evidence of the prosecution is cogent, explicit and clear especially when the testimony is from the creditworthy witnesses and their statement is reliable but when the witnesses are on inimical terms with the accused or accused persons or the witnesses are interested witnesses or when the defence’s version competes with the probability with the version of the prosecution, the adverse inference could be drawn.

In **Rajender Singh v. State of Bihar**,¹⁵ the question was whether non-explanation of the injuries on accused Rajender ipso facto can be held to be fatal to the prosecution case and it was held by the Supreme Court that, it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of the occurrence if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused

in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. In the case, in hand accused-appellant, Rajender had one penetrating wound, three incised wounds and one lacerated wound and of these injuries, the penetrating wound on the left axillary area in the 5th intercostal space $\frac{1}{2}$ " $\times$ 3" $\times$ 4" was grievous in nature as per the evidence of the doctor, PW 3 who had examined him. On the basis of the evidence of PW 3 as well as PW 11, the courts have come to the conclusion that there is no room for doubt that the appellants and their men had injuries on their person on the date of the occurrence. The Supreme Court upheld the findings of the trial court as affirmed by the High Court that the non-explanation of injuries was not fatal to the prosecution case which appeared cogent true and trustworthy. In **Mohar Rai and Bharath Rai v. State of Bihar**¹⁶ this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness relating to the incident is not true or at any rate, not wholly true and further, those injuries render probability to the plea taken by the accused persons. But in **Lakshmi Singh v. State of Bihar**¹⁷ this Court considered **Mohar Rai [AIR 1968 SC 1281 : (1968) 3 SCR 525: 1968 Cri LJ 1479]** and came to hold that non-explanation of the injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three-Judge Bench of the Supreme Court in the case of **Vijayee Singh v. State of U.P. [(1990) 3 SCC 190: 1990 SCC (Cri) 378]** the Court held that non-explanation of injury on the accused person does not affect the prosecution case as a whole.' and if the prosecution evidence is clear, cogent and creditworthy and the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case.

The Supreme Court in **Chandrappa v. State of Karnataka**,¹⁸ vide para 21 held, 'It is also well settled that the prosecution is not called upon to explain each and every injury on the person of an accused and in this view of the matter the non-explanation of an insignificant injury on the person of accused does not dislodge the prosecution story.'

In **Takhaji Hiraji v. Thakore Kubersing Chamansing**,¹⁹ it was held-

'17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In **Rajender Singh v. State of Bihar [(2000) 4 SCC 298: 2000 SCC (Cri) 796]**, **Ram Sunder Yadav v. State of Bihar**

16. [AIR 1968 SC 1281 : (1968) 3 SCR 525 : 1968 Cri LJ 1479]

17. (1976) 4 SCC 394 : 1976 SCC (Cri) 671

18. (2008) 11 SCC 328

19. (2001) 6 SCC 145

[(1998) 7 SCC 365: 1998 SCC (Cri) 1630] and **Vijayee Singh v. State of U.P.** [(1990) 3 SCC 190: 1990 SCC (Cri) 378], all three-Judge Bench decisions, the view was taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied with the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.'

The Supreme Court again in **Kashiram v. State of M.P.**²⁰, relying on **State of U.P. v. Mukunde Singh** [(1994) 2 SCC 191: 1994 SCC (Cri) 473] and **Takhaji Hiraji v. Thakore Kubersing Chamansing** [(2001) 6 SCC 145: 2001 SCC (Cri) 1070] has held as follows

'It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied with the existence of two conditions: (i) that the injuries on the person of the accused were of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution.'

In **Waman v. State of Maharashtra**,²¹ : vide para 36, the Supreme Court held-

'Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature. However, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the

20. (2002) 1 SCC 71 : 2002 SCC (Cri) 68

21. (2011) 7 SCC 295

course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case.'

The Supreme Court in **Bhagwan Sahai v. State of Rajasthan**,²² reversing the finding of the HC had observed that

"Once the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused including the death of the father of the appellants, the only possible and probable course left open was to grant the benefit of doubt to the appellants. The appellants can legitimately claim the right to use force once they saw their parents being assaulted and when actually it has been shown that due to such assault and injury their father subsequently died. In the given facts, adverse inference must be drawn against the prosecution for not offering any explanation much less a plausible one. Drawing of such adverse inference is given a go-by in the case of free fight mainly because the occurrence, in that case, may take place at different spots and in such a manner that a witness may not reasonably be expected to see and therefore explain the injuries sustained by the defence party. This is not the factual situation in the present case.'

'9. Therefore, we have no hesitation in allowing the appeal and acquitting the appellants of all the charges. We order accordingly. They shall be released from jail custody forthwith, if not required in any other case. The appeal is allowed.'

Quality of the explanation by the prosecution to the injury of accused: Explanation of the injury or injuries to the accused or accused persons is not required to be of a higher degree or impeccable, it is sufficient that some explanation is offered by the prosecution, and even if there is some explanation there could be no adverse inference qua prosecution.

Conclusion:

It is noted that in all circumstances the adverse inference cannot be drawn for both of the reasons i.e for non-examination of important witness and non-explanation of injury to the accused or injuries to the accused, in a murder trial and it would come only when at the murder trial, the case is not established of the prosecution by the cogent and reliable evidence, hitherto, either in case of non-examination of an important witness or in case of non-explanation of the injury or injuries on the body of the accused person or persons. Thus the Court has to look first as to

22. (2016) 13 SCC 171

whether the case of the prosecution is explicit from the evidence adduced; and if the same is not clear, then only adverse inference may be drawn as under:

- (1) **Adverse inference for non-examination of important witness:** Non-examination of an important witness who is supposed to know the facts of the case would lead to an adverse inference against the prosecution that either the case of the prosecution is false or at any rate not true in toto for the reasons that if the prosecution would have examined such witness, he would have deposed against the prosecution or the important witness is left to be examined as he or she is not prepared to support the false case of the prosecution:

For a witness to be categorized as important, his knowledge of the facts of the case would matter and also his disinterestedness in the case that he does not have any benefit from the trial in which the adverse inference is drawn.

- (2) **Adverse inference for non-explanation of injury or injuries to the accused or accused persons:** In a murder trial, if the accused suffers injury it is not in all circumstances that an adverse inference could be drawn, there are conditions in which the adverse inference may be drawn:
 - (a) The injury on the body of the accused or accused persons must be of a serious nature and not superficial with the consideration to look into the nature of the injury that whether the injury is capable of self-infliction;
 - (b) The injury could have been proved to have been sustained or at least occurred during the occurrence for which the trial is going on.

It is important to note that both the conditions must co-exist and not in the alternative. Thus, if one of the conditions is missing, **no adverse inference could be drawn**. Now the question logically arises as to what should be the quality of the explanation? From the discussion above the answer of the question is concluded as follows:



Topic No. – 34

Facts within special knowledge under section 106 of the Indian Evidence Act in murder trial.

By
Sri Bharat Bhushan Bhasin,
Add. Director , Bihar Judicial Academy,
Patna.

Sri Bharat Bhushan Bhasin,
Add. Director , Bihar Judicial Academy, Patna.

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Facts within special knowledge under section 106 of the Indian Evidence Act in murder trial.

Introduction

Facts that are pre-eminently or exceptionally within the knowledge of a particular person are said to be facts, especially within his knowledge. Section 106 of the Indian Evidence Act (hereafter referred to as Act) embodies the rule ‘when any fact, especially within the knowledge of any person, the burden of proving that fact, is upon him.’ Apparently, the rule refers to the burden of proof. Section 106 there fore- requires understanding the Burden of Proof.

Burden of Proof: The expression “burden of proof” is used in two senses in the Act, 1) the Burden of proving an issue sometimes termed as the ‘Legal Burden’ and 2) the Burden of adducing evidence also termed as ‘Evidential Burden’. Legal Burden never shifts, in civil proceedings, it is always upon the Plaintiff whereas in criminal cases it is always upon Prosecution. The elementary rule of the Burden of proof is embodied in section 101 of the Act and is inflexible. On the other hand, the ‘evidential burden’ remains shifting during various stages of the trial. The rule is governed by section 102 of the Act. In terms of section 102, the initial onus is always on the plaintiff/prosecution and if the initial onus is discharged and a case is made out entitling him/it for relief, the onus shifts to the defendant/accused to prove those circumstances, if any, which would disentitle the plaintiff/prosecution of the relief. A conjoint reading of section 101 & 102 of the Act impliedly distinguishes two terms viz., ‘Burden’ and ‘Onus’. Term Burden refers to Legal Burden whereas ‘Onus’ refers to Evidential Burden. The distinction between ‘Burden’ and ‘Onus’ was considered by their Lordships in **Addagada Raghavamma vs. Addagada Chenchamma, AIR 1964 SC 136**, it was held that *‘there is an essential distinction between burden of proof and onus of proof; burden of proof lies upon the person who has to prove a fact and it never shifts but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.’*

The burden of Proof as envisaged under section 101 of the Act requires the person to prove the existence of facts which he asserts.

‘Section 101- Burden of Proof – Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.’ Section 106 is an exception to the general rules so laid down under section 101.

SECTION 106 AN EXCEPTION TO SECTION 101

As a general rule fact or facts asserted by a person need to be proved by him. Section 106 is an exception to the general rule regarding Legal Burden, as embodied under section 101. ‘Section 106 – when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him.’ Illustrations appended to the section further fortify the commonsense

principle woven in the section. The first illustration states that when a person does an act with some intention other than that which the character and circumstances of the act, suggest, the burden of proving that intention is upon him. The second one illustrates the case of a traveller on the railway without a ticket. The burden of proving that the traveller had a ticket is on him. The illustrations appended to section 106 are nevertheless exhaustive. The rule as provided under section 106 of the Act is equally applicable in Civil and Criminal Cases.

Applicability of section to criminal cases: It is no doubt the golden rule that in criminal jurisprudence the accused is presumed to be innocent unless and until he is found guilty of the charged offence. The burden to prove the guilt of the accused i.e., the Legal Burden is always on the Prosecution and the burden never shifts. Section 106 does not relieve the Prosecution of its initial burden. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience, the word "especially" stresses that 'It means facts that are preeminently or exceptionally within his knowledge'. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. Thus section 106 does not throw upon the accused the burden of establishing his innocence. The ingredients of an offence are to be proved by the prosecution. Section 106 does not absolve the prosecution from proving its case. (**Md. Usman v. State of Bihar, AIR 1968 SC 1273**) The cases to which section 106 is applicable are those similar to the two cases given in the illustration to the section. Where the person is found travelling without a ticket and is charged with so travelling, the prosecution need not and indeed cannot prove that the man never had a ticket. Once it is proved that he was travelling without a ticket a prima facie case against him is established. If the accused person purchased a ticket and lost it, then such a fact is especially within his knowledge and it is for him to prove such fact.

Again when a person does an act with some intention other than that which the character and the circumstances of the act suggest, it is not for the prosecution to eliminate all other possible intentions. If the accused had a different intention, that is a fact especially within his knowledge and as such he must prove it.

Section 106 is not meant to be utilized to make up for the prosecution's inability to establish its case by leading, cogent and reliable evidence. It is only when the prosecution is unable to lead evidence because of circumstances beyond its control and that the fact required to be proved was 'within the special knowledge of accused alone' and prosecution could not have known it by due care and diligence only in that case section 106 can be resorted to by shifting the burden on the accused to divulge that fact which is 'in his special knowledge' and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished.

When section comes into play: Application of section 106 does not absolve the prosecution from the duty of discharging its general or primary burden of proving the case beyond a reasonable doubt. It is only when the prosecution has led the evidence which, if believed, will sustain a conviction, or which makes out a prima facie case that the question arises of considering of facts of which the burden of proof may be upon the accused. It needs to remember that section 106 never relieve the prosecution to prove its case beyond all reasonable doubts. Only when the prosecution case has been proved, the burden regarding such facts, which are within the special knowledge of the accused, may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule e.g., where the burden of proof may be imposed upon the accused because of a statute.

Discharge of burden of accused under section 106: The burden of accused to prove plea specifically set up by him and which may even absolve him from the offence charged gets discharged once accused establishes his plea by a preponderance of probability. (**Sawal Das v. State of Bihar, AIR 1974 SC 778**), (**H. Singh V. State of Punjab, AIR 1966 SC 97**)

Mens rea: - Where prosecution proves the act done is illegal and the accused pleads want of mens rea, the burden is upon the accused to prove that the act was done with some other intention. (**Mangaladas vs State of Maharashtra, AIR 1966 SC 128** also **State of Maharashtra vs. Mayer Hans George, AIR 1965 SC 722**)

Intention: The question of intention depends upon the circumstances of each case. The prosecution has to prove intention by proving circumstances. A person who is found travelling on a train without a ticket is liable for punishment under section 68 of the Railway Act. In such a case the fact that he had a ticket is within his special knowledge and he must prove it. The illustration (a) appended to section 106 of the Indian Evidence Act is relevant and fortifies the core principle underlying the section. Applying the principle to gather intention, if the prosecution proves that accused fired from close range, the intention gathered would be to kill. If there was any other intention the burden shifts upon the accused to prove the same.

Presumption u/s 113 B and 106 Evidence Act: Presumption in terms of Section 113B is one of the law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

- (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B IPC.)
- (2) The woman was subjected to cruelty or harassment by her husband or his relatives.
- (3) Such cruelty or harassment was for, or in connection with, any demand for dowry.
- (4) Such cruelty or harassment was soon before her death.

As and when the aforesaid circumstances are established, a presumption of dowry death shall be drawn against the accused under Section 113B of the Evidence Act.

(Tarsem Singh Vs. State of Punjab, AIR2009SC1454; Kans Raj vs State of Punjab, AIR2000SC2324). Thus it is seen that in a case accused is charged u/s 304B IPC, the initial burden upon prosecution is to prove that the death of the woman was caused within seven years of her marriage, she died otherwise than under normal circumstances (burns, injuries etc.) and she was soon before her death subjected to cruelty in relation with the demand of dowry. If prosecution has discharged its burden, the presumption of causing dowry death u/s 113B Evidence Act shall be drawn by the court and it shall be upon the accused to rebut the presumption. Section 106 cannot be replaced or substituted with section 113B. The prosecution has to prove all the essential ingredients of the offence to invoke presumption against the accused and unless the same is proved, presumption u/s 113B or 106 cannot be invoked against him.

APPLICABILITY OF SECTION IN MURDER (homicide) TRIALS

After having an overview of the basic principle, scope and applicability of section 106 in criminal cases, its applicability in murder trials can better be understood illustratively by studying case law.

Cases where the section was held applicable: -

Ram Gulam Chaudhury And Ors vs State Of Bihar, AIR 2001 SC 2842,

Brief Facts of the case: It is the case of the prosecution that the Accused Persons/Appellants, along with some other persons came to the place of the victim – Krishnanand Choudhary and all were variously armed with lathis, bhala and chhura. The accused persons assaulted Krishnanand Chaudhary, dragged him into the courtyard of the house and further assaulted him. When the mother and the father of the victim tried to save him they were also assaulted. Appellants took Krishnanand Chaudhary to a nearby ditch and pushed him down there. Bijoy Chaudhary, one of the accused stated that he (victim) was still alive and should be killed. On such statement, another accused/Appellant gave a Chhura blow on the chest of Krishnanand Chaudhary which resulted in his death. It is the case of the prosecution that all those persons thereafter left the place taking away the body of the deceased. The dead body of the victim was not found. The trial court, after considering the evidence convicted one of the Accused of the offence under Section 302 I.P.C. and sentenced him to life imprisonment. The other accused persons were convicted under Sections 302 read with 149 I.P.C. and were also awarded life imprisonment. All the Appellants were also convicted under Section 201 and sentenced to seven years of rigorous imprisonment.

Arguments on behalf of convicts: Before Hon'ble Apex Court, it was argued on behalf of convicts that this was a case where the corpus delicti had not been found. It was contended that there was no proof that Krishnanand Chaudhary has actually died. It was also argued that there was no medical evidence of death. On behalf of convicts, it was also stated that the evidence of the

prosecution witnesses, to the effect that they had seen one of the accused/Appellant killing Krishnanand Chaudhary, could not be believed. It was argued further that all that the prosecution could be said to have established was that the said boy had been assaulted and had then been taken away by the Appellants. It was submitted that the defence theory that the boy was still alive at the time of the trial could not be ruled out. It was submitted that the conviction under Sections 302 and 201 of the Indian Penal Code could not be sustained.

Arguments on behalf of Prosecution: In addition to other aspects, it was argued on behalf of the Prosecution that in the present case non-recovery of a dead body cannot be considered as a failure of the prosecution to prove its case. On behalf of the Prosecution Section, 106 of the Evidence Act was pressed into putting a burden upon accused persons to explain what happened to the victim once he was taken away by them.

Held: Hon'ble Apex Court after considering rival contentions qua applicability of section 106 of Indian Evidence Act, held that "in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura blow was given on the chest. Thus Chhura blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The Appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the Appellants. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the Appellants were suspecting the boy to have kidnapped and killed the child of the family of the Appellants, it was for the Appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the Court there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond a reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellants by virtue of their special knowledge must offer an explanation that might lead the Court to draw a different inference.

State of Rajasthan vs. Kashi Ram (2006) 12 SCC 254 - It is case of murder of wife and two children--Conviction and death sentence awarded by the trial court, but acquittal by High Court. In Appeal Hon'ble Supreme Court held that the Prosecution case was founded on circumstantial evidence. The death of three was homicidal and caused by strangulation. It was proved that the deceased was last seen alive in the company of the accused on February 3, 1998, at her house. House was found locked in the morning of February 4, 1998, and continued to be locked till opened after removing the door on February 6, 1998. Dead bodies found inside the house, throughout this period, the respondent not seen and arrested only on February 17, 1998. Accused tendered no explanation in defence given by him. He also failed to explain about his whereabouts from February 4 to 17, 1998. It was held that Section 106 of the Evidence Act is

attracted. Non-explanation on behalf of the accused is an additional link to complete the chain. This circumstance providing the missing link in the chain of circumstances proving the guilt of the accused beyond a reasonable doubt. It was also observed by Hon'ble Apex Court that The principle is well settled. The provisions of Section 106 of the Evidence Act, 1872 itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must explain as to how and when he parted company. He must furnish an explanation that appears to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

State of West Bengal vs. Mir Mohammad Omar and Ors. AIR 2000 SC 2988 in this case, A young businessman of Calcutta was abducted and killed. The kingpin of the abductors and some of his henchmen were later nabbed and were tried for the offences. The trial court convicted them under Section 364 read with Section 34 of the Indian Penal Code, but not for murder, and sentenced them each to rigorous imprisonment for 10 years. A Division Bench of the Calcutta High Court rejected the State appeal against the acquittal for murder and reduced the sentence to short term imprisonment restricting it to the period which the convicted persons had already undergone. The State of West Bengal as well as the convicted persons filed these appeals against the said decision of the Calcutta High Court, the former mainly challenging the acquittal for the murder charge and the latter challenging the very conviction entered against them.

Hon'ble Apex Court held that when it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody. Hon'ble Apex Court further observed that section 106 Indian Evidence Act is also applicable in the circumstances of the case. It was observed by their Lordships that section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond a reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the

accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

Gajanan Dashrath Kharate vs. State of Maharashtra, (2016) 4 SCC 604]: In this case victim (father) and son were residing in the same house. They were not having good relations. One day victim was found dead lying in pool of blood and a stone having blood stains was found lying nearby.

While upholding the conviction of accused (son) u/s 302 IPC, Hon'ble Apex Court observed that when an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. On the date of occurrence, when the accused and his father (Victim) was in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

Harihar Singh vs. The State of Bihar (14.09.2015-PATNAHC): MANU/BH/0871/2015 = 2015 SCC online Pat. 7724- In this case accused was charged and convicted u/s 302 IPC for the murder of his mother and brother. FIR was lodged on the fardbayan of accused himself, wherein, he narrated that some dacoits invaded his house and also caused the death of his mother and brother. During the investigation, police found that story of dacoity was false. It was concluded by Investigating Officer that the accused/informant himself caused the murder of his mother and brother and concocted a false story of dacoity. The accused was convicted by Trial Court and in Appeal Hon'ble High Court upheld the conviction. While referring and discussing case law on section 106 Indian Evidence Act, their Lordships held that In the instant case, it was only the appellant who was privy to the manner in which his mother, brother were done to death in the night of 19.10.1991 in his house, as such, it was for him to have disclosed the correct manner of occurrence to the Investigating Officer which was within his special knowledge, but he chose not to disclose the same and misled the prosecution, as such, his case is covered by Section 106 of the Evidence Act.

Some other cases where section 106 Indian Evidence Act was held applicable:-
Ranjit Kumar Halder vs State of Sikkim (2019) 7 SCC 684; **Buttan Sao vs. State of Bihar**, Manu/BH/0862/2019; **Ezhil & Ors. Vs State of Tamil Nadu**, (2002) 9 SCC 189; **State of Rajasthan Vs Thakur Singh**, (2014) 12 SCC 211; **Suresh vs state of Haryana**, 2014 SCC OnLine SC 1673; **State of J & K vs Vijay Kumar & Ors.**, (2018) 13 SCC 655; **Sathya Narayan Vs State Rep. by Inspector of Police**, (2012) 12 SCC 627; **Kiriti Pal and ors. Vs State of W.B.**, (2015) 11 SCC 178; **Timukh Maroti Kirkan vs State of Maharashtra** (2006) 10 SCC 681; **Santosh Kumar Singh vs. State Through CBI** (2010) 9 SCC 747;

Prithpal Singh and ors. Vs. State of Punjab, (2012) 1 SCC 10;; **Raju Gupta vs State of Bihar**, Manu/BH/0473/2007

CASES WHERE SECTION 106 INDIAN EVIDENCE ACT WAS HELD NOT APPLICABLE

Sunita vs State of Haryana, (2019) 14 SCC 258: In this case, there was evidence against the accused that she was last seen with the deceased. Subsequently, the dead body of the deceased was found burning in 'Bitora' (conical storage of cow dung cakes). Accused was convicted u/s 302 IPC by Ld. Trial court. Her conviction was upheld by the Hon'ble High Court. But Hon'ble Apex court on appeal acquitted accused. It was held that 'The High Court referred to Section 106 of Act, 1872 to hold that the Appellant was required to explain the circumstances under which the body parts of the deceased came to be recovered from the burning 'Bitora' at Village Kailash. Finding of the High Court is erroneous in as much as 'Bitora' was not in possession of the Appellant much less exclusive. It was located in an open area. Still, further, such an explanation would be necessary, if the prosecution has discharged the initial onus on it. Therefore, the Appellant was not required to explain the circumstances of body parts being found in 'Bitora' in the village where she resided with Baburam.'

Murlidhar and ors. Vs State of Rajasthan, (2005) 11 SCC 133: In this case, accused persons were convicted u/s 364 IPC by Ld. Trial court. Their conviction was altered by the Hon'ble High Court to that under section 302 IPC. The evidence available against accused persons included evidence of conspiracy, abduction of deceased, beatings given by accused persons to the deceased. Later on, the dead body of the deceased was recovered from nallah (drain) under the Ringus bridge. While acquitted accused persons u/s 302 IPC Hon'ble Apex Court held regarding the application of section 106 Indian Evidence Act that 'In our judgment, the High Court was not justified in relying on and applying the rule of burden of proof under Section 106 of the Evidence Act to the case. As pointed out in *Mir Mohammad Omar* (supra) and *Shambu Nath Mehra* (supra), the rule in Section 106 of the Evidence Act would apply when the facts are "especially within the knowledge of the accused" and it would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts, "especially within the knowledge of the accused." In the present case, the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused and, therefore, the principle in Section 106 could not apply. On the other hand, the prosecution proceeded on the footing that there were eyewitnesses to the fact of murder'.

Tomaso Bruno vs State of U.P. (2015) 7 SCC 178: In this case, three foreign nationals were staying in one hotel room in Varanasi. One of the room-mate was found dead in that hotel room. The remaining two accused persons were held guilty for the murder of their companion/deceased by the Ld. Trial Court. Conviction of accused persons was upheld by Hon'ble High Court. Hon'ble Supreme Court acquitted the accused persons. It was held by Hon'ble Apex Court that

‘....an important circumstance relied upon by the prosecution and accepted by the courts below is that the offence had taken place inside the privacy of the hotel room in which the accused and the deceased were staying together and only the accused had the opportunity to commit the offence. The prosecution mainly relied upon Section 106 of the Indian Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The prosecution mainly relied upon the circumstance that the occurrence was inside the hotel room and that death had occurred in the privacy of the hotel room and that the Appellants have no plausible explanation for the death of Francesco Montis and the absence of explanation or untrue explanation offered by the accused point to their guilt.

The principle underlying Section 106 of the Evidence Act is that the burden to establish those facts, which are within his personal knowledge, is cast on the person concerned, and if he fails to establish or explain those facts, an adverse inference may be drawn against him. Explaining the death of deceased Francesco Montis, the Appellants have stated that in the wee hours of 4.2.2010 at 4.00 A.M., they had gone to see the famous 'Subahe Banaras' and returned back to the hotel room at 8.00 A.M. and found the condition of Francesco Montis very serious and immediately informed PW-1 about the condition of their friend and then with the assistance of the hotel staff, Francesco Montis was taken to the hospital.....’

‘.....To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW-1 Ram Singh-Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and on all three floors. Since CCTV cameras were installed in prominent places, CCTV footage would have been the best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case....’

State of Bihar Vs. Ravi Upadhyaya, (2014) 4 BLJ 29 (PHC) = 2014 SCC online Pat. 884; In this case accused was married to the deceased after a love affair. However, the deceased, after her marriage with the accused alleged ill-treatment by the accused. On the day of the incident deceased was taken to hospital in burnt condition. There was evidence of the daughter of the accused that her father sent her to buy eatables from the market and when she returned, she found the door of her house locked. The daughter was told by neighbours that her mother suffered burn injuries and has been taken to hospital. After investigation, the accused was put to trial for murdering his wife by burning her. Accused pleaded that she (deceased) set herself on fire. Accused was acquitted by Ld. Trial Court u/s 302 IPC. The acquittal was challenged before

Hon'ble Patna High Court. It was argued on behalf of the Prosecution that it was a case of circumstantial evidence as strong links in the chain of circumstances unfailingly pointing out to the guilt of the accused persons, ruling out all the hypotheses in consonance with their innocence and that there was some sort of burden on the accused to explain by virtue of Section 106 of the Evidence Act as to how the deceased happened to have received burn injuries and in absence of any explanation coming from the accused it could be yet another strong circumstance against them pointing out his culpability.

Hon'ble High Court while upholding acquittal of accused observed that Prosecution failed to establish beyond doubt the charge against the accused persons. Regarding the application of section 106 Indian Evidence Act, Hon'ble High Court held that '....Section 106 of the Evidence Act could never be applied universally to all facts and in all cases. The provision may be attracted only when the prosecution had succeeded in establishing the acts complained of by admissible and acceptable evidence and then only the Courts have to turn to the accused to seek his explanation or about his special knowledge as to how the deceased happened to die. If the prosecution evidence raises some conclusive inference or inference which could be very difficult to repel then in that case, in our opinion, Section 106 of the Evidence Act is never attracted. The probability arising out of the prosecution case, if negatives the charges then the charges stand disproved and the benefit of such disproof of charge has always to accrue to the accused in all such cases. This is the reason, no substance in the submission that the accused persons owed an explanation to the Court as to how Ragni happened to receive those injuries, because Ragni herself had stated as to how she has received those injuries....'

Important aspects, in brief, regarding the application of the rule in cases of homicide/murder trials: As enlightened by Lordships in a catena of judgments, the following brief aspects may be culled out regarding application of section 106 Indian Evidence Act in criminal/murder cases.

- A. The rule is only an exception to section 101 Indian Evidence Act and does not absolve Prosecution from the burden of proving charge against the accused.
- B. Accused, by virtue of section 106 Indian Evidence Act is not supposed to prove his innocence.
- C. Section 106 Indian Evidence Act is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" means facts that are preeminently or exceptionally within his knowledge.
- D. Only when the prosecution case has been proved, the burden in regard to such facts, which are within the special knowledge of the accused, may be shifted to the accused for explaining the same.

- E. It is only when the prosecution is unable to lead evidence because of circumstances beyond its control and that the fact required to be proved was 'within the special knowledge of an accused alone' and prosecution could not have known it by due care and diligence, that section 106 can be resorted to by shifting burden on the accused to divulge that fact which is 'in his special knowledge' and if accused fails to offer any reasonable explanation to satiate judicial inquisitive scrutiny, he is liable to be punished.
- F. The provision may be attracted only when the prosecution had succeeded in establishing the acts complained of by admissible and acceptable evidence and then only the Courts have to turn to the accused to seek his explanation or about his special knowledge as to how the deceased happened to die.
- G. The principle underlying Section 106 of the Evidence Act is that the burden to establish those facts, which are within his personal knowledge, is cast on the person concerned, and if he fails to establish or explain those facts, an adverse inference may be drawn against him.
- H. When Prosecution by way of cogent and reliable evidence can prove that accused was last seen with deceased and within a short span of time deceased was found murdered. The onus to prove shift upon accused. Accused need to explain about the circumstances which led to the death of the victim and if he fails, the adverse inference would be drawn against the accused.
- I. Where in case Prosecution produces reliable evidence to prove that at the time of death/crime, deceased and accused were alone in closed premises, the burden to prove his innocence shifts upon accused by virtue of section 106 Indian Evidence Act.
- J. Where it is proved that the deceased was residing with the accused and the dead body of the accused is recovered from a concealed place at the instance of the accused within the house itself, the burden in such case shifts upon the accused to prove his innocence.

APPLICABILITY OF SECTION 106 INDIAN EVIDENCE ACT IN CIVIL CASES

Parties to a transaction: - Every transaction viz., sale, mortgage, contract etc., contemplates two parties to it. When any such transaction has been entered into, the law presumes that both the parties have knowledge of all the facts constituting the transaction. In case any litigation arises between the parties regarding the transaction, none of the parties is allowed to say that any fact of the transaction is especially within the knowledge of the other party and that the burden to prove that lies on such party. In cases between the parties to a transaction the general principle of burden

of proof applies, section 106 Evidence Act cannot be utilized by a party to a transaction to say that the other party having special means of knowledge has to prove it. The rule applies equally to the privies of the parties.

Negligence: Negligence by the driver of the any vehicle, has to be proved by the plaintiff. However, in a case where the facts speak for themselves showing the negligence of the defendant, the burden lies on the defendant to prove that he was not negligent. The principle *res ipsa loquitur* applies. (**Sayed Akbar vs State of Karnataka AIR 1979 SC 1848**).

Negligence by carriers: In any suit against a common carrier, it is the carrier who must prove the absence of negligence, because all the facts relating thereto are in his special knowledge. In case of negligence by carriers when it is proved that goods were handed over in sound condition to the carrier and were found damaged, the burden shifts upon the carrier to prove how the goods got damaged. In case the carrier fails to prove or explain reasonably the cause of damage, it is liable to compensate the plaintiff. (**Sobharam Jokhairam Vs. Union of India AIR 1970 Pat 182; Union of India vs Shree Ram Richhpal, AIR 1965 All 246; Union of India vs Delhi Cloth and General Mills Co. Ltd., AIR 1964 Punj 147; National Insurance Co. Ltd., V Om Prakash Poddar, AIR 1993 Cal 26**)

Eviction of Tenant: In case of eviction of the tenant on the ground of sub-tenancy, the landlord is burdened to prove that the premises were sublet, once the burden is executed by the landlord, burden to prove the exact date of sub-tenancy shifts upon the tenant. In cases where eviction is sought on the basis of default in payment of rent, basic requirement i.e, the landlord-tenant relationship has to be proved by the landlord. The tenant cannot be allowed to come forward with allegations that the rent was paid but no receipt was issued without explaining as to why the rent was not sent through money order. Merely on the oral testimony of tenant in regard to the payment of rent claiming discharge of liability in this regard cannot be deemed to be worth reliance at all. (**Madan Mohan vs Krishna Kumar Sood, (1993) 1 JT SC 162**)

Social Status: In case of declaration about the social status for seeking constitutional, socio-economic advantages, the burden of proof is always upon the person who propounds such status. (**Director of Tribalwelfare vs Laveiti Giri, (1995) 2 MLJ 30 SC**)

Breach of trust: - It is settled law that where a property is entrusted to a servant or agent, it is the duty of the servant/agent to give a true account of what he does with said property. If he fails to account for it reasonably or fails to return the property or when he gives a false and incredible explanation about its loss, the burden shifts upon such servant/agent to prove that the property so entrusted was not misappropriated by him. In a case where a postman was charged for misappropriating a money order meant for one person namely 'M', the postman took the plea that he handed over the money order form and money to one boy who opened the door of the house of "M". The postman further explained that the boy went inside the house and returned with the form having signatures of "M" on it in token of receipt of the money order amount. M proved

that he did not sign the money order form and also adduced evidence of other inmates of the house to show that none among them ever received the money on behalf of 'M'. It was held that the burden shifts upon the postman to prove and produce that boy to whom he handed over the amount. It was held that said fact was within the special knowledge of the accused/postman and he was bound to prove it within the preview of section 106 Indian Evidence Act. **(AIR 1957 All. 381).**

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Topic No. – 35

Issues related to section 313 of the Cr.P.C..

By
Sri Chanchal Kr. Tiwari,
Additional District & Sessions Judge,
Munger.

Sri Chanchal Kr. Tiwari,
Additional District & Sessions Judge, Munger.

Topic : Issues related to section 313 of the Cr.P.C..

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Issues Related with the Examination of Accused Under Section 313 of The Code of Criminal Procedure, 1973

I. INTRODUCTION

It is said that crime and criminal are born together and it exists since the advent of mankind. As soon as a crime is committed a picture of a human being is drawn on the human psyche as per causation principle. There must be a cause of every act and every act has an effect. As act or omission punishable by law is a crime and the person against whom accusation for the same was levelled is the accused.

One of the pious principles of natural justice is *audi alteram partem* it means the right to be heard. It can be said in this way, that whenever there is a case before a court of law, the accused and the respondent must have a right to be heard before the court. So the accused also has a right to know about the case which is made against him, the evidence which is going to be used against him etc so that he also gets a chance to prove himself as innocent.¹ The same has been prevalent in the Indian legal system since time immemorial. In the court scene of Mahabharata (Shantiparva), *Mrichhkatikam* by Shudrak² and *Merchant of Venice*³ by Shakespeare the accused persons were only asked questions and they were present in the court. In western mythology, Adam and Eve were the first accused persons who have plucked prohibited fruits from the Garden of Eden and they were asked questions about their actions. During the famous trial of Socrates, the Archon determined after listening to Socrates and Meletus that the lawsuit was permissible under Athenian law.⁴

Magna Carta Libertatum, commonly called ***Magna Carta*** is a charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215 which recognised in principle that the accused of an offence has certain rights.⁵ Stephen a British Jurist⁶ after tracing the history of the law on this point in England stated that this state of law continued till the year 1848 when by 11-12 Vic. c. 42 the present system was established, under which the prisoner is asked whether he wishes to say anything.

Travelling a long distance from there a right was given to the accused in India to explain the

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1. Mitra, Sayani, Protecting the Rule of Natural Justice (January 19, 2011). Available at SSRN: <<http://dx.doi.org/10.2139/ssrn.1743442>> (last visited on May 27, 2020)
 2. A.L. Basham, *The Wonder That Was India*, PP 116-117 (3ed. 2004, Picador)
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 4. *Criminal Procedure in Ancient Greece and the Trial of Socrates*, available at :<<http://law2.umkc.edu/faculty/projects/ftrials/socrates/greekcrimpro.html>> (last visited on May 27,2020)
 5. Stephen, *History of Criminal Law of England*. Vol. 1 pp 441-442.
 6. *Ibid.* pp 441-442.

incriminating circumstances vide various Statutes including Sec 313 of Cr.P.C. 1973. On the recommendation of the 41st Report of the Law Commission Sec 313 of the Cr.P.C. came into existence in 1973. This right is based on the principle of audi alteram Partem i.e. right to be heard in the present Cr.P.C., 1973. This general provision for examination was framed by the legislature which was amended in the year 2009 (Act 5 of 2009, Sec. 22) and falls in Chapter XXIV which is 'General Provisions as to Inquiries and Trial'.⁷

We all know the fundamental principle of justice is that no one should be condemned unheard. Accused is examined in every enquiry or trial by enabling him personally to explain the circumstances appearing in the evidence against him. Section 313 of The Criminal Procedure Code, 1973 envisages the power of the trial court to examine the accused to explain evidence adduced against him. To meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish an explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction.⁸

Government of India, Ministry of Home Affairs appointed a Committee on Reforms of Criminal Justice System popularly known as Malimath Committee submitted its report in the year 2003 and recommended and discussed the provision of Sec 313 of the Cr.P.C. Later on, Sec 313 of the Cr.P.C. was amended in the year 2009 (Act 5 of 2009, Sec. 22).

The purpose of section 313 of Cr.P.C is set out in its opening words 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him' so that it is right of the accused to explain to the court what are circumstances of the event appearing in the evidence against him. The accused is indeed having right to maintain silence, he is not compelled to speak during the investigation and subsequent thereon. At the same time court must give an opportunity to speak or explain his case and against the evidence put forth by the prosecution during the trial. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and have to be excluded from consideration.

OBJECTIVES OF THE STUDY

In many countries today, traditionalism plays a great part in the policy of their criminal procedure. As a corollary of such traditionalism, popular misconceptions and vague notions prevail which often serve to hamper the achievement of better criminal procedure and further disguise and confuse the real problems of our systems.

The present study seeks to focus on the relevant provisions, practice and significance of the

7. Singhal Justice M.L : Code of Criminal Procedure 1973: 22nd Edition: Vol-2: Lexis Nexis.

8. Singhal Justice M.L : Code of Criminal Procedure 1973: 22nd Edition: Vol-2: Lexis Nexis

Examination of the accused in the criminal trial in India. We shall also discuss similar provisions in existence over the globe. Also, to find out and suggest an appropriate manner for the examination of the accused in a criminal trial. To explain and analyse the importance of examination of the accused and its evidentiary value in Criminal Trials, without affecting the Constitutional right of the accused. In particular, the objectives of the study are as follows-

- (1) To analyse and discuss the provisions regarding the examination of the accused.
- (2) To make a comparative analysis of the laws relating to the examination of accused in other countries and at the international level when necessary.
- (3) To study and critically evaluate the Legislative process with respect to the examination of the accused.
- (4) To analyse the judicial decisions in respect of the examination of the accused.
- (5) To evolve a model scheme for examination of the accused. As per the guideline of the decision of the Hon'ble court.

ISSUES INVOLVED IN THIS STUDY

- (1) Whether existing laws relating to the examination of the accused are adequate?
- (2) Whether the existing provision regarding the examination of the accused fulfils the needs of the fair trial principle?
- (3) Whether the examination of the accused in criminal trial always essential?
- (4) Whether the practice of recording pleading guilty during the examination of the accused under section 313 of the Cr.P.C is good in the eye of law?
- (5) Whether the factum of compromise could be recorded during the examination of the accused under section 313 of the Cr.P.C.?
- (6) Whether the present prevailing practice of examination of accused by asking questions like (a) whether you have heard evidence of the witnesses? (b) what you have to say regarding your defence etc. is proper?
- (7) Whether examination of the accused under section 313 could be done through supplying a questionnaire to the accused and by filing a statement in writing or through Video Conferencing?

II. EXAMINATION OF ACCUSED: A HISTORICAL PERSPECTIVE

The law relating to the examination of the accused, as is settled today, is founded upon the principle of natural justice. Natural justice requires a person to be heard before he is condemned. To put it in another way every individual possesses an inherent right to defend himself. Follows from it, the accused's claim to have an opportunity to explain the accusation made and evidence

during a trial against him. Law is a means and Justice is an end. Criminal Justice is an end product of accusation through the process of law.

Before directly discussing legal provisions regarding the examination of the accused under the Code of Criminal Procedure, 1973 it is relevant to trace out rights of an accused person in ancient, medieval and modern times in the Indian context. We will take the reader to the concept in the inquisitorial system whenever required and needed during this discussion. We will also unfold the history of France, Italy and England on this subject. The present legal position is not born out of the blue but it is a result of the long evolution process of law.

The rights which were available to the accused in ancient India would be traced from Vedas and other scriptures of India which are the early source of all rights and duties of all persons including the rights of the accused person. The rights of the accused described in epics like Mahabharata, Shrutis, Smritis, Dharmasastras would also be seen. The Manusmriti and Arthashastra which were considered a sort of codes in ancient times to run administration and dispensation of Justice would also be referred, highlighting their provisions relating to the right of an accused person and opportunity of hearing. During the medieval period, Muslim rulers ruled the country and scriptures like 'Quran' and other literature contained the rights of an accused person. The British rule in India is also a flashpoint where under criminal law i.e. Indian Penal code, Criminal Procedure Code, Evidence Act and other laws were codified and enacted. These enactments provided a plethora of rights for the accused persons. The rights of the accused persons including the opportunity of being heard also reflected in Fundamental Rights.

RIGHTS OF ACCUSED IN ANCIENT INDIA

In ancient times crime was regarded as a sin and people used to condemn it with all possible brutalities. The primitive societies lacked the institution of government to enforce a prescribed code of conduct that is now called law, but in the ancient civilized societies a pervasive concept of 'Dharma' was evolved. Thus, in the ancient Indian civilized society, the violations of 'Dharma' rules and some of the customary rules regarded crimes as sins and the criminals were punished for their violation.

Our earliest sourcebooks are, of course, the Vedas. We do get from them an inkling of the conditions in which the foundation of the traditional Indian legal system was laid. Thus the Dharmasastras and Arthashastra, Smritis and other Vedic revelations provide for basic rights for the accused person. At no time accused person was convicted without affording an opportunity of being heard and if he could prove biasness or enmity of the complainant he had a right to acquittal.

RIGHTS OF ACCUSED IN MEDIEVAL INDIA

The Muslim system of government came to be established in several parts of India. Muslim law was mainly contained in Quran, Hadis, Sunnahs and Qiyas. Lord Macaulay was the architect of various laws of British India.

RIGHTS OF ACCUSED DURING BRITISH PERIOD

When East India Company was established by Britishers in India, they brought with them the common law of England which remained restricted to British subjects in the company's factory. These factories establishments thus became the nurseries of the English Law in India which in course of time brought about tremendous influence over the laws and the system of administration of justice in the whole subcontinent.

Initially in Britain, the prisoner was protected from all sorts of questioning during trials. It is only after the case is over, and the defence evidence is closed, the prisoner is asked if he wishes to say anything about the case and he is also warned that if he chooses to do so, what he says, will be taken down and may be given in evidence of his trial. With the introduction of the inquisitorial trial in the continent of Europe, the English courts were tempted to follow that practice and they adopted it too to the discomfort of the accused. Human values were sacrificed and the accused was subjected to searching examination during the trial. The vices of inquisition were realized then and finally, the Criminal Evidence Act 1898 was enacted in England. The new statute protected the accused from all sorts of judicial questioning during the trial unless and until he opted to examine himself as a defence witness. But the British Administration in India enforced the Code of Criminal Procedure in 1861, incorporating the provisions for the examination of the accused during trial. The provisions so drafted contained within it the scope of inquisition during the examination of the accused. However, in the course of legal development, the inquisition during the examination was done away with the values of natural justice were restored. To have a glimpse over the historical development of the law relating to the examination of the accused in India the relevant legal provisions in chronology may be quoted below:-

THE CODE OF CRIMINAL PROCEDURE, 1861

The Code of 1861 gives discretion to the court, to examine the accused. The relevant provisions in this regard are embodied U/S 202, 204 and 373 of the Cr.P.C. 1861. These provisions are permissive in nature.

Section 202 Cr.P.C 1861 states: “it shall be in the discretion of the Magistrate from time to time, at any stage of the inquiry, to examine the accused person and to put such question to him as he may consider necessary. It shall be in the option of the accused person to answer such question”. Section 249 of the Code applied this provision to warrant cases

Section 204 Cr.P.C 1861 states, “No oath or affirmation shall be administered to the accused persons”.

Section 373 of the Code states that the Court, at the close of the evidence on behalf of the

accused person if any evidence is adduced on his behalf, or otherwise at the close of the case of the prosecution, may put any question to the accused person, which it may think proper. It shall be in the option of the accused persons to answer such a question.” This section was intended for the Sessions trial.

THE CODE OF CRIMINAL PROCEDURE, 1872

The Code of 1872 replaces the earlier Code of 1861. The relevant provisions under the Code, 1872 are as follows:-

Section 193 of the Cr.P.C states, “The Magistrate may from time to time, at any stage of the inquiry and without previously warning the accused person, examine him, and put such questions to him, as he considers necessary. The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such reference as may seem just from such refusal.

Explanation- The answer given by the accused person may be put in evidence against him, not only in the case under inquiry but also in trials for any other offences which his replies may tend to show he has committed.”

Section 342 of the Code states, “In all inquiries and trial, a criminal court may from time to time and at any stage of the proceedings, put any questions to the accused person which such court may think proper.”

Section 343 of the Code states, “The accused person shall not be liable to any punishment for refusing to answer or for answering falsely, questions asked U/S. 342, but the court shall draw such inference as seems just from such refusal.”

Section 345 of the Cr.P.C speaks, “No oath or affirmation shall be administered to the accused person.”

So, the Code of 1872 although makes it permissive for the court to put questions to an accused at any stage of the proceeding, but for the Sessions Trial, makes it mandatory, after the closure of the prosecution case and before the accused is called upon to disclose his defence. But this Code does not define the scope and nature of the questions to be asked to the accused.

THE CODE OF CRIMINAL PROCEDURE 1882 AND 1898

The Code of Criminal Procedure, 1882 replaced the earlier Code of 1872. This new Code consolidated all the related provisions of the earlier Code and expressed the whole of Law under section 342 Cr.P.C. The Code of Criminal Procedure, 1898 replaced the earlier Code, 1882 but the literal contents of Section 342 of the Cr.P.C remain unaffected.

Section 342 Cr.P.C, 1898: -

- (1) “For the purpose of enabling the accused to explain any circumstances appearing in

the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

- (2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them, but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.
- (3) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence, which such answers may tend to show he has committed.
- (4) No oath shall be administered to the accused when he is examined under sub-section (1).”

This section explains the purpose and scope for such examination and the stage at which the accused may be examined etc. But this Code has authorized the court to draw an adverse inference against the accused when he refuses to answer any question or gives a false answer thereto. Such provision was often criticized as offending Article-20(3) of the Constitution of India.

41st REPORT OF LAW COMMISSION OF INDIA

In the 41st Report Of Law Commission Of India, it was observed that Section 342 is one of the most important sections in the Cr.P.C.1898. It requires that the Court must at the close of the prosecution evidence, examine the accused “for the purpose of enabling him to explain any circumstance appearing in the evidence against him.” the section for a moment brushes aside all counsel, all prosecutors, all witnesses, and all third persons. It seeks to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation. For a while, the section was misunderstood and regarded as authorising an inquisitorial interrogation of the accused, which is not its object at all. The key to the section is contained in the first sixteen words of the section. Giving an opportunity to the accused to explain the circumstances appearing in the evidence is the only object of the examination. He may if he chooses, keep his mouth shut or he may give a full explanation, or, if he is so advised, he may explain only a part of the case against him.

Discussing the history and scheme of this section in **History of the Criminal Law of England**.⁹ **Stephen Writes:**

“The words specifying the purpose for which questions are to be asked were not in the Code of 1872, which authorised the examination of the accused without assigning any reason for it. Perhaps the expression was introduced in the Code of 1882

9. Stephen, History of Criminal Law of England. Vol 3 p. 335.

to soften what many people consider a harsh proceeding. For my part, I regret the alternation. It will either be inoperative or most embarrassing, and it looks like an apology for what does not require one. It is, however, hypocritical, for the Code contains no provision as to what is to happen if the questioning does not conform to the directions of the Code, and it specifically enacts that 'the court and jury (if any) may draw such inference from the refusal of the accused to answer or from his answers as they please. Besides, in practice, every question anyone could want to ask might be justified by the terms of the section; e.g. the witnesses say they saw you at this place. Were you there or not, and, if not, where were you? The words thus make hardly any difference.'"

At another place in the same treatise,¹⁰ however, Stephen has expressed himself in favour of questioning the accused at the trial. After tracing the history of the law on this point in England, he writes:

"This state of the law continued till the year 1848, when by 11 & 12 Vic, c. 42 the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence on their behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial when it is difficult for anyone to test the correctness of what is said.

This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is I think highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks on English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study.

On the other hand, I am convinced by much experience that questioning, or the power of giving evidence, is positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most persons accused of a crime are poor, stupid and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee. So that even when prisoners are defended by counsel, the defence is often extremely imperfect, and

~~consists rather of what occurs at the moment to the solicitor and counsel than of what the~~
10. Stephen. History of Criminal Law of England. Vol. 1 pp 141-442.

man himself would say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant uneducated man has the greatest possible difficulty in collecting his ideas and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp."

It has been suggested that after the enactment of section 342A which enables the accused to enter into the witness box if he so chooses and give evidence, section 342 is redundant and can be safely omitted. A view has also been expressed that the elaborate examination contemplated by this section leads to needless delay. At least where the accused is represented by counsel it should be unnecessary to examine the accused because his counsel is bound to put forth, whatever explanation there is to be offered.

As against this it has to be borne in mind that there are several offences (such as receipt of stolen property) which are of such a nature that the accused has to give his explanation, because in the absence of a reasonable explanation¹¹ the accused runs the risk of being convicted by the court relying on section 114, illustration (a) of the Evidence Act, 1872.

The provisions of the Prevention of Corruption Act 1947 and other special laws which enable the court to hold the accused guilty unless he can satisfactorily account for his possession of property or other articles may also be referred to in this connection. Section 342 of the Code affords the accused the only opportunity of giving such an explanation without running the risk of facing cross-examination.

Furthermore, differing from civil cases in this respect, the parties in criminal cases are not equally placed. The whole machinery of the States is against the accused. The accused has no investigating machinery, no power of search and no power of questioning, which the prosecution has. If he puts forth a definite case, he may not in many cases be able to prove it. This is also the reason why in civil cases preponderance of evidence is sufficient, but in criminal cases, a shadow of doubt operates in favour of the accused. Even where the State provides counsel for the accused, experience shows that the Court has to guide counsel who is usually a junior member of the Bar. In this state of affairs, the examination of the accused under Section 342 appears to be an essential proceeding. The mode of applying the section would no doubt vary with the knowledge intelligence and experience of the Judge. If in a particular case the Judge exceeds the permissible limit and subjects the accused to an inquisitorial examination, the superior courts will correct the error. The words "question him generally" in the section are intended to prevent unfair interrogation of the accused. On the basis of these facts the Law Commission observed.

"We have, after considering the various aspects of the matter as summarised above, conclude that Section 342 should not be deleted. In our opinion, the stage has not yet come

11. G. Feller, A.I.R 1943 p.c. 211: Hori Lal, I.L.R 56 All. 250.

for its being removed from the statute book. With further increase in literacy and better facilities for legal aid, it may be possible to take that step in the future.

The examination of the accused under Section 342 is of two kinds:-

- (a) the power of the court to put a particular question to him at any stage for the purpose of enabling to explain any circumstance appearing in the evidence against him, and
- (b) the duty of the Court to generally, examine him (after the close of the prosecution evidence) for the above purpose.

The object of the examination in each case is the same. But the first is optional, while the second is mandatory. The first can be at any stage of the inquiry or trial, while the second is after the witnesses for the prosecution have been examined, and “before the accused is called upon to enter upon his defence”. The first is particular, while the second is general. These points of difference between the two would be brought out more clearly if each is dealt with in a separate clause, and we recommended that sub-section (1) may be split up into two clauses, each clause dealing with one kind of examination.

There is a conflict of decisions on the question of whether section 342 applies to summons cases. Most High Courts have taken the view¹² that it does so apply, but a contrary view¹³ has been taken by some High Courts.

Where the court has dispensed with the personal attendance of the accused, it is necessary that his pleader should be examined under Section 342, or should such examination be of the accused himself? There is also a controversy on this point, and different views have been expressed both as to what the law is and as to what it should be. One view is that the accused himself should be examined in all cases, and even where his personal attendance has been dispensed with at other hearings, the court must require him to be present for examination under Section 342. Another view is that where it is not a serious case and personal attendance has been dispensed with, the court may also dispense with the examination of the accused or his pleader. It is against the intendment of Section 342 to examine the pleader instead of the accused and such examination serves no useful purpose.

The question came up before the Supreme Court in a case¹⁴ decided recently. After noting the sharp conflict of Judicial opinion. The Supreme Court referred to the decision of the Calcutta High Court in **Prova Debi v. Mrs Fernandes**¹⁵ and said: -

“In that case, a Full Bench of the Calcutta High Court by a majority decision held that the Magistrate may in his discretion examine the pleader on behalf of the accused under

12. Kacho Mal v. Emp. AIR 1926 ALL. 358 Sita Ram v. Emp, AIR 1935 All 217; Ram Dhiraln v. State AIR 1956 All 167 Balkrishna v. Emp. AIR 1931 Bom. 132, Gulam Raud, AIR 1921 Pat. 11.

13. Ponnuswami AIR 1924 Mad. 15; Vidyand AIR 1962 a.p 394.

14. B.B Das Gupta v. State of West Bengal, (1969) 1 S.C.J. 867, 869

15. A.I.R. 1962 Cal. 203.

Section 342. this view is supported by numerous decisions of other High Courts, but from time to time many judges expressed vigorous dissents and came to the opposite conclusion. The two sides of the questions are ably discussed in the majority and minority judgments of the Calcutta case. After a full examination of all the decided cases on the subject, we are inclined to agree with the minority opinion.”

A third view is that the pleader should be examined in such cases, but the law should also provide that the answers given by the pleader shall not be put in evidence against the accused in any other inquiry or trial for any other offence which the answers of the pleader may tend to show that the accused has committed. It would not, according to this view, be proper to totally dispense with the examination of both the accused and his pleader. There should be something on the record to show the explanation either of the accused or of his pleader.

A suggestion intended to simplify the matter was also considered, namely, in summons cases, no examination of the accused under Section 342 should be necessary and neither the accused nor the pleader need be examined; but in all other cases, accused nor the pleader need be examined; but in all other cases, the accused person should be examined personally. A more limited form of this suggestion was also considered by us, namely, that in summons cases in which the personal attendance of the accused is dispensed with, Section 342 should not apply, and neither the accused nor the pleader need be examined.

The Commission has, on a consideration of the various views expressed in the matter, concluded that:-

- (a) the section does and should, apply to all inquiries and trial including commitment inquiries and trials of summons cases, and to make this position clear, the words 'In every inquiry or trial' should be inserted at the beginning of subsection (1);
- (b) in summons cases where the personal attendance of the accused has been dispensed with, either under section 205 or under section 540A, the court should have a power to dispense with his examination; and
- (c) in other cases, even where his personal attendance has been dispensed with, the accused should be examined personally.

The Commission accordingly recommend that section 342(1) be revised as follows:-

- “(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court--
- (a) may at any stage without previously warning the accused, put such questions to him as the Court considers necessary, and
 - (b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examined under clause(b).

Section 342(2) is ambivalent in its import. The first part rightly provides that the accused shall not render himself liable to punishment by refusing to answer the questions put by the Court or by giving false answers to them, but the section immediately gives the warning to the accused that “the Court and the jury(if any) may draw such inference from such refusal or answers as it thinks just.” It has been suggested that because of the clear possibility of the Court drawing an adverse inference from a refusal to answer, the section offends article 20(3) of the Constitution, in that its indirect effect may be to compel the accused to be a witness against himself.

The matter has not come up before the Supreme court but High Courts have held that the provision does not conflict with the Constitution. The reasoning on which one of the decisions is based¹⁶ is that the drawing of an adverse inference is a far cry from being compelled to be a witness. A distinction is made between “evidence” and “statement” and it is said that the statement of the accused is not “evidence.” It is also stated¹⁷ that no oath is administered to the accused and therefore, he is not a “witness”. We are afraid, however, that it is possible to argue that the permissibility of drawing an adverse inference would, at least in some cases, amount to an indirect compulsion of the accused to enter the witness box. Where the prosecution evidence is strong, this will be particularly so. It cannot be denied that the accused will be placed in a dilemma: he must either answer the questions under section 342 or enter the witness box under section 342A. The first course compels him to incriminate himself because the answer can be used against him. The second course also compels him to incriminate himself, because, once he enters the witness box, he is bound to be cross-examined.

It may be said that the privilege against self-incrimination operates regardless of the ultimate result, and emphasizes that certain means cannot be adopted even for a righteous end. In a Calcutta case¹⁸ the Judges observed:--

“If a person accused of an offence refuses to answer a question on the ground that by answering it he will incriminate himself or to produce a document on the ground that it will incriminate him, he will in a way be admitting his guilt, and yet. If effect is to be given to Article 20(3) of the Constitution, he will, in effect be protected from being compelled to furnish evidence of his admitted guilt and protected even by the issue of writ. This may seem odd, but in balancing the advantages of effective detection of crime, with information collected from all sources, against the observance of the civilized standards of inquiry and the upholding of the dignity of man, the framers of our Constitution like those of the Constitution of America, have given preference to the latter.”

16. Banarsi Lal Vs The State, AIR 1956 All 341.

17. In re B.N. Ramakrishna, AIR 1955 Mad 100.

18. Collector of Cusoms v. Calcutta Motor and Cycle Co., AIR 1958 Cal. 682. 690.

It was therefore, recommended that the latter part of section 342(2) be omitted. Since section 342(3) provides that the answers (whether false or true) given by the accused may be taken into consideration in such inquiry or trial, there is no need to state in section 342(2) that the court “may draw such inference from such answers as it thinks just.”

The latter part of section 342(3) provides that the answers given by the accused may be put in evidence for or against him in an inquiry into, or trial for, any other offence which such answers may tend to show he has committed. Such use of the answers for the accused would be governed by the evidence Act. Reference may be made to sub-sections(1), (2), (3) of section 21 and illustrations(c), (d) and (e) thereto, and also sections 157 and 159, of the Evidence Act.

The answer given by the accused may amount to an admission of some other offence or may by themselves constitutes an offence. e.g. contempt of court or defamation. As regards the latter case. The question may arise whether the answers enjoy any absolute protection. In a Bombay case¹⁹ it was held, that the criminal law of defamation being codified in Section 499 of the Indian Penal code the case must (if an exemption is claimed) be brought within the four corners of one of the nine exceptions given below that section. The Court followed a Calcutta decision.²⁰ Wherein the judgment contains a comprehensive discussion of the law of defamation under the Indian Penal Code. A wider view was taken in one case by the Madras High Court²¹ holding that such answers enjoy absolute protection and that this rule of the English law was not intended to be abrogated by section 499 of the Indian Penal Code: but this was over-ruled in a latter case²² The Allahabad High Court²³ has taken the wider view, recognizing absolute protection for answers given by the accused.

These decisions, however, are not based on the effect of section 342(3) but an interpretation of section 499, Indian Penal Code. Most courts have assumed that the answers given by the accused can be used in evidence in a later prosecution for defamation filed against the accused, and have proceeded to deal with the case on the other legal issues. We have considered the question of whether this position requires to be disturbed.

It was stated before us, that the accused is in a less favourable position than a witness to whom section 132, Evidence Act, gives full protection. Though the accused is not, in law, “compelled” to answer the questions put under section 342 (so that the analogy of section 132 may not be strictly appropriate), yet the accused has to answer the questions to save himself from conviction for the offence for which he is under trial. Such compulsion as there maybe is, in our view, no compulsion in law. If the accused, while answering such a question, commits an offence,

19. AIR 1927 All 707, 708.

20. Satish Chandra v. Ram Dayal, ILR 48 Cal 388.

21. In re Venkata Reddy (1912) ILR 36 Mad 216 (F.B.)

22. AIR 1926 Mad. 906 (F.B.)

23. Murali Pathak, ILR 50 All. 169.

such as defamation, contempt of court, or uttering obscene words, there is no reason why he should not be punishable. Any privilege that the substantive law itself recognizes in such cases would, no doubt, be available; but the procedural law need not in our opinion, add its special cloak of protection to the accused.

III. EXAMINATION OF ACCUSED: PRESENT LEGISLATIVE POSITION

The new Code of Criminal Procedure, 1973 reproduced the whole of section 342 of the earlier Code, 1882 and 1898 except the provision relating to the drawing of an adverse inference against the accused in the event he refuses to answer the questions or gives a false answer thereto. The examination contemplated in the Code is quite in contrast to the inquisitorial examination of the accused. The former adheres to the norms of natural justice and honours human rights.

SECTION 313 OF THE CODE OF CRIMINAL PROCEDURE, 1973

The provisions relating to the examination of the accused as per

Section 313 of Cr.P.C are as follows:- Power to examine the accused;

- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court: -
 - (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
 - (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case;

Provided that in a summons case where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

- (2) No oath shall be administered to the accused when he is examined under sub-section (1).
- (3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
- (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.
- (5) The Court may take help of prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.

Section 313 of the Cr.P.C. postulates the examination of the accused in an enquiry or trial.

Such examination is in respect of evidence recorded against him during the trial. To ascertain the scope of examination of an accused in an enquiry or trial, it is necessary to know what exactly these terms 'enquiry' and 'trial' do connote?

ENQUIRY OR TRIAL

According to sec 2 (g) of Cr.P.C. Enquiry includes every enquiry other than a trial conducted under this code by a Magistrate or the court. The Code of Criminal Procedure contemplates enquiries under various provisions. For example: - A Magistrate may conduct an enquiry U/S 202 of Cr.P.C. to decide whether there are sufficient materials to issue a process against the accused. A Magistrate may also enquire as to the fitness of the surety U/S 441 of Cr.P.C. A Magistrate may also conduct an enquiry U/S 169 of Cr.P.C. to see whether there are sufficient materials to proceed with the case or not? There are also other occasions in which the Magistrate or court may conduct an enquiry. But in each such enquiry, there may not be an accused before the court. So Section 313 Cr.P.C. does not apply to all such enquiries contemplated under the code. It is only where there is an accused before the court whose enquiries into the matter involving an offence, the examination of the accused is stipulated for.

On the other hand, the word trial has not been defined in the Cr.P.C. So we have to take the meaning of trial in common parlance. In common parlance, trial means the determination of issues arising in a particular case. In criminal law 'trial' concerns an accused whose guilt or innocence is decided by the court. The determination of guilty or innocence is based upon the evidence, which is usually recorded on the commencement of trial. Then the question, when does the trial commence assumes significance. On this issue, there are two shades of views. One view is that trial commences with the framing of charge. The other view is that the trial does not commence with the framing of charge, but only when the accused refuses to plead guilty and claims for trial. ***From these two views, the latter view appears to be logical and acceptable. Because the plea of guilty if accepted leads to the waiver of trial. So only if the accused does not plead guilty or pleads guilty but the court does not accept such a plea then only the trial commences.***

Till the commencement of trial whatever is done in a criminal proceeding may be termed as 'enquiry'.

As per the scheme of the Code of Criminal Procedure 1973 four kinds of trial viz. Sessions trial, Warrant trial, Summons trial and Summary trial. In all such trials, except "warrant trial instituted otherwise than on a police report", the court proceeds to record evidence after the accused does not plead guilty to the charge. But in case of warrant cases instituted otherwise than on a police report, the evidence is recorded even before the commencement of trial. ***So there is scope for a Magistrate to examine the accused U/S 313 (a) Cr.P.C. even before the trial***

commences. But the use of section 313 (a) Cr.P.C. before the commencement of trial is seldom followed in practice in a criminal court.

Although in warrant cases instituted on a police report, there is provision for examination of the accused U/S 240 of Cr.P.C., the scope of such examination is different from the examination of the accused as envisaged U/S 313 of Cr.P.C. The scope of examination of the accused U/S 240 of Cr.P.C. is not well defined.

All that it indicates is that such examination may facilitate the removal of doubt if any in the mind of the magistrate for framing of the charge. The examination of the accused as envisaged U/S 313 of Cr.P.C. becomes operative generally after the commencement of trial. Because this section intends to seek an explanation from the accused in respect of incriminating circumstances appearing against him in evidence. So unless there is some evidence on record there is hardly any scope to examine the accused U/S 313 of Cr.P.C. and in usual practice in criminal court section 313, Cr.P.C. is put into use only after the recording of the prosecution evidence during a trial.

AT ANY STAGE OF ENQUIRY OR TRIAL UNDER SECTION 313 (1) (a) Cr.P.C.

The court may at any stage in an enquiry or trial put such questions to the accused, as the court considers necessary. This is an enabling provision for the court. The court may put such questions to the accused or may not. However, the expression “at any stage in inquiry or trial” is qualified by the availability of evidence. This expression must be interpreted to mean that at any stage after some evidence from the prosecution is recorded.

The operation of this section starts only when incriminating evidence appears against the accused and not before that.

The 41st Law Commission of India in its report observes that, although sub-section (1) of section 342 Cr.P.C. 1898 (new section 313 of the Cr.P.C.) is split up into two clauses, each clause deals with one kind of examination. The examination of the accused under section 313(1) (a) Cr.P.C. does not absolve the court of its duty to examine the accused U/s 313(1) (b) Cr.P.C. 1973. If the court examines the accused before the closure of the prosecution evidence concerning any circumstance appearing against him, such examination is not conclusive on the point. The court has to proceed with the trial, record the rest of the evidence and examine again the accused thereafter U/s 313(1)(b) Cr.P.C.

Section 313(1) (a) Cr.P.C. (Section 342 Cr.P.C. 1898) was in vigorous use when there was a committal enquiry by the Magistrate. But that procedure (committal enquiry) is no more in existence. However, in a warrant case instituted otherwise than on a police report, if the court examines the accused U/s 313(1) (a) Cr.P.C. before framing of charge, the accused may well explain the evidence available against him and may help the court deciding the matter in his favour and the court may discharge him from the charge.

Nevertheless, the legislatures had a distinct vision in incorporating this provision in the Code of Criminal Procedure. Particularly after examination of the accused U/S 313(1) (b) Cr.P.C. if some witness is called as a court witness or prosecution witness is recalled, re-examined and further cross-examined, it may so happen that some fresh incriminating materials may be brought to the record against the accused. In that contingency Section, 313(1) (b) of the Cr.P.C. may not come into operation. But Sec. 313(1) (a) Cr.P.C. would be useful in dealing with the situation. When the legislators have conferred a power on the court and that power is infinite in point of time, they are bound to use the term “may”. Because the term “shall” mandates the court to do something finite at a particular time or stage. Therefore the mere use of the term “may” in Clause (a) of Section 313 (1) does not relieve the court of its duty to seek an explanation from the accused in respect to incriminating evidence available on record against him. More so, it is a statutory right given in favour of the accused to explain the evidence appearing against him. And such right cannot be fettered away on the pretext of discretion. So when some additional evidence of incriminatory nature has been brought into the record after the examination of the accused U/S 313 (1) (b) Cr.P.C., the court is under a duty to ask the accused to explain that evidence. To avoid this duty under the guise of ‘discretion’, would be nugatory of the provision embodied U/S 313(1) (a) of the Cr.P.C.

The circumstances may necessitate further examination of the accused. Such further examination comes within the ambit of section 313(1) (a) of the Cr.P.C. The circumstances are as follows: - (a) Prosecution witness recalled and re-examined

- (b) Examination of fresh prosecution witness
- (c) Examination of Court witness
- (d) Evidence after remand

The trial court recording the evidence under a remand under Section 391 Cr.P.C. does not decide the matter afresh, rather sends the additional evidence so recorded to the appellate court, which would dispose of the case. So the appellate court may seek an explanation from the accused in respect of the additional evidence. Although there is no express provision authorizing the Appellate Court to question the accused in respect of additional evidence, there is neither any such prohibition in the code as well. Therefore, in case of ‘remand’ for recording of additional evidence, if further evidence incriminating the accused is brought on record, then the accused should be allowed to offer his explanation through his counsel before the appellate court which would unhesitatingly consider such explanation. Besides this, the appellate court while remanding the case for recording of additional evidence should do well to direct trial courts to record the explanation of the accused in respect of the evidence so recorded and send it to the appellate court for consideration. For this direction, no statutory provision is required, since such direction is incidental to the power of remand.

EXAMINATION OF THE ACCUSED AFTER THE CLOSURE OF THE PROSECUTION EVIDENCE U/S313(1)(b) Cr.P.C., 1973

After closure of the prosecution evidence and before the accused is called upon to enter into his defence, the court is under obligation to examine the accused in respect of the evidence available against him. The examination of the accused U/s 313(1) (b) of the Cr.P.C. is not the end of the road. The use of the word 'shall in clause (b) of sub-clause (1) of Section 313 goes to show that the examination contemplated in that portion is mandatory and not merely discretionary. The provision of clause (b) is not permissive, but imperative and the accused must be offered an opportunity to explain any circumstances appearing in the evidence against him. Compliance with the provisions of the section is not a mere idle formality.

It is obligatory on the court to question the accused on the circumstances appearing, against him in evidence given under Section 313 to enable him to explain the same. The examination of the accused under Section 313, Code of Criminal Procedure is mandatory. In case of failure of such examination, the accused is entitled to acquittal.

Courts are empowered by clause (a) to question the accused at any stage of inquiry or trial, whereas clause (b) obligates the court to question the accused before he enters upon his defence. Examination of accused under clause (b) of Section 313(1), Cr.PC is mandatory and cannot be dispensed with in any case

THE ACCUSED TO BE QUESTIONED 'GENERALLY ON THE CASE' U/S 313(1)(b) Cr.P.C.

The expression "generally on the case" was interpreted by the Privy Council in **Dwarikanath Berma Vrs. Emperor**²⁴ that the purpose of section 342 Cr.P.C. is to enable the accused to explain the incriminating circumstance appearing against him and this purpose can be accomplished if each material point is put to the accused for his explanation. Their Lordship held that if the court fails to put any material point appearing in evidence to the accused then the argument that the accused has failed to explain that material point, loses force. Therefore, a question of general nature would not serve the purpose of this section. It is not only that each material point should be put to the accused, but also each point should be put to the accused separately. If the court summarizes the prosecution evidence or lumps together a bundle of incriminating facts and puts a composite question to the accused, it is not the proper compliance with the statutory provision.

To a similar effect the Supreme Court in **Tara Singh Vs. State of Punjab**²⁵ held that the accused should be given an opportunity to explain each and every material circumstance, which is intended to be used against him and any sort of composite question is misleading. Their Lordship further held that question should be framed in a simple and intelligible manner so that the accused

24. A.I.R. 1933 P.C. 124

25. A.I.R. (38) 1951 S.C. 441

would be in a position to understand it and to give proper answer thereto. When the accused is illiterate the duty of the court is more onerous as it is to see that the questions are framed properly to make him understand the whole case made out against him. Even in the case of a literate person, the court should not take it easy on the assumption that he is able to understand the question what the court asks.

While questioning the accused the court should take the following precautions: -

- (i) When there is no evidence against the accused the court should not put a question on his own to the accused.
- (ii) The court should not examine the accused to extract an admission from him.
- (iii) The court must not examine the accused to supplement the prosecution evidence.
- (iv) The court should not examine the accused in the style of inquisition. The court is required to put the evidence to the accused straightway.
- (v) The examination of the accused should not be like a cross-examination.

While Examining the Accused the following points need to be Considered

- (a) No oath shall be administered to accused when he is examined under subsection(1) of Cr.P.C.
- (b) Accused can not be compelled to speak, the right to keep silence is the right of the accused governed by our Constitution.
- (c) It may be seen that the language in which Section 313 of Criminal Procedure Code, 1973 is couched is plain and simple language and leaves no room for any misapprehension as to the scope and purpose of the Section.
- (d) Each answer should be recorded separately. The examination should be thorough and only to enable the accused to explain the circumstances against him to the best of the ability.
- (e) No vital or salient or incriminating point should be left out which might result in prejudice to the accused.
- (g) It was never intended by the legislature that the court should not frame its questions on its initiative but should depend upon questions to be supplied to it by the prosecution by way of adducing evidence against the accused basing on charges framed
- (h) Proper care has to be taken while examining deaf and dumb. Court has to observe whether the accused, though deaf, mute had sufficient intelligence to understand the criminal character of the act committed by him and take the assistance of an interpreter or person who is capable of understanding signs of the accused or even in writing.

The points to be covered by Presiding Officer while examining accused based on prosecution evidence is that:

- (a) The presence and involvement of the accused at the scene of occurrence.
- (b) The part alleged to be played by him at the scene of occurrence in the commission of the offence.
- (c) The motive of the crime.
- (d) Anything revealed by the medical evidence as against him.
- (e) Any objects recovered from him tending to incriminate him.
- (f) Confession.
- (g) Extra-judicial confession
- (h) Motive of witnesses to depose against him.
- (i) Dying declaration.

SUBJECT MATTER OF EXAMINATION

(A) On Every Material Fact And Adverse Or Incriminating Circumstance

Each material circumstance against the accused must be put to him to enable him to explain it.²⁶

Facts that constitute the ingredients of the offence charged, should be specifically put to the accused.²⁷ Circumstances not put to the accused cannot be used against him.²⁸ The accused should be examined regarding all incriminating circumstances brought out against him in the prosecution evidence before he is called upon to enter his defence.²⁹ If any circumstance has not been put to the accused in his statement under trial, it will not be open to the prosecution to place reliance upon that circumstances for the proof of the guilt of the accused.³⁰ The importance lies in putting to the accused each material fact that was intended to be used against him and for affording him a chance of explaining if he could.³¹

Where ocular evidence supported by medical evidence establishing the guilt of accused and accused is not offering any explanation to the incriminating circumstance in a statement under Section 313 Criminal Procedure Code, no infirmity was found in the conviction of accused.³²

It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it, where such an omission has occurred. It does

26. *S. Harnam Singh v. State (Delhi Admn.)*, A.I.R. 1976 S.C. 2110

27. *Sarsibala Dewan v. State*, 1962 B.L.J.R. 20.

28. *Mazahar Ali. v. State*, 1976 Cri. L.J. 1629

29. *M.B. Kamar v. State* 1963 1 Cri. L.J. 609

30. *Jai Singh v. State of Rajsthan*, 1964 R.L.W. 478

31. *Hate Singh Bhagat Singh v. State of M.P.*, A.I.R. 1952 S.C. 469

32. *Kailash v. State of M.P.*, 2013 (4) Crimes 19 (S.C.)

not ipso facto vitiate proceedings unless the accused succeeds in establishing that prejudice has been occasioned by such defect.³³

Questions should be put on each of the adverse circumstances on which conviction is based.³⁴

Incriminating circumstances like delay in making a report is not to be considered unless the accused had been given an opportunity to explain them.³⁵

When a circumstance was not put the accused in examination under Section 313, Code of Criminal Procedure the said circumstance could not be used against him.³⁶

In **Balu Ramu Macchi v. State of Gujarat**³⁷, therefore, the circumstance that the accused was made to put on, in the presence of the panchas the chappals that were found lying on the spot of the crime and that the same fitted him, could be taken into consideration against the accused, in as much as the said circumstance was not put to accused when examined under Section 313 Code of Criminal Procedure.

The necessity of bringing all the material facts implicating the accused with the commission of the crime to the notice of the accused by putting him question in that regard in the statement under Section 313, Cr.P.C. is for the reason that no material can be taken help of by the court without the accused bring given an opportunity to explain it. The very purpose of Section 313 is to put the circumstance against the accused so that he may meet out the prosecution case and explain the circumstances brought by the prosecution to implicate him in the commission of the crime. It is not well settled that any circumstances not put to the accused in his statements at the trial, thereby depriving him of the opportunity to explain those circumstances, should be completely excluded from consideration.³⁸

But it is not legitimate for the court to require the accused to make a demonstration by putting on certain shoes recovered from his house to see whether they fitted him.³⁹

Under Section 313 the questions are to be only in respect of the material which is in the nature of a circumstance against the accused. The prosecutions in criminal case may be required to lead even formal evidence to complete the chain, but all the material is not required to be put to the accused⁴⁰

33. Shivaji Sahabrao Bombed v. State of Maharashtra, A.I.R. 1973 S.C. 2622

34. Kadarnath Bejoria v. State of W.B., A.I.R. 1954 S.C. 660

35. Zwingale Ariel V. State of M.P., 1954 Cri. L.J. 230

36. Balu Ramu Macchi v. State of Gujarat, 1986 Cri. L.J. 983

37. (Supra)

38. Kabul v. State of Rajasthan 1992 Cri. L.J. 1491

39. Pritam Singh v. State of Punjab, A.I.R. 1956 S.C. 415

40. Prabhakar v. State of Maharashtra, 1977 Cri. L.J. 127

Every circumstance on which a trial Court relies to hold accused guilty must be put to accused for his explanation.⁴¹

When on examination under Section 313 no question was put to the accused regarding stains of human blood on his shirt, then no inference can be drawn against the accused on that account.⁴²

(B) Conduct of The Accused

If reliance is placed upon the conduct of the accused even that conduct should be put in his examination and his explanation obtained.⁴³

If the trial court wishes to attach importance to the fact that the accused has absconded after the commission of the crime, this circumstance should be specifically put to him otherwise it can not be used against him.⁴⁴

(C) On Bye-Laws

When no specific reference was made to certain bye-law in questions put to the accused under Section 313, then it was held that this was a material irregularity and the conviction of the accused was set aside.⁴⁵

(D) On Circumstantial Evidence

It would be fallacious to contend that unless the circumstantial evidence itself makes out a prima facie case against the accused, he can not be asked to explain the incriminating circumstances.⁴⁶

(E) Confessional Statement

If there is a confessional statement made by the accused and it is proved in the case, the trial court while examining the accused under the section should bring it to the notice of the accused and ask his explanation.⁴⁷

If the prosecution relies on some circumstances amounting to confession or admission of the guilt as to sustain the conviction, it must be put to the accused for an explanation. If it is not done so, that evidence is not to be relied upon.⁴⁸

41. State of Mijoram v. Shari Vanlachhanga 2007 (3) Crimes 300

42. Rahim Beg v. State of U.P., 1972 S.C.C. (Cri.) 827

43. Jai Singh v. State of Rajasthan 1964 R.L.W. 478

44. Hate Singh Bhagat Ram v. State, 1953 Cri. L.J. 1933

45. 1974A. Cri. R. 6(7)(For contrary view plea refer to 1973 J & K. L.R.608)

46. I.L.R. (1953) 2 Cal. 133 (135)

47. State of Assam v. Nanda Kumar, 1973 Cri. L.J. 521 (526) D.B.

48. Kaur Sain v. State of Punjab, 1974 Cri. L.J. 358

If the accused admits to have done an act which would for explanation furnish by him be an offence, the admission can not be used against him divorced from the explanation.⁴⁹

(F) Documents Produced By Prosecution Should Be Put to the Accused in his Examination

Documents produced by prosecutions must be put to the accused for explanation. Documents not put to the accused can not be used.⁵⁰

MATERIAL ABOUT WHICH NO QUESTION CAN BE PUT TO THE ACCUSED

(A) Regarding Inferences

The accused is to be questioned with regard to the circumstances appearing against him in evidence and not the inference that follows from the circumstances.⁵¹

It is not necessary to ask the accused to explain any inference that a court may be asked to draw and to prepare to draw from the evidence on record.⁵²

Where, in prosecution for the offence of criminal breach of trust, legal and independent evidence was absent concerning the entrustment of the different sums of money with accused, a question about that entrustment put to him would be improper. An answer to a question improperly put partially admitting entrustment ought not to have been taken advantage of by the prosecution and made use of by the trial courts in holding that the case of entrustment had been established.⁵³

(B) The Statement Under Section 161, Code Of Criminal Procedure, 1973

It is beyond the pale of controversy that statements made by witnesses under section 161, Code of Criminal Procedure, during the investigation, are not substantive evidence. Hence, the trial Judge cannot accept the statements recorded under Section 161 as substantive evidence and proceed to questions under Section 313 of the Code of the accused on the basis of these statements. The statements cannot be allowed to go on record in view of the bar of Section 161 of the Code.⁵⁴

The statement recorded under Section 161 of the Code is not permitted by law to be used except for contradicting the author of the statement. Such a statement cannot be regarded as reaching anywhere near the proximity of reliability for fixing up the correct age of a person.⁵⁵

49. Narayan Singh v. State of Punjab, 1964 (1) Cri. L.J. 730

50. Bharat Swain v. State, 1967 Cri. L.J. 1427

51. State of H.P. v. Wazir Chand, 1978 Cri. L.J. 347

52. 52 R.K. Dalmia v. Delhi Admn. A.I.R. 1962 S.C. 1821

53. Mohd. Ishaque v. State of Orissa, 1982 Cri. L.J.N.O.P.C. 183

54. Smt. Sewaki v. the State of H.P, 1981 Cri. L.J. 919

55. Ram Deo Chauhan V. State of Assam, 2001(4) Scale 116:

(C) The Statements Under Section 164, Code Of Criminal Procedure, 1973

Similarly, statement of a witness recorded under Section 164, Code of Criminal Procedure, 1973 is not a substantive piece of evidence, hence no question can be put with respect to such statements, under Section 313.⁵⁶

(D) About Previous Convictions

A court cannot question the accused about his previous conviction in his examination under Section 313, Code of Criminal Procedure, 1973, before convicting him for the offence with which he has charged.⁵⁷

(E) About The Contents Of Bail Application

A bail application cannot be said to constitute a circumstance appearing in evidence against the accused within the meaning of Section 313, Code of Criminal Procedure.⁵⁸

The Statement of the accused made on his behalf by his counsel in the bail application cannot be read as his admission as it was not put to the accused in his statement under Section 313.⁵⁹

(F) Arguments Which The Prosecution Might Advance

The court has no right to question an accused person and ask him what he has to say regarding arguments which the prosecution might advance after all the evidence has been recorded.⁶⁰

(G) Not On Material Which May Fill Up The Gaps in Prosecution Evidence

The questions put up by the Court cannot be used for filling up gaps in the proof against the accused by the prosecution.⁶¹

(H) Documents Proved And Exhibited By The Accused

It is not permissible to treat a document, purporting to be proved by the statement made by the accused in his examination under Section, as evidence against the accused.⁶²

In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. If

56. Padam Pradhan v. State , 1980 Cri.L.J. 534

57. Padam Pradhan v. State , 1980 Cri.L.J. 534

58. Satya Vir Vs. State, A.I.R 1958 All. 746:

59. Randhir Singh v. State, 1980 Cri.L.J. 1397.

60. Yashwant Sakham v. State. A.I.R 1956 Bom.409:

61. State Vs. Ram Avtar Chaudhary, A.I.R 1955 All. 138:

62. Mohd. Yasin v. State, A.I.R 1954 Patna 437:

the bad character of the accused is not itself a fact in issue in the case, under law the trial Judge cannot put a question to the accused about his bad character.⁶³

A Court cannot question the accused about his previous conviction before convicting him for the offence with which he was charged.⁶⁴

(I) Record Of Police Not To Be Put To Accused

Record of the police during investigation is no part of the evidence and the accused is not to explain it.⁶⁵

(J) The Prosecution In A Criminal Case May Be Required To Lead Even Formal Evidence To Complete The Chain, But All That Material Is Not Required To Be Put To The Accused⁶⁶

(K) Court Should Not Examine The Accused As To Know His Defence

The evidence referred to in Section 313 is the evidence already given at the trial. A court is not justified or authorised in examining an accused person for the purpose of ascertaining what witnesses he intends to call for, what evidence they will give or what his defence is.⁶⁷

(L) No Experiment Possible Under Section 313

The Court cannot try an experiment under Section 313. It cannot ask the accused to put on a pair of shoes to see whether it belongs to him.⁶⁸

(M) Court Is Not Required To Ask Any Questions Which Are Not Against The Accused

The court is not required to ask any questions which are not against the accused. Further, the accused is required to answer only incriminating circumstances appearing against him. Therefore, when the accused takes the plea of self-defence but Court did not ask the accused questions about that plea, that accused cannot make a legitimate grievance that the form of examination under Section 313 deprived him to make out a case of right to private defence, especially when he was defended by a lawyer and case of private defence was put forth during the trial.⁶⁹

CONSTITUTIONAL VALIDITY OF EXAMINATION OF THE ACCUSED DURING TRIAL

Article 20(3) states that no person accused of an offence shall be compelled to be a witness

63. Shayam Charan v. State, A.I.R 1969 All. 61:

64. Murlidhar v. State, 1978 Cri.L.J. 1163.

65. In re. Pagoti Sanyasi Rao, 1968 Cri.L.J 1345:

66. Prabhakar Raghunath Kamerkar v. The State of Maharashtra, 1977 Cri.L.J. 127 (131).

67. Queen Empress v. Har Govind Singh I.L.R 14 All. 243

68. Pritam Singh v. State of Punjab. AIR. 1956 S.C 415

69. Saban S.K.Vs.State, 1984 Cri.L.J.N.O.C 17(Cal);

against himself. The Supreme Court in **State of Bombay Vs. Kathikaloo Oghad**⁷⁰ observes, “Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely a mechanical process of producing documents in the court which may throw a light on any of the points in the controversy but which do not contain any statement of the accused based on his personal knowledge”.

So the philosophy behind this constitutional mandate is not to compel the accused to disclose facts that are within his knowledge. When the accused is examined U/s 313 Cr.P.C., he is not bound to answer any question. The purpose of examination U/S 313 of Cr.P.C. is to enable the accused to explain the evidence available against him and not to compel him to incriminate himself. Before the enactment of the Code of Criminal Procedure in 1973, the proposition of law U/s 342 Cr.P.C. 1898 was a little different. Under the old code, the court had got the power to draw an adverse inference against the accused in the event he refused to answer or gave a false answer during his examination. To prevent the court from drawing an adverse inference, the accused had to answer the question thereby incriminating himself on certain occasions. So the privilege that was granted under section 342 to the accused, not to answer the question virtually was rendered ineffective by the power of the court to draw an adverse inference.

In the net result the accused was being compelled to speak and at times to his peril. So the old law was contrary to the constitutional value embodied under Article – 20(3). But the new Code since 1973 has done away with the possibility of drawing adverse inference against the accused. Now the accused is at liberty not to answer the question or to give false answer thereto with immunity from punishment. The Supreme Court in **Sri Ram Vs. State of Uttar Pradesh**⁷¹ declared that no adverse inference can be drawn against the accused for not giving any answer or giving false answers to the questions. Thus the examination U/s 313 Cr.P.C. does not offend the Constitutional value embodied Under Article – 20(3), rather it carries the sanctity of natural justice, maintains a balance in the trial and renders procedural justice.

Section 313 Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1) (b) Cr.P.C. the Court is duty-bound under Section 313(4) Cr.P.C. consider the same. The mere use of the word ‘may’ cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence

70. AIR 1961 SC 1808

71. AIR1975 SC 175

available is an entirely different matter. If there has been no consideration at all of the defence taken under Sec. 313 of Cr.P.C., in the given facts of a case, the conviction may well stand vitiated.⁷²

PROCEDURE FOR EXAMINING THE ACCUSED

Hon'ble Supreme Court observed it is our experience that in criminal trials no proper attention is paid to the framing of charges and the examination of the accused under Section 313 of the Cr PC, the two important changes in the criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful manner.⁷³

Further remarked is that Trial Court should not perform his duties in an unmindful and mechanical manner while examining the accused under Section 313 Criminal Procedure Code.⁷⁴

This part of the trial is of utmost importance, and if as a result of any inadvertence, or on account of undue haste on the part of the Judges in the zeal of completing the trial soon, if the examination of the accused under Section 313 is not properly done in its true and fair spirit, the possibility of the trial Court doing injustice cannot be ruled out.⁷⁵

To sum up, recording a statement of the accused under section 313 of the Code of Criminal Procedure 1973 is not a purposeless exercise as it establishes a direct dialogue between the court and accused. Each material circumstances appearing in evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial if it is shown that accused was prejudiced.⁷⁶

At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause(b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without allowing him to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.

It is submitted that a pragmatic and humanistic approach is warranted regarding such special exigencies. The word 'shall' in clause (b) Section 313 (1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantages, the court should, in appropriate cases, e.g, if the accused satisfies the court that he is unable to reach the venue of the court except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some

72. Reena Hazarika vs State of Assam MANU /SC/1249/2018.

73. Sajjan Sharma v. State of Bihar, 2011 Cri L.J 1169 (1171-72) (SC)

74. Sajjan Sharma v. State of Bihar, 2011 (1) Crimes 187 (SC)

75. Surendra Prasad v. State of Gujarat, 1980 Cri. L.J. 1016

76. Asrabali v. State Assam, 2008 (3) Crimes 112 (SC):

such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

The questions put to the accused under Section 313 must be intelligible and not merely as a matter of form, so that the object of the legislature that the accused may have the opportunity of giving such explanations, as he may desire, may be fulfilled.⁷⁷

An accused cannot be convicted solely on confession of guilt made in examination under Section 313 Criminal Procedure Code in absence of any other evidence on record to establish the charge.⁷⁸ ***Thus, it is humbly submitted that the prevalent practice in the State of Bihar is that when an accused wanted to confess his guilt in cases when there is no evidence on record, the examination of the accused was done by the Courts in the format of 313 Cr.P.C. [Schedule-XLII High Court [(M) 3 (old) (M) 85]] particularly in Magisterial trial cases is bad in the eyes of law.***

‘EXAMINATION’ - NOT CROSS-EXAMINATION

In exercising its power under Section 313, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get the opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court shall put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined under Sections 313 would be to enquire. Whether having regard to all the questions put to him, he did get an opportunity to say what he wants to say in respect of the prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. No general rule can be laid down regarding the manner in which the accused person should be examined under Section 313. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of Section 313 as anxiety for the thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person.⁷⁹

Questions should be put in such a manner as to be easily understandable and they should not be lengthy. Long questions and questions which are omnibus or composite or complicated should not be put.⁸⁰

77. Fattan v. Emperor, AIR 1945 All.87:46 Cri. L.J. 495

78. Vebeiki Pachorana v. State of Mizoram, 2013 (1) Crimes 187 (Gau).

79. Jai Dev v. State of Punjab 1963(1) Cri. L.J. 495

80. State v. Kachara Sada, 1961(1)Cri L.J. 255

The Law Commission of India in its 41st Report observed that the stage has not yet been reached for the deletion of this provision and maybe in future, with better education and better facilities for legal aid this matter may have to be reconsidered in the changed circumstances. As the law stands today Section 313 of the Code provides not only the accused an opportunity to explain the circumstances appearing against him, but also the Court an opportunity to have a personal dialogue with the accused to elicit such explanation as he may have to offer, free from the fear of being trapped to make an embarrassing admission or statement or of being led to make any statement meant to fill up the lacuna in the prosecution case. The questioning by the Court must inspire this confidence in the accused that the questioning is meant for his benefit and not for the benefit of the prosecution. The purpose of the examination of the accused is only to elicit his explanation regarding circumstances appearing against him and nothing more. The duty is cast upon the Court to see to it that this purpose is achieved and that the examination of the accused is not reduced to a mere formality.

While putting questions to an accused, the Courts must not forget that the questioning must be fair and concluded in a form that an ignorant or illiterate person will be able to appreciate and understand. The Courts cannot lose sight of the fact that in a large number of cases the accused may not be fully equipped to follow and appreciate all that is said in Court against him. Moreover, while facing a criminal charge, the accused may be in a disturbed state of mind which may further cloud his understanding. It is, therefore, of essence that the questions put to the accused are couched in simple language and are specific. The examination of an accused under Section 313 of the Code is neither a test of his intelligence nor his memory. For the proper discharge of the duty cast upon the Court, it is obliged first to marshal the evidence that has come on record. It must thereafter cull out all the circumstances appearing against the accused. The next step is to arrange the circumstances as far as possible in chronological order. The last step is to frame appropriate questions and in doing so, as far as possible, each question must be specific and must relate to a specific circumstance appearing against the accused. It is improper to roll into one question several circumstances appearing against the accused, and to seek his explanation. When such questions are framed and put to the accused, the whole purpose of the examination is defeated because such questions fail to pinpoint the attention of the accused to the specific circumstance for which his explanation is sought. The questions must, therefore, be couched in simple language which can be understood even by an illiterate person and must relate to a single circumstance as far as possible. The circumstances of the case must be put in chronological order so that he may be able to appreciate the prosecution case against him and the circumstances which the prosecution wishes to establish against him.

It is our common experience that the evidence adduced in the case is not in the chronological order of events projected by the prosecution. Nevertheless, the lower Courts start the questions right from the first witness and end up with the last witness. This type of questioning, putting forward the events in a haphazard manner, is likely to confuse the accused many times and,

therefore, the questions must be in the chronological order of events. Therefore, after the closure of evidence the entire evidence shall be marshalled and arranged in chronological order of events for one single circumstance, there should be one question. Each question shall not be in respect of more than one circumstance. If a single circumstance has been spoken to by many witnesses it is not necessary to frame questions in respect of that circumstance as many times as the number of witnesses who have spoken regarding the same. That circumstance spoken to by many witnesses could form the subject-matter of one single question.

MANNER OF EXAMINATION

The examination of accused under Section 313, Code of Criminal Procedure, 1973 shall be recorded in the form of a question-answer and not in form of a written statement.⁸¹

Every circumstance emerging from the record against the accused is put to him. Justice requires that questions under Section 313 are put in a manner, style and form to be easily comprehensible to the persons in the position of an accused. It is better if each question contains one circumstance alone and not a combination of several circumstances. To provide the accused a proper and adequate opportunity to explain the circumstances against him, it is fair and just that the circumstances are properly put to him in the first place. That will not only help the accused but also help the Appellate Court in appreciating an appeal correctly and adjudicating inter alia based on the said examinations, the truth or otherwise of one or the other story.⁸²

The statement of the age of the accused must come in his examination under Section 313 and not merely in the relevant column of printed form meant for examination.⁸³

The accused need not be questioned about every important statement made by a witness in the witness box. It is only the portion of the evidence of the witness on which the accused person can give an explanation that should be put to the accused in his examination. Of course, the accused should be asked whether he wishes to say anything about every one of the prosecution witnesses. If a prosecution witness has not given evidence of any incriminating circumstance requiring an explanation of the accused, portions of the evidence of such a witness need not be put to the accused in his examination.⁸⁴

Section 313 does not require the court to record in writing that it had read the evidence on record and had applied its mind to the facts of the case and then was going to record the statement of the accused. Once the Sessions Judge starts the recording of the statement it is presumed that the court had read the evidence on record and had applied its mind to the facts of the case.⁸⁵

81. Arvind Balashankar Joshi v. State of Gujarat, 1991 Cri L.J. 2241 (2245)

82. Shahaji Duttu Patil v. State of Maharashtra (1983) 1 Crimes 67 (Bom):

83. Maizal S.K. v. State, 89 C.W.N. 172.

84. State v. Kacnra Sade, 1961(1) Cri L.J. 255

85. Baij Nath Singh v. Ram Narain Singh 1982 Cri. L.J. N.O.C 185(All.)

In **Jai Dev v. State of Punjab**,⁸⁶ it was observed thus: The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.

In **Bakhshish Singh v. State of Punjab**,⁸⁷ a three-Judge Bench of Hon'ble Supreme Court has held that: "... It was not all necessary that each separate piece of evidence in support of a circumstance should be put to the accused and he should be questioned in respect of it under that section..."

In **Shivaji Sahabrao Bobade v. State of Maharashtra**,⁸⁸ Hon'ble Apex Court considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, widening the sweep of the provision concerning the examination of the accused after closing prosecution evidence made the following observations: It is not proper to put the accused questions like "Have you heard the evidence of the prosecution? What have you said to this?" The law requires that every incriminating circumstance should be put to the accused separately.⁸⁹

It is of the highest importance that when a certain circumstance appearing in the prosecution evidence is to be raised against the accused and certain inferences are to be drawn from it, the circumstance must be specifically put to him. To put simultaneously and in a manner that makes an accused person not comprehend the implications of the questions is not proper.⁹⁰

In **Bibhuti v. State of W.B.**,⁹¹ Their Lordships of Supreme Court observed that the statement of the accused cannot be a piece of evidence for the prosecution in the case in which the statement is made but the answer can be put in evidence or against him in other enquiry or trial for other offences which such answers may tend to show that he has committed, e.g. if in a murder trial the accused says that he concealed the dead body but did not commit the murder. In a subsequent trial for an offence under Section 201, IPC the above statement of the accused may be used.

The statement made in defence by the accused under Section 313, Cr.P.C can be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code cannot be made the sole basis of his conviction.⁹²

86. AIR 1963 SC 612

87. AIR 1963 SC 612

88. 1973 (2) SCC 793.

89. *Devi Ram v. State* 1970 Cri L.J. 536

90. *Kandhai v. State*, 1953 Cri L.J. 1193:

91. A.I.R. 1966 SC 381: 1969 Cri L.J. 654

92. *Mohan Singh v. Prem Singh* 2003 Cri L.J 11 (SC)

Statement under Section 313 can be taken into account along with prosecution evidence and the accused be convicted.⁹³

STATEMENT TO BE TAKEN AS A WHOLE

The Statement made in defence by accused under Section 313 Cr.PC can be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code cannot be made the sole basis of his conviction.⁹⁴

The Court cannot split the statement of accused under Section 313, Code of Criminal Procedure and accept a portion and reject the rest. The Statement has to be accepted as a whole or not to be relied upon at all.⁹⁵

The Court cannot accept the inculpatory part of the statement and reject the exculpatory portion. The statement must be treated like any other evidence and the material in favour of the accused must be given the same weight as that against him.⁹⁶

In **Nishi Kant v. State of Bihar**⁹⁷ the Hon'ble Apex Court observed that the Statement made by the accused whether amounting to confession or not must be admitted in its entirety. If a portion of the statement of the accused under Section 313 is inculpatory then it can be relied upon to convict the accused where there is other evidence in the case incriminating the accused.

RECENT JUDGEMENTS OF HON'BLE SUPREME COURT ON SECTION 313 OF CR.P.C.

Fainul Khan vs State Of Jharkhand⁹⁸ on 4 October, 2019

The Hon'ble Apex Court observed that Sec. 313, Cr.P.C. incorporates the principle of audi alteram partem. It provides an opportunity to the accused for his defence by making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence. The importance of the provision for a fair trial brooks no debate. In **Suresh Chandra Bahri vs. State of Bihar**, 1995 Suppl (1) SCC 80, it was observed as follows :

“26. It is no doubt true that the underlying object behind Section 313 Cr.P.C. is to enable the accused to explain any circumstance appearing against him in the evidence and this object is based on the maxim audi alteram partem which is one of the principles of natural justice. It has always been regarded unfair to rely upon any incriminating circumstance

93. *Gent Lal v. State*, (1985)60 C.L.T. 9

94. *94 Mohan Singh v. Prem Singh*, 2003 Cri. L.J.11 (SC)

95. *Mohan Singh v. Prem Singh*, 2003 Cri. L.J.11 (SC)

96. *Om Prakash Kumar v. The State of H.P* 1974 Cri. L.J 556

97. 1969 Cri. L.J. 671:

98. Criminal Appeal no (s). 937 of 2011

without affording the accused an opportunity of explaining the said incriminating circumstance. The provisions in Section 313, therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such nonexamination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him. In *Bejoy Chand Patra v. State of W.B.*, AIR 1952 SC 105, this Court took the view that it is not sufficient for the accused merely to show that he has not been fully examined as required by Section 342 of the Criminal Procedure Code (now Section 313 in the new Code) but he must also show that such examination has materially prejudiced him. The same view was again reiterated by this Court in *Rama Shankar Singh v. State of W.B.*, 1962 Suppl(1)SCR 49.....”

Notwithstanding our conclusions as aforesaid that there has been no irregularity in procedure under Section 313 Cr.P.C. much less any prejudice caused to the appellants we shall now deal with the issue whether the appellants could at this stage raise objections with regard to the same. In *Sukha vs. State of Rajasthan*, 1956 SCR 288, it was observed as follows : “35. We have recently decided that we will be slow to entertain question of prejudice when details are not furnished; also the fact that the objection is not taken at an early stage will be taken into account. There is not a hint of prejudice in the petition filed by the appellants here in the High Court for leave to appeal to this Court; nor was this considered a ground for complaint in the very lengthy and argumentative petition for special leave filed in this Court. The only complaint about prejudice was on the score that there was no proper examination under Section 342 of the Criminal Procedure Code. We decline to allow this matter to be raised.”

Union Of India vs Sandeep Kumar⁹⁹ on 13 September, 2019

The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C.. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the

99. Criminal Appeal no (s). 1388-1389 of 2019

case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.”

Anand Ramachandra Chougule vs Sidarai Laxman Chougala¹⁰⁰ on 6 August, 2019

The Hon’ble Apex Court held that the fact that a defence may not have been taken by an accused under Section 313, Cr.P.C. again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In **Sunil Kundu v. State of Jharkhand**, (2013) 4 SCC 422, this Court observed:

“28... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probalilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.”

Samsul Haque vs The State Of Assam¹⁰¹ on 26 August, 2019

The Hon’ble Supreme Court has observed that: it is trite to say that the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. We may usefully refer to the judgment of three-Judge Bench of this court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused’s attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 of the Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed.

Prahlad vs The State Of Rajasthan¹⁰² on 14 November, 2018

The Hon’ble Apex Court held that the silence on the part of the accused in such a matter wherein he is expected to come out with an explanation leads to an adverse inference against the accused.

100. Criminal Appeal no (s). 1006 of 2010

101. Criminal Appeal no (s). 1905 of 2009

102. Criminal Appeal no (s). 1794-1796 of 2017

Reena Hazarika vs The State Of Assam¹⁰³ on 31 October, 2018

The Hon'ble Supreme Court observed that Section 313 Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) Cr.P.C.. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty-bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

The State Of Maharashtra vs Nisar Ramzan Sayyed¹⁰⁴ on 7 April, 2017

Hon'ble Supreme Court has reiterated the view expressed in Munna Kumar Upadhyay Vs. State of Andhra Pradesh, (2012) 6 SCC 174 as follows:

"It is a settled law that the statement under Section 313 Cr.P.C. is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him..."

Nagraj vs State Rep. By Inspector Of Police,¹⁰⁵ on 10 March, 2015

Hon'ble Supreme Court has reiterated the view expressed in Sher Singh vs. State of Haryana (2015) 1 SCR 29 as follows :

"In Sher Singh vs. State of Haryana (2015) 1 SCR 29 this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either under Section 313 Cr.P.C. or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to

103. Criminal Appeal no (s). 1330 of 2018

104. Criminal Appeal no (s). 865-866 of 2013

105. Criminal Appeal no (s). 1311 of 2006

answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the Statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination under Section 313 Cr.P.C..”

IV. EVIDENTIARY VALUE OF STATEMENT OF THE ACCUSED

As accused is not examined on oath in examination under Section 313 Cr.P.C. while explaining his version or his case against the evidence adduced by prosecution, his statements cannot be taken as a evidence against him. It is right of accused to keep silence or he may give any statement, but that statement does not bind him or the court is not allowed to prosecute him on false statements given by him in examination. **It is humbly submitted that oath cannot be administered to the accused while examination under Section 313 of Cr.P.C. because oath or affirmation bind the maker of the oath with God/Almighty or Soul of the person. Thus, voluntary nature of examination cannot be done under oath.**

The purpose, procedure and consequences of examination of accused was discussed elaborately by the Apex Court in **Sanatan Naskar & Anr vs. State of West Bengal**¹⁰⁶ it was observed that the answers by an accused under section 313 of the Cr.P.C are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of section 313 of the Cr.P.C. is wide and is not a mere formality. Let's examine the essential features of this sections and the principles of law as enunciated by Judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of sections 313 of the Cr.P.C. As already noticed, the object of recording the statement of the accused under section 313 of the Cr.P.C is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of

106. AIR 2010 SC 3507

the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. It is a mandatory obligation upon the Court and, besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a directed dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the inquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory part of the admission, if any, made by the accused. It can be taken into consideration in any inquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) of Cr.P.C explicitly provides that the answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against the accused in any other inquiry into or trial for, any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.P.C as it cannot be regarded as a substantive piece of evidence. The statements of accused can be used for proper appreciation of evidence.

In **Mohan Singh V. Prem Singh**¹⁰⁷ the Hon'ble Apex Court held: "The statement of the accused under Section 313 Cr.P.C is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. If the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 Cr.P.C. cannot be made the sole basis of his conviction."

As no oath is administered to accused and he is not subject to cross-examination for the statements given by him, those statements cannot be treated as evidence as contemplated in

107. AIR 2002 SC 3582.

section 3 of the Indian Evidence Act.

In **Dehal Singh v. State of H.P.**¹⁰⁸, the Hon'ble Apex Court observed that "Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfulness or otherwise of the case of the prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, the said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. The appellants have not chosen to examine any other witness to support this plea and in case none was available they were free to examine themselves in terms of Section 315 of the Code of Criminal Procedure which, inter-alia, provides that a person accused of an offence is a competent witness of the defence and may give evidence on oath in disproof of the charges. There is a reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined with reference to those statements. However, when an accused appears as a witness in defence to disprove the charge, his version can be tested by his cross-examination."

The statements given by accused in 313 Cr.P.C. cannot be used to fill up the laches on the part of the prosecution. In case prosecution evidence is not sufficed to give conviction to the accused then, inculpatory statements given by the accused cannot be taken into consideration.

In **Raj Kumar Singh @ Raju @ Batya vs State Of Rajasthan**,¹⁰⁹ the Hon'ble Apex Court held that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions.

An adverse inference can be taken against the accused only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself.

USE OF THE STATEMENT OF THE ACCUSED U/S 313 CR.P.C.

Section 313 of the Cr.P.C. contemplates the use of the statement made by the accused in the following ways: -

- (a) The court may take into consideration the statement made by the accused in the ensuing trial. The expression "may take into consideration" has given birth to some intricate legal questions. Should the answers be used only in favour of the accused? Should the answers be used both in favour of and against the accused, if so to what

108. AIR 2010 SC 3594

109. AIR 2013 SC 3150.

extent? These questions have not been finally settled by any authoritative judicial pronouncement. Some judicial decisions follow the reasoning that the answers given by the accused may be taken into consideration by the court but such answers should not be used to fill up the gaps in the prosecution evidence or to supplement thereto. On the other hand, some judicial decisions follow the reasoning that without there being any statutory restriction, the court is at liberty to use the incriminating answers against the accused and may even supplement the prosecution evidence for the purpose.

It is argued by Professor C.K. Allen¹¹⁰ that unsworn statements are evidence. He cites *R.v. Maybrick* wherein Mrs. Maybrick, the accused, in making an unsworn statement blundered and said “put the rope around her neck.” He states that this was “evidence of the highest importance, though to the great disadvantage of the prisoner.” Just because it was evidence against the accused, however, does not mean that unsworn statements are evidence for the accused.¹¹¹

Professors Cowen and Carter¹¹² also argued that unsworn statements are evidence. Their chief argument is based upon the reasoning of the court in *R v. Riley*, which has been exposed as fallacious. They further argue, “if the reason is that it is unsworn and untested, out statute law expressly recognizes that statements of fact may be evidence, although not given under oath.”¹¹³ Because an unsworn Statement is not under sanction of oath and does not undergo the test of cross-examination, it would certainly not meet many definitions of evidence¹¹⁴ However, that is not pertinent because as has been shown, the whole theoretical and historical purpose of the unsworn statement has been to allow the accused a chance to argue his case in a “statement” to the jury. Certainly, during period of laxity, the courts allowed the accused to introduce new facts into his “statement” which were not in evidence. These facts were not and are not evidence as some courts have mistakenly.

(b) If such statement tends to show that the accused has committed any other offence, such statement may be put in evidence for or against him in any such subsequent inquiry or trial for such other offence. The statement of the accused as envisaged by this provision of law would be mostly like admission, as defined U/s 17 of the Indian Evidence Act. If such statement is used in favour of the accused in the subsequent trial there may not be any hitch. But the problem may crop up when such statement is used against the accused in any other trial. Such statement being a piece of evidence is to be put to the accused during his examination U/s 313 Cr.P.C. in the subsequent trial. The accused may retract from his earlier admission on the plea that he had made a false statement

110. 69 Law Quarterly Review P. 22(1953)

111. *R.v. Shimmin*, 15 Cox. Cr. Case. 122, 124(1882) wherein a quotation from *R.v. Haines* is cited: “The prisoner's statement is evidence against him but for him.”

112. Cowen and Carrer, p. 205.

113. Cowen and Carter, at p. 216.

114. Wigmore, Vol.II, p. 684

to that effect. It would then lead to an anomalous situation. It may be urged that retracted admission does not lose its evidentiary character and the court can act upon such admission if it was true and voluntarily made. To ascertain the truth of admission, the court has to look into other evidence. If other evidence except such admission is not available on record, the problem would be further multiplied. Judicial prudence insists on independent evidence. When the accused makes a statement for which he owns no responsibility of speaking truth, such statement need not be given the status of evidence. It would be better to treat such statement as a previous statement of the accused and to use it for the purpose of corroboration or contradiction if such accused stands as a defence witness in the subsequent trial in which the relevancy of such statement would be in question.

SCOPE OF SECTION 313 (4)

Under sub-section (4) the statement of the accused may only be taken into consideration, so far as the inquiry or trial in which the statement is made, is concerned. A statement under this section does not take the place of evidence.¹¹⁵

Their Lordships of Supreme Court in **Bibhuti v. State of W.B.**¹¹⁶ has observed that the statement of the accused cannot be used as evidence for the prosecution in the case in which the statement is made, but the answer made be put in evidence for or against him in other inquiries or trial for other offences which such answer may tend to show that he has committed e.g. if in a murder trial the accused says that he concealed the dead body but did not commit the murder. In a subsequent trial for an offence under Section 201, I.P.C., the above statement of the accused may be used.

Ever since the decision of **Hare Singh V. State of M.P.**¹¹⁷ there is a catena of authorities¹¹⁸ of Supreme Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 313, the same cannot be used against him.

The proposition of law that the statement under Section 313 of the Code is not the evidence in the strict sense of the term and conviction cannot be based merely on the ground that the accused could not explain the circumstances. But once the prosecution has adduced evidence to bring home the charge, if the accused makes a deliberate false statement, the Court can reasonably conclude that the accused has left unexplained circumstances put to him.¹¹⁹

A full bench of **Allahabad High Court in Roshan Lal v. State of U.P.**¹²⁰ observed that the answers given by an accused under Section 313(2) are not on oath and they are optional. It is

115. Vijendra JitAyodhya Pd. Goel v. State of Bombay, A.I.R 1935 S.C 247

116. 116 1969 Cri.L.J 654

117. AIR 1953 S.C 468.

118. Shamu Balue Changule v. State of Maharashtra, A.I.R 1976 S.C 357:

119. Bablu Mahanto v. State of W.B.,2005(3) Crimes 415(Cal)(DB)(at page 424).

120. 1975 Cri.L.J.1877:

open to the accused to refuse to answer the questions put to him. He is free to make a statement in favour of himself and consequently, it cannot be said that he is compelled to make a statement against himself. Of course, it is open to the court to take into consideration the answers given by the accused as also his refusal to answer the questions put to him, while determining his guilt but they cannot be a substitute for the prosecution evidence on which alone an accused can be held guilty. These matters stand on the same footing as the giving of finger impressions or specimen writing or of signatures by an accused person and though they may amount to furnishing evidence in the larger sense, they are not included with the expression “to be a witness.”

Merely because an explanation given by the accused is not convincing no adverse inference can be drawn against the defence.¹²¹

STATEMENT OF AN ACCUSED CANNOT BE USED AGAINST A CO-ACCUSED

Ordinarily, the statement of an accused cannot be used against a co-accused,¹²² but in a case where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons about their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact under Section, 10 Evidence Act, as against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of conspiracy is, however, limited to two circumstances, namely: (i) that the act shall be about their common intention; and (ii) in respect of a period after such intention was first intended by anyone of them.¹²³ Under Section 30, Evidence Act, confession of a co-accused can be taken into consideration but it is not a substantive evidence.¹²⁴ However, it can be used in support of other evidence.¹²⁵

The statement made by an accused is to be considered by the Court which may draw such inference from the answer or refusal to answer as it thinks fit. But the court is not entitled to draw any inference against a co-accused from the answer of one accused in response to question put at the trial. Evidence within the meaning of Section 313 would mean legal and admissible evidence.¹²⁶

INFERENCE FROM REFUSAL TO ANSWER OR GIVING FALSE ANSWER

Before enactment of the sub-section (3) of the present Section 313, Code of Criminal Procedure, the court was at liberty to draw such inference from refusal of accused to answer or giving a false answer to the questions put to him, but now the provision of sub-section 2 of the old Section 342 enabling the court to draw an inference from an answer and or refusal to answer has

121. Abdul Karim Madar Sabha vs. State of Mysore, 1979 Cri.L.J. 1123:

122. Raj Paul v. State of H.P., 1985 Cri.L.J 1501:

123. Ashok Datta Naik v. State, 1979 Cri.L.J. N.O.C 95(Goa).

124. A.I.R 1957 S.C 381; Man Ali v. State, 1970 Cri.L.J. 603.

125. Thimma v. State of Mysore, 1970 S.C.C.(Cri.)320.

126. S.K.Jahir Mohd. v. State, (1985) 60 C.L.T. 91

been omitted from sub-section (3) of the present Section 313 on the ground that it may offend Article 20(3) of the Constitution.

By now it is a well-established principle of law that in a case of circumstantial evidence where an accused offers a false answer in his examination under Section 313, Cr.P.C. against the established facts that can be counted as providing a missing link for completing the chain.¹²⁷

When in case of murder based on circumstantial evidence then false answers are given by accused in his examination under Section 313 Cr.P.C then such false answers offer an additional link in a chain of circumstances to complete chain.¹²⁸

The Hon'ble Apex Court in **State of Maharashtra v. Suresh**¹²⁹ has held that a false answer offered by the accused when his attention was drawn to any inculpatory circumstance would render such circumstance as capable of inculpatory him. The Court also held that in such a situation a false answer can also be counted as providing "a missing link" in completing the chain. If the said principle in law is to be accepted, the statement of the appellant made under Section 313, Cr.P.C being palpably false and there being cogent evidence adduced by the prosecution to show that the appellant had given two other versions as to the incident, the court will have to proceed on the basis that the appellant has not explained the inculpatory circumstances established by the prosecution against him which would form an additional link in the chain of circumstances.¹³⁰

In-State (Delhi Administration) v. Dharam¹³¹ it was held as under: "That it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellant Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him."

If prejudice was caused on account of inadequate compliance with Section 313, such an irregularity would entail retrial. But before a retrial can be ordered, the court must be clearly satisfied with prejudice having been caused.¹³²

In **Moseb Kaka Choudhary v. State of W.B.**¹³³ their Lordships of Supreme Court observed that a conviction is not to be set aside merely on inadequate compliance with Section 313 unless prejudice is caused.

127. Antony D'Souza & Others v. State of Karnataka, 2003(1) Crimes 100(S.C).

128. Dharam Dev Yadav v. State of U.P., 2014 Cri L.J 2371(S.C).

129. 2001 (1) S.CC 471.

130. Mani Kumar Thapa v. State of Sikkim, 2002(3) 138(SC)

131. 2001(10) SCC 372

132. Kedar Nath Bejor v. State of W.B., AIR 1954 SC 660:

133. A.I.R 1956 S.C 536:

PROVISION FOR WRITTEN STATEMENT

The practice of filing a written statement by the accused is to be deprecated, though it may not be a ground for interference unless prejudice is caused.¹³⁴

However, the Lordships of Supreme Court in **Har Bhajan Singh Vs. State of Punjab**¹³⁵ while summing up the whole law, made these observations. *“It has been pointed out, are not to be read as laying down a general principle that the filing of a written statement by an accused person should be deprecated and the plea raised by him in such a written statement is not to be seriously considered as they are result of legal advice and are no better than afterthoughts. In many cases, the accused person would prefer to file a written statement and give a connected answer to the question raised by the prosecution evidence. Section 243(1) indeed even provides that if an accused person puts in a written statement, the Magistrate shall file it with record. If the written statement is filed after a long delay and contains pleas which can otherwise be legitimately regarded as matter of afterthought, that no doubt would effect the values of the pleas taken in written statement. “It would not be possible to lay down a general rule that the written statement filed by an accused should not receive the attention of the court because it is likely to have been influenced by legal advice. Such a distrust of legal advice would be entirely unjustified.”*

Such right of the accused to file a written statement is available only in a warrant case but not in summons case.¹³⁶

EFFECT OF NON COMPLIANCE OF SECTION 313 Cr.P.C.

Non-examination of accused under section 313 of Cr.P.C does not vitiate the entire proceedings or case of the prosecution. Accused can make good of the same even at the appellate stage. It can not be the sole base for conviction unless accused shown miscarriage of justice.

In **Gyan Chand and Others v. State of Haryana** Plea to non-compliance with the provisions of section 313, Cr.P.C. was taken for the first time before the Supreme Court. But there was no material showing as to what prejudice has been caused to the accused persons if facts of conscious possession were not put to them. Thus the court held that the trial was not vitiated for non-compliance of the provisions of section 313, Cr.P.C. Mere defective/improper examination under section 313, Cr.P.C. is no ground for setting aside the conviction of the accused, unless it has resulted in prejudice to the accused. Unless the examination under section 313, Cr.P.C. is conducted in a perverse way, there cannot be any prejudice to the accused.¹³⁷

The expression “failure of justice” is relative. It must be determined based on the facts of a particular case. That is to say, it looks into whether the accused had objected to the irregularity at

134. Tikeswar Singh vs. state of Bihar, AIR 1956 S.C 238(142).

135. 1966 Cri.L.J 82:

136. Bippin Textile Dying and Printing Industries v. State of U.P. 1986 All:

137. SC Bahri v. State of Bihar; AIR 1994 SC 2420; Shobhit Chamar v. State of Bihar; AIR 1998 SC1693

the appropriate stage of the trial. If the accused raised objection but the trial court overlooked it and proceeded with the trial, the appellate court must go into the question of failure of justice. It must scan the facts of the case and find out if any prejudice has been caused to the accused by such irregularity. Where in the opinion of the appellate court, there is real prejudice to the accused, the finding must be reversed and a step further as deemed proper may be taken by it. Even If the accused does not raise the question of “failure of justice”, the matter is not closed for the appellate court or revisional court. It may suo-moto take cognizance of the irregularity that has perverted the justice. To find out whether the prejudice has been caused to the accused, the court may look into the following circumstances: -

- i. Whether the accused has had a fair trial?
- ii. Whether the accused knew what he was being tried for?
- iii. Whether the allegations and facts were explained to him fairly and clearly? and
- iv. Whether he was given a fair and full chance to defend himself?

If the answers to this proposition are in the affirmative, the only conclusion could be that there had been no prejudice or failure of justice. If the answers are negative, the trial must necessarily be treated as vitiated. If there is reasonable doubt regarding the answers, the benefit of doubt must go to the accused. The effect of non-compliance of section 313 Cr.P.C. would be decided as per the guideline enumerated above.

INSTANCES OF NON COMPLIANCE OF SEC. 313 OF Cr.P.C.

There is non-compliance of section 313 Cr.P.C. in the following situations: -

- (a) Where the accused is not examined at all after the closure of the prosecution case. On this score alone the appellate court may not reverse the finding of the trial court. Although it appears to be a gross irregularity, still then the appellate court has to go into the evidence to judge the real prejudice caused to the accused.

If the evidence of prosecution appears to be cogent enough to warrant the finding reached by the trial court, still then the accused should be allowed to offer his explanation. Justice is not only done but it must appear to have been done. In any such contingency, the appellate court before reversing the finding may remand the case to the trial court to conduct the trial afresh from the stage where the irregularity has been committed. Or the appellate court may ask the defence counsel to offer the explanation if any on behalf of the accused and consider the explanation along with the evidence on record to decide the matter.

- (b) Where there is defective examination of the accused, there is non-compliance of section 313 Cr.P.C. Defective examination may be of following types: -

- Where different questions are clubbed together and put to the accused in a composite form and the questions lumped together correspond to the unconnected fact situations and any answer thereto might partially explain the fact situation or any attempt to answer the whole questions would be self-contradictory, then it can be safely concluded that the accused is prejudiced thereby. In this case, the appellate court may be doing well to remand the case to the trial court to decide the case afresh after examining the accused in conformity with the statutory provisions and judicial precedents.
 - Where the questions put to the accused are not directly borne out of evidence or the questions put to the accused are inferential or inquisitorial, there is non-compliance of section 313 Cr.P.C. Answers elicited by such examination are clearly in violation of the spirit of the provision of law. If such answers are made the foundation of the 'finding', it can be concluded that the accused has been prejudiced thereby. The appellate court must eschew such answers from consideration and find out if the finding of the trial court can still be maintained. Irregularity of this nature may not come within the purview of section 465 Cr.P.C. Where the finding of the trial court is solely based on the answers of the accused without there being any evidence to that effect, it is incurable irregularity. Under this situation, the proceeding is vitiated. The appellate court has to reverse or alter the finding.
- (c) Where the trial court omits to put material evidence to the accused and makes use of such evidence in working out the conclusion, there is non-compliance of Section 313 Cr.P.C. In such contingency the appellate court is left with three options: -
- It may remand the case to the trial court to make fresh examination of the accused and to decide the case afresh, or
 - It may ask the defence counsel to explain the question not put to the accused in his examination U/s 313 Cr.P.C., or
 - It may completely eschew that evidence from consideration

However, section 465 Cr.P.C. applies to the case, which is finally disposed of. This section is not intended to apply to a case where the petitioner has approached the High Court immediately after an order contrary to the express provision of the code has been passed by the trial Magistrate. If the Superior Court finds that the Magistrate has contravened some provisions of the code then it would be proper, that the Magistrate should be immediately directed to act in accordance with law rather than to allow the error to persist till the entire trial is over and then ask the petitioner to show that by the non-observance of the provision, any prejudice has been caused to him and then to decide if the conviction is to be set aside and retrial to be ordered. Similarly, where during the trial the irregularity has been pointed out before the trial court, the trial court

should not press section 465 Cr.P.C. into service and opine that such irregularity would be remedied by this section.

MALIMATH COMMITTEE'S REPORT ON EXAMINATION OF ACCUSED¹³⁸

The committee on Reform of Criminal Justice System popularly known as Malimath Committee also expressed its view on this controversy or we can say grey area of law. The committee has the view that the right to silence is a fundamental right guaranteed to the citizen under Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. As the accused is in most cases the best source of information, the Committee felt that while respecting the right of the accused a way must be found to tap this critical source of information. The Committee, further felt that without subjecting the accused to any duress, the court should have the freedom to question the accused to elicit the relevant information and if he refuses to answer, to draw an adverse inference against the accused. At present the participation of the accused in the trial is minimal. He is not even required to disclose his stand and the benefit of a special exception if any which he claims. This results in great prejudice to the prosecution and impedes the search for truth.

The Committee has therefore felt that the accused should be required to file a statement to the prosecution disclosing his stand. For achieving this, the following recommendations to be made:

Section 313 of the Code may be substituted by Section 313-A, 313-B and 313-C on the following lines:

- (i) 313-A In every trial, the Court shall, immediately after the witnesses for the prosecution have been examined, question the accused generally, to explain personally any circumstances appearing in the evidence against him.
- (ii) 313-B: Without previously warning the accused, the Court may at any stage of trial and shall, after the examination under Section 313-A and before he is called on his defence put such questions to him as the court considers necessary with the object of discovering the truth in the case. If the accused remains silent or refuses to answer any question put to him by the court which he is not compelled by law to answer, the court may draw such appropriate inference including adverse inference as it considers proper in the circumstances.
- (iii) 313-C: No oath shall be administered when the accused is examined under Section 313-A or Section 313-B and the accused shall not be liable to punishment for refusing to answer any question or by giving a false answer to them. The answers given by the accused may be taken into consideration in such inquiry or trial, and put

138. Committee on Reform of Criminal Justice System popularly known as Malimath Committee

in evidence for or against him in any other inquiry into, or trial for, or any other offence which such answers may tend to show he has committed.

The Committee further suggested suitable provisions should be incorporated in the Code on the following lines: -

- (i) Requiring the Prosecution to prepare a 'Statement of Prosecution' containing all relevant particulars including, date, time, place of the offence, the part played by the accused, motive for the offence, the nature of the evidence oral and documentary, names of witnesses, names and similar particulars of others involved in the commission of the crime, the offence alleged to have been committed and such other particulars as are necessary to fully disclose the prosecution case.
- (ii) 'Prosecution statement' shall be served on the accused.
- (iii) On the charge being framed the accused shall submit the 'Defence Statement', within two weeks. The Court may on sufficient cause being shown extend the time, not beyond 4 weeks.
- (iv) In the defence statement the accused shall give a specific reply to every material allegation made in the prosecution statement.
- (v) If the accused pleads guilty he need not file the defence statement.
- (vi) If any reply is general, vague or devoid of material particulars, the Court may call upon the accused to rectify the same within 2 weeks, failing which it shall be deemed that the allegation is not denied.
- (vii) If the accused is claiming the benefit of any general or special exceptions or the benefit of any exception or proviso, or claims alibi, he shall specifically plead the same, failing which he shall be precluded from claiming the benefit of the same.
- (viii) Form and particulars to be furnished in the prosecution statement and defence statement shall be prescribed.
- (ix) If in the light of the plea taken by the accused, it becomes necessary for the prosecution to investigate the case further, such investigation may be made with the leave of the court.

The Committee further recommended that:

- (i) On considering the prosecution statement and the defence statement the court shall formulate the points of determination that arise for consideration.
- (ii) The points for determination shall indicate on whom the burden of proof lies.
- (iii) Allegations that are admitted or are not denied need not be proved and the court shall make a record of the same.

Section 313 of the Code confers power on the court to examine the accused only to explain any circumstances appearing in the evidence against him. Whereas Clause (a) of Sub-Section (1) of Section 313 empowers the court to put questions at any stage to the accused as it considers necessary, Clause (b) of Sub-Section (1) requires the court to question the accused generally on the case after the witnesses for the prosecution have been examined. Sub-Section (2) of 313 provides that no oath shall be administered to the accused when he is examined under Sub-Section (1). Sub-Section (3) provides that the accused shall not be liable for punishment for refusing to answer the questions put to him or for any false answers.

Sub-section(4) provides that the answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, or any other offence which such answers may tend to show he has committed. It does not empower the court to draw any inference when the accused remains silent or refuses to answer the question put to him.

If, in answer to the question put to the accused under Section 313 he voluntarily makes a self-incriminatory statement it can be taken into consideration for or against him as provided in Section 313(4). As no compulsion is involved Article 20(3) is not violated. If any incriminatory statement is voluntarily made by the accused in answer to the question put by a police officer, it cannot be regarded as one made under compulsion, vide **AIR 1962 SC 1831, R.K. Dalmia Vs. Delhi Administration. In AIR 1965 SC 1251, State of Gujarat Vs. Shyamlal Mohanlal Choksi** the Supreme Court has upheld the validity of Section 27 of the Evidence Act which renders the portion of the statement of the accused that leads to the discovery of any fact admissible in evidence.

The common features discernible from the analysis of some of the statues in India in the previous paragraphs may be summarized as follows:

- (i) Article 20(3) does not prohibit the Investigating Officer from putting question to the accused to elicit information about the commission of the crime and his involvement.
- (ii) The court can put any questions to the accused during trial to allow him to explain the circumstances appearing against him in the evidence.
- (iii) The accused has a right to answer or refuse to answer any question put to him during investigation or trial.
- (iv) The court can draw appropriate inferences from the answers given by the accused when examined under Section 313 of the Code.
- (v) There is no express provision empowering the court to draw an adverse inference against the accused on his failure to answer the questions put to him.
- (vi) On the accused failing to rebut the statutory presumption the court can proceed to treat the presumption as absolute

In criminal cases, the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution because the accused is presumed to be innocent until the guilt is established by the prosecution. Section 105 of the Evidence Act is an exception to this general rule and provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing his case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code or any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. It releases the prosecution of the burden and necessity of proving the absence of facts which might bring the case within the general or specific exception or exempted or proviso under the IPC or other criminal law. This Section involves both (i) the presumption and (ii) a rule as to the burden of proof following it. As the court is required to presume the non-existence of circumstances bringing the case within the exception, the accused who relies on its existence, has to prove the same. There is no law requiring the accused to plead before he can claim the benefit of any general or special exceptions in the Penal Law.

At present, he may take such a plea after the conclusion of the prosecution evidence, when he is examined under section 313 of the Code. If at that stage the benefit of exception is claimed the prosecution will be prejudiced as it would be deprived of an opportunity of leading evidence to negate the claim of the accused. In our system, it is the prosecution that furnishes the accused copy of the allegations and the supportive materials collected during the investigation. The accused is not required to disclose what his defence is going to be. He may spring a surprise at any stage. This is not fair and hampers dispensation of justice. So far as documents produced by the prosecution or the accused are concerned, section 294 of the Code provides that the opposite party can be called upon to admit or deny the genuineness of each document and if not disputed, to admit the same without proof. Logically the same principle can be extended to the allegations making out the case of the prosecution.

As the quest for the truth shall be the guiding star of the Criminal Justice System any impediments to discovery of truth have to be eliminated. Therefore it is necessary to require the accused to specifically plead at the earliest stage of the trial of the case and disclose the general or special exception he claims. After the charge is framed and supporting allegations called the 'Prosecution Statement' are served on the accused, he should be required to file his reply called the 'Defence Statement' in which he should state as to which of the allegations he accepts and which he does not. He should specifically plead the general exceptions in the IPC or any special exception or proviso contained in any other part of the Code or any law defining the offence which he claims, failing which he shall not be entitled to claim the benefit of such exceptions. Along with the defence statement, the accused should file the documents on which he relies and the list of witnesses whom he proposes to examine.

V. CONCLUSION

The law of the examination of the accused showcases interplay of some of the fundamental principles in evidence and criminal procedure. The provisions regarding the examination of the accused play an important role in the criminal justice system.

To implement effectively the provisions of the Indian Constitution including the natural justice principle of audi alteram partem on the recommendations of 41st Report of the Law Commission of India Section 313 of Cr.P.C. was included in The Code of Criminal Procedure, 1973. Section 313 Cr.P.C which deals with the examination of the accused persons is based on the fundamental principle of fairness.

The provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right to the accused to have an opportunity to explain such incriminatory material appearing against him. Trial Court must not treat this provision as a mere formality as it carries much importance in the appreciation of evidence. The Hon'ble Apex Court expressed concern over use of this provision as a mere formality. Some of the decision of the Hon'ble Court has been circulated to all the courts of this Country for effective implementation of this Section.

Recently this section was amended and a provision was made that the court may take help of the prosecution in the framing of the question. It is also to be noted that the Court must be cautious while framing questions for the examination of the accused under Section 313 of the Cr.P.C. Nature of the question must be explanatory and not to fulfil the lacuna of the prosecution case.

Section 313 Cr.P.C. confers a valuable right upon the accused to establish his innocence by explaining incriminating circumstances and can well be considered, beyond a statutory right, as a constitutional right to a fair trial under Article 21 of the Constitution. It constitutes a valuable right of an accused for access to justice and eliminates the likelihood of the prejudice that may be caused to him.

The present law of examination of accused at the stage of enquiry or trial which is in the first place is discretionary whereas on the other side it is mandatory since the evidentiary value of the statement of accused is almost negligible, therefore, the law should be so framed in harmonisation with the recommendation of Malimath Committee that accused should also be made accountable for his line of defence taken at the investigation or trial. In a criminal trial under the inquisitorial system, the accused is being examined by police at the stage of investigation and asked to explain the accusation against him. But in practice, despite getting his explanation on the accusations the investigating officer used to mention a general paragraph in the case diary that the accused has not satisfactorily explained the accusation. To find out the truth should be the aim of a criminal trial. So the statement of an accused and his line of defence must be elaborately jotted down in the case diary and if any evidence appears against the

accused, the accused must have been cast duty to explain the circumstances. Because an accused is the best person who knows that he or she is guilty or not.

It is also a general practice in this State to record the confession of the accused in cases having no evidence in the format of recording statement under section 313 Cr.P.C. [Schedule-XLII High Court [(M) 3 (old) (M) 85]] particularly in Magisterial trial cases which is not legal and proper, Since the examination of the accused under section 313 Cr.P.C. is only limited to explain incriminating circumstances against the accused in evidence, therefore, the factum of compromise should not be recorded under Section 313 of Cr.P.C. However, from the above discussion, it is clear that the provision regarding the examination of accused fulfils the need of the hour as per natural justice and fair trial.

In every criminal trial, it is not essential to examine the accused under Section 313 of the Cr.P.C., it is only necessary when during prosecution evidence some incriminating circumstances appearing against the accused. However, the accused has right to keep silence.

The prevalent practice of asking questions like whether you have heard the evidence of witnesses is not serving any purpose because the law requires that every evidence must be taken either in presence of the accused or his counsel.

Although the object of examination of accused under Section 313 of Cr.P.C. is a direct discourse between accused and court, sometimes this creates hardship to the accused who is residing outside the jurisdiction of the Court or suffering from some ailments. To meet out such contingency suitable amendments are required to made for recording the Statement of accused under section 313 Cr.P.C. through electronic means such as video conferencing etc or by supplying such questions in writing to the accused through his counsel and obtaining their responses in the form of a written statement signed by the accused with certain conditions. The accused should be examined through video-conferencing in such cases.

The examination of the accused during trial play a vital role in the quest for justice. Hence, the laws relating to it ought to develop with the changing needs of time and technology.

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Topic No. –36

***Issues related to Section 319 of the Cr.P.C. in the context of
Hardip Singh's and Brajendra Singh's case.***

By
Sri Brajesh Kumar Singh,
Additional District & Sessions Judge,
Danapur, Patna.

Sri Brajesh Kumar Singh,
Additional District & Sessions Judge, Danapur, Patna.

**Topic : Issues related to section 319 of the Cr.P.C. in the context of Hardip singh's and
Brajendra Singh's case.**

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Issues related to section 319 of the Cr.P.C. in the context of Hardip singh's and Brajendra Singh's case.

INTRODUCTION

The criminal jurisprudence is premised on one of the most important presumptions, i.e. the presumption of innocence meaning thereby every man is presumed to be innocent unless proven to be guilty. However, the above presumption is not absolute now a days. Due to the advent of new challenges before humanities and also because of the advancement of science and technology, new challenges emerged leading the legislatures to invoke the above principle of presumption by explicitly providing for the presumption of guilt instead of a presumption of innocence in statutes, mostly in welfare, terrorism and preventive statutes. In aforesaid statutes, certain statutory presumptions about a certain class of offences have been provided against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. Further, the constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice-making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at same time the Constitution through different provisions gives equal protection to victims and to the society at large to ensure that the guilty do not get away from the clutches of law. The legislatures, administrators and judiciary are not oblivious to these competing theories. Thus, for the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") indicating as to how the courts should proceed to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to the book under the law. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of a fair trial and to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C..

It would be pertinent to reproduce the text of Section 319 of Cr.P.C. for the ease of reference:-

Power to proceed against other persons appearing to be guilty of offence Section 319 CrPC

319. Power to proceed against other persons appearing to be guilty of offence:—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

- (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
- (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

A close perusal of Section 319 reveals that Section 319 of the Cr.P.C. is premised on two principles of law, they are (1) that the judge is condemned when guilty is acquitted which is the English expression of the Latin doctrine 'judex damnatur cum nocens absolvitur' and (2) that the court has to do justice by punishing the real culprit.

In this article, I would like to discuss some authoritative pronouncements on the topic of 'Power to proceed against other persons appearing to be guilty of offence' under the purview of section 319 of the Cr.P.C.. The parameters of exercise of power under Section 319 Cr.P.C. has been explained by the Courts time and again. Needless to say that there is a catena of rulings on this point and it is difficult to refer to all those rulings, and therefore, I will restrict myself on two most important rulings of the Hon'ble Supreme Court i.e. **Hardeep Singh v. State of Punjab, (2014) 3 SCC 92** and **Brijendra Singh v. State of Rajasthan, (2017) 7 SCC 706** in this article for ready reference.

ISSUES INVOLVED IN HARDEEP SINGH V. STATE OF PUNJAB, (2014) 3 SCC 92

In **Hardeep Singh**, the Constitution Bench of the Hon'ble Supreme Court had the occasion to consider in detail the scope and ambit of the powers of the Court under Section 319 Cr.P.C., the object and purpose of Section 319 Cr.P.C., etc. In the said case, the following five questions fell for consideration before the Hon'ble Supreme Court: (SCC p. 112, para 6)

“6. ... 6.1.(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

6.2. (ii) Whether the word “evidence” used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

6.3. (iii) Whether the word “evidence” used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during a trial?

6.4. (iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

6.5. (v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?”

The Constitution Bench summed up the answers of the above questions in the following words:—

“117. We accordingly sum up our conclusions as follows:

Questions (i) and (iii)

— What is the stage at which power under Section 319 Cr.P.C. can be exercised?

and

— Whether the word “evidence” used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during a trial?

Answer-

117.1. In *Dharam Pal case* [*Dharam Pal v. State of Haryana*, (2014) 3 SCC 306: AIR 2013 SC 3018], the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till “evidence” under Section 319 Cr.P.C. becomes available for summoning an additional accused.

117.2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C., and Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C.. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word “evidence” in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—

Whether the word “evidence” used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

Answer-

117.4. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)—What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

117.5. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge [Ed.: The conclusion of law as stated in para 106, p. 138c-d, may be compared: “Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction”. See also especially in para 100 at p. 136f-g.] . The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)—Does the power under Section 319 Cr.P.C. extend to persons not

named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

ISSUES INVOLVED IN BRIJENDRA SINGH V. STATE OF RAJASTHAN, (2017) 7 SCC 706

The judgment in Brijendra Singh was delivered by division Bench authored by Dr A.K.Sikri. The division bench held interalia the following:-

“ 9. The powers of the Court to proceed under Section 319 Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that the real culprit should not get away unpunished. A Constitution Bench of this Court in Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] explained the aforesaid purpose behind this provision in the following manner: (SCC pp. 112 & 114-16, paras 8, 12, 13 & 19)-----

10. It also goes without saying that Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Sections 207/208 Cr.P.C., the committal, etc. which is only a pre-trial stage intended to put the process into motion.

11. In Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86], the Constitution Bench has also settled the controversy on the issue as to whether the word “evidence” used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during the trial. It is held that it is that material after cognizance is taken by the court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court. The word “evidence” has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the

power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that “evidence” under Section 319 Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the court which can be gathered from the reasons recorded by the court in respect of complicity of some other person(s) not facing trial in the offence.

13. In order to answer the question, some of the principles enunciated in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some “evidence” against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The “evidence” herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C.. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

CONCLUSION

Having analyzed the aforementioned two judgments pronounced by the Apex court and having perused the text of Section 319 of the Cr.P.C. vis a vis scheme of the Cr.P.C., it can be concluded that Section 319 Cr.P.C. is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial because of the reason that the court is the sole repository of

justice and a duty is cast upon it to uphold the rule of law. It is a human experience that the desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. As the court is duty-bound to uphold the rule of law, this upholding the rule of law requires fair trial which presupposes balancing the conflicting interests of the accused vis a vis society at large. Given in the above background, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. It is never to be forgotten that the power under Section 319 Cr.P.C. is a discretionary and extraordinary power that is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. As per Hardeep Singh, power under section 319 of the Cr.PC is not to be exercised because the Magistrate or the Sessions Judge believes that some other person may also be guilty of committing that offence. One should not forget that the Supreme Court issued a caveat to the trial court that such power should be exercised only where strong and cogent evidence appears against a person from the evidence led before the court and not in a casual and cavalier manner. I may conclude this article with an observation that powers under section 319 of Cr.P.C is to be invoked not as a matter of course but where the invocation of such power is imperative to meet the ends of justice.



Topic No. – 37

Framing of charges, discharge, and alteration of charge.

By
Sri Gaurav Kamal,
Officer on Special Duty (Computerization),
Patna High Court.

Sri Gaurav Kamal,
Officer on Special Duty (Computerization), Patna High Court.

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Framing of charges, discharge, and alteration of charge¹

“Where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou should not eat?”²

“Fortescue J. in *R. v. Chancellor of Cambridge*³, in 1973 quotes a perhaps fanciful view which holds that the principle of *audi alteram partem* was invoked in the investigation of the first offence on record that was committed in the Garden of Eden. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.”⁴

PART I

Basic Principles and Procedure Regarding charges:

The fundamental requirement of a fair trial in criminal jurisprudence is to give precise information to the accused as to the accusation against him. This is vitally important to the accused in the preparation of his defence. In all trials under the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.) the accused is informed of the accusation at the beginning itself. In case of serious offences, the Code requires that the accusations are to be formulated and reduced to writing with great precision & clarity. This “charge” is then to be read over and explained to the accused person⁵

Charge is an accusation against a person for the commission of an offence. Charge serves the purpose of notice or intimation to the accused, drawn up according to specific language of the law, giving clear and unambiguous or precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial⁶.

Every charge shall state the section of the law along with the name of the offence, if any, which the accused is charged and shall also state the time, place and the manner of the occurrence as well as the person against whom or the thing in respect of which the offences has been

1. Gaurav Kamal, O.S.D. (Computerisation), Patna High Court.

2. Bande, T. M, The role of principles of natural justice in Indian legal system, available at, https://shodhganga.inflibnet.ac.in/bitstream/10603/217054/7/07_chapter%202.pdf. (last visited at 1.09.2020)

3. Ibid

4. Ibid

5. This procedure is followed in trial of warrant cases and trial before Courts of Sessions. See, Ss. 240(2), 246(2) and 228(2) of the Cr.P.C..

6. V.C. Shukla v. State through CBI, 1980 Cri. L.J. 690 at Page 732. See also, Nayak

Sugandha, Framing Of Charges: An Overview - Criminal Law – India, available at <https://www.mondaq.com/india/crime/257582/framing-of-charges-an-overview>. (last visited on 02.09.2020). See also, K.N. Chandrashekhara Pillai, R.v. Kelkar's Criminal Procedure (Eastern Book Company, sixth edition, 2016).

committed. The provisions regarding charge are contained in Sections 211 to 224 and Section 464 of the Cr.P.C.. By framing the charge the Court formally recognizes the offences for which the accused will be charged. Framing the charge is the simple recognition of the offences for which the accused will be tried in the Court. Previous conviction of the person charged with, if any, may also be mentioned because it directs severe punishment. For every offence, there shall be a separate Charge and the charge be tried separately except in the cases mentioned in the section. In one series of acts so connected as to form the same transaction, more offences than one are committed by the same person, the person may be charged with and tried at one trial for every such offence. If the offences so committed falls within the definition the accused may be charged with both offences and tried at one trial for each of such offences. On the framing of charge, the same be read over and explained to the accused and his reply shall have to be recorded in the prescribed form and the Magistrate shall sign the same. The matter of framing of the charge may also be noted in the order sheet of the case.

As stated above, the essential requirement of a fair trial in criminal cases is a precise statement of the accusation. The code seeks to secure this requirement, **first**, by laying down in Sections 211 to 214 of Cr.P.C. as to what a charge should contain; and **thereafter** stipulating in Section 218 of Cr.P.C. that for every distinct offence there should be a separate charge; and **lastly**, by laying down in the same section that each charge should be tried separately so that what is sought to be achieved by the first two rules is not nullified by a joinder of numerous & unconnected charges⁷.

➤ **Section 211 & Section 212 specifies about Contents of the Charge and mentioning of particulars as to time and place of the alleged offence in the charge.**

This rule is to an extent relaxed in a case of criminal breach of trust or dishonest misappropriation. When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates. It is obvious that the relaxation given by the above rule is applicable only in case of criminal breach of trust or dishonest misappropriation and not in case of any other offence like theft, falsification of accounts under Section 477-A of the IPC, cheating etc.

This rule is intended to cover cases of persons who showed a deficiency in the accounts with which they were entrusted but who could not be shown to have misappropriated this or that specific sum⁸.

7. Sanatan Mondal v. State, 1988 Cri. L.J. 238 (Cal)

8. Shyam Sunder v. Emperor, AIR 1932 Oudh 145 at Page 147.

- **Section 213 speaks about; when manner of committing offence must be stated:**

When the nature of the case is such that the particulars mentioned in sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

- **Section 214 gives a rule for interpreting the words used in the charge: It provides that in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.**

- **Section 218 reads as Separate charges for distinct offences:**

The object of section 218 is to save the accused from being embarrassed in his defence if distinct offences are lumped together in one charge or in separate charges & are tried together. Another reason is that the mind of the court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the court trying him on one of the charges not to be influenced by the evidence against him on the other charges. The strict observance of Section 218(1) may lead to multiplicity of trials, therefore exceptions, in suitable cases, have been provided by Section 218(2) in Sections 219, 220, 221 & 223. The effects of non-compliance with provisions regarding charge would be considered later in this article. It would however be useful to allude to the decision of the Hon'ble Supreme Court in the context of non-compliance with Section 218. In every case, in which a departure from the requirements of Section 218 has occurred, the question before the court is, whether the omission to frame the required charge has or has not in fact occasioned a failure of justice by prejudicing the accused in his defence, & whether he has thus been deprived of a fair trial⁹.

- **Power of Court to order separate trial in cases where joinder of charges or offenders is permissible**

The basic rule regarding charge is that for every distinct offence there shall be a separate charge & for every such charge there shall be a separate trial. The only exceptions recognized are contained in Sections 219, 220, 221 & 223 of Cr.P.C.. Therefore separate trial is the rule and the joint trial is an exception. The sections containing the exceptions are only enabling provisions. A court has got the discretion to order a separate trial even though the case is covered by one of the exceptions enabling a joint trial¹⁰. A joint trial of a very large number of charges is very much to be deprecated even though it is not prohibited by law. A separate trial is always desirable whenever there is a risk of prejudice to the accused in a joint trial. The Hon'ble Supreme Court of India has taken the view that it is the option of the court whether to resort to Section 219, 220 & 223 of the

9. Willie Stanley v. State of MP, AIR 1956 SC 116.

10. Chunnoo v. State, AIR 1954 ALL 795.

Code or whether to act as laid down in Section 218 and that the accused has no right to claim joinder of charges or offenders¹¹.

- **Applicability of provisions relating to joinder of charges to cases where no charge is framed.**

In all summons cases, though it is necessary to state to the accused the particulars of the offence of which he is charged, it is not necessary to frame a formal charge. In such cases, a question may arise whether the provisions relating to joinder of charges & of offenders apply to such proceedings. The Code does not make any express provision in this regard. However, the courts have taken the view that these provisions are equally applicable in summons cases also¹².

- **Effects of omission to frame, or absence of, or error in charge**

Under Section 215 & 464 of Cr.P.C., the main object is to prevent failure of justice where there has been only a technical breach of rules which are not going to the root of the case as such. The two sections read together to lay down that whatever the irregularity in the framing of a charge, it is not fatal unless there is prejudice caused to the accused¹³. The object of the section is to prevent failure of justice where there is some breach of the rules in the formulation of the charge. However, the section also makes it clear that insignificant irregularities in stating the particulars of the offence will not affect the trial or its outcome. To decide whether the error or omission has resulted in a failure of justice the court should have regards to the manner in which the accused conducted his defence & to the nature of the objection.

The object of the charge is to give an accused notice of the matter he is charged with. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective. Nor could a conviction recorded on charges under wrong provisions be reversed if the accused was informed of the details of the offences committed and thus no prejudice was caused to him. The mere omission to frame a charge or a mere defect in the charge is no ground for setting aside a conviction. Procedural laws are designed to subserve the ends of justice & not to frustrate them by mere technicalities.

PART-II

➤ **Framing of Charges & Discharge:**

“....at the stage of framing of charges, wherein it is the duty of the court to apply its judicial mind to the material placed before it and to come to a clear conclusion that a

11. Ranchhod Lal v. State of M.P., AIR 1965 SC 1248

12. Harihar Chakravorthy v. State of W.B., AIR 1954 SC 266. The Hon'ble Chennai High Court and Hon'ble Delhi High Court in cases like K. Govindraj v. Ashwin Barai, 1(1999) CCR 294 and Gulshan Kumar Ahuja v. Veena Sharma and Others, 2003(107)DLT725 have specifically held that there is nothing in the Code or Act and in particular section 138 of the Negotiable Instruments Act which precludes the procedure envisaged under sections 218, 219 or 220 to 223 being adopted or applied in a summons case under Chapter XX of the Cr.p.c.

13. Kailash Gir v. v.K. Khare, Food Inspector, 1981 Cri LJ 1555, 1556 (MP).

prima facie case has been made out against the accused. An order for framing of charges is of serious concern to the accused as it affects his liberty substantially. Courts must therefore be cautious that their decision at this stage causes no irreparable harm to the accused.¹⁴ [Emphasis supplied by me]

The Hon'ble Apex Court of India has, by way of the aforementioned observations, clearly set the duty of the Trial Judge when any order of framing of charges is required to be passed. It is also not out of place to mention that despite some variation in the language, the following three pairs of sections, dealing with framing of the charge or discharge at the sessions trial or trial of a warrant case or a summons case ultimately converge to a single conclusion, namely, that a prima facie case has to be made out before a charge can be framed¹⁵. The three pairs of sections are Sections 227 and 228 relating to sessions trial; Sections 239 and 240 relating to trial of warrant cases; and Sections 245(1) and (2) qua trial of summons cases.

Before invoking provisions of Sections 227 and 228 dealing with trials before the Court of Session, Courts generally do not take note of Section 226 which obliges the prosecution to describe the charge brought against the accused and state by what evidence the guilt of the accused would be proved. This point was stressed by the two-Judge Bench of Hon'ble Apex Court in **Satish Mehra v. Delhi Administration**¹⁶. But it is a matter of regret that neither the courts nor the prosecution comply with this section. It may reduce the workload of the courts if the trial courts insist upon the prosecution to strictly comply with the provisions of Section 226 of the Code in as much as the courts can discharge the accused if there is no prima facie case. The Hon'ble Supreme Court essayed on the rationale of Section 227 thus:

*"14. The object of providing such an opportunity as is envisaged in Section 227 of the Code is to enable the court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that the Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code."*¹⁷

The Court examined the purpose of Section 239 Cr.P.C. and observed as follows:

"13. Similar situation arises under Section 239 of the Code (which deals with trial

14. Satishchandra Ratanlal Shah v. State of Gujarat, (2019) 9 SCC 148 : (2019) 3 SCC (Cri) 697 : 2019 SCC OnLine SC 196 at page 151

15. S.R. CHITNIS, Framing of Charge in Criminal Cases, (2002) 2 SCC (Jour) 24. Also see, Antulay's Case, (AIR 1986SC 2045), Opinion of Bhagwati, C.J.. Also refer: Ganauri Singh & Ors. v, State of Bihar & Ors., 2010 SCC OnLine Pat 954.

16. (1996) 9 SCC 766.

17. Ibid., p. 771.

*of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the Code enjoins on the court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the court at that stage. Here the 'ground' may be any valid ground including insufficiency of evidence to prove the charge."*¹⁸

Having regard to these observations in **Satish Mehra Case** (*Supra*), it is not only incumbent upon the prosecution to describe the charge brought against the accused but even if the accused produces the materials which would clinch the issue the Court of Session under Section 227 of the Code has to consider the same and if there is no prospect of the case ending in conviction, the valuable time of the court should not be wasted for holding a trial to formally complete the procedure to pronounce the conclusion at a future date. This has been the consistent position taken by the Hon'ble Supreme Court.¹⁹

It is equally a well-settled law that at the stage of framing of charge under Section 228 Cr.P.C. or while considering the discharge petition filed under Section 227 Cr. P.C., it is not for the Magistrate or the Judge concerned to analyze all the materials including the pros and cons, reliability or acceptability etc. and the learned Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, the veracity of various documents at the time of trial and take a decision one way or the other. Thus, the trial Court has to be prima facie satisfied as to whether there is sufficient ground for proceeding against the accused and at the stage of considering the discharge petition under Section 227 Cr. P.C., or framing of charges, the standard of test, proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied in as much as the prosecution evidence is yet to commence.²⁰

The Hon'ble Supreme Court has recently in the case titled **Dipakbhai Jagdishchandra Patel v. State of Gujarat**,²¹ made observations regarding the law relating to framing of charge and discharge and has held that all that is required is, that the Court must be satisfied that with the material available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can

18. *Ibid.*, p. 771.

19. *Century Spg. & Mfg. Co. Ltd. v. State of Maharashtra*, (1972) 3 SCC 282, *State of Karnataka v. L. Muniswamy*, (1977) 2 SCC 699.

20. *Sangeeta Singh & Anr. v. State of Bihar*, 2020 SCC OnLine Pat 1328.

21. (2019) 16 SCC 547 : (2020) 2 SCC (Cri) 361 : 2019 SCC OnLine SC 588.

be translated into evidence at the stage of trial. Relevant paragraphs of the said judgment is reproduced below:

"13. We may profitably, in this regard, refer to the judgment of this Court in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018 wherein this Court has laid down the principles relating to framing of charge and discharge as follows:

"...Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and initial stage of the trial the truth, veracity and effect of the evidence, which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the Accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the Accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter Under Section 227 or Section 228 of the Code. At that stage, the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the Accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the Accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not.

If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order Under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one Under Section 228 and not Under Section 227...

21. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the Accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the Accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that Accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the *prima facie* view that the accused has committed the offence."²²

In **Lalu Prasad v. State of Bihar, (2007) 1 SCC 49 : (2007) 1 SCC (Cri) 241**, the Hon'ble Supreme Court of India elaborately dealt with the issue observing that,

“13. The question raised relating to recording of reasons at the time of framing of charge is different from a case of opinion on the basis of which an order of discharge of the accused is passed. Sections 227 and 228 of the Code are with regard to discharge of the accused and framing of charges against the accused respectively in a case triable by the Court of Session; Sections 239 and 240 concern discharge and framing of charge in case of warrant triable cases by the Magistrate whereas Section 245 deals with discharge and framing of charges in cases instituted other than on the police report, indicates the difference. The relevant provisions read as follows:

“227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.—(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—

(a) is not exclusively triable by the Court of Session, he may, frame a charge

22. The abovestated principles have been recently affirmed in *State (NCT of Delhi) v. Shiv Charan Bansal & Ors.*, (2020) 2 SCC 290; (2020) 1 SCC (Cri) 594 : 2019 SCC Online SC 1554.

against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the First Class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the First Class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

Section 239. When accused shall be discharged.—(1) If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Section 240. Framing of charge.—(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.***

245. When accused shall be discharged.—(1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

15. In **Kanti Bhadra Shah v. State of W.B.** [(2000) 1 SCC 722: 2000 SCC (Cri) 303] again the question was examined. It was held that *the moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge, the court is*

required to form an opinion that there is ground for presuming that the accused has committed the offence. In case of discharge of the accused the use of the expression “reasons” has been inserted in Sections 227, 239 and 245 of the Code. At the stage of framing of a charge the expression used is “opinion”. The reason is obvious. If the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial. It was *inter alia* held as follows: (SCC pp. 725-26, paras 10-11)

“10. It is pertinent to note that this section required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try. In such a situation he is only required to frame a charge in writing against the accused.

11 Even in cases instituted otherwise than on a police report, the Magistrate is required to write an order showing the reasons only if he is to discharge the accused. This is clear from Section 245. As per the first sub-section of Section 245, if a Magistrate, after taking all the evidence considers that no case against the accused has been made out which if unrebutted would warrant his conviction, he shall discharge the accused. As per sub-section (2), the Magistrate is empowered to discharge the accused at any previous stage of the case if he considers the charge to be groundless. Under both sub-sections, he is obliged to record his reasons for doing so. In this context, it is pertinent to point out that even in a trial before a Court of Session, the Judge is required to record reasons only if he decides to discharge the accused (*vide* Section 227 of the Code). But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge.”

The Hon’ble Apex Court further observed that where the question of jurisdiction is raised and the trial court is required to adjudicate that issue, it cannot be said that reasons are not to be recorded. In such a case reasons relate to the question of jurisdiction and not necessarily to the issue relating to framing of charge. In such a case reasons dealing with a plea relating to jurisdiction have to be recorded.²³

In **Shri. Ram Pravesh Rai v. The Union of India Through The Central Bureau of Investigation, Through The Superintendent of Police, Anti Corruption Branch, Dr S.K. Singh Path, Bailey Road, Patna-800022 & Ors.**²⁴, the Hon’ble Patna High court considered the relevant authorities about the scope of Sections 227 and 228 Cr.P.C. and observed as follows:

(i) The Judge while considering the question of framing the charges under Section 227

23. (2007) 1 SCC 49 : (2007) 1 SCC (Cri) 241, at Para. 16.

24. 2016 SCC OnLine Pat 2048.

Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

- (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
- (iii) The Court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.
- (iv) If based on the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond a reasonable doubt that the accused has committed the offence.
- (v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of an offence by the accused was possible.
- (vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.
- (vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

Thus, an effort has been made to incorporate the important aspects regarding the framing of charge as well as discharge in this part of the article with help of the latest case law.

PART-III

➤ Amendment/Alteration of charge:

“In our view, the Criminal Procedure Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about

that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him.”²⁵ Justice Vivian Bose in **Willie (William) Slaney v. State of M.P., AIR 1956 SC 116** observed in his unique style

“...Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (1) the accused has “in fact” been misled by it “and” (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language.”

According to Section 216 (1) of Cr.P.C., any court may alter or add to any charge at any time before judgment is pronounced. The relevant provision is extracted here for better understanding:

“216. Court may alter charge.—

- (1) Any court may alter or add to any charge at any time before judgment is pronounced.
- (2) Every such alteration or addition shall be read and explained to the accused.
- (3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.
- (4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.
- (5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

The section invests a comprehensive power to remedy the defects in the framing or non-framing of a charge, whether discovered at the initial stage of the trial or any subsequent stage before the judgment.

In **P Kartikalakshmi v Sri Ganesh**²⁶, Justice F M Ibrahim Kalifulla, while dealing with the power of the Court to alter or add any charge, held:

25. Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166. Quoted Justice P. Jaganmohan Reddy with approval in Mala Singh v. State of Haryana, (2019) 5 SCC 127:2019 SCC OnLine SC 175 at page 137.

26. (2017) 3 SCC 347.

“6. ... Section 216 Cr.P.C. empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr.P.C. to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge because it is not provided under Section 216 Cr.P.C.. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised.”
(Emphasis supplied by me)

Similarly, in **Anant Prakash Sinha @ Anant Sinha v State of Haryana**²⁷, a two-judge Bench of Hon’ble Apex Court dealt with a situation where for commission of offences under Sections 498A and 323 of the IPC, an application was filed for framing an additional charge under Section 406 of the IPC against the husband and the mother-in-law. After referring to various decisions of this Court that dealt with the power of the court to alter a charge, Justice Dipak Misra (as the Hon’ble Chief Justice then was), held:

“18. the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless

27. (2016) 6 SCC 105.

evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 Cr.P.C..

19. In addition to what we have stated hereinabove, another aspect also has to be kept in mind. **It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 Cr.P.C.. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial...**”
(Emphasis supplied)

In **CBI v Karimullah Osan Khan**²⁸, the Hon'ble Apex Court of India dealt with a case where an application was filed under Section 216 of Cr.P.C. during the course of trial for addition of charges against the appellant under various provisions of the IPC, the Explosives Act 1884 and the Terrorist and Disruptive Activities (Prevention) Act 1987. Justice K S P Radhakrishnan, speaking for the Hon'ble Court, held thus:

“17. Section 216 Cr.P.C. gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions “at any time” and before the “judgment is pronounced” would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 Cr.P.C. confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 Cr.P.C., only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court.”
(Emphasis supplied by me)

In **Jasvinder Saini v State (Govt of NCT of Delhi)**²⁹, the Hon'ble Supreme Court dealt with the question whether the Trial Court was justified in adding a charge under Section 302 of the IPC against the accused persons who were charged under Section 304B of the IPC. Hon'ble Mr Justice T. S. Thakur (as he then was) speaking for the Court, held thus:

“11. A plain reading of the above would show that the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment

28. (2014) 11 SCC 538

29. (2013) 7 SCC 256

is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. **There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.”** *(Emphasis supplied by me)*

It has been held in **Amar Singh v. State of Haryana**,³⁰ that the accused must always be made aware of the case against them so as to enable him to understand the defence that he can lead. An accused can be convicted for an offence which is minor than the one he has been charged with unless the accused satisfies the court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. While so stating, it is apt to quote the following two passages from **Bhimanna v. State of Karnataka**³¹:

“25. Further, the defect must be so serious that it cannot be covered under Sections 464/465 Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. **In determining whether any error, omission or irregularity in framing the charges has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).”**

[Emphasis Supplied by me]

In **Balbir Singh v. State of Punjab**, (2006) 12 SCC 283 : (2007) 1 SCC (Cri) 715, the Hon’ble Supreme Court of India has distinguished that earlier decision of **Shamnsaheb M. Multtani v. State of Karnataka**³² as the question which had arisen for consideration of Hon’ble Supreme Court in **Shamnsaheb Case** (*Supra*) was as to whether in a case where the only charge

30. (1974) 3 SCC 81.

31. (2012) 9 SCC 650.

32. (2001) 2 SCC 577 : 2001 SCC (Cri) 358.

framed against the accused was under Section 302 IPC, he could be convicted under Section 304-B IPC thereof and in holding that the same would be impermissible, it was stated :³³

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

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

The Hon’ble Court distinguished the aforesaid decision in **Balbir Singh Case** (*Supra*) as the appellants had the requisite knowledge of the charges against them, it may or may not be justifiable for the learned trial Judge to frame an alternative charge. The Apex Court finally laid down the correct proposition of law as follows :

38. Effect of framing of alternative charges varies from case to case. In the peculiar facts of the present case, we are of the opinion that the appellants having not raised any grievance at any stage in that behalf, they cannot be allowed to do so at this stage.

In **Girraj Prasad Meena v. State of Rajasthan**³⁴, the Hon’ble Supreme Court of India

33. Ibid (SCC p. 587, paras 31-32)

34. (2014) 13 SCC 674 : (2014) 5 SCC (Cri) 794 : 2013 SCC OnLine SC 899 at page 678.

opined that the filing of charge-sheet and taking cognizance has nothing to do with the finality of charges, **as charges framed after the cognizance is taken by the court, can be altered/amended/changed and any charge can be added at any stage up to the stage of conviction in view of the provisions of Section 216 Cr.P.C.. The only legal requirement is that, in case the trial court exercises its power under Sections 228/251 Cr.P.C., the accused is entitled to an opportunity of show cause/hearing as required under the provisions of Section 217 Cr.P.C.**³⁵ Thus, it is crystal clear from the aforementioned appreciation of the legal provisions and judicial precedents that:

1. Under the provisions of Section 216, all the courts, including the Designated Courts, are authorised to alter or add to the charge at any time before the judgment is pronounced. Whenever such an alteration or addition is made, it is to be read out and explained to the accused.
2. The phrase “add to any charge” in Sub-Section (1) includes the addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. The real test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial.
3. Subsection (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the persecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge.
4. Sub-Section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused.
5. Section 217 of the Cr.P.C. deals with recalling witnesses when the charge is altered or added by the court after commencement of the trial. The Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the Appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him³⁶.
6. The court has a very wide power to alter the charge; however, the court is to act

35. (Vide *Umesh Kumar v. State of A.P.* [(2013) 10 SCC 591 : (2014) 1 SCC (Cri) 338 :: (2014) 2 SCC (L&S) 237 : JT (2013) 12 SC 213])

36. *Kantilal Chandulal Mehta Case* (Supra note 25)

judiciously and to exercise discretion wisely. It should not alter the charge to the prejudice of the accused person.³⁷

7. Merely because the charges are altered after the conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in Section 216 Cr.P.C. and other related provisions³⁸.
8. That no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge because it is not provided under Section 216 Cr.P.C.. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardized.³⁹

➤ **Conclusion:**

In a criminal trial, the charge is the foundation of the accusation and every care must be taken to see that it is not only properly framed but the evidence is also tendered with respect to matters put in the charge and not the other matter.⁴⁰

While judging the question of prejudice or guilt, the Court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s). The entire scheme of procedural law is to ensure substantive justice. The law relating to charge framing, discharge and alteration/amendment to charges are also the tools to ensure a fair trial and substantive justice. The scope and scheme of these laws are to ensure natural justice, fairness and substantive justice so that the societal and individual interests can be balanced and the concept of fair trial can be put to reality. The concept of a fair trial is itself a multidimensional concept incorporating all the ideals to ensure Constitutional Justice for “We, the People”. The powers and duties of the Court are also different sides of the same coin and the real goal or aim is to ensure fair trial to all the stakeholders.



37. Ramakrishna Redkar v. State of Maharashtra, 1980 Cri LJ 254 (Bom)

38. Harihar Chakravarty v. State of West Bengal, AIR 1954 SC 266

39. P. Kartikalakshmi Case (Supra note 26 at page 350)

40. Ramkrishna Sawalram Redker v. State of Maharashtra, 1980 Cri. L.J. 254 (Bom.).

Topic No. – 38

***Various Presumptions under Indian Evidence Act and their
Relevance under Special Laws—the NDPS Act, the POCSO Act,
the SC & ST (POA) Act***

By
Sri Jitendra Kumar,
District and Sessions Judge,
Gaya.

Sri Jitendra Kumar,
District and Sessions Judge, Gaya.

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Various Presumptions under Indian Evidence Act, 1872 and their Relevance under Special Laws-

1. The Narcotic Drugs and Psychotropic Substances Act, 1985
2. The Protection of Children from Sexual Offences Act, 2012
3. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

1. Introduction

Indian Evidence Act is basically an adjective or procedural law regulating the means and manner in which a party substantiates his own case and refutes that of his opponent in a judicial proceeding. It is a general or mother law regarding Evidence and consolidatory in nature. However, it is not exhaustive as it does not contain the whole of the rules of Evidence. Some other Acts and statutes also provide specific provisions on the matter of Evidence, supplementing the provisions of the Indian Evidence Act, such as, the Bankers Books Evidence Act, Order 26 of the CPC, sections 291 to 294 of the CrPC, Sections 59 and 123 of the Transfer of Property Act, Section 49 of the Registration Act and Section 35 of the Stamp Act, Sections 19 and 20 of the Limitation Act, Section 63 of the Succession Act. Some special criminal statutes like the NDPS Act, 1985, the POCSO Act, 2012 and SC and ST (Prevention of Atrocities) Act, 1989 also contain some provisions regarding evidence supplementing or modifying the Indian Evidence Act. Such provisions in special criminal statutes seem to be intended to serve the objects of the enactments dealing with particular types of crimes which are considered to be obnoxious and extremely detrimental to the society.

Presumptions are part of law of evidence. They are devices by which courts are enabled and entitled to pronounce findings on an issue notwithstanding that there is no evidence or there is insufficient evidence. A presumption is defined as an inference of a certain fact drawn from other proved facts. It is not final, but it could be final if it remains undisturbed or unrebutted . This is not an evidence in itself, but it makes a prima facie case in favour of the party in whose favour it is raised and shifts the evidentiary burden of proof on the opposite party. When rebuttal evidence is adduced, presumption disappears in the sunshine of facts. When it is conclusive, it obviates the production of any evidence to dislodge it.

2. Presumptions under The Indian Evidence Act, 1872.

The Indian Evidence Act does not define the word "Presumption". However, Section 4 of the Act has defined the words- "may presume", "shall presume" and "conclusive proof".

Section 4 reads as follows:

4. "May presume". — Whenever it is provided by this Act that the Court may presume

a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

“Shall presume”. — Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

“Conclusive proof”. — When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. “

The definition of the words “ May presume” clearly shows that presumptions of this kind are wholly in discretion of the Court and the Court may or may not presume the existence of the fact in issue. Such presumptions are also rebuttable as they go away when they are explained or rebutted by establishment of positive proof. Such presumptions are also called presumptions of facts and they are naturally and logically drawn from the observation of the common course of nature, common course of human conduct and common course of public and private businesses. As such , they are based on logic, human experience and law of nature. Examples of this kind of Presumptions can be found in Sections 86 to 88 A, Section 90, Section 113 A and Section 114 of the Indian Evidence Act.

The definition of the words “ Shall presume” shows, on the other hand , that such Presumptions are mandatory and no discretion is left with the Court, as the Courts are bound to raise such Presumptions under the legislative command. Such presumptions are also called presumptions of Law and they are grounded on policy and expediency of convenience. However, such Presumptions are also rebuttable through positive evidence. Examples of this kind of Presumptions can be found in Sections 79 to 85 C, Section 89, Section 111 A, Section 113 B and Section 114 A of the Indian Evidence Act.

The definition of the words “ Conclusive Proof” shows that the Courts are obliged, on proof of a fact, to regard the other as proved and no further evidence is allowed to disprove that fact. Such presumptions are also called presumptions of Law and they are also based on policy and expediency of convenience. However, such Presumptions are not rebuttable. Examples of such conclusive presumptions can be found in Section 41, Section 112 and Section 113 of the Indian Evidence Act.

Hon’ble Supreme Court has on several occasions examined and elucidated the provisions of presumptions under the Indian Evidence Act. In **M/S Kumar Exports vs M/S Sharma Carpets** as reported in **(2009) 2 SCC 513**, Hon’ble Apex Court has observed as follows: “15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act, all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term `presumption' is used to designate an inference, affirmative

or disaffirmative of the existence a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof."

Hon'ble Supreme Court in **State of Andhra Pradesh Vs V. Vasudeva Rao** as reported in **(2004) 9 SCC 319** has observed as follows: " 18. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the Court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled."

Hon'ble Supreme Court in **Sodhi Transport Co. Vs State of UP** as reported in **(1986)2 SCC 486** has observed as follows: " 14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances. 15. In **Izhar Ahmad khan Vs Union of India, [1962] Suppl. 3 S.C.R. 235 @ 257** Gajnendragadkar, J. (as he then was) explains the meaning of a rebuttable presumption thus : "It is conceded, and we think, rightly, that a rule prescribing a rebuttable presumption is a rule of evidence. It is necessary to analyse what the rule about the rebuttable presumption really means. A fact A which has relevance in the proof of fact and inherently has some degree of probative or persuasive value in that behalf may be weighed by a judicial mind after it is proved and before a conclusion is reached as to whether fact is proved or not. When the law of evidence makes a rule providing for a rebuttable presumption that on proof of fact A, fact shall be deemed to be proved unless the contrary is established, what the rule purports to do is to regulate the judicial process of appreciating evidence and to provide that the said appreciation will draw the inference from the proof of fact A that fact has also been proved unless the contrary is established. In other words, the rule takes away judicial discretion either to attach the due probative value to fact A or not and requires prima facie the due probative value to be attached in the matter of the inference as to the existence of fact B, subject of course, to the said presumption being rebutted by Proof to the contrary..." "

In **Sodhi Transport Co. Case** (*Supra*) Hon'ble Supreme Court has also observed as follows : 11. In the Indian Evidence Act, 1872 there are three cases where conclusive presumption may be drawn. They are Sections 41, 112 and Section 113 . These are cases where law regards any amount of other evidence will not alter the conclusion to be reached when the basic facts are admitted or proved. In Woodroffe & Amir Ali's Law of Evidence (Vol. I) 14th Edition at page 299 it is stated thus : "Conclusive presumptions of law are 'rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection, just alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden (Taylor, Ev., s.71 : Best, Ev., p. 317, s.304') Rebuttable presumptions of law are, as well as the former, 'the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet, it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode, the law defines the nature and the amount of the evidence which is sufficient to establish a prima facie case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions as in the former, have been adopted by common consent from motives of public policy and for the promotion of the general good; yet not as in the former class forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised.' " "

3. Relevance of presumptions under Special Criminal Statutes-

3.1 The NDPS Act, 1985

The NDPS Act was enacted to deal with the crimes related with misuse and abuse of Narcotic drugs and psychotropic substances. In view of the serious and heinous nature of the crimes, the Act provides for stringent provisions to protect the societal interest. There are three presumptions provided in the Act. All are presumptions of law and mandatory in nature. The courts are duty bound to raise the presumptions on fulfilment of the required conditions. However, the presumptions are rebuttable. These presumptions are provided in Section 35, Section 54 and Section 66 of the Act which read as under:

“35. Presumption of culpable mental state.—(1) In any prosecution for an offence

under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this section “culpable mental state” includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section , a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. ”

“ 54. Presumption from possession of illicit articles.—In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily. ”

“ 66. Presumption as to documents in certain cases.—Where any document—

- (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or
- (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person, and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall—
 - (a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the

handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

- (b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
- (c) examine any person acquainted with the facts and circumstances if it is proved, the truth of the contents of such document. ”

The reading of Section 35 shows that it provides for presumption of culpable mental state with right to the accused to prove that he had no such mental state with respect to the act charged as an offence under the prosecution. Section 54 places the burden of proof on the accused as regards possession of the contraband to account for the same satisfactorily.

The constitutionality of Section 35 and 54 of the Act was challenged in **Noor Aga vs State of Punjab** as reported in **(2008) 16 SCC 417**. In this case Hon'ble Supreme Court examined these two Sections and held it constitutional holding as follows: “ 35. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld. 40. The provision for reverse burden is not only provided for under the special acts like the present one but also under the general statutes like the Indian Penal Code. The Indian Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Section 113A and 113B thereof. Even otherwise, this Court, having regard to the factual scenario involved in cases, e.g., where husband is said to have killed his wife when both were in the same room, burden is shifted to the accused. Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens. The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right. {See *S v. Dlamini*; *S v. Dladla and Ors.* 1999(7) BCLR 771 (CC)} While, however, saying so, we are not unmindful of serious criticism made by the academics in this behalf. ”

However, while explaining the meaning and import of these provisions in **Noor Aga case** (*Supra*), Hon'ble Apex Court has held as follows- “ 58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the

circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established. 59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt. 60. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself. In **Sheldrake v. Director of Public Prosecutions (2005) 1 All ER 237**, it was stated in the following terms: "21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirements of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case. (emphasis added) " "

In **Gian Chand and Ors. Vs State of Haryana** as reported in (2013)14 SCC 420, Hon'ble Supreme Court has held as follows: "19. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the Accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the Accused to prove

otherwise. 20. Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the Accused to establish that he had no knowledge of the same.”

In **Madan Lal and Anr. Vs. State of Himachal Pradesh** as reported in **(2003) 7 SCC 465**, Hon’ble Apex Court held as follows: “ 26. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles...”

In **Gangadhar alias Gangaram Vs State of MP (Crim. Appeal No. 504 of 2020)** as decided on 5.8.2020) Hon’ble Apex Court held as follows: “ 9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. ...”

Now coming to the presumption as provided in section 66 of the Act as to documents, it is also presumption of law and mandatory for the court if conditions are fulfilled. In **Fakrul Islam alias Fakru alias Phakru Vs Union of India as reported in 2019 CRI. L. J. 1631** , Hon’ble Calcutta High Court has held as follows: “ 28. An analysis of the statutory presumption contained in the aforesaid provision would show that such presumption would apply to documents which are produced, furnished or seized from the control or custody of a person against whom such document is tendered during trial. It is not the prosecution case that Exts.17 and 20 which have been tendered against the appellants were either produced, furnished or seized from the control or custody of the said appellants. Therefore, the statutory presumption cannot be attracted to Exts.17 and 20, namely enquiry reports produced by DRI officers from their control and custody and tendered against the appellants in the course of trial.”

In **Directorate of Revenue & Anr Vs Mohammed Nisar Holia** as reported in **(2008) 2 SCC 370**, Hon’ble Supreme Court has held as follows: “19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout. Furthermore, in this case, apart from proving the fax and the copy of a challan nothing else has been proved. The fax was illegible. It allegedly was received in the PCO run by PW-17. He could not prove the contents of the fax. He also could not show when the same was received and from whom. It has not been shown that the accused was the person who obtained the said fax from PW-17. Furthermore, contents of the said

documents had not been proved. In absence of the aforementioned details, the fax being illegible and its contents being not known, the question of the same being admissible in evidence in terms of Section 67 of the Act would not arise. The xeroxed copy of the said fax had not been proved in the strict sense of the term. No secondary evidence could have been led to prove another secondary evidence. Contents of document are required to be proved. The contents of a document could be held to have been proved in terms of Section 66 only when the contents are decipherable and not otherwise.”

In **Mohd. Alam Khan vs Narcotics Control Bureau** as reported in **(1996) 9 SCC 462**, Hon’ble Apex Court has held as follows: “9. We have considered the rival submissions. We do not think that the learned Additional Solicitor General is right in invoking the aid of Section 66 of NDPS Act for Section 66 (i) visualizes the production of a document which has been seized from the custody or control of any person or furnished by any person. In this case, the document namely the agreement has not been seized from the custody of the appellant or it has been furnished by him. In order to invoke the aid of Section 66, the prosecution should have established that the appellant is the owner and was in actual possession of the flat in question. Therefore, we are not able to accept the argument of the learned Additional Solicitor General. It is not in dispute that the appellant did not admit his signature in the agreement in question. The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from concerned Registrar’s office or by examining the neighbors. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the document or examine the neighbors to prove the ownership of the appellant relating to the flat in question. It is relevant to note here that two independent witnesses attested the panchnama. Only one of them was examined as PW 5 who did not support the prosecution version and therefore was treated as hostile. In this case except the retracted statements of the appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court.”

3.2. The POCSO Act, 2012

The POCSO Act, 2012 is intended to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of judicial process, incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special courts. To serve the object of the enactment, Sections 29 and 30 of the Act, provide for presumptions. These sections read as under:

“29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section

9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. "

Reading of both the aforesaid sections shows that the presumptions as provided in the statutory provisions are those of law and mandatory in nature. The courts are duty bound to raise the presumptions on fulfilment of the required conditions. However, the presumptions are rebuttable. It is also apparent that Sec 29 provides for reverse burden on the accused facing prosecution under sections 3, 5, 7 and 9 of the POCSO Act to prove his innocence, creating an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial. Section 30 stipulates that in a prosecution under the POCSO Act, where the offence requires the existence of a culpable mental state, the court is to presume the existence of such culpable mental state on the part of the accused, however giving right to the accused to rebut it beyond reasonable doubt.

The meaning and import of the presumptions as provided in the POCSO Act has been examined and explained by Constitutional courts on several occasions. In **Navin Dhaniram Baraiye Vs State of Maharashtra** as reported in **2018 SCC Online Bom 1281**, Hon'ble Bombay High Court has observed as follows : "18. A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by

law..... 24. The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability.”

In **Joy V. S. Vs State of Kerala** as reported in **2019 SCC Online Ker 783**, Hon’ble Kerala High Court has observed as follows : “ 11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without advertent to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened.”

In **Sahid Hossain Biswas Vs State of West Bengal** as reported in **2017 SCC Online Cal 5023**, Hon’ble Calcutta High Court has observed as follows : “ 23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove ‘the contrary’, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see **Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562**, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary. 24. Once the foundation of the prosecution case

is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be.”

In **Dharmender Singh Vs State (Govt. Of NCT of Delhi)** as reported in **2020 SCC Online Del 1267**, Hon’ble Delhi High Court has observed as follows : “ 50. Drawing from the verdict of the Supreme Court and the views taken by the various High Courts in the above cases, in essence, the position is that to rebut a presumption, first, the presumptive proposition must itself be formulated based on relevant and credible material; and second, the accused must know what presumption he has to rebut. It is not enough to say that the accused has been implicated by the police on charges under sections 3, 5, 7, and/or 9 of the POSCO Act. At the very least, the charges should have been framed by court against the accused under one or more of those sections for the presumption to arise; and mere implication by the police is not enough. ”

In **Sachin Vs State of Maharashtra** as reported in **MANU/MH/3940/2015**, Hon’ble Bombay High Court has observed as follows : “ 18 . The presumption, however, cannot be said to be irrebuttable. In-fact, no presumption is irrefutable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved. 19. One has to keep in mind, as expressed by an eminent jurist that presumptions are bats in law; they fly in a twilight but vanish in the light of facts.”

In **Babu Vs State of Kerala** as reported in **(2010) 9 SCC 189**, Hon’ble Apex Court has observed as follows : “ 27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption

Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact. 28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (Vide: *Hiten P. Dalal v. Bratindranath Banerjee*, (2001) 6 SCC 16; *Narendra Singh v. State of M.P.*, (2004) 10 SCC 699 : AIR 2004 SC 3249; *Rajesh Ranjan Yadav v. CBI*, (2007) 1 SCC 70 : AIR 2007 SC 451; *Noor Aga v. State of Punjab*, (2008) 16 SCC 417; and *Krishna Janardhan Bhat v. Dattatraya G. Hegde*, (2008) 4 SCC 54 : AIR 2008 SC 1325)."

3.3. The SC and ST (Prevention of Atrocities) Act, 1989

The SC and ST Act is intended to protect social dignity and self respect of the members of scheduled castes and scheduled tribes by preventing the commission of offences of atrocities against them by non- scheduled castes and scheduled tribes people. To promote the object of the Act, Section 8 provides for raising of presumptions as to offences. This section reads as under :

"8. Presumption as to offences.—In a prosecution for an offence under this Chapter, if it is proved that—

- (a) the accused rendered any financial assistance in relation to the offences committed by a person accused of, or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;
- (b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object;
- (c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved."

Reading of Section 8 of the Act clearly demonstrates that the presumptions as provided in the statutory provision is that of law and mandatory in nature. The courts are duty bound to raise the presumption on fulfilment of the required conditions. However, the presumptions are rebuttable.

As per Sec. 8 (a), it is also clear that in case of financial assistance being provided by the Accused, presumption of abetment of the offence would be raised against the Accused, unless the

contrary is proved. As per Sec. 8 (b), presumption is to be raised that the offence has been committed in furtherance of common intention or prosecution of common object if it is proved that the offence has been committed as sequel to any existing dispute regarding land or any other matter. As per Sec 8 (c) of the Act, court is duty bound to raise presumption that the accused was aware of the caste or tribal identity of the victim if the accused was having personal knowledge of the victim or his family, unless, of course, the contrary is proved.

Section 2 (1) (f) of the Act provides that the words and expressions as used in Cr.P.C, I.P.C and the Evidence Act are applicable unless contrary meanings are assigned to them under the SC and ST (Prevention of Atrocities) Act, 1989. Section 2 (1) (f) of the Act reads as under:

“Section 2 (1) (f) - the words and expressions used but not defined in this Act and defined in the Indian Penal Code (45 of 1860), the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), as the case may be, shall be deemed to have the meanings respectively assigned to them in those enactments. ”

While examining and explaining the meaning and import of Section 8 (c) read with Section 3 (2) v of the Act, Hon’ble Gujarat High Court in **Vaghela Dilipbhai Gulabsang Vs State of Gujarat** as reported in **MANU/GJ/2290/2019** has observed as follows: “ 10.1- Section 3(2) (v) of the Act prescribes knowledge of the caste of a person against whom an offence is committed as necessary ingredient of it where knowledge can be presumed under Section 8(c) of the Act. Section 8(c) of the Act provides that if the accused is having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim unless contrary is proved. Thus, if the offender is having personal knowledge of the victim, may be a person against whom an offence is committed or who has suffered or experienced physical, mental, physiological, emotional or monetary harm or harm to his property as a result of commission of any offence under the Act, which also includes his relatives, legal guardian and legal heirs, and therefore, in the present case, the first informant is falling within the definition of victim, that knowledge can be presumed. The very fact that accused No. 1 is alleged to have visited the house of first informant frequently for the purpose of recovery of money alongwith the fact that the deceased i.e. her husband was a friend of accused No. 1, coupled with the fact that for lending money he had procured document of title to the property in which the victim resides and the said document came to be seized from the brother of accused No. 1 and not only that, accused No. 1, who is already arrested, in his statement, confirms these things, is more than enough to presume knowledge of caste of the victim. ”

In **Rajulapati Ankababu Vs Counsel (Crim. Petition No. 7468 of 2017**, decided on 25.10.2017), **Hon’ble Andhra High Court** observed as follows: “ 39. A perusal of Section 8(c) of the SC/ST Act in juxtaposition with Section 3(2)(va) of the SC/ST Act makes it clear that the Court can draw a presumption that the accused has knowledge that the victim belongs to SC/ST community unless the contrary is proved. Whether the petitioner committed the alleged offence

knowing fully well that the de facto complainant belongs to Scheduled Tribe or not would become a relevant issue after full-fledged trial only. It is needless to say that while deciding the interlocutory applications more particularly the bail petitions, the Court has to restrain itself to express any opinion more particularly on factual aspects which ultimately affects the merits of the main case. At this stage, the Court has to consider whether the allegations made in the complaint *prima facie* constitute the offences alleged to have been committed by the petitioner, for a limited purpose of granting or rejecting the bail.”

In **Kulvinder Vs State (NCT of Delhi)** as decided on 24.8.2018, Hon’ble Delhi High Court has observed as follows: “ 336.(xiii)Section 8(b) POA Act is of particular relevance in the present case since it makes specific reference to a group of persons committing an offence as a sequel to an existing dispute regarding land "or any other matter". In such a scenario, it is stipulated that the presumption is drawn as regards the common intention and prosecution of the common object. In the context of the incident of 19th April 2010 and the incident that subsequently occurred on 21st April 2010, the presumption underSection 8(b) stands attracted.”

4. Conclusion

To conclude, presumption of innocence is a human right. However, it cannot be absolute and can be subjected to statutory exceptions if societal interest so requires. However, such statutory exceptions are amenable to the tests of reasonableness and liberty as enshrined in Articles 14 and 21 of the Constitution.

It also emerges from the case laws as referred to hereinabove in the context of the NDPS Act, the POCSO Act and the SC & ST Act that the foundational facts as required under the statutory provisions providing for presumptions have to be first proved by the prosecution beyond all reasonable doubts by relevant and legally admissible evidence and only then the burden of proof shifts to the accused to rebut the presumption on the touchstone of preponderance of probability and not proof beyond reasonable doubts. The accused may rebut the presumption by leading defence evidence or by discrediting prosecution witnesses through cross examination or by exposing the patent absurdities or inherent infirmities in the prosecution case by analysing special features of the particular case. Presumption does not take away the essential duty of the court to analyse the evidence on record in the light of special features of a particular case. The courts are required to be on guard to see that merely application of presumption does not lead to any injustice or mistaken conviction.



Topic No. – 39

Issues related to criminal assault against females.

By
Kajal Jhamb
Additional District & Sessions Judge,
Kaimur at Bhabhua

Kajal Jhamb**Additional District & Sessions Judge, Kaimur at Bhabhua****Topic : Issues related to criminal assault against females.****TABLE OF CONTENT**

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Issues Relating to Criminal Assault on Women

“Violence against women is perhaps the most shameful human rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace”

Kofi Annan¹

INTRODUCTORY REMARKS

“Criminal assault against women” means direct or indirect physical cruelty to women. A woman is subjected to criminal hardships at almost every stage of her life starting from cradle to grave. Almost every woman has gained tolerance towards some or the other form of violence against her. If the nation has to grow, it is essential that the empowerment of women occur not only within their personal spheres but also in the broader spheres of the community and the state. And the biggest impediment in the empowerment of women is the constant fear that they are living in an atmosphere of rising crimes against them.

Atrocities range from subjecting women to the crime of pre-natal sex determination, discrimination at home, violence in marital relationship, harassment at workplace to the offences like rape at home and outside.

The Response of law towards the crimes against women can be broadly classified in the following categories

Gender-specific offences Identified in Indian Penal Code, 1860

1. Rape and sexual assault
2. Kidnapping & Abduction, trafficking
3. Dowry Deaths or their attempts
4. Acid Attacks

Gender-Specific laws

1. The Sexual Harassment of Woman at Workplace (Prevention, Prohibition and Redressal) Act, 2013
2. The Protection of Women from Domestic Violence Act, 2005
3. Commission of Sati (Prevention) Act, 1987
4. The Immoral Traffic (Prevention) Act, 1956
5. Indecent Representation of Women (Prohibition) Act, 1986

1. Kofi Atta Annan was a Ghanaian diplomat who served as the seventh Secretary General of United Nations from Jan, 1997 to Dec.,2006. Annan and UN were corecipients of Noble Peace Prize, 2001

6. Dowry Prohibition Act, 1961

Now we will discuss each of these in detail

PART-I**OFFENCES UNDER THE INDIAN PENAL CODE, 1960****RAPE**

Section 375 and 376, 376-A to 376-E IPC are related to the offence of Rape. These sections were added and amended by Act 13 of 2013 and Act 22 of 2018. The most important change that has been made through these Amendment Acts is the change in the definition of rape and the quantum of punishment prescribed for the offence. Section 375, deals with the definition of Rape which after amendment in 2013² reads as “A man is said to commit “rape” if he- (a) *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.*” Explanation to the section says that the vagina includes labia majora. Before the amendment, only penile-vaginal intercourse was identified and the rest of the acts used to fall in the definition of criminal sexual assault defined under section 354 of IPC.

Moreover, for such act to fall in the definition of rape, it must be committed under the circumstances falling under any of the following seven clauses;

- (1) Against her will, or
- (2) Without her consent, or
- (3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt, or
- (4) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is the one with whom she is lawfully married or
- (5) With her consent when, at the time of giving such consent, because of unsoundness of mind or intoxication she is unable to understand the nature and consequences of the act to which she gives consent, or
- (6) With or without her consent, when she is under eighteen years of age,³

2. Prior to the amendment in 2013, the rape was defined as sexual intercourse with a woman without her consent

3. Prior to amendment in the year 2013, the age of consent was 16 years

(7) When she is unable to communicate consent.”

The law provides that consent means an unequivocal voluntary agreement. The Hon’ble Supreme Court in the case of **Bantu v. State of U.P.**⁴ explained the term “rape” stating that the rape is ravishment of a woman, without her consent, by force, fear or fraud, or the carnal knowledge of a woman by force against her will. The essential words in an indictment for rape are *rapuit and carnaliter cognovit*, but both must be present. In the case of **Madan Gopal Kakkad vs. Naval Dubey**,⁵ the Hon’ble Apex Court held that it is not essential that hymen should be ruptured, provided it is clear that there was penetration even if partial. Even the slightest penetration is sufficient to make out an offence of rape. The depth of penetration is immaterial.⁶ The Court in **Koppula Venkatrao v. State of AP**⁷ held that the sine qua non of the offence of rape is penetration and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. The gravamen of the offence is that the sexual intercourse by a man with a woman is without the consent of that woman.

The Supreme Court in **Dileep Singh v. State of Bihar**⁸ observed that an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible. The Hon’ble Courts have followed the test laid down under Section 90 of the IPC for establishing consent for the act. Below the age of 18 years, the consent is immaterial. Proof of mere commission of an act is sufficient to constitute the offence. In **Deepak Vs State of Haryana**⁹, the Hon’ble Apex Court explained the application of Section 114-A of the Indian Evidence Act¹⁰ and held that in order to enable the court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix and second, it should be proved that it was done without the consent of the prosecutrix. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused and the accused fails to give any satisfactory explanation in his defence evidence, the court shall draw a presumption under Section 114-A of the Indian Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent.

In **MotiLal vs. State of M.P**¹¹, the Apex Court observed that a rapist not only violates the

4. 2008 (2) Crime 264 (SC)

5. (1992) 3 SCC 204

6. Aman Kumar v State of Haryana AIR 2004 SC 1497

7. (2004)3 SCC 602

8. (2005)1SCC 88 (para 14)

9. SC (CA) 65 OF 2012

10. Inserted by Act X of 1983 and amended by Act 13 of 2013 (S26)

11. 2008 8 SCC 271

victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. The court, therefore, shoulders a great responsibility while trying an accused on charges of rape. The court must deal with such cases with utmost sensitivity examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix. The victim of a sexual assault is not to be treated as an accomplice and as such her evidence does not require corroboration from any other evidence including the evidence of the doctor. Even if the doctor who examined the victim does not find any sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence. Hence, a finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence and so the evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 18 years of age.

It is also well settled that the absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor does it construe as evidence of consent. The opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. On the other hand bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and support the allegation of sexual assault. In this regard, it is pertinent to quote **Medical Jurisprudence and Toxicology (Twenty-First Edition) by Modi on page 369** reads "To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one." Similar observation is made in **Parikhs Textbook of Medical Jurisprudence and Toxicology**.

In the case of **Ashrit Ram vs. State of Bihar**¹², the Hon'ble Supreme Court observed that the conviction can be based on the sole testimony of a witness. However, the testimony of such a witness should be viewed with caution and circumspection. The appropriate test to apply would

12. (1981) 2 SCC 60

be the "close and severe scrutiny" test. If the witness is reliable, then it does not matter if he is partisan or interested or both. The evidence of a sole witness should be of sterling quality, natural and convincing enough to record a conviction. If there is some doubt then a conviction ought not to be based on the testimony of a sole witness.

Whether there is rape or not depends ultimately on the facts and circumstances of each case.”¹³ In this respect, **Medical Jurisprudence and Toxicology (Law Practice & Procedure)** authored by **Dr K.S. Narayan Reddy** at page 439 reads

"As the age and size of the infant increases, the pattern of injury will become less marked but the circumferential tears of the vestibular mucoas are found up to the age of six years or more. Full penile penetration produces bruising of the vaginal walls and frequently tears of the anterior and posterior vaginal walls. Anterior tears can involve the bladder and the posterior tears the anorectal canal. Vaginal vault may rupture, and there may be vaginal herniation of abdominal viscera. The hymen may be entirely destroyed or may show lacerations. Blood may be oozing from the injured parts, or clots of blood may be found in the vagina. There may be mucopurulent discharge from the vagina. In digital penetration of the infant vagina, there is frequently some scratching or bruising of the labia and vestibule, but the circumferential tears are absent. The hymen shows a linear tear in the posterior or posterolateral quadrant, which may extend into the posterior vaginal wall and on to the skin of the perineum and may involve the perineal body. Ano-rectal canal is rarely involved. Bruising in the margins of tear and of anterior vaginal wall are common, but vaginal vault injury is rare. Any attempt to separate the thighs for examination causes great pain, because of the local inflammation. The child walks with difficulty due to pain. The absence of marks of violence on the genitals of the child, when an early examination is made is strong evidence that rape has not been committed."

TRACING THE EVOLUTION OF THE RAPE LAWS IN INDIA

Tuka Ram and Anr vs State of Maharashtra¹⁴ (Mathura Case)

The case is also known as Mathura rape case. The case is about a young tribal girl named Mathura who was allegedly raped by two policemen while she was in custody. The rape allegedly took place on March 26th, 1972 at Desai Gunj Police Station in Maharashtra. The accused were tried and the Sessions Court passed the judgment in favor of defendants and held them not guilty. It was held that Mathura gave her consent voluntary as she was habituated to sexual intercourse. Learned Sessions Judge found that there was a major difference between "sexual intercourse" and "rape". So, it was a case of sexual intercourse in which she had consented voluntary and not a case

13. Radhu vs. State of Madhya Pradesh 2007 CrL.J. 4704

14. AIR 1979 SC 185

of rape. The case was appealed in the Bombay High Court which took note of all the findings arrived during the trial in Sessions Court. High Court appreciated the observation given by the learned Sessions Judge that there is a major difference between sexual intercourse and rape but at the same time observed that there is a world of difference between “consent” and “passive submission”. On the ground of such observations, the court held that the defendants were guilty of rape and the consent given was not voluntary and it was due to serious threats by policemen. Later, the case went to the Supreme Court, and the court acquitted the accused and set aside the judgment passed by the Bombay High Court. The Court stated that no marks of injury were found on the person of the girl, there were no signs of any struggle, any resistance and on that basis the court concluded that the girl had not been put in fear of death or hurt so the consent was free. The court also took in to account the sexual history of the girl and held the girl was habituated to sex. So, it may be possible that she might have incited the cops. It was held that the sexual intercourse could not be proved to amount to rape.

The rationale behind the judgment causing protests and a huge public outcry which ultimately led to the amendment in Indian rape law. At the time when the Mathura rape case did take place, the rape laws in our country were heavily biased in favour of rapists. The main question which was raised after this judgment was regarding the concept of consent which is very difficult to prove in such cases with the help of evidence. So, after this landmark judgment, the Criminal Law Amendment Act, 1983 came which brought many changes in the Indian rape law like:

- Section 114 A was inserted in the Indian Evidence Act, 1872 which provides that in cases of rape where sexual intercourse is established and the victim states that the sexual intercourse was without consent, the burden of proof lies on the accused to prove that it was consensual.
- Section 376 of the Indian Penal Code, 1860 underwent a change in which sections 376(A), 376(B), 376(C) and 376(D) were added. It got further amended by the Criminal Law Amendment Act, 2013.
- The Amendment Act added the provision for “custodial rape” under section 376(2) of Indian Penal Code, 1860 for the offences which take place when a victim is in the custody of state.
- The Act introduced section 228A in the Indian Penal Code, 1860 which prohibits any publication regarding the identity of rape victims and any matter through which victim’s identity could be known. It was further amended by Criminal Law Amendment Act, 2013.

Interpreting Section 228A, the Hon’ble Apex Court In the case of **Sangitaben Shaileshbhai Datanta v. State of Gujarat**,¹⁵ it was held that keeping in view the social object of preventing social victimization or ostracism of the victims of a sexual offence, the name of the victim should not be indicated.” Also, in **Nipun Saxena v. Union of India**¹⁶, the Supreme Court held “Section 228- A IPC clearly prohibits the printing or publishing “the name or any matter which may make

15. 2018 SCC OnLine SC 2300

16. (2019) 2 SCC 703

known the identity of the person. This prohibits not only the publication of the name of the victim but also the disclosure of any other matter which may make known the identity of such victim.

Another landmark case in the evolutionary journey of the Rape laws in India is **State of Maharashtra vs. Madhukar Narayan Mardikar**¹⁷ Supreme Court in the case held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. She is as much entitled to protect her in case of any attempt to violate her as a person as any other woman. While deciding the cases of rape, past history of victim's sex life does not matter.

In **Delhi Domestic Working Women's Forum v Union of India and Others**¹⁸ the Apex Court laid down the following broad guidelines for rape trials and held that the complainants of sexual assault cases should be provided with legal representation. The role of the victim's advocate is not only to explain to the victim the nature of the proceedings but also to prepare her for the case and to assist her in the police station and in court, to provide her with guidance as to how she might obtain help of other agencies.

The same person who looked after the complainant's interests in the police station should represent her till the end of the case. Legal assistance should be provided at the police station itself. The police should be under a duty to inform the victim of her right to representation before any question is asked from her and that the police report should state that the victim was so informed. A list of advocates willing to act in these cases should be kept at the police station for victims in need. The advocate should be appointed by the court, upon application by the police at the earliest convenient moment. In all rape trials anonymity of the victim must be maintained. Regarding the Directive Principles contained under Article 38(1) of the Constitution of India, the state should set up Criminal Injuries Compensation Board for such victims.

In the year 2004, the Hon'ble Supreme Court in the case of **State of Punjab v. Gurmit Singh**¹⁹ highlighted the importance of provisions of Sections 327(2) and (3) Cr.P.C and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in-camera. It was also pointed out that such a trial in camera would enable the victim of the crime to be a little more comfortable and answer the questions with greater ease and thereby improve the quality of evidence of the prosecutrix. It was further directed that as far as possible, trial of such cases may be conducted by lady judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge its duties. Then the case of **Sakshi v Union of India**²⁰ became an important milestone in the journey and the

17. AIR 1991 SC 207

18. 1995 (1) SCC 14

19. (1996) 2 SCC 384

20. (2004) 5 SCC 518.

provisions in the subsequent legislation, be it Criminal Law Amendment act of 2013 or the POSCO Act, were inspired by the observations made by the court in this case. Here, an organization called Sakshi filed a writ petition by way of public interest litigation under Article 32 seeking a declaration that “sexual intercourse” as contained in Section 375 of the Indian Penal Code to include all kinds of forcible penetration such as penile/oral, penile/anal, finger/vaginal, finger/anal and object/vaginal penetration and not only penile/vaginal penetration. The organization contented that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration, have been treated as offences falling under Section 354 IPC as outraging the modesty of a woman or under Section 377 IPC as unnatural offences. The court however, gave the following directions:

- ◆ A screen or some such arrangement be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused.
- ◆ Questions to be put by the accused in cross-examination be given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language that is not embarrassing.
- ◆ Whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC. The judgment laid down the foundation for the establishment of Child-Friendly Courts.

It was the unrest and dissatisfaction in the public after the Nirbhaya Gangrape that compelled further amendment in the Rape laws. After the incident, a panel was set up under the chairmanship of JS Verma (former Chief Justice of India) for analyzing criminal laws. As per the recommendations of the Justice Verma Committee, Criminal Law (Amendment) Act, 2013 was passed which provided for the amendment of Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and Protection of Children from Sexual Offences Act, 2012 in relation to sexual offences. The Act widened the scope of rape’s definition and provided for capital punishment in rape cases that cause the death of the victim or leave her in a permanent vegetative state. Act also provided for several new offences to make the laws more stringent.

Another milestone proved to be the judgment of the Hon’ble Supreme Court in the case of Independent Thought vs. Union of India and Anr.²¹ In the judgment, the Supreme Court criminalized sexual intercourse with a minor wife whose age lies between 15 and 18 years. The Court opined that the exception 2 in section 375 is violative of Articles 14, 15 and 21 of the Indian Constitution as it permits intrusive sexual intercourse with a girl who is below 18 and above 15

21. (2017) 10 SCC 800

years on the ground of marriage. The court held that such an exception clause in Indian rape laws negates the very purpose of the Prohibition of Child Marriage Act. It violates the provisions of the Protection of Children from Sexual Offences Act (POCSO) and other international conventions to which India is a signatory. The Apex court struck down exception 2 to section 375, of the Indian Penal Code. In **Gaya Prasad Pal @ Mukesh Vs. State**²² The Court observed that “rape” as defined in section 375 of IPC may also constitute “penetrative sexual assault” as defined in Section 3 of the POCSO Act in case of a child. And acts constituting the offence of “penetrative sexual assault” against a girl child would also amount to rape. Hence, a person may not be punished twice over for the same set of acts of commission or omission which collectively constitute an offence covered by two different provisions of law. Though the law permits trial on alternative charge to be held for both the offences, the punishment may be awarded only for one of them, the one which is graver in nature.

In cases of **The State of Maharashtra v. Bandu @ Daulat**,²³ the Hon’ble Court directed the setting up of special centres for the examination of vulnerable witnesses in every district and at least two such centres in each High Court’s jurisdiction. The Court also reiterated the directions issued in the case of Sakshi v. Union of India and held that the provisions of section 327(2) Crpc shall in addition to the offences mentioned in the subsection, also apply in inquiry or trial of offences under sections 354 and 377 of the IPC.

CONTENTIOUS ISSUES IN DECIDING RAPE CASES

Delay In Lodging FIR

In **Ashok Surajlal Ulke v. State of Maharashtra**²⁴

The apex court observed that in a case of rape, the fact that the FIR had been lodged after a little delay is of very little significance. In our society it is considered to be a matter of shame for the entire family and as such the parents or even the prosecutrix are reluctant to go to the police to lodge a report.

Conviction on sole testimony of the Victim Of Rape

The Apex Court in **State of U.P. v. Chhotey Lal**²⁵ observed that *“a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. The testimony of the prosecutrix if found to be reliable by itself, maybe sufficient to convict the culprit and no corroboration of her evidence is necessary. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.”*

22. 2016 SCC Online Del 6214

23. 2018 (11) S CC 163

24. 2011 Cri. L.J. 2330 (S.C.)

25. A.I.R. 2011 S.C. 697

Rape of a woman of easy virtue

The Apex Court in **Narender Kumar v. State (NCT of Delhi)**²⁶ observed that even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of “easy virtues” or women of “loose moral character” can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated.

Two Fingers Test

The Supreme court in **Lillu alias Rajesh and another v. State of Haryana**²⁷ observed that in view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity. They are entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The court held that the two-finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Moreover, even if the report of the test is affirmative, it cannot ipso facto give rise to the presumption of consent.

Individual liability in case of Gang Rape

In **Pramod Mahto V. State of Bihar**,²⁸ the Hon’ble Supreme Court held that it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there is more than one in order to find the accused guilty of gang rape and convict them under section 376 IPC. In **Pradeep Kumar V. Union Adm. Chandigarh**²⁹ it was laid down by the Supreme Court that to bring the offence of rape in the category of gang rape it is necessary to prove that more than one person had acted in concert with common intention to commit rape on victim. That more than one accused had acted in concert in commission of crime of rape with a predetermined plan, prior meeting of minds and with the element of participation in action. It may also be in a plan formed suddenly at the time of commission of offence which is reflected by element of participation in action. That in furtherance of such common intention one or more person of the group actually committed offence of rape on victim or victims.

26. AIR 2012 SC 2281

27. AIR 2013 SC 1784

28. 1989 (2) SCC 672

29. 2006 (10) SCC 608

Minor Contradictions in the sole testimony of Prosecutrix

In the case of **State of Himachal Pradesh v Asha Ram**, AIR 2006 SC 381, the court held that the testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

Digital Rape – Court’s Recommendations

In the case of **Shakshi Vs. Union of India**³⁰ the Apex court observed that there is a growing demand world over for inclusion of Digital Rape/ Male Rape/ Oral Rape/ Anal & Rectal Rape within the definition of Rape. Section 377 of the Indian Penal Code to a large extent does cover case of carnal intercourse committed by a person against the order of nature. But, technically its applicability is limited and it becomes difficult to include certain category of cases where the offence has been committed by the offender on another with an object. This case sounded a wake-up call for the legislators to think about having a re-look at the definition of Rape so as to specifically include the instances of Digital Rape/ Male Rape/ Anal Rape and make the offence Gender Neutral.

OTHER SEXUAL OFFENCES MENTIONED UNDER IPC

Section 354 deals with offence of Assault or criminal force to woman with intent to outrage her modesty Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty is said to have committed the offence. The Supreme Court in **Raju Pandurang Mahale v. State of Maharashtra**³¹ defined what constitutes an outrage to female modesty. The court observed that the essence of a woman’s modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her sari, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence. In **Ram Kripal v. State of Madhya Pradesh**³², the Supreme Court explained the essential ingredients of offence under Section 354 IPC and held that

30. Supra 30

31. AIR 2004 SC 1677

32. 2007 II Cri. L.J. 2302

- (a) That the assault must be on a woman.
- (b) That the accused must have used criminal force on her.
- (c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

In **State of Punjab vs. Major Singh**³³, a question arose whether a female child of seven and a half months could be said to be possessed of “modesty? which could be outraged. In answering the above question the court held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind then that must fall within the mischief of Section 354IPC. The “common notions of mankind” have to be gauged from contemporary societal standards. The essence of a woman’s modesty is her sex and from her very birth, she possesses modesty which is the attribute of her sex. The Apex court in the case of **Rupan Deol Bajaj v. K.P.S. Gill**³⁴ held that the alleged act of Mr Gill in slapping Mrs Bajaj on her posterior amounted to “outraging her modesty” for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady “sexual overtones” or not, notwithstanding. After 2013 Amendment, Sections 354A, 354B, 354C and 354D have been added to deal with the specific nature of the sexual assault.

PART-II

SEXUAL OFFENCES AGAINST GIRL CHILD- POCSO ACT

The sexual offences defined under the Indian Penal Code are gender-specific and general in nature. For the protection of children, a need was felt for special legislation and so The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), special legislation was enacted. It provides punishment for penetrative, touch, and non-touch based sexual offences against children and also mandates the establishment of Special Courts and procedures for trial of offences involving children. The statute aims to protection of children from offences arising out of sexual assault, sexual harassment and pornography. It defines a child as any person below the age of 18 years. Hence, if the sexual offence is committed against a girl child then apart from the liability under IPC, the liability under the POCSO Act also arises. Here it is pertinent to observe that POCSO Act is gender neutral. Hence, apart from the general provisions mentioned under IPC and CrPC, there are some special provisions mentioned under the Act. So, understanding this legislation becomes important and the discussion on sexual offence remains incomplete without discussing the POCSO Act. In this chapter, I will be discussing only the special provisions of the legislation without repeating the general principles which are applicable in case of victims of sexual offence irrespective of their age. Several provisions in this act are based on the guidelines given by the Hon’ble Supreme Court in **Sakshi’s Case**³⁵ and **Gurmit Singh’s case**.³⁶

33. AIR 1967 SC 63

34. AIR 1996 SC 309

35. AIR 2004 SC 3566

36. AIR 1996 SC 1393

The law intends to protect the child through all stages of the judicial process and gives paramount importance to the principle of "best interest of the child". The power to determine the age has been vested in the Special Court established under Section 34 of the Act. When the age of the victim is to be assessed or ascertained, the provisions of Section 94 of the JJ Act are applicable.

Process for Age-Determination under Section 94, Juvenile Justice Act, 2015

The process can be followed by any court before which the age of a person either the victim or the accused is in question. The moot question is what steps are to be followed in case the age of a minor or child is to be ascertained.

Under Section 94(1), JJ Act, 2015, the appearance of a person can be relied upon only to conclude that the person is a child. It cannot be the basis to conclude that the person was an adult. According to Section 94(2), JJ Act, 2015, the birth certificate from school, matriculation or evaluation certificates will be considered to determine if the person is a child. If these documents are not available, the birth certificate by a corporation, municipal authority, or a Local Body will be considered. If these are also unavailable, the JJB or CWC can order an ossification test or the latest medical age determination test.

The Special Court under the POCSO Act could also adhere to the procedure prescribed under the JJ Act, 2015 for age-determination as in **Jarnail Singh v. State of Haryana**,³⁷ the Supreme Court has held that the procedure to determine the age of a child in conflict with the law can be used to determine the age of a child victim. The Supreme Court held that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim.

In every case concerning a child or juvenile in conflict with the law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining— (a)(i) ***the matriculation or equivalent certificates***, if available; and in the absence whereof; (ii) the date of birth certificate from the ***school first attended*** (other than a play school); and in the absence whereof; (iii) the birth ***certificate given by a corporation or a municipal authority or a panchayat***; (b) ***and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board***, which will declare the age of the juvenile or child. ***In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year*** and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and

37. (2013) 7 SCC 263

either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

The Supreme Court in **Shah Nawaz v. State of Uttar Pradesh**³⁸ observed that in accordance with the erstwhile JJ Model Rules, 2007 “the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available.”

There are five types of sexual offences against children defined under Chapter II of the POCSO Act. These are:

Penetrative sexual assault; (Sections 3)

Aggravated penetrative sexual assault; (Sections 5)

Sexual assault; (Sections 7)

Aggravated sexual assault; (Sections 9), and

Sexual harassment (Sections 11)

- Abetment of an offence or an attempt to commit an offence is also punishable under the Act. (Section 16)

- Using a child for pornographic purposes such as representation of the sexual organ of a child, usage of a child engaged in real or stimulated sexual acts, the indecent or obscene representation of a child is an offence under POCSO Act and is punishable (Section 13).

The POCSO Act provides for two presumptions – **presumption as to certain offences (Section 29) and presumption of culpable mental state (Section 30)**. A person prosecuted for committing, abetting or attempting to commit penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault will be presumed to have committed the offence unless the contrary is proved. If an offence requires presence of a culpable mental state, the Special Court should presume its existence and the burden is on the defence to establish that the accused did not have the mental state. The phrase “culpable mental state” includes “intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact” as per the Explanation to Section 30, POCSO Act. The offences of sexual assault, aggravated sexual assault, and sexual harassment require the presence of sexual intent. The presumption of culpable mental state can be applied to these offences.

Jurisdiction of Special Court, POCSO

The law provides for the establishment of Special Courts. Special courts have the jurisdiction in matters of sexual offences against a child. The Jurisdiction, as is stated above of Special Court

38. (2011) 13 SCC 751

constituted in terms of section 28 of the Act arises when the victim is a child, either boy or a girl of sexual offence fully defined under sections 3 to 22. As per the provisions contained under section 28(3) of the POCSO Act, the court will also have the jurisdiction to try offences relating to publication or transmission of sexually explicit material depicting children in any act or conduct or manner that facilitates abuse of children online under Section 67B, Information Technology Act, 2000.

The Act emphatically lays down the provisions for age determination, cognizance of offences and the special procedure for trial in such cases. Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and child harassment including using of child for pornographic purposes are the five offences against children that are covered by this act. This act envisages punishing even for abetment or for an attempt to commit the offences defined in the act. It recognizes that the intent to commit an offence even when the attempt to commit the offence is unsuccessful. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence.

It is duty of the Special Court to ensure Child-friendly atmosphere for which they have to take care of the following aspects:-

- Allowing a family member, guardian, friend, or relative whom the child trusts or has confidence in to be present. (Section 33(4), POCSO Act).
- They should ensure that the child is not repeatedly called to testify in court. (Section 33(5), POCSO Act)
- They should ensure that identity of the child is not disclosed at any time during investigation or trial unless the disclosure is in the interest of the child. Reasons should be recorded in writing if the disclosure is allowed. (Section 33(7), POCSO Act)
- Special Courts should determine the age of the child when the question arises before the court and adhere to the provisions of the JJ Act, 2015 on age-determination.(Section 34(2), POCSO Act)
- They should ensure that the child is not exposed to the accused at the time of recording the evidence and that the accused can hear the statement of the child and communicate with his advocate. Video conferencing, single visibility mirrors, curtains, or any other device should be used to facilitate this. (Section 36, POCSO Act)
- They should conduct the trial in camera and in the presence of parents of the child or any other person in whom the child has trust or confidence. (Section 37, POCSO Act)
- Special Courts should examine the child in a place other than the courtroom if the situation so requires (Section 37, POCSO Act)

- **The Special Courts have a mandate to complete the trial within a period of one year from the date of taking cognizance of the offence (Section 35).**

In the case of **Alakh Alok Srivastava Vs Union of India and Others**³⁹ the Hon'ble Supreme Court laid down the following directions

- (i) *The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitized in the matters of child protection and psychological response.*
- (ii) *The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.*
- (iii) *The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time frame under the Act.*
- (iv) *The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.*
- (v) *The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.*
- (vi) *Adequate steps shall be taken by the High Courts to provide a child-friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.”*

It has been directed by the Hon'ble Supreme Court that the Judges of Special Courts be sensitized to the issues of child psychology. As the nature of case to be tried by the Special Courts are the ones where the most important witness is the child himself/herself, it has been further laid down that in the case of **Ranjit Hazarika v. State of Assam**⁴⁰ that the testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury. The court while appreciating the evidence of a

39. 2018 SCC Online SC 478

40. (1998) 8 SCC 635

prosecutrix may look for some assurance of her statement to satisfy its judicial conscience since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.”

But, before a person is convicted on the sole testimony of the child victim, it is important that the court is satisfied that the victim understands the difference between a right and a wrong and what the child states before the court is the truth and that he/she is not tutored.

How to Ascertain if a Child Witness Understands the Difference between Truth and Lie

In **State v. Sujeet Kumar**⁴¹, the Delhi High Court was critical of the inappropriate questions posed by a Magistrate to assess the competence of a two-and-a-half-year-old child victim of a brutal rape before recording her statement under Section 164, Cr. P.C. It found the questions to the child about the school she went to and the class she studied in highly inappropriate as the child lived in a slum and did not attend any school. The Magistrate then asked her if she understood the term “truth” and the difference between truth and lie. The High Court observed: “How could a two and half-year-old child explain the meaning of word “truth” and state the difference between truth and lie. It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between truth and lie. What to talk of a two and half year old child.”

The Delhi High Court cited an article “Child Witness Competency: When Should the Issue be Raised” and highlighted the key points as follows—

- Asking, "What does it mean to tell the truth?" and "What does it mean to tell a lie?" are more developmentally appropriate for young children than asking, "What is the difference between the truth and a lie?"

- Very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. Situationally relevant multiple-choice questions can be posed to assess the child’s competency.

- Examples of such questions are:

- * If I told your mom that you just yelled at me, would that be the truth or a lie?

- * If you told your mom that I hit you, would that be the truth or a lie?

- * If you told your teacher that something bad happened to you, but it really didn't happen-you were making it up-would you be telling the truth or a lie?

- Competent children should be able to consistently provide correct answers to these multiple-choice questions.

41. CRL.A. no. 1190 of 2014 Decided On,13 October 2014

Questioning Children

- Special Courts should ensure that the Special Public Prosecutor and defence lawyer do not question the child directly. The questions to be put to the child have to be communicated to the Special Court, who should put the questions to the child (Section 33(2), POCSO Act)
- They should permit frequent breaks to the child during trial, if necessary.(Section 33(3), POCSO Act)
- They should not allow aggressive questioning or character assassination of the child and ensure that dignity is maintained (Section 33(6), POCSO Act)
- Special Courts should take the assistance, if necessary, of a qualified and experienced translator or interpreter on payment of prescribed fees when recording the statement of a child. (Section 38(1), POCSO Act).
- They should take the assistance, if necessary, of a qualified and experienced special educator or person familiar with the manner of communication of the child or an expert, when recording the statement of a child with a mental or physical disability.(Section 38(2), POCSO Act).

Another important issue that arose before the court is whether a person with mental age of less than 18 years can be treated as a child and the court answered it in the case of **Eera through Manjula Krippendorf v. State (Govt. of NCT of Delhi) and Ors**⁴² The issue before the apex court, in this case, was whether Section 2(d) of the POCSO Act which defines the term “child” should be interpreted to include the mental age of a person so that a mentally retarded person or extremely intellectually challenged person above the biological age of 18 years would come within its ambit. A two-judge bench of the Supreme Court held that such an interpretation would not be tenable because of the purpose of the legislation and the intention of Parliament. The court held *“we would be doing violence both to the intent and the language of Parliament if we were to read the word "mental" into Section 2(1)(d) of the 2012 Act. Given the fact that it is a beneficial/ penal legislation, we as Judges can extend it only as far as Parliament intended and no further.”*

Facilitation of Recording of Statement under Section 164, Cr.P.C., by the Magistrate

The POCSO Act does not mandate that a statement under Section 164, Cr.P.C. be recorded in every case. However, pursuant to the Criminal Law (Amendment) Act, 2013, Section 164(5-A)(a), the statement of a victim against whom offences have been committed under Sections 354, 354-A, 354-B, 354-C, 354-D, 376(1), 376(2), 376-A, 376-B, 376-C, 376- D, 376-E or 509 of the IPC shall be recorded by a Judicial Magistrate. As per the provisions of Section 164(5-A)(a)Cr.P.C., the statement should be recorded as soon as the commission is

42. (2017)15 SCC 133

brought to the notice of the police. In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement and preferably to a Lady **Magistrate (State of Karnataka v. Shivanna, (2014) 8 SCC 913.)**

In case of sexual offences under the IPC, the IO should bring the child victim to the Magistrate immediately. [Section 164(5-A)(a)] In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/ preferably Judicial Magistrate for recording the 164 statement.

The reasons for delay in bringing the victim of rape within 24 hours should be recorded in the case diary and the copy of the same should be handed to the Magistrate. For instance, if the child is traumatized or in no state to be physically taken for the 164 statement, this reason should be cited to the Magistrate to explain the delay. The IO should also hand over to the Magistrate a copy of the medical examination report. The POCSO Act does not mandate that the child should be taken to a lady Magistrate. The Supreme Court has also indicated that this is a preference and not a mandatory requirement. The priority should be on ensuring that the statement is recorded at the earliest. If a lady Magistrate is unavailable, the IO should not delay matters and take the child to any Metropolitan or preferably Judicial Magistrate.

Compensation

Special Courts should direct payment of compensation (interim and final) for physical or mental trauma caused to the child or for the child's immediate rehabilitation. They should determine the quantum and direct the State Government to pay the compensation within 30 days. (Section 33(8), POCSO Act read with Rule 7, POCSO Rules) For the Special Court to order for interim or final compensation, it is not a prerequisite for the child to file an application. The Special Court may order on his/her own accord where it is found to be appropriate. A record of conviction is not mandatory for the provision of compensation. Where the Special Court is satisfied that a child has been a victim of sexual abuse, the judge may direct compensation to be paid in cases where the accused has been acquitted or even in cases where the accused has not identified or traced POCSO Rules, Rule 7(2) Interim compensation can be paid at any stage and is not linked to the child's testimony.

The compensation ordered must be disbursed by the State Government within 30 days from the order as per POCSO Rules, Rule 7(4) and 7(5) The State Government may pay the sum from the Victims Compensation Fund or any other scheme or fund which has been established under section 357A of the Code of Criminal Procedure.

The quantum of compensation is not specified in the POCSO Act and it is based on the discretion of the judge deciding the matter. The POCSO Rules provides that while deciding the quantum of compensation, the judge must take into consideration the type, nature and severity of abuse, the extent of physical and mental harm caused to the child, expenditure incurred for medical treatment for physical and/or mental health, the financial condition of the child. [Rule 7(3)]

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

Sexual harassment at the workplace is a form of gender discrimination that violates a woman's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution. Sexual harassment at the workplace in India was for the very first time recognized by the Supreme Court in its landmark judgment of **Vishaka v. State of Rajasthan**⁴³, wherein the Supreme Court framed certain guidelines and issued directions to the Union of India to enact an appropriate law for combating workplace sexual harassment. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and its corresponding Rules were enacted 16 years after the Vishaka Judgement. The Supreme Court, in the Vishaka Judgment, laid down certain guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment ("Vishaka Guidelines") until the enactment of the Act. In the case, the Supreme Court for the first time acknowledged the glaring legislative inadequacy and acknowledged workplace sexual harassment as a human rights violation. In framing the Guidelines, the Hon'ble Court placed reliance on the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the General Assembly of the United Nations in 1979 which India has both signed and ratified. As per the Judgment, the Guidelines issued under Article 32 of the Constitution were to remain in operation till such time the legislative framework on the subject is drawn-up and enacted, to have the effect of law and to be compulsorily followed by organizations, both in the private and government sector.

As per the Vishaka judgment, 'Sexual Harassment' includes such unwelcome sexually determined behaviour like physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography and include other unwelcome physical, verbal or non-verbal conduct of sexual nature. Where any of these acts are committed in circumstances under which the victim of such conduct has a reasonable apprehension that in relation to her employment or work such conduct can be humiliating and may constitute a health and safety problem, it amounts to sexual harassment in the workplace. It is discriminatory in the sense that the woman has reasonable grounds to believe that her objection would disadvantage her future prospects in connection with her employment or work or that it would create a hostile working environment.

After the Vishakha Judgement and before the framing of legislation, in **Apparel Export Promotion Council v. A.K Chopra**⁴⁴ case, the Supreme Court reiterated the law laid down in the Vishaka Judgment and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace. The Hon'ble Court enlarged the definition of sexual harassment by ruling that physical contact is not essential for it to amount to an act of sexual harassment.

43. AIR 1997 SC 3011

44. AIR 1999 SC 625

Thereafter, in the year 2012, a letter written by Dr Medha Kotwal of Aalochana (an NGO) highlighted that in several individual cases of sexual harassment, the Vishaka Guidelines were not being effectively implemented. It was converted into a writ petition, **Medha Kotwal Lele & Ors. V. Union of India & Ors.**⁴⁵ and the Hon'ble Supreme Court took cognizance and undertook monitoring of the implementation of the Vishaka Guidelines across the country by directing state governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. In its judgment, the Supreme Court observed that "the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect. Not being satisfied with the implementation of the Vishaka Guidelines, it directed the states to put in place sufficient mechanisms to ensure effective implementation of the Vishaka Guidelines. The Court asserted that in case of a non-compliance or non-adherence of the Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.

On September 03, 2012, and on February 26, 2013, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was passed by the Lok Sabha and Rajya Sabha respectively. On April 23, 2013, the Act received the President's assent and was published in the Gazette of India as Act No. 14 of 2013. The Indian Ministry of Women and Child Development notified December 09, 2013, as the effective date of the Act and the Rules.

An aggrieved woman in relation to a workplace is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. The definition does not necessitate the woman to be an employee, even a customer/ client who may be sexually harassed at a workplace can claim protection under the Act. For a woman to claim protection under the Act, the incident of sexual harassment should have taken place at the 'workplace'.

Work Places Covered: The Act applies to both the organized and unorganized sectors in India. It inter alia applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and also applies to a dwelling place or a house.

Sexual Harassment includes unwelcome sexually tinted behaviour, whether directly or by implication, such as (i) physical contact and advances, (ii) demand or request for sexual favours, (iii) making sexually coloured remarks, (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

The definition of 'sexual harassment' under the Act is wide enough to cover both direct or implied sexual conduct which may involve physical, verbal or even written conduct. The key

45. (2013) 1 SCC 297

distinguishing feature is that the conduct is unwanted and unwelcome by the recipient. It includes quid pro quo proposals wherein the respondent being a person in power, pressurizes the woman employee (usually a subordinate) for sexual favours in exchange for advancement in the workplace or threat of adverse employment action. The definition also includes reference to creating an 'intimidating, offensive or hostile working environment'. The burden lies on the internal committee to decide whether the harassment suffered by a victim is sufficiently severe to have created a hostile working environment or not. Further, determining what constitutes 'sexual harassment' depends upon the specific facts and the context in which the conduct has occurred.

In 2010, the High Court of Delhi endorsed the view that sexual harassment is a subjective experience and for that reason held "A complete understanding of the complainant's view requires an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. Men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as a comparatively harmless amusement. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."⁴⁶

Workplace The Vishaka Guidelines were confined to the traditional office set-up. Recognizing the fact that sexual harassment may not necessarily be limited to the primary place of employment, the Act has introduced the concept of an 'extended workplace'. As per the Act, 'workplace' includes any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer to commute to and from the place of employment. In the case of **Saurabh Kumar Mallick v. Comptroller & Auditor General of India**⁴⁷, the Delhi Court while considering this matter held this as 'clearly misconceived'. The Delhi Court observed that 'the aim and objective of formulating the Vishaka Guidelines were obvious in order to ensure that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly. Keeping in view the objective behind the judgment, a narrow and pedantic approach cannot be taken in defining the term 'workplace' by confining the meaning to the commonly understood expression "office". The High Court observed that the following factors would have bearing on determining whether the act has occurred in the 'workplace': *** Proximity from the place of work; * Control of the management over such a place/residence where the working woman is residing; and * Such a residence has to be an extension or contiguous part of the working place.**

In conclusion, the Delhi High Court held that the official mess where the employee was alleged to have been sexually harassed definitely falls under 'workplace'.

46. Dr. Punita K Sodhi v Union of India and others WP(C) 367/2009, DOJ 09-09-2010

47. 151(2008) DLT 261(DB)

Punishments and compensation

The Act prescribes an employee indulging in an act of sexual harassment should be punished with the punishment prescribed under the service rules of the organization. If the organization does not have service rules, disciplinary action including a written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service and deduction of compensation payable to the aggrieved woman from the wages of the respondent can be taken. The Act also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee, the loss of career opportunity due to the incident of sexual harassment, the medical expenses incurred by the victim for physical/ psychiatric treatment, the income and status of the alleged perpetrator and the feasibility of such payment in a lump sum or instalments.

DOWRY RELATED CRIMES

Crime against women for Dowry includes committing cruelty and violence against them for the satisfaction of greed and in extreme cases, it goes to the extent of causing death. Death for dowry is where women are burnt alive or beaten to death or compelled to commit suicide. Dowry death is the most gruesome and spiteful form of murder committed by the husband and his relatives. The only difference between murder and dowry death is that here the perpetrator are husband and his family members and the victim is the wife.

The Hon'ble Supreme Court in the case of **Smt. Paniben Vs State of Gujarat**⁴⁸ observed *"Every time a case relating to dowry death comes up, it causes ripples in the pool of the conscience of this Court Nothing could be more barbarous, nothing could be more heinous than this sort of crime. The root cause for killing young bride or daughter-in-law is avarice and greed. All tender feelings, which alone make the humanity noble, disappear from the heart. Kindness, which is the hallmark of human culture, is buried. Sympathy to the fairer sex, the minimum sympathy is not even shown. The seedling which is uprooted from its original soil and is to be planted in another soil to grow and bear fruits is crushed."*⁴⁹

"Dowry" is, and has always been essentially, that property which has been obtained under duress, coercion or pressure. It is in fact property extorted from the father or guardian of the bride by the bridegroom, his parents or relations. It does not consist of voluntary gifts given to the bride and bridegroom.

The tradition of dowry can be traced back to the centuries-old ritual of "Vardakshina" which

48. AIR 1817, 1992 SCR. 1992; (2)197

49. Smt. Paniben . Vs State Of Gujarat, AIR 1817, 1992 SCR. 1992; (2)197

used to be given by the parents of the bride to the bridegroom out of love and affection and to honour the groom rather than to induce him to take the bride. Later on, it became the symbol of status and prestige to assert one's superiority over others and dowry emerged as an unintended consequence.

Law Commission in its 91st Report defined the term dowry as money, or other things estimable in terms of money demanded from the wife or her parents or relatives, where such demand is not properly referable to any legally recognized claim and is relatable only to the wife's having married into the husband's family.

Dowry Prohibition Act 1961 defines it as any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage to the other party to a marriage or by the parents to either party to marriage or by any other person at or before or any time after the marriage of the said parties but does not include dower or mahr in the case of a person to whom the Muslim Personal Law applies.⁵⁰

Supreme Court in the case of **State of Andhra Pradesh V. Raj Kumar Asava**⁵¹ held that the term dowry is not only restricted to agreement or demand for payment of dowry before or at the time of marriage but also includes demand made after marriage when marriage institution is subsisting.

Definition of dowry given in Dowry Prohibition Act 1961 is wider and it includes dowry demand made directly or indirectly either at the time of marriage or at any time after marriage when the demand of dowry is made in connection of marriage means either for solemnization of marriage or subsistence of marriage. Dowry Prohibition Act is a social legislation attempts to check the menace of dowry and it makes punishable giving and taking dowry, abetting dowry and demand of dowry made at the time of marriage, before or after the marriage. The voluntary presents given at or before or after the marriage to the bride or bridegroom out of love, affection or regard would not fall within the expression 'dowry' punishable under the Dowry Prohibition Act. Further dowry punishable under Dowry Prohibition Act must be given or taken or demanded 'in connection with marriage' means either for solemnization of marriage or subsistence of marriage.

When demand of money has no connection with marriage, dowry-related provisions would not be attracted as Supreme Court observed in the case of **Appasaheb v. State of Maharashtra**⁵² that a demand for money on account of some financial stringency or for meeting some urgent domestic expenses cannot be termed as a demand for dowry. When demand for money has nexus to marriage, then it will come under the definition of dowry punishable under the Dowry

50. Sec. 2 Dowry Prohibition Act 1961.

51. (2004) 4 SCC 470.

52. (2007) 9 SCC 721.

Prohibition Act. The Supreme Court in the case of **Bachani Devi v. State of Haryana**⁵³ observed that if demand for property or valuable security has a nexus with marriage, such demand would constitute 'demand for dowry'; the cause or reason for such demand being immaterial.

A Joint Committee appointed by the Houses of Parliament to examine the working of the Dowry Prohibition Act in 1982 found that dowry had permeated all classes, communities, and religious groups and castes. It noted with distress that education had no liberalising effect on the minds of people. The Committee recommended amendments to the Dowry Prohibition Act of 1961 and in the Indian Penal Code. Amendments were brought into effect by the Dowry Prohibition Amendment Act, 1986 and Criminal Law Amendment Act, 1983. Before the enactment of the Amendment Acts in 1983 and 1986, dowry deaths were dealt with under Section 302 of the Indian Penal Code i.e. murder or under Section 306 i.e. abetment to suicide.

Section 498A was introduced wherein if a woman is subjected to cruelty by her husband or his relative they could be convicted under this Penal provision. Section 113A was introduced in the Evidence Act which contains a presumption as to abetment of suicide by a married woman. The law underwent a further change with the introduction of Section 304B in the Penal Code and Section 113B in the Evidence Act by the Dowry Prohibition (Amendment) Act, 1986. The legislature has by introducing Sections 113A and 113B in the Evidence Act tried to permit a presumption to be raised if certain facts are established.

I. CRUELTY:

In 1983, Chapter XXA was inserted in the Indian Penal Code to shield married women from being exposed to abuse by the husband or his relatives. The object of adding new chapter XXA in the Indian Penal Code is to punish a husband and his relatives who torture and harass the wife intending to coerce her or any person related to her to meet any unlawful demands or to drive her to commit suicide.

1. The offence under Section 498-A IPC is a cognizable and non-bailable offence. The information relating to the commission of the offence can be given to an officer-in-charge of a police station by the person aggrieved or by any person related to her by blood, marriage or adoption or if there is no such relative, by any public servant belonging to such class or category as may be notified by the State Government in this behalf. Section 498-A IPC was introduced with the avowed object to combat the menace of dowry deaths and harassment to a woman at the hands of her husband or his relatives. Nevertheless as pointed out by the Hon'ble Supreme Court

53. 2011 (2) SCALE 265.

in *Onkar Nath Mishra v. State (NCT of Delhi)*⁵⁴, the provision should not be used as a device to achieve oblique motives.

2. In *U. Suvetha v. State*⁵⁵ the court discussed essentials for the commission of an offence under Section 498-A and held

- (i) The woman must be married;
- (ii) She must be subjected to cruelty or harassment; and
- (iii) Such cruelty or harassment must have been shown either by husband of the woman or by the relative of her husband.

3. Every harassment does not amount to “cruelty” within the meaning of Section 498-A. For the purpose of Section 498-A, harassment simpliciter is not “cruelty” and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet any unlawful demand for property, etc. that it amounts to “cruelty” punishable under Section 498-A IPC.⁵⁶

4. Cruelty can either be mental or physical. It is difficult to straightjacket the term cruelty employing a definition because cruelty is a relative term. What constitutes cruelty for one person may not constitute cruelty for another person⁵⁷. The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs.⁵⁸

In *S. Hanumantha Rao v. S. Ramani*⁵⁹ the Supreme Court considered the meaning of cruelty in the context of the provisions under Section 13 of the Hindu Marriage Act, 1955 and observed that mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In *Mohd. Hoshan v. State of A.P.*⁶⁰ the Supreme Court while dealing with a similar issue held that mental or physical torture should be “continuously” practiced by the accused on the wife. The Court further observed that whether one spouse has been guilty of cruelty to the other is essentially a question of fact. Cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies

54. (2008) 2 SCC 561.

55. (2009) 6 SCC 757.

56. *State of A.P. v. M. Madhusudhan Rao* (2008) 15 SCC 582

57. *G.V. Siddaramesh v. State of Karnataka* (2010) 3 SCC 152

58. *Gananath Pattnaik v. State of Orissa* (2002) 2 SCC 619

59. AIR 1999 SC 1318

60. (2002) 7 SCC 414,

from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. In order to be covered under Section 498-A IPC one has to be a “relative” of the husband by blood, marriage or adoption⁶¹. A girlfriend or a concubine being not connected by blood or marriage therefore is not a “relative” of the husband as per Section 498-A⁶². Proof of the wilful conduct actuating the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, is the sine qua non for entering a finding of cruelty against the accused person⁶³. As In a criminal trial, the charges against the accused must be proved beyond all reasonable doubts, before recording a finding of guilt against the accused, the Court must satisfy itself that the deceased was not hypersensitive⁶⁴.

6. The expression “husband” covers a person who enters into a marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty in the manner provided under Section 498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Section 498-A.⁶⁵

7. A Two-Judge Bench of the Supreme Court has held that even a second wife can file a complaint under Section 498-A. In this connection, following words of Arijit Pasayat, J. assumes importance:

10. “... The legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent. ...”⁶⁶

8. The same position was reiterated in the case of **A. Subash Babu v. State of A.P.**⁶⁷ and the Hon’ble Court held that Section 498-A is attracted even in the case of allegation of cruelty to second wife. Though concerning a woman in a live-in relationship Kerala High Court in **Unnikrishnan v. State of Kerala**⁶⁸, after considering various decisions of the Supreme Court has held that for an offence under Section 498-A to be committed, the parties must have undergone some sort of ceremonies with the object of getting married.

61. Vijeta Gajra v.State (NCT of Delhi), (2010) 11 SCC 618.

62. U. Suvetha v. State, (2009) 6 SCC 757.

63. Gurcharan Singh v. State of Punjab, (2017) 1 SCC 433.

64. State of W.B. v. Orilal Jaiswal, 1994) 1 SCC 73.

65. Reema Aggarwal v. Anupam (2004) 3 SCC 199.

66. *ibid* para 18

67. (2011) 7 SCC 616

68. 2017 SCC OnLine Ker 12064.

9. Dowry demand is included in the “unlawful demand” as contemplated under Explanation (b) of Section 498-A; however, it need not be the only demand considered to be unlawful. The Supreme Court in **Modinsab Kasimsab Kanchagar v. State of Karnataka**,⁶⁹ held that a demand of Rs 10,000 towards repayment of a society loan, though not a dowry demand, was an unlawful demand sufficient to attract Section 498-A. In **Kaliyaperumal v.State of T.N.**⁷⁰, it was held that Section 498-A includes in its amplitude past events of cruelty.

10. In the case of **B.S. Joshi v. State of Haryana**⁷¹ the Supreme Court held that Section 498A was added with a view to punishing husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. A hyper-technical view is counterproductive and acts against the interests of women and against the object for which the provision was added.

Whether Crime committed under section 498A I.P.C. is Compoundable

In ordinary circumstances the offence under Section 498-A of the Indian Penal Code, 1860 is not statutorily compoundable. In *Thathapedi Venkatalakshmi v. State of A.P* 1991 CriLJ 749, the Andhra High court held that the basic object of any matrimonial law is to facilitate a happy and harmonious matrimonial life between the spouses. In the larger interests of the parties and to secure the ends of justice, the Court by exercising powers u/S. 482 Cr.P.C. can accord permission to the parties to compound the offence after examining them in Court and after satisfying about the voluntary nature of the settlement and the consequent filing of the Petition in question for purposes of compounding the offence.

In case a conviction has been recorded and a sentence is awarded under Section 498-A, and if the Court feels that the parties have a real desire to bury the hatchet, in the interest of peace, it can reduce the sentence of the accused to the period of sentence already undergone⁷².

In **Arnesh Kumar v. State of Bihar**⁷³ the Hon’ble Supreme Court of India, in an endeavour to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically in cases under Section 498-A IPC, the Court gave certain directions which include:

- (i) Police officers not to automatically arrest the accused when a case under 498-A IPC is registered. They should satisfy themselves about the necessity of arrest under parameters flowing from Section 41 CrPC.

69. (2013) 4 SCC 551.

70. (2004) 9 SCC 157.

71. AIR 2003 SC 1386

72. *Manohar Singh v. State of M.P.*, (2014) 13 SCC 75

73. (2014) 8 SCC 273.

- (ii) Police officers shall fill the checklist [containing specified sub-clauses under Section 41(1)(b)(ii) CrPC] and furnish the reasons and material necessitating the arrest.
- (iii) The Magistrate will authorise detention only after recording its satisfaction on the report furnished by the police officers.
- (iv) If the police officers fail to comply with the directions, they will be liable for departmental action as well as punishment for contempt of Court.
- (v) Failure of the Judicial Magistrate to comply with the directions will render him liable for departmental action by the appropriate High Court.

In **Rajesh Sharma v. State of U.P.**⁷⁴, the Supreme Court again gave directions to prevent misuse of Section 498-A IPC which were further modified in Social Action Forum for **Manav Adhikar v. Union of India**⁷⁵. These directions include:

- In every district one or more Family Welfare Committee be constituted by the District Legal Service Authority and till the report of the committee is received no arrest should be normally made
- Complaints under Section 498-A and other connected offences may be investigated only by a designated Investigating Officer of the area.
- If a settlement is reached between the parties, it is open to them to approach the High Court under Section 482 seeking quashing of proceedings or any other order. It will be open to the District and Sessions Judge or any other senior judicial officer nominated by him to dispose of the proceedings including closing of the criminal case if the dispute primarily relates to matrimonial discord.
- If a bail application is filed with at least one day's notice to the Public Prosecutor/complainant, the same may be decided as far as possible on the same day. Recovery of disputed dowry items may not, by itself, be a ground for denial of bail if maintenance or other rights of wife/minor children can otherwise be protected.
- In respect of persons ordinarily residing out of India impounding of passports or issuance of Red Corner Notice should not be a routine.

These directions not to apply in case of tangible physical injuries or death.

Under Section 468 CrPC, a complaint alleging commission of an offence under Section 498-A can be filed within 3 years of the alleged incident. However, Section 473 CrPC enables the Court to take cognizance of an offence after the period of limitation if it is satisfied that it is necessary so to do in the interest of justice.

74. 2017 SCC OnLine SC 821.

75. 2018 SCC OnLine SC 1501.

II. DOMESTIC VIOLENCE

Domestic violence includes a broad spectrum of abusive and threatening behaviour which includes physical, emotional, economic and sexual violence as well as intimidation, isolation and coercion. The Protection of Women from Domestic Violence Act, 2005 ("Domestic Violence Act") was passed to provide a civil law remedy for the protection of women from domestic violence in India. The Domestic Violence Act encompasses all forms of physical, verbal, emotional, economic and sexual abuse and forms a subset of the anti-dowry laws to the extent it is one of the reasons for domestic violence. Section 3 of the Domestic Violence Act specifically incorporates all forms of harassment, injury and harms inflicted to coerce a woman to meet any unlawful demand for dowry. Some of the common remedies provided under the Domestic Violence Act include:

- Protection Orders under Section 18, – prohibiting a person from committing domestic violence;
- Residence Orders under Section 19– dispossessing such person from a shared household;
- Monetary Relief under Section 20
- Custody Orders under Section 21– granting custody of a child;
- Compensation Orders under Section 22 – directing payment of compensation; and
- Interim Relief under Section 23

Where a case under Section 498-A is pending before a Criminal Court and an allegation is found to be genuine, it is always open to the appellant to ask for reliefs under Sections 18 to 22 of the Domestic Violence Act and interim relief under Section 23 of the said Act.

III. DOWRY DEATH

Indian Penal Code defines Dowry Death as death of a woman caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with, any demand for dowry, such death is called as dowry death and such husband or relative is deemed to have caused her death.

Essential ingredients necessary for dowry death are:

- Death must have been caused by burns or bodily injury or otherwise than under normal circumstances.
- Death must have taken place within seven years of marriage.
- Wife must have been subjected to cruelty or harassment by her husband or in-laws.
- Such cruelty or harassment must be for or in connection with demand for dowry.

- Such cruelty or harassment must be shown to have been meted out to woman soon before her death.

The presumption clause is created to cure the problem of lack of evidence as dowry death is committed within four walls and is generally shown as an accident. For attracting the presumption clause it is needed that all essential requirements of this section must be proved before the court. Death must be within seven years of marriage and soon before the death, cruelty or harassment for dowry demand is proved to have been committed meaning thereby all the requirements of Section 498-A of IPC are proved in addition to death of woman, then only death will become dowry death and presumption clause will become applicable. It is a much difficult task as in dowry-related offences eyewitnesses and other kinds of evidence are generally not available. Requirements of proving death in suspicious circumstances and cruelty committed for dowry demand soon before death check the effective enforcement of provisions relating to dowry death. Whenever a married woman dies within seven years of her marriage under suspicious circumstances and it is proved that she was harassed for dowry, it is presumed that the husband or in-laws have committed dowry death. It is immaterial whether she committed suicide or was murdered, both types of deaths are covered u/s 304-B IPC dealing with dowry death.

In **Kaliyaperumal v. State of Tamil Nadu**⁷⁶, the Supreme Court in its detailed judgment observed that the expression “soon before her death?” used in the substantive section of 304B I.P.C. and section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression “soon before her death” is not defined. The determination of the period which can come within the term “soon before” is left to be determined by the courts, depending upon the facts and circumstances of each case. The expression “soon before” would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

The Supreme Court in **Manohar Lal vs State Of Haryana AIR 2014 SC 2555**, has ruled that the presumption shall be raised only on proof of the following essentials:

- (1) The woman died within 7 years of her marriage.
- (2) The woman was subjected to cruelty or harassment by her husband or his relatives.
- (3) Such cruelty or harassment was for, or in connection with, any demand for dowry.
- (4) Such cruelty or harassment was soon before her death.
- (5) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

76. AIR 2003 SC 3828

In **Bansi Lal v State of Haryana AIR 2011 SC 691**, the Supreme Court observed that — *in Section 113B of the Indian Evidence Act, 1872 the legislature in its wisdom has used the word “shall” thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where discretion has been conferred upon the court. Therefore, in view of the above, onus lies on the accused to rebut the presumption. and in case of Section 113B relatable to Section 304B IPC; the onus to prove shifts exclusively and heavily on the accused.*

Burden of Proof

In **Pawan Kumar vs. State of Haryana AIR 2001 SC 1324**, it was observed that “It is true, as argued by learned counsel for the appellants that in criminal jurisprudence benefit of doubt is extendable to the accused. But that benefit of doubt would arise in the context of the application of penal law, and the facts and circumstances of a case. The concept of benefit of doubt has an important role to play but within the confines of the stringency of laws. The amendment brought in the concept of deemed causation of dowry death by the husband or the relatives, as the case may be. This deeming clause has a role to play and cannot be taken lightly and ignored to shield an accused, otherwise, the very purpose of the amendment will be lost. The prosecution has to prove the ultimate essential ingredients beyond all reasonable doubt after raising the initial presumption of deemed dowry death.”

The Supreme Court in the case of **Shanti v. State of Haryana**⁷⁷ observed that in-laws persisted with the dowry demands on a married woman and it comes out from the findings that the woman was killed and her body was cremated without informing her relatives and family. The Apex Court held that *if it was a natural death, there was no need for the appellants to act in such unnatural manner and cremate the body in great and unholy haste without even informing the parents. In the result, it was an unnatural death, either homicidal or suicidal. But even assuming that it is a case of suicide even then it would be death which had occurred in unnatural circumstances. In such a case, section 304B is attracted and this position is not disputed. Therefore, the prosecution has established that the appellants have committed an offence punishable under section 304B beyond all reasonable doubts.*

In the case of **Mst. Premwati v. State of MP**⁷⁸ court observed that the framers intended and contemplated the liability of the occurrence of death of the bride to be fastened on the in-laws though they did not cause it, by creating a fiction. The court held that if the husband or his relations create such circumstances as would compel a person to choose death as the only way of getting out of misery, such treatment would also attract section 304-B.

77. AIR 1991 SC 1226

78. (1991) Cr. L. J. 268 (MP). 2014 37

Section 304-B and 498-A of IPC are complementary to each other to check the problem of dowry related violence. Under Sec. 304-B, dowry death is punishable when committed within seven years of marriage, such time period is not provided for cruelty punishable under section 498-A. Sec. 498-A deals with the problem of cruelty when the victim is still alive while sec. 304-B deals with that stage of cruelty when cruelty resulted in the death of the victim. When requirements of sec. 498-A and/or 304-B are not proved then the case is dealt with under general provisions of the Indian Penal Code penalizing use of criminal force, hurt, grievous hurt, culpable homicide and murder.

In dowry death cases eyewitnesses are generally not available therefore medical evidence are crucial. Provisions relating to investigation contained in the Criminal Procedure Code direct police officers for taking necessary steps for the collection of medical evidence. Further dowry problem is creating a grave problem before society, it must be tackled properly. Therefore, besides police officers, the Code imposes a duty on executive magistrates also for taking necessary steps for the collection of evidence. When a police officer gets information about dowry death, Sec. 174 Cr.P.C. imposes a duty on the police officer to reach the crime scene and send the inquest report to the magistrate. The police officer then takes all the measures to take the dead body for medical examination. Section 176(1) Cr.P.C. imposes a compulsive duty on executive magistrates to inquire into the cause of death either instead of or in addition to the investigation by the police officer.

As stated earlier in dowry death cases direct evidence is scarce and to cure this problem presumption clauses are provided in the **Indian Evidence Act, 1872** under **Section 113-B** which provides that *When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person cruelty or harassment for or in connection with any demand for dowry, the court shall presume that such person had caused the dowry death.*”

This presumption clause reiterates the provision contained under Section 304-B of IPC about the presumption of the commission of dowry death by husband and his family members. In dowry related violence main problem is the lack of evidence as the crime is committed within four walls. Presumption clauses have been added in IPC and Evidence Act according to which once it is proved before the court that the death of the woman was caused in suspicious circumstances within seven years of marriage and soon before death cruelty was committed, then presumption clause applies to determine that murder is dowry death and dowry death was committed by husband or/and in-laws.

Normally in criminal cases burden of proof lies on the prosecution to prove beyond all reasonable doubts that the crime was committed by the accused but in dowry death cases after application of the presumption clause burden of proof shifts on the accused to prove his innocence. Suicide committed by a woman is also covered by dowry death provisions. Usually,

the death of a woman is shown by her husband and in-laws as suicide or accident. For this purpose, the presumption clause is provided in the Evidence Act by which the husband and his relatives are presumed guilty for abetment to suicide. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and if it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Sections 304-B and 498-A IPC, Sections 113-A and 113-B of the Indian Evidence Act and Section 174 and 176 Cr.P.C. provide complete measures to tackle the problem of dowry death. Presumption clauses contained in Sections 304-B IPC and Sections 113-A, 113-B Indian Evidence Act only apply after proving certain essential requirements like death by burning, bodily injury or suspicious circumstances, death within seven years of marriage, cruelty was committed soon before death for or in connection with dowry demand. All these essential requirements for the application of presumption clauses are needed to be proved by evidence.

JUDICIAL DIRECTIONS

The role of the judiciary becomes more crucial in case of dowry death cases because dowry death takes place within four walls and direct evidence are generally not available therefore judiciary is required to be very careful in analyzing the facts of the case, analyzing evidence and application of presumption clauses.

In the case of **Kulwant Singh v. State of Punjab**⁷⁹ unnatural death of wife within four years of marriage was caused due to the poisoning. Postmortem report proved death due to the poison. Demand of dowry and harassment for dowry was proved by evidence and witnesses. Accused could not explain the circumstances causing death. Presumption u/s 113-B Evidence Act was applied and the court opined that all the ingredients envisaged u/ss304-B and 498-A IPC are satisfied and conviction was upheld.

In the case of **Ashok Kumar v. State of Haryana**⁸⁰ Supreme Court directed that 'soon before her death' should be decided on the basis of proximity principle. The expression 'soon before her death' cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. However, there must be existence of proximate link between the acts of cruelty along with the

79. 2007Cr.L.J. 3695 (P&H).

80. AIR 2010 SC 2839

demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Provisions relating to dowry death are exception in criminal law as it provides deeming provision. Such provisions are provided after considering the problem of evidences in this crime. Supreme Court observed that: *“The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of section 304-B, where other ingredients of section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of section 304-B, the court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the court keeping in view the evidence produced by prosecution in support of the substantive charge under section 304-B of the Code.”*

“In India, there is always a possibility of falsely implicating a person in a case, therefore, care has been taken in the enactment of legal provisions that the deemed fiction is applicable only on proving essential ingredients of Section 304-B IPC and further deemed fiction creates rebuttal presumption for protection of innocent persons. Supreme Court observed in this case that no doubt the deemed fiction would introduce a rebuttal presumption and the husband and his relatives may, by leading their defence and proving that the ingredients of Section 304-B were not satisfied, rebut the same. In light of the above essential ingredients for constituting an offence under section 304-B of the Code, the court has to attach specific significance to the time of alleged cruelty and harassment to which the victim was subjected to and the time of her death, as well as whether the alleged demand of dowry was in connection with the marriage. Once these ingredients are satisfied, it would be called the ‘dowry death’ and then, by deemed fiction of law, the husband or the relatives would be deemed to have committed that offence.”

IV. DOWRY PROHIBITION ACT, 1961

Section 3 of the act penalizes giving or taking of dowry. It states that, if any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years and a fine which shall not be less than fifteen thousand rupees or amount of the value of such dowry whichever is more. Provided that the court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than 5 years.

Section 4 provides penalty for demanding dowry. As per Sec. 4, if any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom any dowry, he is punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which may extend to ten thousand rupees. The court

may for the special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than 6 months.

Section 4A puts restriction on an advertisement about dowry. It states that if any person-

- Offers, through any advertisement in any newspaper, periodical, journal or through any other media any share in his property or of any money or both as a share in any business or other interest as consideration for the marriage of his son or daughter or any other relative.
- Prints or publishes or circulates any advertisement referred to CI. He shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to five years, or with fine which may extend to fifteen thousand rupees.

Provided that the court may for adequate and special reasons recorded in the judgment, impose a sentence of imprisonment for a term less than six months.

Section 5 of the act declares that any agreement for the giving or taking of dowry shall be void.

Section 6 states that where any gift by way of dowry is received then that dowry shall be kept for the benefit of the wife or heirs. Where any dowry is received by any persons other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman

- a. If the dowry was received before marriage, within three month after the date of marriage or,
- b. If the dowry was received at the time of or after the marriage within three months after the date of its receipt or,
- c. if the dowry was received when the woman was a minor, within three months after she has attained the age of 18 years, and pending such transfer, shall hold it in trust for the benefit of the woman.

if any person fails to transfer any property as required by subsection (1) within the time limit specified therefore or as required by sub-section (3), he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend two years or with fine which shall not be less than five thousand rupees, but which may extend to ten thousand rupees or with both.

Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being: if she has no children, be transferred to her parents, or if she has children, be transferred to such children and pending such transfer, be held in trust for such children.

(3-A). Where a person convicted under sub-sec. (2) for failure to transfer any property as

required by sub-sec(1) or sub-sec. (3) has not, before his conviction under that sub-section, transferred such property to the woman entitled thereto or, as the case may be, her heirs, parents or children, the court shall, in addition to awarding punishment under that sub-sec. Direct by order in writing, that such person shall transfer the property to such woman or as case may be, her heirs, parents or children within such period as may be specified in the order and if such person fails to comply with the direction within the period so specified an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such court and paid to such woman, as the case may be, her heirs, parents or children

Under Sec. 8B the state government may appoint dowry prohibition officers who shall exercise and perform the following powers and functions, namely,-

- (a) to see that the provisions of this Act are complied with,
- (b) to prevent, as far as possible, the taking or abetting the taking of, of the demanding of dowry;
- (c) to collect such evidence as may be necessary for the prosecution of persons committing offences under the Act; and
- (d) to perform such additional functions as may be assigned to him by the state government, or as may be specified in the rules made under this Act.

ACID ATTACK

Acid attacks are one set of crimes committed against women which shake the conscience of the society at large while completely stripping off the victim of her basic human right to life. Acid attacks involve intentional acts of violence in which perpetrators throw, spray, or pour acid onto the victims' faces and bodies, often intending to permanently disfigure and cause extreme physical and mental suffering to victims. Since, in most of the cases, the attack leaves the victims handicapped, even after recovery from physical pain, the victims become dependent for everyday activities which act as an additional trauma to both the family members as well as the victim. Acid attacks perpetuate gender inequality and discrimination.⁸¹

The last decade has witnessed an alarming growth of acid attack especially against women, usually committed with an intention to disfigure or kill her. It can also be called as gender-based violence against women.

DEFINITION AND MEANING OF ACID ATTACK

The provision of "Prevention of Offences (by Acids) Act 2008, National Commission for Woman – Draft Bill)" defines Acid Attacks and Acid.

81. Report by Avon Global Center for Women and Justice at Cornell Law School, The Committee on International Human Rights of the new York City Bar Association, the Cornell Law School International Human Rights and Virtue Foundation, "Combating Acid Violence in Bangladesh, India and Cambodia," Page 10 available at <http://www.asfi.in/images/Combating-Acid-Violence-Report.pdf>

According to Section 3 of said Act -

(a) “Acid” shall mean and includes any substance which has the character of acidic or corrosive or burning nature that is capable of causing bodily injuries leading to scars or disfigurement or temporary or permanent disability.

(b) “Acid attack” means any act of throwing acid or using acid in any form on the victim with the intention of or with knowledge that such person is likely to cause to the other person permanent or partial damage or deformity or disfiguration to any part of the body of such person.”⁸²

It is a form of violent assault involving the act of throwing acid or a similarly corrosive substance onto the body of another with the intention to disfigure, maim, torture, or kill. The definition of “Acid” and “Acid Attack” in the Draft Bill were incorporated in the Indian Penal Code, 1860 by virtue of the Criminal Law (Amendment) Act, 2013 under Explanation 1 of Section 326B.

Acid attack is a serious problem all over the world, even children become a victim of acid attack in many cases. Bangladesh has the highest number of acid attacks, followed by India, Pakistan, Cambodia and Afghanistan⁸³. Though the acid attack is a crime that can be committed against both men and women, but in India, it has a specific gender dimension. Acid violence tends to create fear amongst women in society as some women may feel that they might get attacked if they failed to conform to traditional subordinate gender roles. To emancipate and empower women in society, it is this fear which the law is supposed to address. Deterrence employing strict laws dealing with crimes against women is one way of addressing the issue. However, before 2013, there was no specific provision in law punishing acid attacks as an offence per se and the perpetrators used to be tried under section 326 of the Indian Penal Code which penalizes voluntarily causing grievous hurt

Statutory Provisions:

In India, often incidences of acid attack grab headlines but there was not any special legislation before the passing of The Criminal Law (Amendment) Act. 2013. The offence was earlier registered under different sections of the Indian Penal Code (IPC) particularly the sections relating to hurt, grievous hurt, grievous hurt by corrosive substances and attempt to murder and murder. Though the Indian Penal Code has provided reassurance to acid attack victims but it is seen that the sections under the code do not accomplish the profundity that is required for the earnestness of these offences. Moreover, the term “acid attack” was not defined anywhere, and the provisions also restrict them to acerbic substances.

Judicial Approach Before 2013

82. “Prevention of Offences (by Acids) Act 2008, (NCW – Draft Bill)”

83. Acid Attacks: Bangladesh’s Hidden Victims, The Independent Asia, 2011, 15

Before the Act, if the throwing of acid resulted in injuries to the victim, the accused used to be convicted of causing hurt/ grievous hurt, depending upon the nature of the injuries. If it resulted in the death of the victim, the accused used to be convicted of causing murder. But, the attack fell short of causing death, the accused was convicted of Attempt to cause death. Like in the case of **State (Delhi Administration) v. Mewa Singh**⁸⁴ the accused threw acid on the victim's face. The liquid splashed on her face produced some redness (erythema) on the skin over a part of her face involving her upper eye-lids. There was no corrosion, of the skin or other deformity. The accused was convicted for causing hurt under Section 323 of the IPC and a meagre fine of Rs. 300 along with 15 days imprisonment was awarded. In **Barati v. State of Uttar Pradesh**,⁸⁵ there was a dispute between the accused and the victim regarding encroachment. The acid was thrown on the victim and he died due to severe burns injury. The accused was charged under section 302 of the Indian Penal Code and was awarded rigorous imprisonment for life. In **Ravinder Singh v. State of Haryana**,⁸⁶ the accused poured the acid on his wife as she refused to divorce him. The victim died due to multiple injuries. The accused was charged under section 302 of the Indian Penal Code. In **Devanand v. The State**,⁸⁷ the accused threw acid on his wife because she refused to cohabit with him. The wife suffered permanent disfigurement and loss of one eye. The accused was convicted for an attempt to murder under section 307 of the Indian Penal Code. In **Gulab Sahiblal Shaikh v. The State of Maharashtra**⁸⁸ Acid was poured on a lady and her child. Both got multiple injuries and in consequence to that lady died. The court charged the accused under section 302 of the Indian Penal Code. In **Marepally Venkata Sree Nagesh v. State of Andhra Pradesh**,⁸⁹ the accused was suspicious about the character of his wife and inserted mercuric chloride into her vagina. The victim died due to renal failure. The accused was convicted under section 302 of the Indian Penal Code. In **Shyed Shafique Ahmed v. State of Maharashtra**⁹⁰ personal enmity with his wife was the reason behind a gruesome acid attack by the husband on his wife as well as another person. This caused disfigurement of the face of both the wife as well as that of the other person and loss of vision of the right eye of wife. The accused was charged under Section 326 and 324 of the IPC and was awarded Rs 5000 as a fine and 3 years imprisonment. This case again shows that the punishment that is often awarded does not take into account the deliberate and gruesome nature of the attack and rests on technicalities of injuries.

84. 5 , DLT 506, 1969

85. AIR 1974 SC 839

86. AIR 1975 SC 856

87. 1987 (1) Crimes 314, 2002 Supp , 1 SC 489

88. 1998 Bomb CR Crim

89. Cr.L.J 3625, 2002

90. 2002 Cr.L.J. 1403

In **State of Karnataka v. Joseph Rodrigues**,⁹¹ the accused threw acid on a girl, Hasina, for refusing his job offer. This deeply scarred her physical appearance changed the colour and appearance of her face and left her blind. The accused was convicted under Section 307 of IPC and sentenced to imprisonment for life. A compensation of Rs. 2,00,000/- in addition to the Trial Court fine of Rs 3,00,000 was to be paid by the accused to Hasina's parents. This was a landmark case as it was the first time that compensation which was quite a large sum was given to the victim to meet the medical expenses including that of plastic surgeries. However, no compensation was awarded for the after-effects of the attack such as loss of income etc.

Thus over the years, various kinds of acid attacks have been registered under the sections related to hurt, grievous hurt, murder etc. However, the nature and effect of the crime of acid attack are very distinct and complex and these sections do not provide adequate relief and punishment. Apart from this, the police often register the case of acid attacks as per their whims and wishes, which are at times influenced by gender bias and corruption or is a wrong assessment. In most of the cases, no compensation was awarded and in cases where awarded, the sum was so minimal that it was inadequate to meet even the medical expenses.

The section on compensation in the CrPC therefore clearly needed to spell out that the fines levied should be given to the victim or their dependents. The victims suffer a great deal due to a slow judicial process, inadequate compensation and obviously from the after affect of the acid attack itself. Thus, there was an urgent need to legislate distinct sections in the I.P.C to deal with acid attacks and to set up a Criminal Injuries Compensation Board in India to deal with such cases effectively and efficiently, to help the victims of the acid attack to get compensation for medical expenses and rehabilitation.

In a landmark judgment, *Laxmi v. Union of India and Others*⁹² the Hon'ble Supreme Court gave directions to frame the rules and for strict compliance of the same. The guidelines were as under:

- All the States and Union Territories which have not yet framed rules will do well to make rules to regulate sale of acid and other corrosive substances in line with the Model Rules framed by the Central Government. The States, which have framed rules but these rules are not as stringent as the Model Rules framed by the Central Government will make necessary amendments in their rules to bring them in line with the Model Rules. The Chief Secretaries of the respective States and Administrators of the Union Territories shall ensure compliance of the above expeditiously and in no

91. Decided by Kerala High Court on 22.8.2006

92. Writ Petition Crl. No 129 of 2006

case later than three months from the receipt of the draft Model Rules from the Central Government.

- The Centre and States/ Union Territories shall work towards making the offences under the Poison Act, 1919 cognizable and non-bailable.
- In the States/ Union Territories, where rules to regulate sale of acid and other corrosive substances are not operational, until such rules are framed and made operational, the Chief Secretaries of the concerned States /Administrators of the Union Territories shall ensure the compliance of the following directions with immediate effect:

(a) Over the Counter, sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the persons(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.

(b) All sellers shall sell acid only after the buyer has shown:

I. A photo ID issued by the Government which also has the address of the person

II. Specifies the reason/purpose for procuring acid.

(c) All stocks of acid must be declared by the seller with the concerned Sub Divisional Magistrate (SDM) within 15 days.

(d) No acid shall be sold to any person who is below 18 years of age.

(e) In case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose a fine on such seller up to Rs. 50000/-

(f) The concerned SDM may impose a fine up to Rs. 50,000/- on any person who commits a breach of any of the above directions.

The Educational Institutions, research laboratories, hospitals, Government Departments and the Departments of Public Sector Undertakings, who are required to keep and store acid, shall follow the following guidelines:

(a) A register of usage of acid shall be maintained and the same shall be filed with the concerned SDM.

(b) A person shall be made accountable for possession and safekeeping of acid in their premises.

(c) The Acid shall be stored under the supervision of this person and there shall be compulsory checking of the students/personnel leaving the laboratories/place of storage where acid is used.

The Concerned SDM shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions.

Acid attacks victims shall be paid compensation of at least Rs. 3 Lakhs by the Concerned State Government/ Union Territory as the aftercare and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of the occurrence of such incident (for being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance of Rs. 2 Lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance with the above direction.

National and International organizations' view

The National Commission for Women has suggested separate legislation to deal with the offence of acid attack and as part of the proposed legislation has suggested that the Central Government should establish a National Acid Attack Victims Assistance Board which will assist the acid attack victims by way of ensuring medical treatment and other services such as psychological counselling. The board has also been given the task to recommend to the Government strategies to regulate and control inter alia the production and sale of acids. It has been suggested that the board administers a fund to be called The National Acid Attack Victims Assistance Fund to which the Central and State Government can give grants apart from others. It has also been provided that the board can give interim financial relief up to Rs. 1 lakh within 30 days directly to the hospital. All Central Government hospitals and establishments have been directed to treat acid attack victims free of cost.

The United Nations General Assembly passed the declaration on the Elimination of Violence against Women in 1993. Article 4(f) of this declaration recommends member states to develop preventive approaches for violence against women by legal measures.⁹³

Constitutional Validity:

The Constitution of India through Article 15 (3) creates an exception to the general rule provided under Article 15, which talks about the prohibition of discrimination against citizens. Whereas Clause (3) of this Article states that "...Nothing in this article shall prevent a State from making any special provision for women and Children"

93. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, 2, 1994

In **Anjali Roy v. State of West Bengal**⁹⁴, it was held that the word ‘for’ in clause (3) signifies that special provisions can be made in favour of women, and not against them. The Apex court in **Government of Andhra Pradesh v. P.B. Vijaya Kumar**⁹⁵ held that the insertion of Clause (3) of Article 15 in relation to women is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is to empower them in a manner that would bring about effective equality between man and women that clause (3) is placed in Article 15 to strengthen and improve the status of women.”

Under the Chairmanship of Justice AR. Lakshmanan the Law Commission submitted its 226th report named as “The inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime”, before the Hon’ble Supreme Court of India for its consideration in the pending proceedings of Laxmi’s case. The Law Commission highlighted that acid attacks are an increasing phenomenon in India. However, since no special section in the Indian Penal Code deals with acid attacks, the incidents are not even recorded separately. Section 326 of the Indian Penal Code, which deals with causing grievous hurt by throwing of a corrosive substance etc. is insufficient/ inadequate to deal with the issue for

1. The definition of grievous hurt is not broad enough to cover the various kinds of injuries which are inflicted during acid attacks.
2. The section does not cover the act of administering acid.
3. The section gives wide discretion to the courts as far as punishment is concerned. The cases on acid attacks in India show that normally inadequate punishment is awarded in these cases.
4. The section in the Indian Penal Code does not punish the intentional act of throwing acid if no injuries occur.
5. The section also does not specify who the fine should be awarded to.

As regards the presumption, if a person has thrown or administered acid on another person, a presumption should be raised against the person who has thrown or administered acid that he has done so deliberately. The distribution and sale of acid should be banned except for commercial and scientific purposes. Acid should be made a scheduled banned chemical which should not be available over the counter and the particulars of purchases of acid should be recorded.

In pursuance of the aforesaid recommendations, the following amendments were made in the Indian Penal Code 1860, Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 by Criminal Law (Amendment) Act, 2013 (No. 13 of 2013):

94. AIR 1952 Cal 825

95. AIR 1995 SC 1648

Section 100: When the right of private defence of the body extends to causing death: Seventhly- ‘An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequences of such act’.

Section 326A: Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine: Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim: Provided further that any fine imposed under this section shall be paid to the victim.

Section 326B: Whoever throws or attempt to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to be fine. Explanation1: For the purposes of section 326A and this section ‘Acid’ includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability. Explanation: 2 For the purposes of Section 326A and this section permanent or partial damage or deformity shall not be required to be irreversible.

Criminal Procedure Code, 1973

Section 154: In subsection (1), the following proviso inserted

‘Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer’.

Indian Evidence Act, 1872

Section 114 B: Presumption as to acid attack- If a person has thrown acid on, or administered acid to, another person the court shall presume that such an act has been done with the intention of causing, or with the knowledge that such an act is likely to cause such hurt or injury as is mentioned in Section 326A of the Indian Penal Code.

COMPENSATION TO THE VICTIMS OF CRIMINAL ASSAULT

The constitution of India guarantees the right to life and liberty of every individual under Article 21. This has been interpreted to include the right to live with dignity and would encompass the right to live with dignity for all including the victims of acid attacks. Article 41 of the constitution lays down that the state shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of under served want.⁹⁶

The United Nations General Assembly passed the Declaration on Elimination of Violence against Women in 1993, and India has ratified this declaration and is under an obligation to follow the same. Article 4(f) of this declaration states that all member states should form certain recommendations, for the safety of women and formulate ways to prevent them. There should also be separate provisions for granting exemplary damages to the victims of the attack. According to Article 253 of the Indian Constitution, the Parliament has the power to make laws to give effect to these international agreements. Hence India is under an obligation to rein in the peril of acid attack. The rehabilitation of the victims becomes an important issue.

In the **Delhi Domestic Working Women's Forum v. Union of India**,⁹⁷ the Supreme Court of India pronounced upon the need by the government to set up a Criminal Injuries Compensation Board for rape victims within 6 months. The Supreme Court suggested that this board should give compensation whether or not a conviction takes place. The Apex Court explained the justification for this proposal and held that it is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up the Criminal Injuries Compensation Board. Rape victims frequently incur a substantial financial loss. Compensation for victims should be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction takes place. The board will take into account pain, suffering and shocks as well as a loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape. In the present situation, the third respondent will have to evolve such a scheme to wipe out the tears of such unfortunate victims.

In **Bodhisattwa Gautam Vs. Shubhra Chakraborty**⁹⁸, the Supreme Court again reiterated the above decision and further laid down that courts trying an offence of rape have jurisdiction to award interim compensation which should also be provided for in the scheme. The jurisdiction to pay compensation to be treated as part of the overall jurisdiction of the court trying the offence of rape which is an offence against basic human rights as also the fundamental right of personal liberty and life.

96. NALSA(Legal services to victims of acid attacks) Scheme, 2016

97. (1995) 1 SCC 14

98. AIR 1996 SCC 922

In the case of an acid attack, the victims often have to undergo multiple surgeries costing lakhs of rupees. They are also in urgent need of rehabilitation as they often need financial help to exist. In the case of **Parivartan Kendra v. Union of India and others**,⁹⁹ an NGO filed PIL seeking to highlight the plight of the acid attack victims and the inadequacy of the compensation payable to the victims as per the orders of the Apex Court in **Laxmi vs. Union of India**.¹⁰⁰ It also highlighted the lack of a legal guarantee to free medical care, rehabilitative services or adequate compensation under the Survivor Compensation Schemes. The Supreme Court in this case directed all the States and the Union Territories to consider the plight of such victims and take appropriate steps about the inclusion of their names under the disability list. The court awarded a compensation of ₹ 13 lakh to both the victim sisters for injuries they suffered in an acid attack. The two-judge bench noted that though the verdict of the Supreme Court mandated a minimum of ₹ 3 lakh compensation, but a higher sum could be awarded. It held that a minimum of ₹ 3 lakh is to be awarded by the government to each victim of an acid attack and it is to be noted that this Court in Laxmi's case doesn't put a bar on the government to award compensation limited to ₹ 3 lakh. The state has the discretion to provide more compensation to the victim in the case of an acid attack as per Laxmi's case guidelines.

The supreme court in its order dated 18.07.2013 directed that the acid attack victims shall be paid a compensation of at least Rs. 3 lakhs by the concerned State government/union territory as the aftercare and rehabilitation cost, out of which a sum of Rs. 1 lakh would be paid to the victim within 15 days of the occurrence of such incidence to facilitate immediate medical attention and expenses in this regard. The court also directed that in case of any compensation claim made by any acid attack victim, the matter would be taken up by the district legal service authority, which would include the district judge and such other co-opted persons who the district judge felt would be of assistance, particularly the district magistrate, the Superintendent of Police and the civil surgeon or the chief medical officer of that district or their nominee and the said body would function as the **Criminal Injuries Compensation Board** for all purposes.

On 21.08.2015 the **Central Victim Compensation Fund** has created with an initial corpus of Rs. 200 crores, the main objective is to promote special financial assistance up to Rs. 5 lakhs to the victims of the acid attack to meet treatment expenses over and above the compensation paid by the state and union territories. The objective was to reduce the disparity in the quantum of compensation amount notified by different states and union territories for victims of similar crimes and to encourage the states and union territories to effectively implement the victim compensation schemes notified by them under the provision of section 357A of Cr.P.C and continue financial support to victims of various crimes especially sexual offences including rape, acid attacks, a crime

99. (2016) 3 SCC 517

100. Supra 84

against children, human trafficking, etc. On 7.12.2015 the court directed that all the states and union territories should consider the plight of such victims and take appropriate steps concerning the inclusion of their names under the disability list.

In the case of **Renu Sharma**¹⁰¹, the Delhi High Court directed the Delhi government to provide free medical treatment to the victim and employment that adequately considers her educational qualification and medical status.¹⁰² The Department of Personnel and Training (DoPT) has directed all central government departments to ensure that one per cent of each post be reserved for people with disability. The move to enhance the reservation quota for those with a learning disability and acid attack victims comes after the passage of the Rights of Persons with Disabilities Act, 2016, and the notification of relevant rules in this regard. Additional financial assistance of Rs. 1 Lakh from the Prime Minister National Relief Fund has been approved to provide immediate relief to the acid attack victim.¹⁰³ This additional assistance provided by PMNRF will be over and above the amount of the scheme prepared by the National Legal Services Authority (NALSA) in consultation with the Centre.

NALSA's Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes -2018

Hon'ble Supreme Court of India in W.P. (C) No. 565/2012 titled **Nipun Saxena Vs. Union of India** opined that it would be appropriate if NALSA sets up a Committee of about 4 or 5 persons who can prepare Model Rules for Victim Compensation for sexual offences and acid attacks. In view of the above, NALSA set up a committee, the committee finalized the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes and submitted the same before the Hon'ble Supreme Court of India on 24.04.2018. Additional suggestions received were also incorporated and the final Scheme was filed before the Hon'ble Supreme Court of India on 11.05.2018. On this day, after hearing NALSA and Ld. Amicus Curiae, Hon'ble Bench was pleased to accept this Scheme and directed all the State Governments/UT Administrations to implement the same in their respective States/UTs. Hon'ble Supreme Court of India further observed that while nothing should be taken away from this Scheme, but it does not preclude the State Governments/UT Administrations from adding to the Scheme.

Section 3 of the Scheme states that there shall be a Fund, namely, the Women Victims

101. WP(C) 229 of 2016 DOD 18th March 2016

102. In the high court of Delhi at New Delhi W.P.(C) 2229/2016

103. Victims of Acid attack are also entitled to additional compensation of Rs. 1 lac under Prime Minister's National Relief Fund vide memorandum no. 24013/94/Misc./2014-CSR-III/GoI/MHA dated 09.11.2016. Victims of Acid Attack are also entitled to additional special financial assistance up to Rs. 5 lacs who need treatment expenses over and above the compensation paid by the respective State/UTs in terms of Central Victim Compensation Fund Guidelines-2016, no. 24013/94/Misc/2014-CSR.III, MHA/GoI

Compensation Fund from which the amount of compensation, as decided by the State Legal Services Authority or District Legal Services Authority, shall be paid to the women victim or her dependent(s) who have suffered loss or injury as a result of an offence and who require rehabilitation.

Section 5 provides for the mandatory Reporting of FIRs. The SHO/SP/DCP shall mandatorily share soft/hard copy of FIR immediately after its registration with State Legal Services Authority/ District Legal Services Authority qua commission of offences covered in this Scheme which include Sections 326A, 354A to 354D, 376A to 376E, 304B, 498A (in case of physical injury covered in this Schedule), so that the SLSA/DLSA can, in deserving cases, may suo-moto initiate preliminary verification of facts for grant of interim compensation. An application for the award of interim/ final compensation can be filed by the Victim and/or her Dependents or the SHO of the area before concerned SLSA or DLSA. It shall be submitted in Form 'I' along with a copy of the First Information Report (FIR) or criminal complaint of which cognizance is taken by the Court and if available Medical Report, Death Certificate, wherever applicable.

While awarding compensation, the State Legal Services Authority/District Legal Services Authority may take into consideration the following factors relating to the loss or injury suffered by the victim:

- (1) Gravity of the offence and severity of mental or physical harm or injury suffered by the victim;
- (2) Expenditure incurred or likely to be incurred on the medical treatment for physical and/or mental health including counselling of the victim, funeral, travelling during investigation/ inquiry/ trial (other than diet money);
- (3) Loss of educational opportunity as a consequence of the offence, including absence from school/college due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (4) Loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (5) The relationship of the victim to the offender, if any;
- (6) Whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;
- (7) Whether victim became pregnant as a result of the offence, whether she had to undergo Medical Termination of Pregnancy (MTP)/ give birth to a child, including rehabilitation needs of such child;

- (8) Whether the victim contracted a sexually transmitted disease (STD) as a result of the offence;
- (9) Whether the victim contracted human immunodeficiency virus (HIV) as a result of the offence;
- (10) Any disability suffered by the victim as a result of the offence;
- (11) Financial condition of the victim against whom the offence has been committed to determining her need for rehabilitation and reintegration needs of the victim.
- (12) In the case of death, the age of the deceased, her monthly income, number of dependents, life expectancy, future promotional/growth prospects etc.
- (13) Or any other factor which the SLSA/DLSA may consider just and sufficient.

The Procedure of granting compensation is described under section 9 of the Scheme. It states that:

Wherever a recommendation is made by the court for compensation under sub-section (2) and/or (3) of Section 357A of the Code, or an application is made by any victim or her dependent(s), under sub-section (4) of Section 357A of the Code, to the State Legal Services Authority or District Legal Services Authority, for interim compensation it shall prima facie satisfy itself qua compensation needs and identity of the victim. As regards the final compensation, it shall examine the case and verify the contents of the claim with respect to the loss/injury and rehabilitation needs as a result of the crime and may also call for any other relevant information necessary for deciding the claim. Provided that in deserving cases and in all acid attack cases, at any time after the commission of the offence, Secretary, SLSA or Secretary, DLSA may suo moto or after preliminary verification of the facts proceeds to grant interim relief as may be required in the circumstances of each case.

The inquiry as contemplated under sub-section (5) of Section 357A of the Code, shall be completed expeditiously and the period in no case shall exceed beyond sixty days from the receipt of the claim/petition or recommendation: Provided that in cases of acid attack an amount of Rs. One lakh shall be paid to the victim within 15 days of the matter being brought to the notice of DLSA. The order granting interim compensation shall be passed by DLSA within 7 days of the matter being brought to its notice and the SLSA shall pay the compensation within 8 days of passing of the order. Thereafter, an amount of Rs. 2 lakhs shall be paid to the victim as expeditiously as possible and positively within two months of the first payment* Provided further that the victim may also be paid such further amount as is admissible under this Scheme.

After consideration of the matter, the SLSA or DLSA, as the case may be, upon its satisfaction, shall decide the quantum of compensation to be awarded to the victim or her dependent(s) taking into account the factors enumerated in Clause 8 of the Scheme, as per schedule appended to this chapter. However, in deserving cases, for reasons to be recorded, the upper limit may be exceeded.

Moreover, in case the victim is minor, the limit of compensation shall be deemed to be 50% higher than the amount mentioned in the Schedule appended to this chapter.

Section 12 provides for interim relief to the victim. The State Legal Services Authority or District Legal Services Authority, as the case may be, may order for immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief (including interim monetary compensation) as deemed appropriate, to alleviate the suffering of the victim on the certificate of a police officer, not below the rank of the officer-in-charge of the police station, or a Magistrate of the area concerned or on the application of the victim/ dependents or suo moto.

Provided that as soon as the application for compensation is received by the SLSA/DLSA, a sum of Rs.5000/- or as the case warrants up to Rs. 10,000/- shall be immediately disbursed to the victim. Provided that the interim relief so granted shall not be less than 25 per cent of the maximum compensation awardable as per schedule applicable to this Chapter, which shall be paid to the victim in totality. Provided further that in cases of acid attack a sum of Rs. One lakh shall be paid to the victim within 15 days of the matter being brought to the notice of SLSA/DLSA. The order granting interim compensation shall be passed by the SLSA/DLSA within 7 days of the matter being brought to its notice and the SLSA shall pay the compensation within 8 days of passing of the order. Thereafter an additional sum of Rs.2 lakhs shall be awarded and paid to the victim as expeditiously as possible and positively within two months.

Section 14 deals with the dependency certificate. It states that the authority empowered to issue the dependency certificate shall issue the same within a period of fifteen days and, in no case, this period shall be extended.

Provided that the SLSA/DLSA, in case of non-issuance of Dependency Certificate, after the expiry of 15 days, may proceed based on an affidavit to be obtained from the claimant.

SCHEDULE APPLICABLE TO WOMEN VICTIM OF CRIMES

Victims of Acid Attack¹⁰⁴

Particulars of loss or injury	Minimum Limit of Compensation	Upper Limit of compensation
a. In case of disfigurement of face.	Rs. 7 Lakh	Rs. 8 Lakh ¹³⁵ .
b. In case of injury more than 50%.	Rs. 5 Lakh	Rs. 8 Lakh

104. https://wcd.nic.in/sites/default/files/Final%20VC%20Sheme_0.pdf (Visited on June 25th, 2020)

c. In case of injury less than 50%.	Rs. 3 Lakh	Rs. 5 Lakh
d. In case of injury less than 20%	Rs. 3 Lakh	Rs. 4 Lakh145.

Note: If a woman victim of sexual assault/acid attack is covered under one or more category of the schedule, she shall be entitled to be considered for combined value of the compensation.

As per the newsletter issued by Bihar State Legal Service Authority in the year 2019- 2020 a total of 88 acid attack victims were awarded compensation of Rs. 2,46,05,707- under Bihar Victim Compensation Scheme 2014. Moreover, under the NALSA Scheme (Legal services to a victim of an acid attack) the numbers of beneficiaries in the year 2019 were about 5007.

STATISTICS

There was no separate statistics for acid violence cases in India till 2013 because the Indian criminal Law did not recognize it as a separate offence. With the amendment in the Indian Penal Code in February 2013, incidents of acid attack are now being recorded as a separate offence under section 326A and 326B. The first data available after the amendment relate to the year 2014 when 349 cases were reported from all over India. This is almost 300 per cent more than the average number of such cases witnessed during the preceding three years. The years 2011, 2012 and 2013 witnessed 83, 85 and 66 cases being reported respectively, but this number shot up to 309 in 2014 – almost four times the average number of acid attack cases in the preceding years.¹⁰⁵ The year 2017 witnessed the highest number of acid attacks in five years from 2014 to 2018, at 309, with 319 victims. Uttar Pradesh, West Bengal and Delhi have been consistently ranking among the 10 worst states in term of acid attacks from 2014 to 2018. These three states alone make up 42 per cent of the victims of acid attacks in India during these five years. Bihar ranked ninth in the list. In terms of convictions, there is a lot to be asked as well. The year 2015 saw the highest number of cases that went for trial - 734. At first glance, the conviction rate of 45.4 per cent looks better than other crimes against women. But out of the 734 cases that went for trial, only 33 were completed. In 2016 and 2017, the conviction rate saw a decline with a total of 25 cases convicted out of 67 which completed the trial, while a total of 849 cases were sent for trial in these two years. The year 2018 saw an upturn in conviction rate with a figure as high as 61 per cent, but out of 523 cases that went for trial, only 19 ended in conviction.¹⁰⁶

ACID VIOLENCE VICTIMS IN INDIA

State/Union Territories	2010	2011	2012	2013	2014	2015	2016	Total
Andhra Pradesh	6	8	6	4	6	14	11	55

105. Acid attack cases as on <http://indianexpress.com/article/india/india-others/309-acid-attack-cases-in-14-300-rise-in-3-yrs/#sthash.PgujDCmB.dpuf>

106. <https://www.indiatoday.in/diu/story/india-saw-almost-1-500-acid-attacks-in-five-years-1636109-2020-01-12>(visited on June 24th, 2020)

Arunachal Pradesh	0	0	0	0	0	0	0	0
Assam	0	0	1	13	0	3	9	26
Bihar	3	3	10	1	4	19	7	47
Chhattisgarh	0	0	0	0	1	0	1	2
Goa	0	0	1	0	0	0	2	3
Gujarat	4	2	4	5	6	4	14	39
Haryana	4	8	6	6	13	12	17	66
Himachal Pradesh	0	0	0	1	1	1	0	3
Jammu & Kashmir	0	2	3	2	2	2	0	11
Jharkhand	0	0	1	0	3	0	1	5
Karnataka	6	3	2	4	3	2	7	27
Kerala	3	1	2	0	4	10	13	33
Madhya Pradesh	1	5	6	11	20	19	7	69
Maharashtra	3	6	3	9	5	8	8	42
Manipur	0	0	0	0	0	1	0	1
Meghalaya	0	0	1	0	0	0	0	1
Mizoram	0	0	0	0	0	0	0	0
Nagaland	0	0	0	1	0	0	0	1
Odissa	2	1	2	3	10	8	13	39
Punjab	8	9	4	5	17	7	18	68
Rajasthan	0	0	6	0	6	1	3	16
Sikkim	0	0	0	0	2	0	0	2
Tamil Nadu	0	0	1	6	13	10	1	31
Telengana	0	0	0	0	1	1	0	2
Tripura	0	0	1	0	4	4	4	13

Uttar Pradesh	5	14	11	18	43	61	61	213
Uttarakhand	0	2	3	0	0	0	2	7
West Bengal	12	13	22	8	41	41	83	220
Andaman and Nicobar	0	0	0	0	0	0	0	0
Chandigarh	1	1	0	1	0	0	2	5
Dadra & Nagar Haveli	0	0	0	0	0	0	0	0
Daman & Diu	0	0	0	0	0	0	0	0
New Delhi	22	28	9	18	20	21	23	141
Lakshadweep	0	0	0	0	0	0	0	0
Puducherry	0	0	1	0	0	0	0	1
Total	80	106	106	116	225	249	307	1189

The Criminal Law (Amendment) Act, 2013 has brought positive changes in the laws against acid violence. Prior to the Act, no provision of strict punishment was there to punish the culprits and either no or compensation of a very meagre amount was used to be given to the victim. The amendment made special laws to punish the culprits and also provided for the provision of providing medical aid to the victim. But, the framing of laws is never enough unless it is properly executed. Thus, quick deliverance of justice and aid to the victim should be ensured. In addition to the stringent penal laws, provisions have also been made to regulate the sale of acid. The acids used for attacks are easily available as they are used in domestic use as well as for scientific and research purposes. A monitoring system should be formed to check the effective implementation of the rules by the people. Many people in the country (particularly the shopkeepers and retailers) are ignorant of the new rules of regulation on the sale and purchase of acid. Steps should be taken by the government to make people aware of the new rules. The Criminal Law (Amendment) Act, 2013 is a welcome act that has brought positive and effective changes. Justice can never be delivered to the victim unless the law is properly implemented. Thus, steps should be taken to effectively execute the new laws to curb such violence.

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Topic No. – 40

***Electronic Evidence : How to collect it, means to present
in the court of law, and relevance in a criminal trial.***

By
Sri Dushyant Kumar,
Additional District & Sessions Judge,
Bhojpur at Ara.

Sri Dushyant Kumar,
Additional District & Sessions Judge,
Bhojpur at Ara.

**Topic : Electronic Evidence: How to collect it, means to present in the court of law, and
relevance in a criminal trial.**

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Electronic Evidence: How to Collect it, Means to Present in the Court of Law, and Relevance in the Criminal Trial

1. Introduction

The traditional legal regime governing the law of evidence was premised on the fact that there was only physical world in which human beings operate and conduct their businesses and other transactions physically through physical materials (paper records/documents)) and orally, and accordingly, the traditional rules of evidence contemplated only physical objects (paper trails and other physical materials) as a source of reliance for determining one's right or liability or culpability, of course, apart from the oral testimony of witnesses. This is borne out from the pre-amendment definition of the evidence given in Sec. 3 of the Indian Evidence Act, 1872 which is given below:

“Evidence means and includes;

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry – such statement are called oral evidence;
- (2) All documents produced for the inspection of the Court – such documents are called documentary evidence.¹

Thus above definition of evidence was restricted to only documentary and oral evidence, and the document² is defined in the Indian Evidence Act as any matter expressed or described upon any substance employing letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, to record that matter.

However giant strides were made in the field of Information Technology & Communication and the mass proliferation of computers and the internet penetrating every aspect of human behaviour led to revolutionary transformations in society across the world. One of such transformations is the creation of the virtual world/cyberspace which not only co-exists with the physical world but plays a crucial part in governing the physical world. These days societal and business communication happen through the transfer of thoughts from the physical world to the electronic world. The virtual world revolves around the use of information and communication technology devices such as computers, mobile phones, printers, digital cameras etc.³ Hardly any aspect of human endeavour and activity have remained untouched by the advent of these ICT (Information & Communication Technology) devices- be it commercial transactions, personal information, compliances of regulatory mandates, crimes, surveillances, banking transactions,

1. Section 3 of Indian Evidence Act available at <https://www.scconline.com/Members/BrowseResult.aspx#FS013>(last visited on 06.01.2021)

2. Ibid

3. Paper 'Information & Communication Technology'; Digital Evidence-Broad Principle available at <http://epgp.inflibnet.ac.in/Home/ViewSubject?catid=20> visited on 07.01.2021.

deliveries etc. New communication systems and digital technology have made dramatic changes in the way we live. A revolution is occurring in the way people transact business. Business firms and consumers are increasingly using computers to create, transmit and store information in electronic form instead of traditional paper documents. Information stored in electronic form has many advantages. It is cheaper, easier to store, retrieve and speedier to communicate.⁴

Resultantly litigations before courts have been severely impacted by this development of Information Technology. One of the challenges posed by the incessant use of Information & Communication Technology devices before the court/law enforcement agencies has been with regard to evidence because the evidence to be produced before the court for determining one's right, liability or culpability are not only confined in the form of physical evidence, paper-based documents and oral testimony but they are increasingly in electronic form/records.

The older legal regime governing the relevancy and admissibility of the evidence was not sufficiently equipped to deal with the challenges posed by this new form of evidence called electronic evidence. As has been observed by the Division Bench of Delhi High Court in **State vs Md. Afzal**⁵

*"The last few years of the 20th Century saw rapid strides in the field of information and technology. The expanding horizon of science and technology threw new challenges for the ones who had to deal with proof of facts in disputes where advanced techniques in technology was used and brought in aid. Storage, processing and transmission of data on magnetic and silicon medium became cost-effective and easy to handle. Conventional means of records and data processing became outdated. Law had to respond and gallop with the technical advancement. He who sleeps when the sun rises misses the beauty of the dawn. Law did not sleep when the dawn of Information and Technology broke on the horizon. World over, statutes were enacted. Rules relating to admissibility of electronic evidence and its proof were incorporated."*⁶

Accordingly, an urgent need was felt to enact a new law to govern not only to deal with this new species of evidence but all the activities being carried in, and through the cyber world. Thus, the Information and Technology Act 2000 came was enacted, because of the recommendations of the General assembly of the United Nations which adopted Model Law on Electronic Commerce adopted by the United Nation Commissions on International Trade Law to provide legal recognition for transactions carried out employing electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce". It involves the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the government agencies and further to amend the Indian Penal Code, 1860;

4. Statements of Objects & Reasons, Information Technology Act, 2000 available at <https://www.scconline.com/Members/BrowseResult.aspx> last visited on 07.01.2021.

5. 2003 SCC OnLine Del 935, para no. 278 available at <https://www.scconline.com/Members/SearchResult.aspx>

6. Ibid

the Indian Evidence Act, 1872; the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto⁷. With the enactment of the Information Technology Act 2000, the concept of electronic evidence which was hitherto marred with uncertainties and vagueness got more formally and legally crystallised.

2. **Electronic Evidence: Meaning & Indian Evidence Act**

The term electronic evidence has nowhere been defined in the Indian Evidence Act. However the Information Technology Act 2000 amended the aforesaid definition of documentary evidence given in Section 3 of the Indian Evidence Act, which as stated above, categorised evidence as a) oral evidence, and b) documentary evidence, to substitute the phrase 'All documents produced for the inspection of the Court' by '*All documents including electronic records produced for the inspection of the Court*'.⁸ The term '*electronic record*' is defined in Section 2(t)⁹ of Information Technology Act, 2000 as '*electronic record*' means, "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche;". Further, the "electronic form" has been defined in section 2(r)¹⁰ of the Information technology Act, 2000 as "any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer-generated micro fiche or similar device." Thus, a combined reading of aforesaid provisions of the Information Technology Act, 2000 defines the electronic evidence as any data or image or sound or information generated or stored or received in media, magnetic, optical, computer memory, microfilm, computer-generated micro fiche or similar device, which is produced for the inspection of the Court. Here it is important to mention that the explanation appended to section 79A¹¹ of the Information Technology Act, 2000 defines 'electronic form evidence' as any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machine.

Further Section 4¹² of the Information Technology Act renders legal recognition to the electronic records by providing where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is— (a) rendered or made available in an electronic form; and (b) accessible to be usable for a subsequent reference. Thus electronic record has now been established statutorily by the name of electronic evidence as a form of documentary evidence to prove one's right, liability or culpability or

7. Supra 4

8. Section 3 of the Indian Evidence Act Supra 1

9. Section 2(t) of the Information & Technology Act 2000 available at <https://www.scconline.com/Members/BrowseResult.aspx#FS013> (last visited on 07.01.2021)

10. Section 2(r) of the Indian Information & Technology Act 2000, Ibid

11. Explanation appended to Section 79A of the Information & Technology Act, 2000 Ibid.

12. Section 4 of the Indian Information & Technology Act 2000, Ibid

innocence in the court of law. Furthermore, amendments were made in the Indian Evidence Act at suitable places to make the electronic records as a source of evidence such as Sec. 17 of Evidence Act was amended to include a statement in electronic form as admission, Sec. 22-A was amended to provide that oral evidence as to the contents of electronic records are not relevant unless the genuineness of electronic record produced is in the question. Section 59 was amended to substitute the phrase the 'Content of Documents' by the phrase 'Content of Documents or Electronic Records'. Further Sections 47-A, 67-A, 73-A, 81-A, 85-A, 85-B, 85-C 88-A and 90-A were added in the Indian Evidence Act to provide presumptions regarding digital signature and electronic record. Further, for the admissibility of the electronic records as documentary evidence, two new provisions were inserted in the Indian Evidence Act in the form of Sections 65A and 65B, which shall be dealt with and elaborately discussed in later sections of this paper¹³.

3. Collection of Electronic Evidence

With the increased use of communication devices/ computers and digital storage devices in homes and offices, there has been increasing instances of crimes involving these devices, either as a tool, or target or simply as a piece of evidence. The investigation of such crimes is complex as the evidence is often in an intangible form and volatile. Its collection and preservation present unique challenges to the investigator. The increased use of networks and the growth of the internet have added to this complexity.¹⁴

During the seizure of digital/electronic evidence in course of an investigation of cybercrime or conventional crime with digital trails, the seizure procedure involves several precautions that are required to be taken in addition to the precautions and care taken during the seizure of conventional articles.

Based upon the guidelines regarding the collection of electronic evidence issued by the various departments of the Government, the stages of digital crime scene search and seizure are:

(A) Preparation/ Planning stage (B) Collection stage (C) Preservation/Transportation stage.

Guidelines for search and seizure of digital/electronic evidence¹⁵

Preparation/ Planning Stage: Before proceeding to the place of the suspect or the scene of crime from where the seizure of electronic items/ digital evidence is to be done, the IO (Investigating Officer) should try to get the following information:-

13. Amendments were made in the Indian Evidence Act by Section 92 of the Information Technology Act 2000. These amended provisions of the Indian evidence Act are available at <https://www.scconline.com/Members/BrowseResult.aspx#FS035> visited on 09.01.2021.

14. Based upon the standing instructions of Delhi Police as mentioned in the Judgment in 'Pooja Khetan v. NCT of Delhi & Ors. [W.P.(Cr)] 1006 of 2015 available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=234478&yr=2018 visited on 10.01.2021.

15. Ibid.

1. Whether the system is live or offline - In the case of live systems, IO needs to obtain appropriate orders from the competent court to make the system offline. The IO will have to take an image copy of the data with the help of a cyber expert and forensic devices. Thereafter, the image copy will be considered as the original (primary) evidence in such cases along with the certificate under Sec. 65-B of Indian Evidence Act.

2. Format of 65-B certificates as per the requirements. The requirement should be analyzed in advance as to whether the seizure of the complete system is required or a portion of the data needs to be seized. In case of seizure of part data, necessary 65-B certification will be required from the concerned authority (custodian of the data).

(B) Collection/Seizure Stage: While conducting search and seizure, the IO should follow the following steps:

- Separate all the employees from their working terminals
- Avoid taking help from the alleged company's employees or the accused persons.
- Identify the equipment of concern as soon as possible.
- IO should document all the steps with the proper date and time.
- The date and time of the seizure of an electronic device are very important. Investigating Officer should make sure, while preparing the seizure, to mention the date and time (in IST format). IO should ensure to mention the current time as obtained from any standard source (such as the Indian Meteorological Department website).

(C) Preservation/Transportation Stage: While transporting or during the preservation period of the seized electronic device, following precautions/steps should be taken by the IO:-

- Make sure that a serial number is allotted for each device and the same should be duly noted, not only in the panchnama but also in the chain of custody and seizure memo.
- Protect digital magnetic media from external electric and magnetic fields. IO should also ensure the protection of digital media, particularly optical media from scratches.
- As computer devices and parts are sensitive in nature, hence, they should be handled carefully. IO should wrap the computer components using styrofoam and other protective coverings.
- Keep the components of each computer system together and should label each part after dismantling.
- The computer system should be secured in a way that would reduce vibrations. The IO should store the computer in a secure, cool, dry place, away from any electric or electromagnetic signals.

Dos and Don'ts¹⁶**(A) For Laptop****1. Check whether the Laptop is ON or OFF.**

2. If ON, then- a). Take a Screen Shot of the screen. b). Take the list of Programs running in RAM. c). Remove the power chord of the laptop from the power outlet (Never Shutdown). d). Remove the battery from the Laptop. e). Note down the colour, Make and Model of the Laptop. f). Note down any serial number available on the chassis of the Laptop. g). If you can remove the back cover of the laptop, then note down the make, model, Serial no. and capacity of the hard disk.

3. If OFF, then – a). Remove the power chord of the laptop from the power outlet (never switch on the laptop). b). Remove the battery from the Laptop. c). Note down the colour, Make and Model of the Laptop. d). Note down any Serial number available on the chassis of the Laptop). If you can remove the back cover of the laptop, then note down the make, model, Serial no. and capacity of the hard disk.

(B) For Desktop**1. Check whether the desktop is ON or OFF.**

2. If ON, then – a). Take a Screen Shot of the screen. b). Take the list of Programs running in RAM; running Operating System. c). Remove the power chord of the laptop from the power outlet (Never Shutdown). d). Note down the colour, Make and Model of the desktop. e). Note down any Serial number, if available on the chassis of the desktop. f). If you can remove the side panel of the desktop/ CPU, then note down the make, model, Serial no. and capacity of the hard disk.

3. If Off, then – a). Remove the power chord of the desktop from the power outlet (Never switch On). b). Note down the colour, Make and Model. c). Note down any Serial number available on the chassis. d). If you can remove the side panel of the desktop/ CPU, then note down the make, model, Serial no. and capacity of the hard disk.

(C) For Mobile Phones/ Tablets**1. Check whether the device is ON or OFF**

2. If ON, then – a). Leave it ON. b). Photograph the device. c). Label and collect all cables of the device. d). If possible keep the device charged. e). Seize the phone in a Faraday bag. f). Note down any Serial number if available on the chassis of the mobile phone. g). Never remove the battery.

3. If OFF, then – a). Seize the device in a Faraday Bag along with all cables of the device

16. Supra5

(D) For Miscellaneous storage devices

1. Collect any storage media like USB Pen drives, External Storage hard disks, Memory Cards, SIM Cards, CDs, DVDs etc. which may be used to store data. For these types of devices: a). Note down the make, colour, capacity and any Serial No. available on the device. b). Wrap the device in antistatic bag and wrap it in a bubble wrapper along with the connecting cables, if any. c). Seize the CDs and DVDs in a suitable protective hard case only.

2. Check if any printer, Photostat machine or any scanning device is available, if yes then- a). Check whether the system is available with its internal storage capacity. b). If yes then follow the above-mentioned procedure.

(E) For CCTV Footage / Digital Video Recorder

1. Immediately after registration of FIR, the Investigating Officer should identify all CCTV cameras, in and around, the relevant spot without any avoidable delay.

2. The Investigating Officer should call the District Cyber Cell Team at the scene of the crime for collection of CCTV System Hard Disks without any delay and not later than 48 hours as far as practicable, from the registration of FIR.

3. The District Cyber Cell Team should scan the scene of a crime to identify any CCTV system that may have captured any visuals/audio.

4. Thereafter, the District Cyber Cell Team should extract the storage media (Hard Disk) containing the relevant CCTV footage and assist the Investigating Officer in its seizure.

5. The District Cyber Cell Team should simultaneously ensure that the Hard Disk/storage media of the concerned CCTV System seized by the Investigating Officer is immediately replaced by a new Hard Disk/storage media of same/similar specification to enable uninterrupted operation of CCTV system.

6. In case the DVR is also seized along with the Hard Disk, a corresponding replacement of the same should be provided to the custodian/owner of the CCTV system.

7. If the Investigating Officer is not able to collect all relevant CCTV footages in 48 hours, then he should notify all persons owning/operating relevant CCTV systems, to take necessary steps to ensure that the relevant footage, as detailed in the Notice, is not altered/destroyed/deleted.

8. In respect of CCTV systems, other than those at the Scene of Crime or in its immediate vicinity, the IO should get their Hard Disks seized with the help of the District Cyber Cell Team without any undue or avoidable delay in course of the ongoing investigation.

9. Whenever possible, the proprietary recorded video files from the DVR should be retrieved to maintain the integrity and image quality of the evidence.

10. Steps involved :

- (a) A copy of the DVRs instruction manual should be taken in possession by the IO.
- (b) IO should determine the earliest recorded date. This will determine approximately how much time the IO has to retrieve the data before the system begins to overwrite it.
- (c) IO should compare the time displayed by the DVR system with the current time. (such as the time displayed by Indian Meteorological Department website)
- (d) Remove the power cord from the DVR.
- (e) Remove all the cables connected with the DVR.
- (f) Seize the hard disk in an antistatic bag.
- (g) IO to collect, if available, a copy of the original CD of the DVR Player provided by the DVR manufacturer along with the DVR from the owner/custodian of the DVR.

11. If the IO needs footage from any banking premises like ATM or the Bank or any other agency, then he should get it at the earliest and without any delay. Most of the ATM footages are overwritten in a time span ranging between 3 to 7 days.

12. Whenever the District Cyber Cell Team assists the IO in the seizure of a hard disk from the custody of any person other than the accused, it should immediately provide a replacement hard disk with the same/similar specifications to the custodian/ owner of the CCTV.

13. Whenever the District Cyber Cell Team assists the Investigating Officer in the seizure of complete DVR from the custody of any person other than the accused, it should immediately provide a replacement DVR with the same/similar specifications to the custodian/ owner of the CCTV.

14. The Heads of the Officers of the Units/ Districts should ensure that their respective District/Unit maintains a reserve stock of DVRs/Hard Disks of the most common specifications and the same is made available to the District Cyber Cell Team and replenished as per requirement. The Districts/Units should replenish their reserve hard disks stocks through regular procurement as per laid down procedures of procurement.

15. The Investigating Officers should follow the abovementioned guidelines at the time of search and seizure of CCTV Systems, computer and communication devices.

(F) For Mobile Phones & CDR: With over a billion mobile phone users, India today has the second-largest subscriber base in the world. Therefore, the call details record (CDR) has become an important data source for quantifying and analyzing user profile, movements, activities and behaviour. A CDR contains various details pertaining to each call, such as - who called whom, when and where was it made, how long it lasted, etc. These details can provide valuables, direct as well as circumstantial evidence, in a criminal investigation. Therefore, the Investigating Officers

(IO) must collect CDRs and other relevant information from telecom service providers (TSPs) in course of their investigation.

Points to be considered in cases where Analysis of CDR is required:

- IOs should, as soon as possible, collect the CDRs from the concerned telecom service provider (TSP) as soon as they pinpoint a mobile number that is relevant to an investigation.
- IO should, within one month of registration of FIR, collect CDRs of all persons relevant to the investigation as per the FIR and facts brought out in the initial investigation, from the concerned Telecom Service Providers(TSPs).
- There should not be any undue gap/lag in the period between the knowledge of a mobile number being relevant to an investigation and the dispatch of a request for its CDR to the TSP.
- IO should note that the CDR of any mobile number is available only for the period of one year. Hence, efforts should be made to identify all telephone numbers relevant to investigation within the initial stages of an investigation.
- CAF (Customer Application Form), in original, should also be taken from the concerned telecom service provider if the CDR of the number is to be included in the list of evidence.
- Certificate under Section 65-B of the Indian Evidence Act should be taken from the concerned telecom service provider.

CDR Analysis can be divided into the following parts:-

I. Call Details II. Subscriber/ CAF Details.

The main columns in the call details are i). Calling Number-The Number that has originated the call. ii). Called Number- This is the number of the receiver. iii). IMEI of the device used- International Mobile Equipment Number. This is the unique number given to each mobile device for its identification. iv). IMSI Number of the SIM Card- International Mobile Subscriber Identity Number. v). Date and time of call- Date and time of the call made over the telecom network. vi). Duration- Duration of the call made (mainly in seconds) vii). Type of Call - type of call like Incoming/Outgoing/ SMS/ Data etc. viii). Cell ID- Number is given to the Cell Tower located at the place from where the caller made the call.

The analysis may cover the following points:

- (i). **Caller No./ called No. can identify the following details:** a. This column will provide the list of numbers on which the target number is making calls. b. This column will provide the list of numbers on which the target number is receiving calls. c. The

column will provide the list of numbers on which the target number is sending SMSs. d. This column will provide the list of numbers on which the target number is receiving SMSs. e. This column will provide the total number of times from which the target number is in contact with other numbers.

- (ii) **IMEI**- a. This column will provide details that how many phone sets have been changed by the target number during the period. b. Type or model of phone can also be identified by the given column as there are several websites available on the internet from where one can find out the model by submitting the IMEI of the phone.
- (iii) **IMSI** - a. This column will provide number of times the SIM Cards for the target number is being replaced. b. Dates on which the target has stopped using the number and again the number has been activated. c. Date on which the number has been ported to another service provider, as generally, if ported, then the new telecom service provider provides a new SIM card and the IMSI will get changed.
- (iv) **Date & time**- a. This column will show the date and time when the calls/SMS were made/ sent during the required period.
- (v) **Duration** - a. This column will show the duration of the call (in seconds).
- (vi) **Type of Call** - a. This column will show the category of the entry made in the CDR as one of the following: 1) Incoming call 2) Outgoing call 3) SMS 4) RCF (Roaming call forward) 5) Internet/Data
- (vii) **Cell ID** - a. This column will show an alpha-numeric number which represents a code given to all the towers of a particular telecom service provider through which they are providing connectivity to the mobile number concerned. By looking for the number in the Cell ID chart the IO can find out the location of the target number at the time of call given in the CDRs.
- (viii) **CAF or Subscriber Data** - This is a document provided by the service provider which contains the following information: a). Name of the subscriber b). Address of the subscriber c). Alternative number of the subscriber d). Permanent address of the subscriber e). Local reference details, if the permanent address is from other state f). Details of the shop from where the SIM has been purchased. g). Details of the agency that has verified the details provided by the subscriber. The form will also have, annexed with it, copies of document like address proof submitted by the subscriber while getting the SIM issued. The Investigating Officers of all criminal cases should ensure that they collect the CDRs and the user details/CAF of all relevant numbers brought out during the investigation and they should extract the various pertinent information/ details from the CDRs/ CAFs.

4. Means to Present Electronic Evidence in the Court of Law: Admissibility of Electronic Evidence

Chapter V of the Indian Evidence Act deals with documentary evidence. Section 61 of the Indian Evidence Act provides that the contents of the documents can be proved by either by primary or secondary evidence. Section 62 of the Evidence Act defines primary evidence as to the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances mentioned. in Section 65 of the Evidence Act which states that secondary evidence may be given of the existence, condition or contents of a document in the case provided therein.

Thus from the above provisions, it emerges that there are two means to present the documentary evidence in the court of law – primary evidence and secondary evidence. However, none of these provisions speaks of the means of presenting the electronic records, which as per the amended definition of documentary evidence is a documentary evidence. This clearly indicates the intention of the legislature that means and mode of production of electronic evidence is not governed by the aforesaid provisions. Thus answer to find out the means to present the electronic evidence in the court of law will have to be looked at in sections 65A & 65B which deal with proof of electronic records.

It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in records. The marginal note to Section 65A indicates that “special provisions” as to the evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to the “admissibility of electronic records”.¹⁷

Section 65B(1) opens with a non-obstante clause and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that “document” as defined by Section 3 of the Evidence Act does not include electronic records.¹⁸

Thus from the afore quoted provisions, it is clearly discernable that the information contained in electronic records can be proved before the court of law either by the production of the original computer system or device where the said information is first generated or the computer output of the said information if the said output meets conditions mentioned in section 65B(2). Therefore the means to present the electronic evidence before the court of law is either the original device, where

17. Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal, (2020)7SCC1 Para 22 available at <https://www.scconline.com/Members/NoteView.aspx?enc=KDIwMjApIDcgU0NDIDEmJiYmJjQwJiYmJiZTZWFyY2hQYWdl>

18. Ibid Para 23

the electronic record in question, is lying or its computer output such as print on paper or its copy in magnetic or optical media such as CD, pen drive, floppy etc. if the said output meets the conditions specified in Section 65B(2) which shall be discussed later in the paragraphs below. Although Section 65B does not explicitly mention the terms “primary evidence” (document itself) and “secondary evidence” (copy of the document) but the same are clearly discernable and applicable even in the case of electronic evidence from the language of the said section.

Certificate under section 65 B and its mandatory nature and recent judicial trends:

As stated above Section 65B permits the admission of computer output of electronic record deeming the same as a document provided the conditions mentioned in Section 65B are met. For ready reference Section 65B(2) is reproduced below¹⁹:

“The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;*
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;*
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and*
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

Further section 65B(4)²⁰ provides that if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- There must be a certificate which identifies the electronic record containing the statement;
- The certificate must describe the manner in which the electronic record was produced;
- The certificate must furnish the particulars of the device involved in the production of that record;

19. Section 65B(2) available at Supra 1

20. Ibid

- The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

In **State (NCT of Delhi) v. Navjot Sandhu [(2005) 11 SCC 600]** the Hon'ble Supreme Court held that irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with the admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.²¹

However, in **Anwar P.V. Vs. P. K. Basheer [2014(10) SCC 473]**, the Hon'ble Supreme Court authoritatively held that 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 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to an electronic record shall be governed by the procedure prescribed under Section 65-B 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.²² Thus Hon'ble Supreme Court overruled the judgment in the **State (NCT of Delhi) v. Navjot Sandhu** (*supra*) came to be overruled.

Further in **Sonu vs State of Haryana [(2017) 8 SCC 570]**, it was held that objections regarding mode and manner of proving electronic record cannot be permitted to be raised at the appellate stage if not raised at the trial.²³

But in **Shaffi Mohammad vs State of Himachal Pradesh [(2018) 2 SCC 801]**, a Division Bench of the Hon'ble Supreme Court held that the applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who does not have a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such a case, the procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be a denial of justice to the person who is in possession of authentic evidence/witness but on account of the manner of proving, such

21. State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600 Para 150 available at <https://www.sconline.com/Members/SearchResult.aspx#JP0157> visited on 10.01.2021

22. Anwar P.V. v. P.K. Basheer, (2014) 10 SCC 473 Para 20 available at <https://www.sconline.com/Members/SearchResult.aspx#JP0020> visited on 10.01.2021

23. Sonu v. State of Haryana (2017)8SCC570 Para 32 available at <https://www.sconline.com/Members/SearchResult.aspx#JP0024>

document is kept out of consideration by the court in the absence of a certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, the requirement of a certificate under Section 65-B(4) is not always mandatory²⁴. Thus doubt was expressed regarding the correctness of the judgement passed by a three-judge bench of Hon'ble Supreme Court in **Anwar P.V. v. P.K. Basheer** (*Supra*) wherein it was held that requirement of a certificate under Section 65B of the Indian Evidence Act for the admissibility of electronic records as evidence is mandatory.

Finally, in the case of Arjun Panditrao Khotkar V. Kailash Kushanrao Gorantyal and Others [(2020)7SCC1], the Hon'ble Supreme court by a three-Judge bench has reiterated that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of an electronic record, as correctly held in **Anvar P.V. [Anvar P.V. v. P.K. Basheer, (Supra)]**, and incorrectly "clarified" in **Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (Supra)]**²⁵.

Further, the Hon'ble Supreme Court clarified some confusions in Anvar P.V. case (*supra*) by observing that if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence Act. The Court also clarified the confusion over the aforementioned sentence in the Anvar P.V. Case and held that the last sentence in Anvar P.V. case which reads as "...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act..." is to be read without the words "under Section 62 of the Evidence Act...".²⁶ The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4)."²⁷

Stage of furnishing the certificate to the Court:

The Hon'ble Supreme Court in **Arjun** (*Supra*) also discussed and clarified that Section 65B does not speak of the stage at which such certificate must be furnished to the Court, and said that

24. Shaffi Mohammad vs State of Himachal Pradesh [(2018) 2 SCC 801] Para 29 available at <https://www.scconline.com/Members/SearchResult.aspx#JP0021>

25. Arjun Pandit Rao(*Supra* 17) Para 61

26. Ibid Para 73.2

27. Ibid Para 73.2

in cases where such certificate could be procured by the person seeking to rely upon an electronic record, such certificate must accompany the electronic record when the same is produced in evidence. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. Thus, the trial judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case.

Thus from the aforesaid interpretation given by the Hon'ble Supreme Court of section 65B of the Indian Evidence Act, it can be stated that the means to produce the electronic evidence in a court of law is either the original device itself where the electronic record is first generated and lying or its computer output accompanied with a certificate issued under Section 65B by a responsible person.

5 Relevancy of Electronic Evidences in Criminal Trial

These days no endeavour of human activity appears to have remained untouched with the advent of the information Technology including crime which has also been deeply impacted by this. As stated above nowadays a parallel virtual world exists along with the physical world and in virtual word and they interlinked and because of the same crime committed in the physical world leaves its footprints in the virtual world in the form of digital footprints. For example, conspiracy to commit a crime has always been hatched in the secrecy of dark but earlier the evidence of the said conspiracy could be gathered from the place of their meeting or letters exchanged between them or materials supplied amongst one another etc. But these days a conspiracy is hatched between four people over their mobile phones or by an exchange of emails between them or through various other communication devices without having met physically and evidence, therefore, can be gathered only from these devices, which evidences are called electronic evidence. Further in the case of the new phenomena of cybercrimes in the form of child pornography or hacking bank accounts or phishing or online gambling or cyber terrorism etc. It is almost entirely impossible to trace the trails of the crime in the physical world and materials to prove the said phenomenon of cybercrime lie entirely in the realm of a virtual world in the shape and form of electronic evidence or digital evidence and therefore the electronic evidence in the criminal trial is increasingly becoming more and more relevant. For example in the case of the parliament attack, the conviction of the accused substantially depended on the communications exchanged between the co-accused over the phone. Similarly, in the 26/11 Mumbai Case, the prosecution of the accused was largely successful on account of data available over the GPS. Section 5 of the Indian Evidence Act provides that the evidence may be given of every fact-in-issue and other facts declared to be

relevant under Sections 6 to 55 of the Act. Therefore any information contained in an electronic record must be relevant under the provisions provided in the Chapter of the Evidence Act for being considered to be admissible if they meet the criteria laid down in Section 65B of the Indian Evidence Act.

6. Conclusion

Although there have been significant developments in the legal field by way of enactment of the Information Technology Act, 2000 and amendments vide the same act in the IPC, Indian Evidence Act, Banker's Books Act etc but these developments still hugely lag behind the pace of developments in the field of ICTs (Information & Communications Technologies). With the mass proliferation of ICTs bound to increase in the days to come, keeping pace with the development of ICTs is acutely going to become more challenging for the enforcement agencies. Even presently with many things crystallised in the form of legislation and the Court's pronouncements, as far as the admissibility of electronic evidence before the court is concerned, many challenges are facing the enforcement agencies especially concerning the collection of the electronic evidence. This is largely owing to the investigating officers being not sufficiently equipped with the requisite knowledge for the acquisition of electronic evidence and lack of uniform guidelines for the same. Efficacy and integrity of the evidence is the soul of the Judicial Trial and hence maintaining the same ought to be the foremost priority for the investigator and hence this area i.e. collection of electronic evidence must be given higher priority than it is being given. Further with the requirement of certificate for admissibility of electronic evidence being now mandatory because of the Arjun's case (Supra) without exception as held in Shaffi Mohammad (Supra), getting the electronic evidence admitted in a court of law is not going to be easy.

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Topic No. – 41

The relevance of inquest report and post-mortem report. Utility and relevance of maps of the crime scene in a criminal trial.

By
Sri Dadhich Narayan Bhardwaj,
Officer on Special Duty,
Patna High Court.

Sri Dadhich Narayan Bhardwaj,
Officer on Special Duty,
Patna High Court.

**Topic : The relevance of inquest report and post-mortem report. Utility and
relevance of maps of the crime scene in a criminal trial**

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The relevance of inquest report and post-mortem report. Utility and relevance of maps of the crime scene in a criminal trial

INTRODUCTION:

Learning of death of a loved one is a harrowing experience for families. There is an interest of society in determining the causes of death of its members. A sudden, unexpected or unwitnessed death must have signalled a potential danger, either by its own members from within the society or by an enemy from the outside. The people commonly say, “the person is dead. Why does it matter?”. Yes, the dead cannot be benefitted, but the value of the death investigation is to benefit the living and future generation. In a culture that values life, it is very important to explain the meaning of death in a public forum as right to life also includes the right to know.

On account of the recent abnormal spout in the unnatural deaths, particularly at places like hospitals, police firings and police encounters, railways and other vehicles, and also in the household by way of dowry deaths, raises suspicion of adoption of illegal means with a strong possibility of the complicity of the officials of the State, therefore, the importance of the topic in hand becomes vital. Serious concern has been expressed at various quarters in this regard and it has also been observed that in criminal cases, the divergent post-mortem reports and the statements of witnesses have led to an alarming rate of acquittal.

It is pertinent to say that every criminal trial is nothing but a quest for the search for truth. A judge presiding over a trial is not merely supposed to see that no innocent person is punished, but also to see that a guilty person does not escape. The one is as important as the other.

The term “inquest” is commonly used to refer to an investigation by the police under section 174 Cr.P.C. or an inquiry by the Magistrate under section 176 Cr.P.C for finding out the cause of unnatural or suspicious death. The idea is to find out the fact whether or not there was any foul play behind such reported death. An inquest is not an adversarial process rather and inquisitorial process. It is neither the trial nor the process for the discovery of truth. There are different systems of investigation in different countries and the system of death investigation are the medical examiner system, coroner system, police system and Continental system. In our country, police inquest and magistrate inquest are in practice.

Explaining the nature of the inquest report compared with the post-mortem report, Hon'ble Apex Court held in **(Munshi Prasad Vs State of Bihar)**¹ that: [Preparation of an inquest report is a part of the investigation within the meaning of criminal procedure code. Neither the inquest report nor the post-mortem report can be termed to be basic evidence or substantive evidence and discrepancy occurring therein can neither be termed to be fatal nor even a suspicious circumstance, which would warrant a benefit to the accused and the resultant dismissal of the prosecution case.]

1. 2002 SCC (Cri) 175

● HISTORY AND ORIGIN: -

INQUEST: - The inquest has its origins in the 11th century in England. When a body was found, a representative of the Crown had to decide five things: -

- Who was the deceased?
- Where did he or she die?
- When did he or she die?
- How did he or she die?
- Who was to blame?

To help the “Crown” (or Coroner) decide these five questions, the representative summoned all the men from the surrounding villages to give evidence. Later, this evolved into a jury selected to hear the evidence.

In England, the duties, activities and powers of Coroners are defined in the Coroners Act, 1988. This act is a legislated authority and reference for an inquest in England.

At present, in India, the Coroners Act, 1871 applies only in respect of very limited territorial jurisdiction (erstwhile Presidency towns i.e., Calcutta and Bombay), namely, the ordinary original civil jurisdiction of the High Courts of Calcutta and Bombay. However, several suggestions have also been given including by way of judicial decisions that such an Act should be framed for the entire country. (Writ Petition No. (C) 6179/2007) between Social jurist, In a **Civil Rights Group & Anr. Vs Union of India & Ors.**, a Division Bench of Hon'ble Delhi High Court by its order dated 12.10.2007 has recommended the Law Commission to examine whether a Legislation like the Coroners Act, 1988 prevalent in the United Kingdom is needed in this country and whether a suitable proposal for this purpose should be made to the Parliament in this regard. In view of the aforesaid and to constitute a necessary independent authority to inquire into the true and real cause of death of a person, even if such a person dies outside the territorial limits of the country, a Proposal for the enactment of New Coroners Act applicable to whole India was suggested by Law Commission of India to Government of India through its report No. 206 in June 2008 but that bill could not be tabled for discussion till now.

Post-Mortem: -

An Autopsy is also known as a post-mortem examination. It is a dissection of a corpse that is performed to help to determine the cause of death in Medico-Legal cases and also to examine the effects of diseases. In ancient Greece, the earliest records of an autopsy were completed by Greek physician Galen of Pergamum who had studied the symptoms of a patient and examined the affected part of the body. In the modern era, the modern-day autopsy was pioneered by Karl Rokitansky of Vienna who had completed thousands of autopsies during his career. He was the

first to examine every part of the body with a systematic and thorough approach. The word “autopsy” has been used since around the 17th century, it refers to the examination inside the dead human body to discover diseases and cause of death. Thus, Post-Mortem is a serious exercise and has serious medical, social and legal repercussions. The result of the autopsy has the potential of affecting the life, limb and liberty of people therefore utmost care is required during preparation of the Post-mortem report as it is required and used by people of different levels such as police, prosecution, public, Court and lawyers.

MEANING AND SCOPE: -

The expression “Inquest” is not literally defined in the Code of Criminal Procedure. It occurs in Section 174 and Section 176 Cr.P.C which literally means a legal inquiry. The word “inquest” is generally used to mean either an investigation by the police under Section 174 Cr.PC or an inquiry by the Magistrate under Section 176 Cr.PC undertaken by them to find out the cause of unnatural or suspicious death. Further, Chapter – 10 (Unnatural Deaths) of Bihar Police Manual 1978 also deals with the matters of Inquest and Post-Mortem Reports. As a matter of law, an inquest must be held where death is or may be due to unnatural causes. The primary purpose of an inquest is to identify the deceased and establish how, when and where the death occurred. It is an inquisitorial process. It does not include a finding of liability either civilly or criminally on the part of any person. An inquest is not confined to merely establishing a medical cause of death. An inquest can take into account the circumstances of a death.

The term 'inquest' is also explained as following: -

Cambridge Dictionary: -

An official process to discover the cause of someone's death:

AMERICAN DICTIONARY: -

It defines inquest as an official examination of facts in an attempt to discover the cause of something especially of a sudden and violent death:

BLACKSTONE DICTIONARY: -

A legal or judicial inquiry, usually before a jury, especially an investigation made by a Coroner into the cause of a death. The decision or finding based on such an inquiry. An investigation or Examination.

Section 174 of the Code of Criminal Procedure mandates that the police immediately after receipt of the information about the occurrence has to proceed to the place of occurrence, start the investigation and prepare the inquest report of the dead body. The section states: -

174. Police to enquire and report on suicide, etc.

(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighborhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any); such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When-

- (i) the case involves suicide by a woman within seven years of her marriage; or
- (ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or
- (iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
- (iv) there is any doubt regarding the cause of death; or
- (v) the police officer for any other reason considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.

● Section 176 of The Code of Criminal procedure, 1973 has been amended by amendment Act 25 of 2005. Firstly, the words “when any person dies when in the police or” omitted and a new clause 1A has been inserted under section 176. Now the provision is as follows: -

176. Inquiry by Magistrate into cause of death. —

(1) when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

(1A) Where, —

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman,

while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known and shall allow them to remain present at the inquiry.

(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical person appointed in this behalf by the State Government unless it is not possible to do so for reasons to be recorded in writing.

Explanation.—In this section, the expression "relative" means parents, children, brothers, sisters and spouse.

Difference between inquiry conducted by the Executive Magistrate and Judicial Magistrate in respect of scope and extent?

By the amendment of 2005, the legislature has introduced the judiciary to play an important and active role at the very inception of the cases of custodial death and rapes. Therefore, the

intention of the legislature is clear to give more gravity to the evidence taken by the judicial magistrate during the inquiry of custodial death and rapes on the basic rule of interpretation of statutes is; *Ut res magis valeat quam pereat* (A statute must be construed as a workable instrument). A comparison of the language used in sub-section (1) and sub-section (1A) of Section 176 of the Code shows that so far as Section 176 (1) of the Code is concerned, the inquiry is confined only to the cause of the death. Therefore, the Executive Magistrate cannot travel beyond the cause of death to give any other finding on the disputed facts. The inquiry relates only to the cause of death and not as to how the injuries were caused and the persons responsible for the same etc. but, in sub-section (1A), a different language has been consciously used by the legislature. Here the legislature has not confined the inquiry only into the cause of the death or cause for the disappearance or cause for rape while in the custody of the police. The qualifying words like inquiry “into the cause of the death” as it is found in sub-section (1) of Section 176 of the Code have been consciously omitted in sub-section (1A) of Section 176 of the Code thereby indicating that the inquiry by a Judicial Magistrate under sub-section (1A) is not confined only to the cause of death or cause for the disappearance or cause for rape. Thus, this inquiry has got a wider scope.

Further, under clause (2) 176 of the Code, the Magistrate holding an inquiry is empowered to record the evidence. It says that the Magistrate holding such an inquiry shall record the evidence taken by him in connection there within any manner hereinafter prescribed according to the circumstances of the case. The expression ‘any manner hereinafter prescribed’ under s. 176(2) suggests that the manner of recording the evidence is either be given in this section itself or other provisions of this Code. The manner of the recording of evidence is nowhere given in this section. Therefore, recording of evidence of witnesses can be taken either according to Section 202 (2) or 274, or 275 of the Cr.P.C Here, as per the Code itself as well under section 3 read with Section 4 of the Oath Act, 1969, the Magistrate may take the evidence of witnesses on oath.

Further, the inquiry by the executive magistrate under clause (1) is only restricted up to the cause of death. Moreover, this inquiry can be done instead of an investigation or in addition to the investigation by the police officer. It suggests that the utility and value of this inquiry is only a directory and recommendatory. At the stage of trial, this report can be used for a limited purpose i.e., for contradictions and corroboration of the witnesses who have been examined earlier.

The said wide scope of Judicial inquiry has been also mentioned in the guidelines issued by the National Human Right Commission, in the year 2013. Enumerating the several important guidelines, the Commission stated that the enquiry Magistrate should also examine and verify the inquest report and Post-Mortem report and the Magisterial enquiry should also cover the following aspects:-

- (a) The circumstances of death.
- (b) The manner and sequence of incidents leading to death.
- (c) The cause of death

- (d) Any person found responsible for the death, or suspicion of foul play.
- (e) Act of commission/omission on the part of public servants that contributed to death
- (f) Adequacy of medical treatment provided to the deceased.

Thus, it becomes clear that the scope and extent of inquiry by the Judicial Magistrate are wider enough than the inquiry held by an Executive Magistrate. While exercising the wide range of inquiry authority a Judicial Magistrate can deduce the facts that what offences have been committed, cause of death, who are allegedly responsible for the offences, manner of commission of offence but he has to take care that he cannot hold somebody guilty of the offence. Since holding one guilty or not is to be considered only in a trial.

POST-MORTEM REPORT: -

Etymologically, the term “Post-mortem” / “autopsy” derived from the Ancient Greek word *autopsia*, i.e. "to see for oneself".

A post-mortem examination is a surgical procedure that consists of a thorough examination of a corpse by dissection to determine the cause, mode, and manner of death or to evaluate any disease or injury. It is usually performed by a specialized medical doctor and the report prepared is called “Post-Mortem Report”.

A post-mortem report generally answers basic questions about “who”, “what”, “when” and “why” of suspicious, sudden and unnatural deaths.

Purposes of Post-Mortem Examination: -

Post-mortem examination/autopsies are performed for either legal or medical purposes. An autopsy is being requested by investigating agencies such as; police under section 174 Cr.PC or by Magistrate under section 176 Cr.PC with following objectives:

1. To find out cause of death
2. To find factual, objective, medical information for law enforcing agencies and court.
3. To allow proper recovery and preservation evidence
4. To document injuries and disease
5. To determine manner of death
6. To know time of death
7. To reconstruct crime scene
8. To provide correlation of facts and circumstances related to death
9. To help in the identification of the victim, etc.

A forensic autopsy is carried out when the cause of death may be questionable in a criminal

matter, while a clinical or academic autopsy is performed to find the medical cause of death and is used in cases of unknown or uncertain death, or for research purposes.

INQUEST REPORT AND POST MORTEM REPORT: EVIDENTIARY VALUE AND GUIDING PRINCIPLES: -

An investigation under Section 174 Cr.PC is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal, homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174 Cr.P.C.

Laying down the guiding principles regarding the preparation of “Inquest Report”, Hon'ble Supreme Court in **Pedda Narayana And Others v. State of Andhra Pradesh**² held in para 11 as following: -

“A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report.”

Thus, it was held that proceeding under section 174 Cr.P.C has a very limited scope. It is not necessary to enter all the details of the overt acts in the inquest report and their omission is not sufficient to put the prosecution out of Court.

- In **Shakila Khader v. Nausheer Cama**³ the contention was raised before the Apex Court that non-mention of a person's name in the inquest report would show that he was not an eyewitness of the incident. The same was repelled on the ground that an inquest under Section 174 Cr.P.C is concerned with establishing the cause of death and only evidence necessary to establish it needs to be brought out.

- The Supreme Court reiterated the same view in **Eqbal Baig v. State of A.P.**⁴ that the non-mention of the name of an eyewitness in the inquest report could not be a ground to reject his

2. AIR 1975 SC 1252

3. AIR 1975 SC 1324

4. AIR 1987 SC 923

testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of the commission of an offence, as the inquest report is not the statement of a person wherein all the names (the accused and also the eyewitnesses) ought to have been mentioned.

- The view taken in **Pedda Narayana versus State of A.P.** was approved by a three-Judge Bench in **Khujji @ Surendra Tiwari versus State of Madhya Pradesh**⁵ and it was held that the testimony of an eyewitness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time.

- Explaining the object of proceeding under section 174 Cr.P.C, the Supreme Court in **State of U.P. Vs Abdul and others**⁶, held that the object of the proceedings under section 174 Cr.P.C is merely to ascertain whether a person has died under suspicious circumstances and unnatural death and if so what was the apparent cause of death. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to be foreign to the ambit and scope of the proceeding under section 174 Cr.P.C. The police don't need to mention in the inquest report how or under what circumstances the injuries were received or who caused whose injuries on the dead body. In the said judgment, The Supreme Court had to set aside the judgement of the High Court by restoring the order of conviction and sentence given by the trial court except for the sentence of death on the accused Abdul, which was commuted to imprisonment for life.

- Explaining the nature and purpose of an inquest under Section 174 Cr.PC, Supreme Court held in **Amar Singh v. Balwinder Singh**⁷ that the High Court had observed that the fact and the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried weight in favour of the accused. After noticing the language used in Section 174 Cr.P.C and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution.

It was also held by The Apex Court in **Kuldeep Singh Vs State of Punjab**⁸, that the inquest report cannot be treated as substantive evidence and the same can be looked into for testing the veracity of witnesses.

Thus, it is well settled by a catena of decisions that the purpose of holding an inquest is very limited viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence.

5. AIR 1992 SC 1853

6. 1977 SCC (Cr.) 804

7. 2003 (2) SCC 518

8. AIR 1992 SC 1944

It has been further held by Supreme Court in **Munshi Prasad Vs. State of Bihar**⁹, that preparation of an inquest report is a part of the investigation within the meaning of criminal procedure code. Neither the inquest report nor the post-mortem report can be termed to be of basic evidence or substantive evidence. Discrepancies if any occurring therein, can neither be termed to be fatal nor even a suspicious circumstance, which would warrant a benefit to the accused and the resultant dismissal of the prosecution case.

Explaining the object of “inquest proceeding” as well as discussing the evidentiary value of inquest report and Post-mortem report in **Madhu Alias Madhuranatha And Another v. State of Karnataka**¹⁰ the Supreme Court stated in para 22: -

“The object of the inquest proceeding is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what is the cause of death. More so, the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as a fatal or suspicious circumstance which would warrant the benefit of the doubt to the accused.”

Now, it is apposite to state here that the post-mortem examination is a surgical procedure that consists of a thorough examination of a corpse by dissection to determine the cause, mode, and manner of death or to evaluate any disease or injury. A post-mortem report generally answers basic questions about “who”, “what”, “when” and “why” of suspicious, sudden and unnatural deaths. It is usually performed by a specialized medical doctor and the report prepared is called a “post-mortem report”. This report has obviously the value of an “expert's evidence in the eye of the law.

“The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party but should assess his evidence like any other evidence.

Section 45 of the Indian Evidence Act 1872 (Under Chapter II) talks about the relevancy of the opinion of a third person. It states that when the Court has to form an opinion upon a point of science, or of foreign law, or art or as to the identity of handwriting or finger impression, the opinions upon the point of persons specially skilled in such subjects are relevant facts.

Although, if the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence, in that case, his opinion is of no use. It is required of an expert, whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his

9. 2002 SCC (Cri) 175

10. AIR 2014 SC 394

conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place a whole lot of similarities or dissimilarities etc., which influenced his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

- Indeed the value of the expert evidence consists mainly on the ability of the witness because of his special training and experience to point out the court such important facts, as it otherwise might fail to observe and in doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented conveniently and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words, the value of expert evidence depends largely on the cogency of reasons on which it is based.¹¹

- Apex Court while answering the question formulated regarding the fact: -

“Whenever there is some conflict in the eyewitness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence?”, was held (para 35) in **“Dayal Singh and others Versus State of Uttaranchal”**¹² as under: -“35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly is destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

In **Kamaljit Singh v. State of Punjab**¹³, the Court, while dealing with the discrepancies between ocular and medical evidence, held:

“8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.”

- Explaining the evidentiary value of the reports given by the experts, The Hon'ble Apex Court held in para 40 of said judgment **“Dayal Singh and others Versus State of Uttaranchal”**¹⁴;

11. Forensic Science in Criminal Investigation and Trial (4th Edition) By B.R.Sharma

12. AIR 2012 SC 3046

13. 2013 (12) SCC 155

14. AIR 2012 SC 3046

“40. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyze the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such a case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.”

MAPS OF CRIME SCENE: UTILITY AND REFERENCE IN CRIMINAL TRIAL

A crime scene is a place where a particular offence has been committed or a place where the physical evidence of a particular case has been firstly detected. The scene of a crime is the most important place which should be properly protected and documented. It should be processed thoroughly and systematically. Examination of the Scene of crime is the most important aspect of crime investigation. Inspection of the crime scene or place of occurrence is practically the basis of all scientific investigation. Nothing can connect to the criminal with a crime other than the crime scene itself. A thorough examination of the scene of crime gives a clear picture of the modus operandi. If compared with the modus operandi, it gives a clear identification with the recorded criminals, if any.

The scene of a crime may be mainly documented in two ways: - (i) By photography of the scene of the crime (ii) By drawing the sketch map of the scene of the crime. Section 157 Cr.PC requires the police officer to investigate a case to proceed to the spot. Utilizing the visible and significant clues, gathered from the study of maps of a crime scene, the chain of occurrence may be proved. Maps of crime scene may be used as an important evidence for the court. It records the details of the scene, shows the positions of various objects and helps to reconstruct the scene of the crime.

Maps of the crime scene also play an important role in the investigation. The sketch map of

the crime scene prepared by the investigating officer is relevant under section 9 (Facts necessary to explain or introduce relevant facts) of the Indian evidence act. Since it is based on the actual observation about the investigating officer at the spot, therefore, it may be treated as direct evidence and is admissible under section 60¹⁵ (Oral evidence must be direct) of the Indian evidence act.

Crime Scene Maps are useful in criminal investigation as well as in criminal trial for the following reasons: -

- a. They reduce the length of reports.
- b. They make a much more exact impression on the mind than written reports.
- c. They make a lucid explanation of an intricate case fairly easy.
- d. Their preparation increases the power of observation of the investigation officer.
- e. They introduce a method into an investigation.
- f. They help judges, Magistrates and others to an accurate understanding of a case.
- g. They often help to prove whether a witness is reliable or not as a plan / Map may show whether a witness was of hearing or an incident or was unable to see what he claimed/stated he saw.

IMPORTANT DECISIONS REGARDING UTILITY OF MAPS OF CRIME SCENE IN CRIMINAL TRIAL

In **Tori Singh Vs State of U.P.**¹⁶; The Apex Court held that the sketch map would be admissible so far as it indicates all that the sub-inspector saw himself at the spot, but any mark put on the sketch map based on the statements made by the witnesses to the sub-inspector would be inadmissible in view of the clear provision of section 162 Cr.PC as it will be no more than a statement made to the police during investigation.

In **Jit Singh Vs State of Punjab**¹⁷, & In **Rameshwar Dayal Vs State of U.P.**¹⁸; It was held by the apex court that, in fact, documents like the inquest report, seizure list or the site-plans consist of two parts, one of which is admissible and the other is inadmissible. The part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under section 60 of the evidence act whereas the other part which is based on the information given to the investigation officer or on the statement recorded by him in the course of investigation is inadmissible under section 162¹⁹ Cr.PC, except for the limited purpose mentioned in that section.

15. Section 60 Indian Evidence Act - Oral Evidence must be direct.

16. AIR 1962 SC 399

17. AIR 1976 SC 1421

18. AIR 1978 SC 236

19. Section 162 Cr.P.C - Statements to Police not to be signed – Use of statements in Evidence

Maps of crime scene may be used while questioning suspects and witnesses. During trial, the crime scene diagram correlates the testimony of witnesses and serves as a tool for relaying reference and orientation points to the Prosecutor, Judge and defence counsel.

Maps of crime scene often become helpful in providing objective evidence for the justice system and also to determine the timing, cause and manner of death.

With the help of the maps of crime scene, the investigating agency or medical expert may reconstruct the crime scene which can be helpful to solve the cases involving the question of hanging, strangulation, firearms, dead bodies found over railway tracks, fall from a height, vehicular death having a suspicion of homicide.

CONCLUSION: -

A good practice is an important step to deliver justice to the case. The scope of Article 21 has been enormously expanded by the Apex Court, to include the right to know or right to have the correct information and this will also include the right to know the correct cause of death of any person. It has been held by the Apex Court in **Essar Oil Ltd. v. Halar Utkarsh Samiti And Others**²⁰ that there is also a strong link between Article 21 and the right to know particularly where “secret Government decisions may affect health, life and livelihood”.

Unfortunately, a tendency has developed to ignore these procedural requirements, which have been incorporated by the legislature with a definite purpose. The common object of the investigating authorities, Prosecution and Courts is to promote the administration of justice and bring the guilty to book. To achieve that end, the procedure prescribed by the Statute and Rules requires to be followed scrupulously. This would result in a better appreciation of the evidence by the Courts and would also avoid unnecessary and scathing criticism about the conduct of the investigation agency. It is clear that merely because of some defect in the investigation or lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinize the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. Where our criminal justice system provides safeguards of fair trial and implementation of the principle of presumption of innocence till proven guilty, to an accused. However, it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape.

20. {2004 AIR SC 1834}

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Topic No. – 42

***Non-examination of important witnesses such as a doctor, I.O.,
and the informant.***

By
Md. Rustam,
Officer on Special Duty,
Patna High Court.

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Officer on Special Duty,
Patna High Court.**

Topic : Non-examination of important witnesses such as a doctor, I.O., and the informant.

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Non-examination of important witnesses such as a doctor, I.O., and the informant.

Introduction

Examination of witnesses is an integral part of the criminal trial. The criminal justice system has many stakeholders like the victim, accused, police, courts and the public at large. Criminal prosecution is launched by a complaint to the police or by a court complaint, which is followed by investigation and enquiry. After investigation and enquiry, cases go for trial. The criminal trial is the soul of the criminal justice system because it is not only the victim and accused, who are affected by the outcome of the trial, rather it affects society as well. As a result, sensitivity is expected from the court while dealing with the evidence of witnesses. Courts should not discard reliable evidence of the prosecution for the mere reason that a particular witness, who seemed to be an important witness was not examined by the prosecution. There is no provision in the Evidence Act, which lists important and non-important witnesses. It depends on the nature of each case. There is no such provision either in the Code of Criminal Procedure or in the Indian Evidence Act, which mandates for the examination of a particular number of witnesses. There is no such requirement of law, which says that non-examination of an informant, investigating officer, doctor, a forensic expert will be a ground for acquittal of the accused in a criminal trial. The procedure for conducting a criminal trial has been provided in the Code of Criminal Procedure. In this regard, the relevant provisions are referred for better appreciation of the issue.

Chapter XVIII: Trial before a Court of Session

Section 225 to 237 deals with the provisions of the Sessions Trial. Section 231 states that on the date fixed for taking evidence of the prosecution, the judge shall take 'all such evidence as may be produced in support of the prosecution'.

Section 232: Acquittal: If after taking evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the judge considered that there is no evidence that the accused committed the offence, the judge shall record an order of acquittal.

In respect to trial of warrant cases by the magistrate, section 242 and 244 also speaks of taking 'all such evidence as may be produced in support of the prosecution'.

So going by these provisions, it is evident that there is no such requirement of law that mandates the prosecution to produce or examine informant, investigating officer and doctor. But the charges levelled by the prosecution need to be proved beyond all reasonable doubts and that can be only proved by the best possible evidence and generally, the evidence of informant, I.O, doctor and forensic experts becomes necessary for proving the guilt of accused. But time and again it has been held by High Courts and Supreme Court that non-examination of informant, doctor and I.O is not fatal in all cases.

Now before discussing the issue at length, I would refer to the relevant provisions of the Indian Evidence Act. As per section 3 of the I.E.A.:-

“Proved” A fact is said to be proved when, after considering the matter before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

“Disproved” A fact is said to be disproved when, after considering the matter before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

“Not proved” – A fact is said not to be proved when it is neither proved nor disproved.

So going by the above provisions it is evident that the Evidence Act speaks of proving the facts by evidence of the kind which can persuade the court to believe in the existence or non-existence of a particular fact and the standard set is that of a prudent man.

We can also take a cue from Section 134 of the Indian Evidence Act. It states that ‘no particular number of witnesses shall, in any case, be required for the proof of any fact’. It is evident from this section that no fixed number of witnesses are required for proving any fact. So this is also implied in the section that no particular kind of witness is required to be examined for proof of any fact. As a result, it can be safely said that there is no straight-jacket formula that examination of informant, doctor and I.O is always fatal for prosecution. It depends on the facts and circumstances of a particular case.

Now before proceeding further, I start with a bare idea of what criminal trial is all about and how it begins and who are the stakeholders in conduction of the same?. A criminal case is launched either by filing a complaint or by lodging an FIR. For launching the prosecution, it is not always necessary that the complainant or the informant himself should be the victim. If the complainant or the informant is the victim himself, then his examination normally becomes mandatory to prove the case. But if the complainant/ informant is not the victim, then if a victim gets examined and supports his or her case and the court finds the evidence reliable and trustworthy, then the accused person can be convicted. Non-examination of informant or complainant in such circumstances will not prove to be fatal.

The requirement regarding the production of evidence and effect of omission of non-examination of important witnesses also varies from case to case based on severity of the offence or the nature of the offence. Lesser the gravity of the offence, little will be the emphasis on the production of all important and material witnesses. The requirements also vary on the nature of the allegation, like cases relating to forgery, cheating and other offences relating to the creation of a false document, cases under the N.I Act are based on documentary evidence. So if in such cases the requisite documents on which the prosecution based its case, are brought on record, then no

adverse inference can be drawn for non-examination of important witnesses. But then it will vary from cases to cases and no straitjacket formula can be applied in all cases. In some cases, non-examination may prove fatal and in some cases, it may not be fatal and significant. For example, if a case is being tried for commission of an offence under minor section like 324 IPC, in such cases, if the prosecution examines the victim only and the informant, the investigating officers and the doctor, who had medically examined the victim, were not examined. The evidence of the victim inspires confidence if it is cogent, reliable and trustworthy and proves the charges beyond all reasonable doubts. In such cases the accused can be convicted only on the solitary evidence of the victim and no corroboration should be insisted unless, for extraordinary reasons, the court thinks it necessary to seek corroboration of the testimony of the single witness. So in the given case non-examination of the Investigating officer, informant and the doctor will not disqualify the prosecution to earn a conviction in the case. Non-examination of some of the important witnesses will not be fatal for the prosecution always. But this cannot be said to be proposition applicable in all cases. Each case has its unique facts and distinct features and courts are supposed to appreciate the evidence as per the requirement of law and singular facts and circumstances of a case in hand.

Similarly, in rape and other cases of sexual harassment, only the single testimony of the victim can form a basis for recording an order of conviction. But then there is a qualification that the evidence of the victim must be impeccable, cogent, reliable and trustworthy and is of a kind that inspires confidence. When the evidence of the victim is of such kind, then the conviction can be based on the sole evidence of the victim and there should not be any insistence for corroboration. It is because usually victims of rape and sexual offences are not viewed like other victims of assault and other offences. Unfortunately, the victim in such cases is treated as an accomplice. The incident becomes a stumbling block and follows the victim throughout life. As a result, in such cases, even the father and close relatives of the victim do not want to appear before the court, for they think that appearing in court and deposing will bring shame and bad repute to their family. Therefore non-examination of some important witnesses may not be always fatal for the prosecution case. In rape cases, the absence of a doctor will not be ground for disbelieving the prosecution case, when the evidence of the victim is impeccable, reliable cogent and trustworthy. It is a settled proposition of law that testimony of the victim may alone form the basis for conviction of accused if the evidence of the victim is reliable and trustworthy. Unless there is a requirement of the statute, no insistence for corroboration should be made by the court except when the evidence of a single witness does not seem to be sufficient, trustworthy and reliable. Of course in some cases, as a rule of prudence, the court may not believe on the sole testimony of a single witness. In cases, where the sole witness is a child witness or accomplice, the courts should be very cautious to rely on sole testimony and should seek corroboration. It depends on the facts of each case whether corroboration is required or not. As per section 134 of the Indian Evidence Act, no particular number of witnesses are necessary to prove a fact. In a criminal trial, the standard of proof is 'proof beyond reasonable doubts'. The expression 'beyond reasonable doubt' is not defined in the Indian Evidence Act, but this is the cardinal principle of a criminal trial which provides safeguards to the

accused from malicious prosecution based on unfounded allegations and charges. It is all about the degree of certainty regarding the guilt of the accused. If the degree of certainty is on the higher side, then it is safe to hold that prosecution has proved the guilt of the accused beyond all reasonable doubts. The general notion that non-examination of the important witnesses will certainly lead to the acquittal of the accused has no sanction of law. It is not the number of the witnesses rather it is the value or weight attached to the evidence of the witnesses which proves the guilt of the accused. We come across a host of cases, in which all the witnesses are examined, despite that prosecution fails to prove the guilt of the accused persons. On appreciation of evidence if it so occurs to the court that the evidence produced is not of the quality which can remove doubts and if the possibility arises that the accused may be innocent, then he is given benefit of doubt. But again it is necessary to clarify that the courts will not be pondering over each kind of doubts created by the defence. The doubt must be reasonable upon which a person of normal prudent will act.

EVIDENCE TO BE WEIGHED NOT COUNTED

Section 134 categorically says that no particular number of witnesses is required to prove a fact. Crimes are not always committed in presence of many eyewitnesses, sometimes there is only one witness or no witness of the crime. Thus, if the court expects a plurality of witnesses in each case, then many criminals will go unpunished. We have several instances, when a case entirely based on circumstantial evidence, result in conviction of the accused persons. The plurality of witnesses will not be a qualification in itself to prove the guilt of the accused. It entirely depends on the facts and circumstances of each case whether the testimony of a single witness is worthy of reliance or not. Non-examination of some important witnesses in some cases may prove fatal and crucial when there is no sufficient and reliable evidence to prove the guilt of the accused. But then if the evidence of examined witnesses is cogent, reliable, unblemished and capable of proving the guilt of the accused, mere non-examination of some important witnesses will not be a valid ground for disbelieving and discarding the prosecution evidence. In some cases, non-examination of important witnesses gain significance, especially when the witnesses are easily available and not produced without any valid reason.

In short, it is upon the wisdom of the trial courts to appreciate evidence of every particular witness and attach value to its evidence. There cannot be any set formula that non-examination of a particular witness will lead to failure of the prosecution case. In some cases, non-examination of informant and I.O may prove to be fatal leading to the acquittal of accused persons. However, in other cases, non-examination of informant, doctor and I.O may not be fatal. So this is all about the quality of the evidence, which matters for proving the guilt of accused persons. This is for the prosecution to decide as to which witness evidence will be best for establishing the prosecution case. Hence, no adverse inference can be drawn for withholding a particular witness. But so far non-examination of important witnesses is concerned, it will vary from case to case. If the prosecution justifies non-examination and there is sufficient evidence on the record to prove the guilt, then non-examination of important witnesses will not be fatal.

Non Examination of Informant

In a criminal trial, non-examination of informant will not be always fatal for the prosecution. It will depend on the facts and circumstances of each case. If best evidence is available on the record, then non-examination of the informant will not have any adverse impact on the prosecution case.

Furthermore, it is not always necessary that the informant must be examined in all probability and his non-examination examination will lead to the acquittal of the accused. If the other witnesses have been examined and their evidence inspires confidence, then non-examination of the informant will not make the prosecution case doubtful and unreliable. In a criminal trial, the available evidence is scrutinised for arriving at conclusion for passing an order of conviction or acquittal. If the evidence is found to be reliable then the accused can be convicted. This is not the mandate of the law that all the witnesses proposed by the prosecution must be examined for recording a finding of guilt. In appreciating the evidence, courts are supposed to see the quality of the evidence and not the numbers.

The court is not bound to allow all the witnesses for the examination that has been produced by the prosecution as it may lead to infinity of the trial in a case where there is a large number of witnesses available to vouch on the incidents like mob killing, rioting etc. In such circumstances, the Court has to filter out the witnesses according to their materiality, probative utility and their proximity near the scene of the crime. This aspect can be understood by an example that in a packed cricket stadium having a capacity of 40 thousand viewers, one player murdered another player in the midfield. In this case, all the 40 thousand viewers are technically eye witness to the incident and if the prosecution has filed the list of all those 40 thousand witnesses for their examination, it would be impossible to conclude the trial within a reasonable time, in such circumstances the number of witnesses allowed to be examined can be filtered applying the indicia as mentioned above i.e. their materiality, probative utility and proximity near the scene of the crime and the witnesses sitting at the end of the gallery can be excluded for examination based on the aforesaid filtration. Hence, the quality of evidence should be the paramount consideration for determining the guilt or innocence of an accused in a criminal trial.

NON-EXAMINATION OF I.O

Tremendous difficulties are faced in procuring the attendance of investigation officers for the reasons that they get transferred frequently. Therefore, now it is important to see what are the consequences if the Investigation Officer is not examined in a criminal case. Non-examination of the investigating officer will not be fatal in every case. It again depends on the facts and circumstances of each case. If the defence shows that non-examination of the informant caused serious prejudice and if the same appears to be true, then in such cases non-examination may prove fatal. If non-examination of the I.O has caused prejudice to such extent that it has deprived the defence of opportunity to test the veracity of the prosecution case, then in such cases accused

can be given benefits of doubt. Reliable and credible evidence of the prosecution cannot be discarded only for the reason that the Investigating officer was not produced for examination. If non-examination has not caused prejudice, then it will not constitute a ground for the acquittal of an accused person. Usually, the prosecution examines material witnesses., but when it comes to the Investigating Officer, it poses serious inconveniences. Normally it takes years to conclude a criminal trial, and when the turn for recording evidence of investigating officer comes, the investigating officer usually gets transferred to some other place. The prosecution normally takes steps for procuring the attendance of investigating officers, but sometimes they fail in securing attendance. In such backdrop, it becomes the duty of the court to see that whether non-examination of investigating officer will affect the decision of a court or there are sufficient evidence on record to enable the court to reach on conclusion. When the commission of offence and involvement of the accused persons are established by the evidence of other witnesses, then non-examination of the investigating officers will not be fatal for the prosecution. For elucidating the matter, I am giving an illustration- if in a murder case, the eyewitnesses support the prosecution case and their evidence establishes the fact of the murder and involvement of the accused persons. The medical report and the evidence of the doctor also support the prosecution case. Then in case of such kind, the entire prosecution evidence cannot be discarded for want of the evidence of the investigating officer.

On the other hand, in some cases of serious nature, the investigating officer plays an important role and he becomes the only person who can bear light on the entire sequence of the events and happenings. In such cases, non-examination of investigating officer will create a vacuum, which can not be filled by evidence of other witnesses. Similarly, in some case, the evidence of the investigating officer may provide sufficient material for holding the accused person guilty. Because when the investigator had found some substantial evidence on the place of occurrence, then evidence of investigating officers in such cases become inevitable as it may provide the missing link to the prosecution case. To add on, in cases, where the case is based on the recovery of some articles or discovery of facts by the investigating officer, then in such case non-examination of the investigating officer may prove to be fatal for the prosecution case, because if investigating officer is not examined then the defence will be seriously deprived of its opportunities to test the veracity of prosecution case.

This is for the court to decide whether the absence of evidence of the investigating officer makes the prosecution weak or not. If it occurs to the court that non-examination of investigating officer will not lead to denial of fair play and does not cause prejudice to the defence, then courts can record a finding of guilt without making insistence for the examination of the investigating officer.

However, in some cases, when it appears that the defence will be deprived of the opportunity to test the correctness of the prosecution case, the non-examination of investigating officer in such cases will be a ground for giving the benefit of the doubt.

Non-Examination of Doctor

It is a settled principle of law that non-examination of the doctor is not fatal for prosecution in each case. It depends upon the facts of each case. The significance of a doctor's evidence matters a lot. In cases of culpable homicide and bodily injury, it is the evidence of the doctor, which shows whether the prosecution case is consistent with the evidence of the doctor or not. The evidence of the doctor sometime contradicts the prosecution case entirely. It plays an important role right from ascertainment of the cause of death to the time of death. It shows the time of injuries, probable weapons that could have caused injuries. Whether injuries are post mortem or anti mortem. Whether the death was caused by any poison and what are the symptoms that formed a particular opinion.

In the case of homicide, it is the evidence of the doctor which suggests that a particular injury is sufficient to cause death in the ordinary course of nature. In cases of kidnapping, the age of the victim remains an important fact to be proved and in such cases, evidence of the doctor plays an important role. Therefore, undoubtedly, evidence of doctors has great corroborative value. The evidence of doctors becomes important as it serves as a check upon oral evidence of the prosecution. If the prosecution case is of killing a person by administering poison, the prosecution examines the informant and all other eyewitnesses, who saw the accused administering poison. But the doctor was not examined. In this case, a non-examination of the doctor may prove fatal, because the doctor will be the only person to explain that why he opined that the death was caused by poisoning such as what kind of poison was that, what are the symptoms usually left on the administration of such poison. Non-examination of a doctor in such cases may prove to be fatal. But it has to be kept in mind that the evidence of a doctor is not something that must be accepted in all probability. It is like evidence of other witnesses and courts are required to appreciate it like other evidence. When eyewitnesses have given a full account of the case and their evidence is credible and trustworthy, then non-examination of the doctor will not be fatal in such cases.

Role of Courts to ensure that all the witnesses are examined

Courts are required to play an active role in ensuring the presence of the material witnesses so that the court is provided with the best evidence for proper adjudication.

Chapter VI of the Criminal Procedure Code provides for the issuance of processes to compel the appearance of witnesses and the accused. So the process of summons and warrants can be issued for procuring the attendance of witnesses. Moreover, trial courts should also resort to electronic means for ensuring the presence of the witnesses.

Conclusion

Based on legal provisions discussed, it can be concluded that non-examination of informant, doctor and I.O and other important witnesses will not be always fatal for the prosecution case. It will depend on the facts and circumstances of each case. Courts are not supposed to count or

insist for a particular kind of witnesses for reaching on conclusion in a criminal trial. The guilt or innocence of an accused person depends on the establishment of existence or non-existence of certain facts and such facts can be established by a single witness or several witnesses. In short, it is not the number that matters, rather it is the quality of the evidence. If the testimony of the witnesses is reliable, credential and trustworthy, then non-examination of important witnesses will not be an impediment in the way of recording a finding of conviction.

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Topic No. – 43

Carnage, and appreciation of evidence. Can the court rely on the testimony of a single witness?

By
Sri Raja Ram Santosh Kumar,
Additional Principal Judge,
Patna.

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Additional Principal Judge,
Patna.**

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Carnage and appreciation of evidence: Can Court rely upon the testimony of a single witness?

Raja Ram Santosh Kumar*

1. Carnage: Meaning

The term carnage has not been defined under the Indian Penal Code or any other statutory law in force in India. Linguistically speaking, the word ‘carnage’ may be defined as “violent killing of a large number of people”. This word is akin to the terms massacre, mass killing, manslaughter, etc. In the international legal parlance, it is similar to the word ‘genocide’, which has been described under Article II of the Convention On The Prevention and Punishment of The Crime Of Genocide, 1948 and which means and includes inter alia “an act of killing members of the group”.¹

2. Treatment of carnage as an offence under the Indian Legal Framework

Although India has ratified the Convention on Prevention and Punishment of The Crime Of Genocide (In short, Genocide Convention) in the year 1959, it has so far not enacted any national legislation for prevention and punishment of the acts of genocide. No necessary changes have been made in the existing domestic laws as well. In substantive terms, the Indian law has, so far, not conceptualized ‘carnage or mass killing’ within the framework of the Indian Penal Code, which is better suited to deal with individual offences. The Indian Penal Code does not recognize carnage as a separate and specific offence and it may be treated within the parameters of the offences of culpable homicide and murder under chapter XVI of the Indian Penal Code. Concomitantly, the provisions and rules of the Indian Evidence Act and Code of Criminal Procedure are pressed into service while dealing with the offences of carnage during a trial.

3. Evidence defined

According to ‘Bentham’, “evidence is any matter of facts, the effect, tendency or design of which is to produce in the mind, a persuasion, affirmative or dis-affirmative, of the existence of some other matter of fact.” Under Section 3 of the Indian Evidence Act, 1872, the term ‘evidence’ means and includes “all statements, which the court permits or requires to be made before it by witnesses, concerning matters of fact under inquiry and all documents including electronic records produced for the inspection of the court”.²

1. Article II, The convention on the prevention and punishment of the crime of genocide, 1948

2. Section 3, The Indian Evidence Act, 1872

4. Appreciation of evidence

Marshalling and appreciation of evidence is the backbone of a Judgment. While the word marshalling connotes “critical grouping together of the relevant statements of witnesses for and against a particular point and the skill of picking up various pieces of evidence on a particular disputed point and putting them together, the term appreciation of evidence means “assessing the worth, value, quality and credibility of a particular piece of evidence.” Appreciation of evidence involves systematic, scientific and methodical evaluation of evidence in accordance with the settled principles of law. It further involves weighing the credibility, reliability, and veracity of evidence presented in a particular case to reach to a conclusive determination regarding the guilt or innocence of the accused person/persons charged in that case. It is about believing or disbelieving a particular piece of evidence by a judicial authority based on reasoning for such conclusion and in conformity with his knowledge of law, observation, experience and the settled principles of the law of the land.

Fiat Justitia is the motto of the court. Noted jurist Viscount Simon had once observed that ‘miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of innocent’. The Hon’ble Supreme court of India, in the case of **State of U.P. v. Anil Singh**,³ has stressed that “a judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other.” It is in this background that appreciation of evidence assumes great importance in the criminal justice delivery system. The term ‘appreciation of evidence’ has not been defined in the Indian Evidence Act but on the basis of the principles laid down in a catena of judgments of the Hon’ble Supreme Court and the Hon’ble High Courts, following basic canons may be spelled out which may be kept in mind while appreciating the evidence on record in a particular case:

- (i) It is the prosecution which is obliged to prove the case beyond all reasonable doubt against each of the accused persons and prosecution must stand on its legs. The prosecution has to prove all the facts that are alleged, to the satisfaction of the judicial mind.
- (ii) The accused persons are not required to prove their defence and failure to prove the defence would in no way strengthen the prosecution case.
- (iii) The burden on the accused person to prove the defence is not that heavy as that of prosecution to prove its case. Even in a criminal trial, the yardstick for the prosecution to prove a case is “beyond all reasonable doubt”, while for the accused person, it is ‘preponderance’ i.e. to set up the defence based on possibility.
- (iv) It is not the quantity but quality of evidence that is required to prove the complicity of accused person in the crime and for that, the nature of the evidence has to be of

sterling quality and it must inspire confidence. The testimonies of unreliable and untrustworthy witnesses should be discarded and should not be used to corroborate the testimonies of other witnesses of the same nature. The evidence has to be weighed and not counted.

- (v) While appreciating the evidence of witnesses, the court should ignore the minor contradictions as well as the omissions, which may have intervened because of passage of time or because of reason of witnesses being rustic, but if the contradictions, omissions and improvements are found to be apparent, deliberate, major and substantial which seriously affect the core of substratum of the prosecution case, the court will reject the testimony of the witness.
- (vi) When there is a large number of accused persons and a large number of victims and witnesses, the court will examine the evidence with great caution, to rule out any possibility of false implication.
- (vii) If the court finds any reasonable doubt in the prosecution case, which is not fanciful, the court should always give benefit of doubt to the accused persons.
- (viii) The maxim *falsus in uno falsus in omnibus* is neither a sound rule of law nor a rule of practice and is not applicable as far as the criminal jurisprudence of our country is concerned. In **Jakki @ Selvaraj v. State**,⁴ the Hon'ble Supreme Court held that - court has to separate the grain from the chaff. In **Bhagwan Tona Patil v. State of Maharashtra**,⁵ the Hon'ble Supreme Court ordained that the function of the court is to disengage the truth from the falsehood.
- (ix) Corroboration, unless required by the statute, goes only to the weight and value of evidence and need not be insisted upon by a court.

However, it is submitted that the cardinal principles, outlined above, are merely illustrative and not exhaustive and in fact, appreciation of evidence is a matter of experience and knowledge of human affairs. It is a delicate task to be carried out for weighing evidence and drawing inferences. Each case presents its peculiarities. The Court has to first ascertain the facts, then it has to find out whether they are relevant and then whether they are actually in issue. After ascertaining this, the court shall examine the fact and later by applying the rules of evidence, the court has to see as to whether those facts are proved, disproved, or not proved.

5. Appreciation of Evidence with particular reference to carnage cases

As it has already been described earlier that "Carnage" has not been recognized or dealt with as a separate and distinct offence under the Indian Penal Code and hence this offence of

4. 2007 Cr.L.J. 1671 SC.

5. AIR 1974 SC 1974

multiple killings has to be dealt with within the purview of the offences of culpable homicide not amounting to murder and murder as specified in the Indian Penal Code.

Against this backdrop, I propose to discuss this topic hereinafter, under different sub-heads:

(A) Appreciation of Evidence: In the cases of delay in the lodging of the F.I.R., delay in the receipt of the F.I.R., in the Court and delay in the recording of the statements of the witnesses by the I.O. of the case:

(i) Delay in lodging of the F.I.R -

The Hon'ble Supreme Court of India had considered the aspect of delay in the lodging of the F.I.R. In its judgments in **Apren Joseph v. State of Kerala**⁶ & **Mukesh v. State (NCT of Delhi)**.⁷ The Court observed as follows:

“Normally the court may reject the case of the prosecution in case of inordinate delay in lodging of the F.I.R. because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the court will decide the matter on merits without giving much importance to such delay. The Court is duty bound to determine whether explanation afforded is plausible enough given the facts and the circumstances of the case. The delay may be condoned if the informant appears to be reliable and without any motive for implicating the accused falsely”.⁸

A three Judge Bench of the Hon'ble Supreme Court of India has observed on the same line in the case of **P. Rajagopal and Ors v. The State of Tamil Nadu**.⁹

This proposition is very much relevant while appreciating the evidence in carnage cases. In carnage cases, normally a situation of complete chaos, uncertainty and disorder arises. Hardly one or few members of victim's family remains alive and if alive they are generally in completely shattered and devastated condition, which may render it practically difficult to lodge the FIR immediately after the occurrence. In this situation, if plausible explanation is offered, it may be taken into consideration by the court.

(ii) Delay in the receipt of the FIR in the court

Delay alone, in the receipt of FIR in court cannot be a factor for rejecting the prosecution case. But delay in the receipt of F.I.R in court, coupled with other circumstances may persuade the court to cast doubt on the veracity of the prosecution case. In this connection, reference may be

6. (1973) 3 SCC 114.

7. (2017) 6 SCC 1

8. Ibid.

9. (Cr. Appeal No- 820/2009).

made to the judgments of the Hon'ble Supreme Court, passed in the cases of **Bhajan Singh v. State of Haryana**,¹⁰ and **Shivlal v. State of Chhattisgarh**.¹¹

In this regard, it is further opined that in carnage cases, number of dead and injured persons is very high, hence some delay in despatching the F.I.R. to the court by the Police may be treated as natural. But where the F.I.R is antedated, the entire fabric of prosecution case may collapse. In this regard, reference may be made to this Hon'ble Supreme Court Judgment in the case of **Marudanal Augusti v. State of Kerala**.¹²

(iii) Delay in recording of the statements of the eyewitnesses

Unusual delay in recording of statements of the witnesses, after the alleged occurrence, may cast serious doubt about the truthfulness of the prosecution case. In this regard, the Hon'ble Supreme Court Judgment in the case of **Shahid Khan v. State of Rajasthan**¹³ may be cited, wherein the Hon'ble Supreme Court had held:

“Delay in recording the statements of witnesses casts a serious doubt about their being the eye-witnesses to the occurrence and that it may suggest that the I.O. was deliberately killing time with a view to decide about the shape to be given to the case and eye-witnesses to be introduced”.¹⁴

On this aspect, reference of the Hon'ble Supreme Court judgment in the case of **State of Orissa v. Brahmananda Nanda**,¹⁵ may also be given wherein the court held that “when murders were committed in the night of 13.06.1969, but the witness did not come out with the names of the accused persons until the morning of 15.06.1969, this is a very serious infirmity which destroys the credibility of the evidence of the witness”.¹⁶

Reliance may further be placed upon the decision of the Hon'ble Supreme Court in the case of **Ganesh Bhavan Patel & Another v. State of Maharashtra**,¹⁷ wherein the Supreme Court held:

“Delay of a few hours, simplicitor, in recording the statements of eye-witnesses may not itself amount to a serious infirmity in the prosecution case. But, it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced”.¹⁸

10. AIR 2011 SC 2552

11. AIR 2012 SC 280.

12. AIR 1980 SC 638

13. (2016) 4 SCC 96

14. Ibid.

15. AIR 1976 SC 2488.

16. Ibid

17. AIR 1979 SC 135

18. Ibid.

In this regard, the decision of the Hon'ble Supreme Court in the case of **Babuli alias Narayan Bahera v. State of Orissa**¹⁹ may also be cited wherein the witness had not disclosed the names of accused persons to any one of the scores of people whom he had met until the F.I.R. was lodged, about 20 hours after the occurrence, the Hon'ble Supreme Court held, "we are unable to appreciate as to how this does not affect the testimony of this witness".²⁰ The Hon'ble court further held "the witnesses are expected to depose to what they have seen or heard and not to draw inferences from what they see. The privilege of drawing inferences is given to the courts and not to the witnesses".

On this aspect, the following judgments of the Hon'ble Supreme Court may also be cited:

- (i) *Din Dayal v. Raj Kumar @ Raju and others*;²¹
- (ii) *Mohinder Singh & another v. State of Punjab & others*;²²
- (iii) *Maruti Rama Naik v. State of Maharashtra*²³; and
- (iv) *Shankarlal v. State of Rajasthan*²⁴.

Based on a catena of decisions of the Hon'ble Supreme Court, the proposition of law in this regard is very clear that unexplained long delay in recording the statements of eye-witnesses creates serious doubt as to the genuineness of the prosecution case. This proposition is very important from the point of view of appreciation of evidence in carnage cases involving a large number of victims and accused persons. Generally, crimes of mass murders are committed in unusual circumstances, and in many of these cases, accused persons are not known to the victims and the witnesses before the occurrence, chances of concoction and false implication of persons as accused are genuine. Hence, in this kind of cases, the court has to be more cautious and circumspect while appreciating the evidence when there is a delay in the recording of the statements of the witnesses.

(B) Importance of Test Identification Parade

While the evidence of identification of an accused person is admissible in trial, it is not a substantive piece of evidence. In support of this contention, reliance may be placed upon the decision of Hon'ble Supreme Court in the case of **Ashok Debbaarma Alias Achak Debbarma v. State of Tripura**,²⁵ wherein the Hon'ble Supreme Court was of the view that Test Identification Parade (henceforth T.I.P) is not a substantive piece of evidence and to hold T.I.P. is not even a rule

19. (1974) 3 SCC 562.

20. Ibid

21. AIR 1999 SC 537

22. AIR 2003 SC 4399.

23. (2003) 10 SCC 670.

24. (2004) 10 SCC 632.

25. (2014) 4 SCC 747

of law but a rule of prudence. If witnesses are trustworthy and reliable, the mere fact that no T.I.P. was conducted, itself, would not be a reason for discarding the evidence of those witnesses. Further, when accused persons are known to the witnesses and they are identified by face, in court, the fact that no T.I.P. was conducted during investigation, is of no consequence. However, in carnage cases, particularly where accused persons are not known to the witnesses from before, the evidence of T.I.P. assumes great importance and in cases of this type wherein T.I.P. has not been conducted, the court should be extra cautious in weighing the evidence of witnesses vis-à-vis identification of the accused persons.

(C) Appreciation of Evidence of Injured Eye-Witness: Cardinal Principles

In a majority of cases involving mass killings, generally, several persons are killed, while some of the persons sustain injuries and remain alive. These witnesses are very crucial and their evidence have great weight to reach a conclusion in the case.

Following principles should be kept in mind while appreciating the evidence of injured witnesses:-

- (i) Presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.
- (ii) Unless it is otherwise established by evidence, it must be believed that an injured eye-witness would not allow real culprit to escape and falsely implicate the accused.
- (iii) The evidence of injured witness has greater evidentiary value unless compelling reasons exist for discarding his evidence.
- (iv) The evidence of injured witness should not be doubted on account of minor contradictions and discrepancies which may creep due to loss of memory with the passage of time and some minor contradictions, embellishments, and exaggeration in the evidence of injured witness should be discarded from the evidence but not the whole evidence.

(D) Identification of the accused persons at the time and place of occurrence vis-à-vis availability/source of light

Many mass killings are deliberately executed during night hours. In those cases, the appreciation of evidence of the witnesses vis-à-vis identification of the accused persons is a very difficult task. On the basis of catena of judgments of the Hon'ble Supreme Court, some general propositions on this point are worth mentioning.

- (i) It is settled law that the accused persons can be identified even in darkness with the help of torchlight, lantern, etc. **[Siddique v. State of U.P.,²⁶ State of U.P. v.**

26. (1999) 9 SCC 143.

Sukhpal Singh,²⁷ **Sonelal v. State of U.P.,**²⁸ **Suraj Pal v. State of Haryana.]**²⁹

In the case of **Nathuni Yadav v. State of Bihar,**³⁰ the Hon'ble Supreme Court sustained conviction even when there was absence of artificial light.

- (ii) Where accused persons were known to the witnesses, identification in faint darkness is possible (**S. Sudershan Reddy v. State of A.P.**).³¹
- (iii) Identification of known persons is possible from the manner of speech, walking and gesticulating [**State of U.P. v. Babu,**³² and **Kedar Singh v. State of Bihar**³³].
- (iv) Conviction can be sustained even where witness identified the accused for the first time in court and witness is not part of T.I.P. especially when the witness knew the accused from before.

However, it is submitted that the above stated propositions are illustrative and appreciation of evidence, on this aspect, in a case, shall be based on peculiar facts and circumstances of that case i.e. it shall be case specific.

(E)Section 149 of the IPC (common object) and specific overt Act

The offence of carnage may normally involve a large number of perpetrators in the form of an unlawful assembly. In this context, a very pertinent question arises as to whether some specific overt act is essential on the part of every offender for making him liable for the crime or mere common object would suffice the involvement of a person in the crime even in the absence of any specific overt act on his part? Most often, during trial of the carnage cases, the defence side takes stand and puts questions like- Who killed whom? Who attacked whom?, Which weapon was used by whom? Which injury was caused by whom? The most common stand of the defence side in carnage cases is that no specific overt act has been attributed to any particular accused person. It is here that section 149 of the IPC comes into play which is based on the principle of vicarious liability otherwise unknown of the criminal jurisprudence. For a better appreciation of evidence in carnage cases, the law of criminal conspiracy has also to be kept in mind. If carnage has been committed by a group of persons who may have assembled in the form of unlawful assembly, each of the members of the group would be liable for punishment, even if some of the members may not have taken an active part in the commission of the crime, provided that the object of each of the members of the group was same. No specific overt act needs to be attributed to each of the accused persons forming the group if the common object of the accused persons was the same.

27. (2009) 4 SCC 385

28. (1978) 4 SCC 302.

29. (1995) 2 SCC 64.

30. AIR 1997 SC 1808.

31. A.I.R. 2006 SC 2716.

32. (2003) 11 SCC 280.

33. 1999 C.R.L.J. 601 (SC)

Even if offence committed is not directly and immediately connected with common object, if members knew that the offence is likely to be committed, it would also be covered under common object. However, if there is no evidence that some members of a mob even knew that the offence in question was likely to be committed, those members of the mob cannot be held liable for the offence under the garb of common object. Very shaky evidence of the witnesses, full of material contradictions, omissions, and the omnibus allegations made by the witnesses regarding accused being present as a part of the mob, would not make them liable under constructive liability concept by invoking section 149 of the IPC. In this context, the decision of the Hon'ble Supreme Court in the case of **State of U.P. v. Dan Singh and others**,³⁴ may be cited wherein the Hon'ble Supreme Court observed:

“It is only after the court comes to the conclusion that the respondents or any of them, was member of such unlawful assembly who shared the common object of killing the victims, can they be convicted even if no overt act can be assigned to any one of them”.³⁵

It is submitted that if common object is not established, the prosecution is duty bound to offer evidence vis-a-vis specific role played by each of the accused in the commission of the offence, failing which no conviction can sustain.

(F) Importance of the statements u/s- 161 of the Cr.PC

It is beyond the pale of any controversy that the statements made by the witnesses u/s 161 of the Cr.PC during an investigation are not substantive evidence and their statements, if reduced to writing in the course of the investigation, may be used to contradict the maker of the statement, if and when he is examined as a prosecution witness in that case and for no other purpose, in view of section 145 of the Indian Evidence Act. In this context, an important question arises from the point of view of appreciation of the evidence, which is, whether omission amounts to a contradiction for the purpose of section 145 of the Indian Evidence Act? In carnage cases, generally involving a large number of victims, witnesses and offenders and given the prevailing environment of chaos during and after carnage, recording of the statements of the witnesses by the police is always a herculean exercise. In such a situation, some omission of facts may have been made by the witnesses, unintentionally. Some omission in recording may also occur due to the lapse of the I.O. Now the question is, whether during recording of the statements of witnesses in court during trial, previous omissions in the statements u/s 161 of the Cr.PC may be treated as contradictions for the purposes of section 145 of the Indian Evidence Act?

After going through a catena of judgments of the Hon'ble Supreme Court on this point, it is submitted that it is not possible to lay down a general rule as to what effect a particular omission from a previous statement should have on the probative value of what was so omitted by a witness. The effect will depend upon the totality of proved facts and circumstances in which the omission

34. AIR 1997 SC 1654.

35. Ibid

might have taken place. It will often be determined by the importance of what was omitted (Laxman v. State of Maharashtra).³⁶

In this regard, it would be appropriate to quote Burn, J., in **Ponnu Sami Chetty v. Emperor**³⁷, who said that “omission and contradiction can never be identical. It is absurd to say that you can contradict by keeping silent”.³⁸

As explained by Wills on *Circumstantial Evidence*³⁹ omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with and the attention so riveted to a particular fact, as to withdraw attention from concomitant circumstances or to prevent it from taking note of what is passing. Still less are mere omissions to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached and unsuspected. Rowland, J., observed in **Deolal v. Emperor**⁴⁰ that “certainly a court should never use such an absence as a contradiction without taking the evidence to prove that no such thing was stated”. Again, as observed in the case of **Ram Bali and Ors. v. State**⁴¹ that “an omission is not contradiction unless what is actually said in court contradicts what is omitted to be said”⁴² Merely because the description and name of the accused have not been mentioned in the statement recorded by the Police, the evidence of eye-witnesses cannot be discarded on that ground alone. Following authorities may be cited in this regard:

- (i) *Simon v. State of Karnataka*;⁴³
- (ii) *Malkhan Singh v. State of M.P.*;⁴⁴
- (iii) *Rizan v. State of Chattisgarh*;⁴⁵
- (iv) *Munshi Singh Gautam v. State of M.P.*⁴⁶

Another important question often arises as to whether statements, if any, recorded after the submission of the charge-sheet, come within the purview of statements u/s 161/162 of the CrPC. It is submitted that law on this point is well settled that only those statements recorded by the I.O. prior to the submission of the charge-sheet are covered under sections 161/162 of the Cr.PC for the purposes of application of section 145 of the Indian Evidence Act.

36. AIR 1974 SC 308.

37. AIR (20) 1933 Mad. 372.

38. Ibid

39. William Wills, Wills' Principles of Circumstantial Evidence 443 (Butterworth Publishers, London, 7th edition, 1936).

40. AIR (20) 1933 Pat 440.

41. AIR 1952 All. 289.

42. Ibid.

43. (2004) 2 SCC 694.

44. (2003) 5 SCC 746

45. (2003) 2 SCC 661.

46. (2005) 9 SCC 631

(G) Appreciation of evidence when there are contradictions, discrepancies in the statements of the eye-witnesses

It is settled law that the testimony of an eye-witness cannot be discarded merely because there is some exaggeration or embellishment in the eye witness account. Minor contradictions and discrepancies in the statements of the eyewitnesses are to be ignored as there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment. In this connection, reliance may be placed upon the Hon'ble Supreme Court judgment in the case of **Sukhdev Yadav v. State of Bihar**.⁴⁷

Further, even if witnesses have committed some factual omissions, the testimonies of the witnesses ought not to be rejected merely on this ground. The court should take into account that mental tension can lead to omission to state everything on the first occasion by a witness and the same should not be a ground to reject the deposition entirely. Reliance, in this connection, may be placed on the judgments of the Hon'ble Supreme Court, in the cases of;

(i) *Jhapsa Kabari v. State of Bihar*;⁴⁸ and

(ii) *Abdul Sayeed v. State of M.P.*⁴⁹

Further, evidence of a hostile witness, if it finds corroboration from the facts of the case, may be taken into account while judging the guilt of the accused.⁵⁰

After the occurrence of incidents like carnage, there prevails complete mayhem and chaos in the surroundings and on the spot. Under these circumstances, some minor contradictions, discrepancies and exaggerations in the eye-witness account of the incident are natural and hence these facts cannot be the sole ground for discarding the eyewitness testimony. But it is further submitted that if these contradictions, discrepancies, omissions or improvements are substantial and vital affecting the substratum of the prosecution case, the same should be looked into with suspicion and the testimony of the witness should be discarded.

(H) Appreciation of the evidence of interested/related witnesses

It is settled law that there cannot be any hard and fast rule that the evidence of interested witnesses cannot be taken into consideration, but the only burden that would be cast upon the courts in those cases is that the courts have to be cautious while appreciating the evidence to exclude the possibility of false implication. In this regard, it would be apt to quote the Hon'ble Supreme Court observation in the case of **Dalip Singh v. State of Punjab**⁵¹, which is as follows:

47. (2001) 8 SCC 86.

48. (2001) 10 SCC 94.

49. (2010)10 SCC 259.

50. *Lella Srinivasa Rao v. State of A.P.*, (2004) 9 SCC 713

51. AIR 1953 SC 364.

“A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty. But foundation must be laid for such a criticism and a mere fact of relationship far from being a foundation is often a sure guarantee of truth”. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts.”⁵² There is no such general rule. Each case should be limited to and governed by its facts. Further, it is also submitted that ‘related’ is not equivalent to ‘interested’. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be interested. An interested witness is one who is desirous of falsely implicating the accused with an intention of ensuring their conviction. Merely, being a relative would not make the statement of such witness equivalent to that of an interested witness. The statement of a related witness can safely be relied upon by the court as long as it is trustworthy, truthful, and inspires confidence. A member of the family of deceased persons may be a related witness but may not necessarily be an interested witness. Further, even if a witness is an interested or partisan witness, his evidence may be relied upon if it does not suffer from any infirmity and there is a ring of truth in such evidence. In such cases, corroboration may be a rule of caution and prudence but certainly not a rule of law. The position has been crystalized for the appreciation of evidence of related and interested witnesses through a catena of decisions. In these cases, court must take utmost care and caution but finally, if it believes that there testimony is credible, reliable and trustworthy and the veracity of the witness is unimpeachable, then there is no legal impediment in placing reliance upon testimony of such related or interested witnesses.⁵³

Practically speaking, in carnage cases, where most or many of the members of a family/families are killed by the perpetrators, few members of family/families may escape the death by hiding in some corner during the occurrence and witnessing the occurrence. These remaining members of victim families are supposed to be the only natural witnesses of the occurrence. Other persons from the vicinity may either not have seen the occurrence or may not be willing to depose out of fear of reprisal. The members of the victims’ families may be termed as interested or related witnesses but in the given situation, they are the only natural eyewitnesses and for the ends of justice, the reliance must be placed on their evidence if the same are trustworthy, consistent with the facts of the prosecution case and are of sterling quality. The evidence of these witnesses should not be discarded merely on the ground that they are related or interested witnesses. In the case of **Ram Kishan v. State of U.P.**,⁵⁴ it has been held that “mere relationship, acquaintance or

52. Ibid

53. *Sudhakar v. State*, 2018 Cr.L.J. 1947 (SC).

54. 2004 (3) crimes 397 (SC).

friendship of witness with the deceased persons by itself could not be a reason to discard evidence of such eyewitnesses”.⁵⁵

(I) Offence of carnage and circumstantial evidence

As a general rule of prudence, it may be said that, in carnage cases, it would be unsafe to convict the accused persons on the basis of circumstantial evidence alone. While dealing with circumstantial evidence, there is always a danger that conjecture and surmise lingering on mind may take place of legal proof. It is a well-established proposition that particularly in carnage cases, conviction should not be based solely on circumstantial evidence. However, in the carnage cases, circumstantial evidence may be a great corroborating factor. Circumstantial evidence may be useful to the court in appreciating the evidence in carnage cases to reach a conclusion regarding the guilt of the accused. It may best be used as corroborating evidence. The circumstantial evidence must be a chain of evidence as complete as to not leave any reasonable ground for the conclusion consistent with the innocence of the accused. The facts, so established should be consistent only with the hypothesis of the guilt of the accused. Given the ecology of carnage cases, circumstantial evidence may be used to corroborate the ocular testimony of the witness but not as stand alone evidence.

(J) Appreciation of post-mortem report

A post-mortem report is a very important document in appreciating the evidence in criminal cases in general and in carnage cases in particular and it must specifically mention the use of the possible weapon in causing the injuries on the person of the deceased.

Here, it would be pertinent to quote that observation of the Hon’ble Supreme Court, in the case of **State of Haryana Vs. Ram Singh**,⁵⁶ which is as follows:

“While it is true that the post-mortem report by itself is not a substantive piece of evidence but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-a-vis the injuries appearing on the body of the deceased persons and likely use of the weapons therefore and it would then be the prosecutor’s duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses”.⁵⁷

It is further submitted that the doctor who conducted the post-mortem must be examined to conclusively determine the cause of death as doctor is the only competent person to opine about nature of injuries and cause of death.

When a post-mortem report has been duly proved, it becomes a very important piece of

55. Ibid

56. 2002 (1) crimes 247 (SC).

57. ibid

evidence having considerable corroborative value vis-a- vis the ocular evidence. In carnage cases, where evidence pertaining the manner of occurrence, weapon used, nature of injuries on the person of the deceased are very significant, appreciation of the ocular testimonies of the eye-witnesses on these aspects and their corroboration or otherwise by the post-mortem report is of crucial importance for reaching to a just conclusion regarding the guilt or innocence of the accused persons.

(K) Carnage cases and the importance of the examination of I.O.

The investigating officer is the very important witness as he investigates the case, maintains the case diary, goes to the P.O. and sends the dead-body for the post-mortem examination, collects the evidence for the prosecution, and records the statement of the witnesses in the case diary. Hence, examination of the I.O. is very material. Non-examination of I.O. in some cases may not be fatal for prosecution particularly when there is no contradiction in the statements given by the witnesses before the I.O. and in the court. But when there are contradictions between the statements of the witnesses recorded before the I.O. u/s 161/162 of Cr.PC and recorded in the court, the I.O. must be examined in the court for explaining the contradictions. In that case, non-examination of I.O. may be fatal for the prosecution case. During the trial of the carnage cases, examination of the I.O./I.Os. assume greater significance as carnage cases involve very large number of witnesses and so the contradictions. Hence, the examination of I.O., in carnage cases, is of crucial importance. I.O. must be examined so that he may be cross-examined about the statements of P.Ws in court and u/s 161 of Cr.PC before him, about delay in the recording of the statements of the eyewitnesses, about the P.O., about the seized materials, if any, from the scene, and so on. Thus the evidence of the I.O. has to be evaluated or appreciated vis-a-vis the evidence of other witnesses, material or formal. It may be submitted that non-examination of I.O. during the trial of carnage cases may be fatal for the prosecution as I.O. has to explain a lot concerning the occurrence, evidence and the contradictions, if any in the prosecution case, however, it will depend upon the facts of each case.

(L) Appreciation of medical evidence vis-à-vis ocular evidence

During the trial of carnage cases, sometimes, a court may be faced with a problem while appreciating the evidence on record, because of the conflict between the available medical evidence and oral evidence of the eye- witnesses. In this situation, a question arises as which one will prevail over the other? The Hon'ble Supreme Court has addressed this problem in the case of **Krishan v. State rep. by Inspector of Police**.⁵⁸ The Apex Court held: "It is trite that where the eyewitnesses account is found credible and trustworthy the medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are eyes and ears of justice. Hence, the importance and primacy of the quality of the trial process. Eye-witnesses

58. 2003 SCC (Cri) 1577 (1583).

account would require a careful independent assessment and evaluation for their credibility which should not be adversely pre-judged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility”.⁵⁹

It is well settled that the positive evidence in a case is that of the eye witnesses and the evidence of medical expert is merely an opinion corroborating the same. The value of the medical evidence is only corroborative. “If direct evidence is satisfactory and reliable, the same cannot be rejected on the basis of opinion evidence of medical expert.”⁶⁰

Further in **Prem v. Daula and others**,⁶¹ it has been held by the Hon’ble Supreme Court that “medical evidence being the opinion evidence cannot nullify the evidence of eye witnesses which is absolutely unimpeachable”.⁶²

Thus, from the above analysis, it is clear that in case of discrepancy between medical evidence and ocular evidence, ocular evidence will have primacy, if it is trustworthy and inspires confidence. However, if discrepancy is vital, great caution has to be exercised in appreciation of ocular testimony of eyewitnesses.

(M) Plea of alibi in carnage cases

As carnage cases generally involve a large number of offenders, the defence of alibi is taken frequently by the alleged offenders. Hence, appreciation of this aspect of the evidence is important in the trial of carnage cases. In this regard, it is worthwhile to quote the observation of the Hon’ble Supreme Court in the case of **Dudh Nath Pandey v. State of U.P.**,⁶³ held:

“The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at other place. The plea can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed”.⁶⁴

It is well settled that the burden of substantiating plea of alibi and making it reasonably probable is upon the accused. The burden of proving alibi is on accused. The Prosecution is not called upon to prove the negative.

In the case of **Soma Bhai v. State of Gujarat**,⁶⁵ it has been observed by the Hon’ble Supreme Court of India that “plea of alibi has got to be proved to the satisfaction of the court. Where there is ample time to reach the place of occurrence, he is to prove that he did not reach.

59. Ibid.

60. Karnail Singh v. State of Haryana, AIR 1984 SC 484.

61. (AIR 1997 SC 715).

62. Ibid.

63. AIR 1981 SC 911

64. Ibid.

65. AIR 1975 SC 1453.

Alibi evidence needs careful scrutiny. It must be definitely proved”.⁶⁶ it is -a settled proposition that plea of alibi must be proved with absolute certainty to completely exclude the possibility of the presence of the accused persons concerned at the P.O. As a plea of alibi is raised by an accused, it is for the accused to establish the said plea by positive evidence.

6. Carnage Cases: Can Court Rely Upon The Testimony Of A Single Witness?

(A) General principles and the Statutory Law

Section 134 of the Indian Evidence Act specifically provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. Section 134 of the Indian Evidence Act enshrines the guiding principle with reference to the subject matter under discussion. It is based on the maxim that evidence has to be weighed and not counted. The Court is concerned with the quality and not quantity of the evidence, necessary for proving or disproving a fact. If the legislature were to insist upon plurality of witnesses, then the cases where the testimony of single person only could be available in proof of the crime would go unpunished.

This aspect of the appreciation of evidence had come up for consideration before the Hon’ble Supreme Court of India in the celebrated case of **Vadivelu Thevar v. State of Madras**,⁶⁷ Wherein the conviction of the appellants rested on the testimony of a sole witness. In this case, the Hon’ble Supreme Court opined that if the evidence, read as whole, rings quite true, there should be no hesitation in acting upon it. On consideration of the relevant authorities and the provisions of the Indian Evidence Act, the Hon’ble Supreme Court outlined the following propositions:

- (i) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
- (ii) Unless corroboration is insisted upon by statute, court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness or of a witness whose evidence is that of that of an accomplice or of an analogous character.
- (iii) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes. In view of these considerations, the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down

66. Ibid.

67. AIR 1957 SC 614.

that “no particular number of witnesses shall in any case be required for the proof of any fact”. The legislature determined, as long as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call for any particular number of witnesses. Section 134 of the Indian Evidence Act enshrines the well-recognized maxim that ‘Evidence has to be weighed and not counted’. Our legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

- (iv) It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where the determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness, only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of evidence of the single witness whose testimony has to be either accepted or rejected.
- (v) If the testimony of a sole witness is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused persons may also be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, it is sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact.
- (vi) Generally speaking oral testimony in this context may be classified into three categories, namely:
 - (a) Wholly reliable;
 - (b) Wholly unreliable;
 - (c) Neither wholly reliable nor wholly unreliable.

In case where the testimony of the sole witness is wholly reliable, the court should have no difficulty in coming to its conclusion either way – it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category where the testimony is wholly unreliable, the court, equally has no difficulty in coming to its conclusion. But it is in the third category of cases that the court has to be circumspect and has to look for the corroboration in material particulars by reliable testimony, direct or circumstantial.

- (vii) There is another danger in insisting on the plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. The situation may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution.
- (viii) There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver. Both these are the cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. Similar is the position where the status of the witness is analogous to that of accomplice. But in other cases, it becomes the duty of the court to convict, if it's satisfied that the testimony of a single witness is entirely reliable, free from all blemish and inspires confidence.

Whether Corroboration is Necessary?

In this regard, it would be worthwhile to quote the observation made by their Lordships of the Judicial Committee of the Privy Council in the case of **Mohamed Sugul Esa Mamasan Rer Alalah v. The King**,⁶⁸ which is as follows:

“In the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a court can act upon it, corroboration, unless required by the statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law”.⁶⁹

So, far as the Indian statutory law is concerned, it is important to see the combined effect of the sections 133 and 114 (Illustration-b) of the Indian Evidence Act. Though a conviction based upon accomplice evidence is legal, the court may not accept such evidence and may seek its corroboration in material particulars from an independent source. It is almost always unsafe to convict upon the testimony of an accomplice alone, though such conviction cannot be said to be illegal, yet the courts, generally do not accept the evidence of such a witness without corroboration in material particulars-as envisaged in section 114, Illustration b of the Indian Evidence Act read with section 133 of the said act.

Thus, barring the exception of the evidence of an accomplice, the Indian Evidence Act does

68. AIR (1946) P.C. 3.

69. Ibid

not prescribe for the need of corroboration of the evidence of a witness and a conviction may be based upon that uncorroborated testimony. Corroboration is not a rule of law but one of caution as an assurance. It has already been discussed that in view of section 134 of the Indian Evidence Act, no particular number of witnesses are required for the proof of any fact in a case. Thus, the general principle of law which emanates on the basis of the statute in force and the judicial pronouncements is that generally conviction may be based upon the testimony of a single witness without any corroboration if the evidence of the solitary witness is wholly reliable, trustworthy and inspires confidence.

(B) Judicial approach vis-a-vis appreciation of evidence in carnage cases

Now, I propose to discuss this aspect with reference to carnage cases in view of the peculiarity of the circumstances as carnage cases involve generally large number of victims, witnesses and the accused persons. In this context, it would be most appropriate to quote the observation of the Hon'ble four judges' Bench of the Hon'ble Supreme Court of India in the celebrated case of **Masalti v. State of U.P.**,⁷⁰ which is as under:

“Where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But, sometimes it is useful to adopt a test like this”.⁷¹

This proposition laid down by the Hon'ble Supreme Court was followed in the case of **Binay Kumar Singh v. State of Bihar**,⁷² wherein the Hon'ble Supreme Court held:

“There is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large and many persons have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting”.⁷³

70. AIR 1965 SC 202.

71. Ibid.

72. AIR 1997 SC 324.

73. Ibid.

In this case, the Hon'ble Supreme Court observed that the "proposition laid down in the Masalti's case can profitably be followed as the said proposition has stood the test of time".⁷⁴ Apart from this, In the case of **Kamaksha Rai and Others v. State of U.P.**,⁷⁵ which was related to the incident where large number of people exceeding 500 in number were alleged to have taken part in attacking a class of persons, the Hon'ble Supreme Court observed:

"Considering the nature of attack and the possibility or otherwise of the identification of the accused persons by the prosecution witnesses and bearing in mind the principles laid down in the Masalti case and followed in Binay Kumar Singh v. State of Bihar Case, it is not safe to rely on the evidence of witnesses who speak generally and in an omnibus way without specific reference to the identity of the individuals and there specific overt acts in regard to the incident".⁷⁶

The Hon'ble Supreme Court further observed "As a rule of prudence it is necessary to fix a minimum number of witnesses needed to accept the prosecution case to base a conviction. The decision in Masalti's case supra enunciating rule of caution is well established law uniformly followed all throughout".⁷⁷

It is further submitted that the proposition laid down in the Masalti's case has consistently been followed in a number of cases of similar nature. Some of the instances may be cited as under:

- (i) *Baddi venkata Narasayya and ors. v. State of Andhra Pradesh*;⁷⁸
- (ii) *State of Andhra Pradesh v. Thakkidiram Reddy and ors*;⁷⁹
- (iii) *Hukam Singh and Ors. v. State of Rajasthan*.⁸⁰

On the other hand in the case of **Krishna Mochi and Ors. v. State of Bihar**,⁸¹ the Hon'ble Supreme Court observed as under:

"In Masalti's case, this court has observed such a rule of caution ordinarily, which would obviously mean that there is not blanket ban or rule of universal application that if the number of eyewitnesses is less than two, in no case conviction can be upheld. No rule of universal application was intended to be laid down or has been laid down. The Hon'ble Supreme Court further observed "it is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life. Even in ordinary cases,

74. Ibid.

75. (1999) 8 SCC 701.

76. Ibid.

77. Ibid.

78. [(1998) 2 SCC 329]

79. [(1998) 6 SCC 554].

80. [(2000) 7 SCC 490].

81. Criminal Appeal- 761 of 2001

witnesses are not inclined to depose or there evidence is not found to be credible by the court for manifold reasons”.⁸²

This case was related to cast war resulting in the gruesome murder of 35 persons of one community. The Hon’ble Supreme Court further observed in this case (Krishna Mochi):

“Even if the complicity of the accused is proved by credible evidence of one or two witnesses, it could not be unsafe to convict an accused, rather a duty is enjoined upon the court to not to acquit an accused on this ground alone unless the prosecution case is otherwise found to be untrustworthy. It is well settled that in a criminal trial credible evidence of even a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy in as much as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses, but the quality of their evidence.”⁸³

Further, in the case of **Kartik Malhar v. State of Bihar**,⁸⁴ the Hon’ble Supreme Court observed that “conviction can be recorded on the basis of the statement of single eye-witness provided his credibility is not shaken by any adverse circumstances. The Court will not then insist on corroboration by any other eye-witness particularly as the incident might have occurred at a time and place when there was no possibility of any other eye-witness being present. Indeed, the courts insist on the quality and not the quantity of the evidence”.⁸⁵

7. Conclusion

Thus, on the basis of the discussion made hereinbefore, it may be stated that on the one hand we have the cardinal principle of the law of evidence that the evidence has to be weighed and not counted, which has found statutory recognition under section 134 of the Indian Evidence Act, on the other hand there is time tested rule of prudence and caution as propounded by the Hon’ble Supreme Court in Masalti’s case and subsequently followed in a number of other cases involving mass killings that it is usual to adopt the test that the conviction could be sustained (in cases of offences involving a large number of offenders and a large number of victims) only if it is supported by two or three or more witnesses who give a consistent account of the incident. It The test may appear to be mechanical, but it can not be treated as irrational or unreasonable.

Further, it is also a well settled proposition of law that corroboration, unless required by statute, goes only to the weight and value of the evidence. Corroboration, unless a required by the statute, is a rule of prudence and not a rule of law. It may therefore finally be concluded by stating that while appreciating evidence in carnage cases, the court should ordinarily insist for two or three or more number of witnesses, depending upon the facts and circumstances of each case, who give

82. Ibid.

83. Ibid.

84. [(1996) 1 SCC 614].

85. Ibid.

a consistent account of the incident. Likewise, the court may rely upon the testimony of a single witness if it is wholly reliable, trustworthy and inspires confidence as there is no rule of law of universal application that a conviction cannot be sustained in a carnage case on the basis of evidence of a solitary witness. Every case has to be judged on the basis of its own peculiar facts and circumstances and no proposition of universal application can be propounded in this regard.

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Topic No. – 44

Scope of 113B of the Indian Evidence Act.

By
Sri Ravi Shankar Kumar,
Additional District & Sessions Judge,
Muzaffarpur.

**Sri Ravi Shankar Kumar,
Additional District & Sessions Judge,
Muzaffarpur.**

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Presumption As To Dowry Death

1. Introduction: -

Our ancient religious text depicts woman as goddess and the same can be well inferred from the sloka of Manusmirit (3/56) which states “yatra naryastu pujoyante ramante tatra devata”. It means where women are worshiped, there lives the God.

However, the latest data released by the NCRB suggests the pathetic condition of women in Indian society. As per the said data on average, every hour a woman succumbs to dowry death in India with the annual figure rising upward of 7,000 but the conviction rate is less than 35 percent despite having stringent provisions for such death under the statute.

In India, when we talk about marriages, voluminous amount of traditions attached to it and deep-rooted cultural belief and practices also flow from it. Hindu religious tradition considers Hindu marriage to be soulful union of husband and wife not only for one life but also for seven consecutive births. In ancient Hindu scripture, a Hindu Marriage have been treated as a holy sacrament as well. With the passage of legislations touching upon the subject as Hindu marriage, divorce, succession and adoption, a considerable amount of change has been brought in and its effect on the nature of marriage is visible. But one custom of dowry attached with the Hindu Marriage has managed to go against the saying ‘change is the only constant’. Dowry death has managed to hold its roots tightly since medieval time to colonial period which is still continuing in the 21st century too. In earlier time, dowry was given to bride by the Bride’s family to ensure that she gets a respectable place in the groom’s family and to maintain her independence after marriage. In colonial era practice of dowry was legalized and was made a compulsory practice for a valid marriage.

In layman’s term dowry is said to be transfer of money, gifts, property movable or immovable from daughter’s paternal family side to the family of groom at the marriage. It can be said to be a consideration of marriage but it flows from the side of daughter’s family. Other explanations include the concept of ‘Varadakshina’: making a gift to the bridegroom to honour him. Unlike the concept of ‘Dower (Mahr)’ under Muslim law which is paid by husband to his wife as a mark of her respect, dowry tradition is prevalent majorly under Hindu personal law.

Dowry is an evil system that has been plaguing society for many decades and centuries. Dowry death is the biggest evil that exists today. It is a problem that is so deep rooted in society that sometimes people do not see it as an actual evil.

2. Definition of Dowry

In simple language, dowry can be understood as a payment, in cash or kind, given by the bride's family to the groom while giving away the bride in marriage. And dowry death is death of

a woman as a result of harassment or abuse done to her by the groom or his family in connection with demand for dowry.

The legal definition as contained in Section 2 of The Dowry Prohibition Act, 1961, defines dowry as: - “dowry means any property or valuable security given or agreed to be given either directly or indirectly-

- (a) by one party to a marriage to the other party to the marriage; or
- (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or any time after the marriage in connection with the marriage of the said parties but does not include dower or mehr in the case of a person to whom the Muslim personal law i.e. Shariyat applies.

By the Criminal Law (Second Amendment) Act 1983 Chapter XXA was introduced in the Indian Penal Code with Section 498-A creating a new offence of cruelty which provides for punishment to the husband or his relatives who harass the women to coerce her to meet any unlawful demand for property. Similarly, the death of bride caused by husband or his relatives for want of dowry shook the conscience of legislature and convinced them to come up with new and stringent laws with regard to dowry deaths specifically because previous dowry legislation was a complete failure. This led to certain substantial and procedural amendments in Criminal law by Criminal Law Amendment Acts, 1986. In 1986, a new offence known as Dowry Death was inserted in the Indian Penal Code (IPC) by the virtue of section 304-B and special rule of evidence was also inserted under the Indian Evidence Act in the form of section 113B i.e. presumption as to Dowry Death. Before 1986 amendment, cases of dowry death was covered under the provision of section 498-A which was added by 1983 amendment which dealt with cruelty to women by her husband or relative of husband. The provision under section 304-B is more stringent than provided under section 498-A of IPC.

Even under Section 174 and 176 of Code of Criminal Procedure, 1973 which deals with investigation and inquiry into cases of unnatural deaths by a police officer or a magistrate, a major change was brought into force by 1983 amendment. The amendment made post-mortem examination compulsory if the death of a woman occurred within seven years of marriage and death took place in suspicious circumstances or if it was an outcome of suicide.

3. Provision of Dowry Death under Indian Penal Code:-

Section 304B of the Indian Penal Code defines Dowry Death as :

(1) where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her

husband for, or in connection with, any demand for dowry, such death shall be called “ Dowry Death”, and such husband or relative shall be deemed to have caused her death.

Explanation- for the purpose of this sub section, dowry shall have the same meaning as in section 2 of the Dowry Prohibition Act 1961.

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

Thus, according to section 304-B of IPC following points are essential for considering death to be a case of Dowry Death:

- (48) Death of woman was caused due to burns or bodily injury or under unnatural circumstances.
- (49) Death of woman must have happened within seven years of her marriage.
- (50) Woman must have subjected to cruelty or harassment by husband or his relatives soon before her death.
- (51) Cruelty or harassment must have been in connection with, any demand for dowry.

4. Section 113 B – Presumption as to dowry death:-

By the same Criminal Law Amendment Act 1986, in Indian Evidence Act, 1872 section 113B was added which relates to burden of proof in cases relating to dowry death. According to this provision court shall presume that a dowry death was caused by the person who is shown to have subjected the woman to cruelty or harassment soon before her death. The objective behind this presumption is to ensure that such offences which are generally committed behind the four walls of residential homes and in secrecy should not go unnoticed. It is very difficult to get independent and direct evidence for recording conviction in such cases and it is not easy to get such evidence.

Section 113B of the Indian Evidence Act reads as under:-

“When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.”

Explanation- for the purpose of this sub section, dowry shall have the same meaning as in section 304 B of the Indian Penal Code 1860.

5. Object of Section 113B

The object for which section 113B was introduced is amply reflected in statement of objects and reasons, while enacting the Criminal Law (Amendment) Act, 1983 (46 of 1983). As clearly

stated therein the increase in the number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses of Parliament to examine the effect of the Dowry Prohibition Act, 1961. Therefore, it was proposed to amend the Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by the husband, in-laws and relatives. This provision is procedural. Section 113-B, therefore, has a retrospective effect.

6. Why Need Extraordinary Provision?

It is proper to mention that to curb the growing menace of dowry deaths, Parliament amended the Indian Penal Code and the Indian Evidence Act and incorporated sections 304B and 113B respectively. This was done keeping in view the recommendations made by the Law Commission of India in its 91 st Report on Dowry Deaths and Law Reforms: Amending The Hindu Marriage Act, 1955, The Indian Penal Code, 1860 and the Indian Evidence Act 1872 submitted under the Chairmanship of Sh. K.K. Mathew on August 10, 1983. The said report in Chapter 1 Introductory is quoted as:

“1.1 The last few months have witnessed an alarming increase in the number of cases in which married women die in circumstances which, to say the least, are highly suspicious. In the popular mind, these deaths have come to be associated with dowry, which is why, in popular parlance, they have come to be called “dowry deaths”. As the victim is often a young (and recently married) woman, the phrase “bride burning” has also come in vogue.”

7. Dowry Death

The explanation to section 113B of the Evidence Act provides that the meaning of “Dowry death” shall be the same as given in section 304B of IPC. In **Kans Raj V. State of Punjab**¹ a three Judges Bench of the Supreme Court dealt with the presumption available in terms of section 113B and its effect on finding persons guilty in terms of section 304B IPC. It was noted as follows:

The law as it exists now provided that where the death of a woman is caused by any burns of bodily injury or occurs otherwise than under normal circumstances within seven years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or his relatives for or in connection with any demand of dowry such death shall be punishable under section 304B. To seek conviction against a person for the offence of dowry death, the prosecution obliged to prove that:

The death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstance;

Such death should have occurred within seven years of her marriage;

The deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

1. (2000) 5 SCC 207

Such cruelty or harassment should be for in connection with the demand of dowry; and)

To such cruelty or harassment, the deceased should have been subjected soon before her death.

If these ingredients are proved, the court shall presume the person caused the dowry death. Of course, the words shall presume means that the court in such circumstances is bound to presume that such person had caused the dowry death but still the presumption is a rebuttable one.

8. Meaning of the phrase “Death within seven years of marriage”

The first and foremost condition for invoking section 304-B is that the death of the woman must have been caused within seven years of her marriage. The Hon’ble Supreme Court in the case of **Iqbal Singh Vs. State of Punjab**² explained the meaning of “period of seven years”. It held that period of seven years would be considered as a cut period for reason that seven steps taken by bride and bridegroom of the sacred nuptial fire for completion of marriage where one step is considered as one year. Further, death of woman within seven years of marriage is mandatory for invoking section 304B. If the death takes place after seven years of her marriage then it will be treated as case under section 498A and if the death is an outcome of suicide then it can also be covered under section 306 of the IPC.

9. Meaning of the word “soon before death”

The Hon’ble Supreme Court in the case of **Mustafa Shahadal Shaikh v. State of Maharashtra**³ interpreted the meaning of term “soon before death” as used under section 304-B, IPC. It observed that no definite period has been mentioned under the Penal Code as well as under section 113-B of Indian Evidence Act. Therefore, the term “Soon before death” is to be interpreted by the courts depending upon the facts & circumstances of each case. However, the time interval between cruelty and harassment inflicted and death of woman in question should not be long.

Further such cruelty or harassment must be meted out “soon before the death of that woman or victim”. The test of proximity is applied when the court is to be satisfied that the case falls within the ambit of section 304B of IPC. There must be proximity between the cruelty meted out and the death occurred. In the case of **Kans Raj v. State of Punjab**⁴, it has been decided that “soon before death” implies that the interval should not be too long between the time of making the statement and the death.

The time must be reasonable depending upon the facts and circumstances of each case. Thus, the proximate and live link “between the effect of cruelty based on dowry demand and the consequential death” is required to be proved by the prosecution

2. 1991 SCR (2) 790

3. (2012) 11 SCC 397

4. (2000) 5 SCC 207

In **Kailash v. State of Madhya Pardesh**⁵, the Apex Court has held that no presumption under section 113B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty, or harassment the dispute stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of sometime by itself would not provide to an accused a defence, if the courses of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is “soon before”. The expression is a relative term which required to be considered under specific circumstances of each case and no strait jacket formula can be laid down by fixing any time limit. It cannot be said that the term “soon before” is synonymous with the term “immediately before”. The determination of the period which can come within the term “soon before” is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression “soon before” would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link. Again in **Devilal v. State of Maharashtra**,⁶ the Supreme court reiterated that it is now well-settled law in view of a catena of decision of the court that what would constitute “soon before her death’ depends upon the facts and circumstances.

10. Burden of Proof:-

Normally in a criminal case, the burden is on the prosecution to prove each fact of the case beyond all reasonable doubts, however, Section 113B carves out an exception to this rule. Under Section 113B the prosecution is required to establish the fact of death of women within seven years of her marriage and that she was subjected to cruelty or harassment by her husband or his relatives in connection with demand of dowry. Now the burden is on the accused by leading positive evidence or establishing the circumstances to rebut the presumption. In the absence of such positive evidence or circumstances on behalf of the accused, the court is well within its power to base the conviction. Section 304B & 498A in the IPC and Section 113A & 113B of the Indian Evidence Act have been incorporated to raise a presumption of certain facts in a given situation, which is otherwise difficult to be proved by leading evidence. As such these provision should be given their true and full effect by the courts and the court should be hesitant to find out some lame excuses for acquitting the offender. But the prosecution under Section 304B of IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand of dowry and such was caused “soon before her death”.

In case of **Satbir Singh Vs. State of Haryana**,⁷ Hon’ble Supreme Court held that if the prosecution is able to establish the essential ingredients of section 304B, IPC, the presumption

5. (2006) 12 SCC 667

6. (2007) 14 SCC 176

7. LQ 2001 HC 3909

under section 113-B, Indian Evidence Act shall be raised and burden of proof of innocence will shift on defense counsel. If the accused fails to rebut the presumption, he is bound to be convicted under section 304-B IPC. Therefore, to strengthen the case of prosecution a presumption is made if certain fundamental facts are established and unfortunate incident of death of bride has taken place within seven years of the marriage then the burden of proof is shifted from the side of prosecution to the accused to show that why court should not presume that such person has caused dowry death.

11. Applicability of the Presumption Under Section 113B

The presumption under Section 113 B shall be raised only on the proof of the following essentials:-

The question before the court must be whether the accused has committed the dowry death of a woman

(2) It must be proved by the prosecution that woman was subjected to cruelty or harassment by her husband or his relatives

The said cruelty or harassment was done soon before her death at a given point of time

In dowry death cases direct evidence is hardly available because such crimes are committed within four corners of the wall and in a very clandestine manner and so, such cases are generally proved by the circumstantial evidence. Section 113 B as well as Section 304 B enacts a rule of presumption i.e if the death occurs within seven years of marriage in suspicious circumstances, the onus shift, on the accused to rebut that presumption. But if the prosecution fails to establish the factum of death within seven years of marriage then this section will not come in aid to the prosecution.

12. Relationship between Section 113A and Section 113B of Indian Evidence Act:-

Section 113A deals with the presumptions of abetment of suicide of a married woman either by her husband or any of his relatives. Section 113A of Indian Evidence Act reads as under:-

Presumption as to abetment of suicide by a married woman:-

When the question is whether the commission of suicide by a woman has been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation:- For the purpose of this section, “cruelty” shall have the same meaning as in section 498A of the Indian Penal Code.

So, the essentials of this provision are:

(1) The incident of suicide was committed within a period of seven years from the date of her marriage: and

2) her husband, or his relatives, has subjected her to cruelty as according to the section 498A of the IPC.

Though Sections 113 A and Section 113B are considered as sisters provision primarily incorporated in the Indian Evidence Act to punish the perpetrators of crimes causing death of a married woman but there is a thin but substantial line of difference between the two provisions. The first distinction is that Section 113B comes into the picture only when the death is the result of cruelty or harassment in demand of dowry, whereas demand for dowry is no requirement under section 113 A . The second distinction is that under Section 113A raising of presumption is the discretion of the court but under Section 113B it is mandatory for the court to raise the presumption. .

13. Conclusion

Despite these major changes brought into force, more than Twenty cases of dowry deaths are registered every day. Thus, putting an end to dowry related crimes seems a far sighted dream.

The Hon'ble Supreme Court in **Kamlesh Panjiyar Vs. State Of Bihar**⁸ observed the following:-

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

In spite of the provision of presumption incorporated in the Indian Evidence Act by way of inserting Section 113-B, thereby shifting the onus on the husband and his family, the process of getting conviction under Section 304B IPC still remains an elusive reality because of the defects in the process of application of law in its true sense. Besides, the inability on the part of family of victim to correlate the linking evidences between demand of dowry and cruelty and harassment leads to acquittal of the accused from the court of law. Hence, it is the need of the hour to make suitable changes in the existing procedure of investigation and inquiry and trial under the Code of Criminal Procedure by way of making provision for audio- video recording the statement of the victim and fixing of timeline for submitting the charge sheet before the court. Similarly, a time limit should be ensured to complete the trial.

In view the aforesaid discussion it can be safely concluded that only by bringing a

8. (2005) 2 SCC 388

stringent piece of legislation cannot get the desired result unless and until the incidental factors such as social and economic aspect of the society is not taken into consideration. The women are required to be adequately educated and made them self- reliant in order to save them to be victim of dowry death. Government is also required to play a pivotal role in spreading awareness among women of their rights and provide them all necessary support to counter the menace of the dowry death which is a blot on a civilized society. Thus a holistic approach must be taken by all the stake holders to counter the menace of the Dowry Death.?

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Topic No. – 45

Prevention of Corruption Act – Demand & acceptance, whether both are required ? Other issues related with Prevention of Corruption Act and Other implications in trial.

By
Sri Satya Bhusan Arya,
Additional District & Sessions Judge,
Samastipur

Sri Satya Bhusan Arya,
Additional District & Sessions Judge,
Samastipur

Topic : Prevention of Corruption Act – Demand & acceptance, whether both are required ? Other issues related with Prevention of Corruption Act and Other implications in trial.

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Prevention of Corruption Act – Demand & acceptance, whether both are required ? Other issues related with Prevention of Corruption Act and Other implications in trial.

1. Back Ground :

In case of **Som Prakash Vs. State of Del. AIR 1974 SC 989**: Hon'ble Supreme Court quoted Kautilya - "just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants cannot be found out while taking money".

The U.N. convention against corruption (Resolution no. 55/61) in Chapter III (Article 15) stipulates that the solicitation and acceptance by a public official, directly or indirectly of an undue advantage shall fall within its scope. Similarly, in Criminal Law Convention on Corruption (Council of Europe), Article 2 & 3 deal with active bribing and passive bribing, respectively. This is the world wide practice, and accordingly, India has also framed its laws to penalize both forms of corruption. The Legislature enacted the law for prevention of corruption, with title, "Prevention of Corruption Act", in the year 1988, by repealing earlier "Prevention of Corruption Act, 1947".

First issue we deal with is whether demand and acceptance both are required to constitute an offence punishable under the P.C. Act.

Earlier view :-

Both forms of corruption i.e. unsolicited and solicited, are punishable. Sec. 20, which lays down the statutory presumption also covers offence u/ss 7, 11 and clause (a) and (b) of sub-sec. (1) of sec. 13.

In P.C. Act, secs. 7, 8, 9, 11, 13(1) (a) (b) and (c) carry both the terms "accepts" & "obtains". Only in sec. 13(1)(d) the term "obtains" is alone used. The former terms refer to unsolicited money & the latter term refers to solicited money, except in cases covered by sec. 13(1) (d), in all other cases.

It was observed by the Hon'ble Supreme Court in **Subash Parbat Sonvane v. State of Gujarat [(2002) 5 SCC 86]**, that words like "accepts" and "obtains" has been especially used by the legislature in Sections 7 and 13(1)(a) and (b) of the Act but in Section 13(1)(d) there is withdrawal of the word "accepts" and put importance on the word "obtains". It has cited its earlier decision of *Ram Krishna v. State of Delhi [AIR 1956 SC 476]*, wherein it is observed that -

"We have primarily to look at the language employed and give effect to it. The word "obtains" on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver".

According to the dictionary, the word “obtain” means that the person who receives anything originally vests upon them; so far as the demand or request will be indispensable against the accused was observed in judgments of **M.V. Mohiuddin v. State of Maharashtra [(1995) 3 SCC 567]** & **C.K. Damodaran Nair v. Union of India- [(1997) 9 SCC 477]** which were referred in *Subash Parbat Sonvane* by the Hon’ble Supreme Court and further, it concluded that Section 20 of the Act which provides the statutory presumption is available for the offences as in Section 7 or Section 11 or Section 13(1) (a) or (b) and not for Section 13(1)(d). The reason for this is the explicit words of Section 20 which states statutory presumption for the mentioned provisions only.

Also, in **Kishan Chand Mangal Vs. State of Raj [AIR 1982 SC 1511]**, it has been held “once the suggestion case that there was a demand or bribe is accepted, the appellant could not be said to be an unwilling victim nor a fence sitter who was induced to fall a victim to the trap”.

Likewise in **State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61]** at page 35 (Three Judges Bench) made distinction between the words “accepts” and “obtains” used in the prevention of corruption. Acceptance is unsolicited and the question of demand does not arise. Both the terms are distinct and cannot be construed complementary to each other. On the other hand “obtains” involves some effort on the part of the accused in the form of demand or coercion.

However, over some time the distinction between the terms ‘accepts’ and ‘obtains’ got obliterated and the courts started using them as synonyms. Later on the Hon’ble Supreme Court in various cases, repeatedly held that proof of demand is an indispensable requisite for an offence punishable u/ss 7 and 13 and also for legal presumption u/s 20.

Now :-

‘Demand’ A New Phase For The Offence of Bribe.

The law has now been settled by the Hon’ble Supreme Court that to convict the accused it is necessary to have adequate proof of demand and acceptance of illegal gratification by the public servants under Sections 7 and 13 of the Prevention of Corruption Act, 1988.

The proof of demand for illegal gratification, thus, is the gravamen, of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in the absence thereof, unmistakably, the charge, therefore, would fail. Mere acceptance of any amount, allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under the two sections of the Act.

In **State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede [(2009) 152 SCC 200]**, it was also laid down that demand is a *sine qua non* for the establishment of an offence under the provisions of the Act. It is said that the court must take into account all the facts and circumstances which are placed on record in its entirety to reach out the conclusion, whether all ingredients of an offence have been satisfied or not i.e., demand, acceptance, and recovery of

the amount of illegal gratification. The standard of burden of proof of both the accused and prosecution differs. The prosecution must establish the foundational facts before the accused is called for explaining the circumstances as to how the amount was found in his possession. If any explanation is offered by the accused then the court is required to take into consideration the explanation, while Section 20 of the Act is invoked, only on the touchstone of preponderance of probability but not on the touchstone of proof beyond all reasonable doubt.

Similar views were expressed in **B. Jayaraj v. State of A.P. [(2014) 13 SCC 55]**, where the complainant turned hostile and where there was no other witness present at the moment of transaction between them so the contents of the complaint cannot be relied upon. It was held that the demand for illegal gratification was not proved beyond all reasonable doubt that the accused accepted the money voluntarily; knowing to be a bribe. So there was no proof of demand for illegal gratification, the abuse of position as a public servant for obtaining any valuable thing or gaining any pecuniary advantage or use of corrupt or illegal means cannot be held to be proved; the offences under Sections 7 and 13 (1)(d) (i) and (ii) cannot be established. Thus, as far as the offence under Section 7 is concerned, it has now been a settled position in law that demand of illegal gratification is a must needed condition to constitute the offence under the Act and further, mere possession and recovery of tainted currency notes from the accused without proof of demand are not adequate to constitute the commission of offence and also for the conviction there under.

The same point is also expressed in **Satvir Singh v. State of Delhi [(2014) 13 SCC 143]**. It also held that to constitute an offence under the Act, demand and acceptance of the illegal gratification is a condition precedent to sustain the conviction. It is pertinent that the accused can dislodge the statutory presumption which is provided under Section 20 of the Act by bringing some evidence on record before the Court, either direct or circumstantial, to show that the amount accepted was other than for the motive or reward as required under Section 7 of the Act.

In **P. Satyanarayana Murthy Vs. State of Andhra Pradesh [(2015)10 SCC 152 : (2016)1 SCC (Cri.)11-(Three Judge Bench)]** Hon'ble Supreme Court made it clear that proper proof of demand and acceptance of illegal gratification by the public servant is necessary to record a conviction under secs. 7 & 13 of the P.C. Act 1988. As per this judgment mere possession and recovery of money, without proof of demand by the accused do not constitute an offence u/ss 7 and 13(1)(d) (i) and (ii) of the Act.

In **State through Central Bureau of Investigation v. Anup Kumar Srivastava [(2017) 15 SCC 560]**, the Supreme Court said that the High Court was justified in quashing the charges, in the absence of the proof of demand, as it is indispensable essentiality and also of permeating mandate for an offence under the Sections 7 and 13 of the Act. It was held that what constitutes illegal gratification is a question of law while whether on evidence that crime is committed is a question of fact. As the evidence in regards to demand and acceptance of a bribe, which leaves the room for doubt and did not displace entirely presumption of innocence so it cannot be said that the charges have been established under the Act. Additionally, in order to prove the case against

the accused, it was necessary for the prosecution to prove requirement of demand and acceptance of the bribe amount by him. - **Dashrath Singh Chauhan v. CBI, 2018 [SCC OnLine SC 1841]**.

In the recent judgment of **S. Nagoor Hussai Mohaideen v. State represented by the Inspector of Police [2019 SCC Online Mad 1104]**, the Court took into consideration all the opinion of the judgments by the Hon'ble Supreme Court like P. Satyanarayana Murthy, B. Jayaraj, A. Subair, Dnyaneshwar Laxman Rao Wankhede and Mukhtiar Singh and decided the matter on the same principle that demand of bribe is requisite for an offence under the Act and to convict the accused. Thus, it analyzed the case on the point that whether the demand and acceptance of the bribe amount by the accused is proved by the prosecution which is in line with the above cases.

After analyzing a series of decisions by the Supreme Court, it is now been a principle that if accused demanded bribe then only it's a case for the conviction under the Act in respect of the said sections. Moreover, the attention may be drawn to an important point that the word "demand" has not been proffered, mentioned or placed in the Prevention of Corruption Act, 1988 instead in order to achieve the aim and object of the Act the Hon'ble Supreme Court has inserted the word "demand" in the statute virtually by its interpretation.

2. Main implication in trial of cases is the mandatory requirement of sanction for prosecution:-

It is an obligation. Grant of sanction is not a mere formality **[AIR 2014 SC 827]**.

3. Once sanction refused :

Once sanction was refused it was not permissible for competent authority to grant it again in absence of any new material **[2014 (1) ALD (Cri.) 120 (127), 2013(1) Rec. Cri. R 577 (581) (P&H)]**.

Once the statutory power u/s 19 of the Act has been exercised by the competent authority no review on the matter on the same materials again. **[AIR 2011 SC 404(408)]**. It is more clarified in **2002 (2) Rec. Cri. R 99 (P & H) 2001 Cri. L.J. 2058 (2063)** wherein it is held that if sanction is refused earlier, a fresh sanction can be granted on the basis of new material.

In a case in which sanction sought is refused by the competent authority, which the public servant is in service, he cannot be prosecuted later after retirement, even though no sanction for prosecution under the Act is necessary after retirement of public servant. In this regard **AIR 2011 SC 2893** says two things (i) No sanction for prosecution is necessary after retirement of public servant.

No public servant can be prosecuted even after retirement, once sanction is denied while he was in service.

4. Impact of sanction by an authority, who is not competent to give sanction :-

When sanction for prosecution was granted but not by competent authority accused can be

discharged only after recording satisfaction that omission or error in sanction has resulted in failure of justice. **[AIR 1999 SC 3706 (3710)]**.

5. Sanction in Private Complaint

The requirement of sanction order cannot be dispensed with even in respect of a private complaint filed by persons against a public servant alleging offence punishable under the prevention of corruption Act, said to have been committed while discharging duties as a public servant. **[2013(5) Kant LJ 325 (336)]**.

In absence of prior sanction court is not empowered to forward private complaint against public servant to police for investigation u/s 156(3) Cr. P.C. **2011(2) ALJ 370 (399) 2010 (1) ADJ 504 (DB) All.**

Bar to take cognizance in absence of sanction:-

There is bar to take cognizance in the absence of sanction, but this bar is to court and not to institution of police case or submission of final form by police u/s 173 Cr. P.C. **[AIR 1967 Pat 416(420)]**

Where no sanction for prosecution is required:-

Offence of public servant is related to misappropriation, cheating, forgery etc. no sanction is required **[2009(1) Crimes 498 (DB) (P & H)]**.

6. Whether there is any time limit for sanction for prosecution :-

It is necessary to recall the settled law that even when the Hon'ble Supreme Court or High Court directs the cases to CBI, the sanction proceeding is mandatory and the investigating agency can't bypass the same. In **Supreme Court Bar Association v. UOI [(1998) 4 SCC 409]**, the Constitution Bench after reviewing the case laws, reiterated the view taken earlier in **Prem Chand Gard v. Excise Commissioner, U.P [(1963) Supp (1) SCR 885]**, as well as the observations made in **Union Carbide Corpn. v. UOI [(1991) 4 SCC 584]** and **A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602]** holding that "the Courts cannot bypass the clause of sanction even while directing the CBI to register the case."

Then in **Subramaniam Swamy v. Manmohan Singh [(2012) 3 SCC 65]**, the Hon'ble Supreme Court endorsed the following directions laid down in Vineet Narain Case "Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's Office."

The Supreme Court recommended restructuring of Section 19 of the P.C. Act by the Parliament incorporating the following suggestions :

1. All proposals for sanction placed before any sanctioning authority, empowered to

grant sanction for the prosecution of a public servant under section 19 of the P.C. Act must be decided within a period of three months of the receipt of the proposal by the concerned authority.

2. At the end of the extended period of time limit, if no decision is taken, sanction will be deemed to have been granted to the proposal for prosecution, and the prosecuting agency or the private complainant will proceed to file the chargesheet / complaint in the court to commence prosecution within 15 days of this expiry of the aforementioned time limit.

Who is public servant Hon'ble Mr. Justice P. Sathashivam, while speaking in Tamil Nadu State Judicial Academy during the special training programme for District Judges functioning in Chennai/ District Judges dealing with CBI Cases/ Chief Judicial Magistrates. Special Judge of DVAC cases, spoke :-

“Section 21 IPC defines public servant while emphasizing on the authority employing and the authority remunerating whereas under section 2(c) of the Prevention of Corruption Act, emphasis is on public duty. Public Duty has been defined under section 2(b) to mean a duty in the discharge of which the State, the public or the community at large has an interest. Thus, the definition of ‘public servant’ has been enlarged so as to include the office-bearers of the registered co-operative societies receiving any financial aid from the Government, or from a Government Corporation/Company, the employees of universities, Public Service Commissions, Banks etc.”

7. Conclusion:-

Through this article first thing was required to be discussed whether demand & acceptance are both required for constituting an offence punishable under the Prevention of Corruption Act.

After analyzing a series of decisions by the Supreme Court, it is now been a settled principle that if accused demands then only it's a case for the conviction under the Act in respect of the said sections. Moreover, the attention may be drawn to an important point that the word “demand” has not been proffered, mentioned or placed in the Prevention of Corruption Act, 1988 instead in order to achieve the aim and object of the Act the Hon'ble Supreme Court has inserted the word “demand” in the statute virtually by its interpretation.

Other point required to be discussed was implications in trial of cases under the law of Prevention of Corruption Act.

The only implication in trial of a case under the Prevention of Corruption Act is sanction for prosecution. The law says, when the sanction for prosecution is required, it be obtained from competent authority and if once refused, it cannot be granted but for a new ground. It is not even dispensed with in complaint case.



Topic No. – 46

Search & Seizure Under NDPS Act

By
Sri Dinesh Sharma,
Additional District & Sessions Judge,
Bhagalpur.

Sri Dinesh Sharma,
Additional District & Sessions Judge,
Bhagalpur.

Topic : Search & Seizure under NDPS Act

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Search & Seizure under NDPS Act

INTRODUCTION

The NDPS Act was enacted in the year 1985 to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for the matters connected therewith.

Chapter V of the NDPS Act comprising of Sections 41 to 68 deals with the procedure relating to issuance of warrants and authorisation, power of entry, search, seizure and arrest without warrant or authorisation, procedure where seizure of goods liable to confiscation not practicable, conditions under which searches shall be conducted, disposal of persons arrested and articles seized, presumptions regarding possession of illicit articles, punishment for vexatious entry, search, seizure and arrest, confiscation of goods used for concealing illicit drugs and substances, procedure for making confiscation and power to tender immunity from prosecution, etc.

All the offences, except those involving small quantity, are heinous, therefore the legislature has provided certain safeguards governing the arrest, search and seizure so that innocent persons are not harassed. As far as search and seizure of the contraband are concerned sections 41, 42, 43, and 50 are the most important sections of Chapter V of the NDPS Act.

Section 41. of the NDPS Act

Power to issue warrant and authorisation:

1. Warrant may be issued by a Metropolitan Magistrate, Magistrate of the first class, Magistrate of the second class specially empowered by the State Government in this behalf. **[Sec.41(1)]**
2. Authorisation can be issued by any officer of Gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence and other departments of Central Government including para-military forces or armed forces as is empowered in this behalf by the Central Government by special or general order. **[Sec.41(2)]**
3. The authorisation may also be issued by any Gazetted rank officer of revenue, drug control, excise, police or any other department of the State Government empowered in this behalf by general or special order of the state government. **[Sec.41(2)]**
4. Warrants or the authorisation may be issued for the arrest of any person who is reasonably believed to have committed any offence under NDPS Act, or for the

search of any building, conveyance or place in which any narcotic drug or psychotropic substance or controlled substance, or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of NDPS Act is kept or concealed. **[Sec. 41(1) & 41(2)]**

5. Any officer subordinate to the Gazetted rank officer but superior in rank to a peon, sepoy or constable of the above departments may be authorised to carry out the research, seizure and to make the arrest. **[Sec. 41(2)]**
6. Search, seizure and arrest may be made at any time, whether by day or by night. **[Sec. 41(1) & 41(2)]**
7. The officer to whom a warrant is addressed and the officer who authorised the arrest or search or the officer who is so authorised shall have all the powers of an officer acting under section 42. **[Sec. 41(3)]**

Section 42 of the NDPS Act

Power of entry, search, seizure and arrest without warrant or authorisation.

1. Any such officer, who is superior in rank to a peon, sepoy or constable of the departments of central excise, narcotics, customs, revenue intelligence or any other departments of the Central Government including para-military forces or armed forces or any such officer of revenue, drugs control, excise, police or any other departments of the State Government specially empowered by the respective governments, by general or special order, can search, seize and make arrest. **[Sec.42 (1)]**
2. Before proceeding to make search, seizure and arrest such officer should have reasons to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under NDPS Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under chapter VA of NDPS Act is kept or concealed in any building, conveyance or enclosed place. **[Sec.42 (1)]**
3. The search, seizure and arrest may be made between sunrise and sunset.
4. In case of search, seizure and arrest are necessary to be made between sunset and sunrise then such officer has to record his grounds of belief that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of

evidence or facility for the escape of an offender. After recording the reasons in writing search and seizure can be made between sunset and sunrise also. [**Proviso, section 42 (1)**]

5. A copy of the information taken down in writing or the grounds of belief, in case search and seizure are carried out between sunset and sunrise, shall be sent by such officer, within seventy-two hours, to his immediate official superior. [**Sec.42 (2)**].

The provisions of sections 41 and 42 and other sections of Chapter V of the NDPS Act came to be considered by the Hon'ble Supreme Court in various cases. It would be apt to mention some of the judgments.

The Hon'ble Supreme Court in the case of **State of Punjab Vs. Balbir Singh, [(1994) 3 SCC 299]**, has held that only an empowered Magistrate can issue warrant for the arrest or the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise, only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone, other than such officers, the same would be illegal.

When the empowered Gazetted officer himself acting under section 41 of the NDPS Act conducts search, then it is not necessary to comply with the requirements of section 42 of the Act. It has been held by the Hon'ble Supreme Court in the case of **M Prabhu Lal V. Assistant Director of Revenue Intelligence [(2003) 8 SCC 449]** that the Gazetted rank officer is given a special position and privilege under the Narcotic Drugs and Psychotropic Substances Act. If the Gazetted officer himself conducts the search and seizure then it is not necessary to comply with section 42 of the NDPS Act.

Empowered Gazetted rank officers need not be equated to the officer taking action with authorisation or warrants. The requirement of sending information to superior officer under sub-section (2) of section 42 of the Act cannot be insisted upon in their case. There is no bar in the statute to the functions of arrest, search and seizure being carried out by the officers of the Gazetted rank themselves. When they act on their own, they do not have to report to their seniors on such things.

In **G. Srinivas Goud V. State of A.P., (2005) 8 SCC 183**, it has been held, by the Hon'ble Supreme Court that officers of the Gazetted rank are not required to send the information taken down in writing to the immediate official superior when making arrest or conducting search themselves. The said requirement is confined to cases where the action is taken by officers below the rank of Gazetted officers without authorisation.

In the case of **State of Haryana V. Jarnail Singh and Others (2004) 5 SCC 188**, superintendent of police (a Gazetted officer) was also a member of the searching party and was exercising his authority under section 41 of the act, it was held by the Hon'ble Supreme Court that proviso to section 42 of the NDPS is not attracted. [**Paragraph No. 10 and 11 of (2004) 5 SCC 188**].

In case search, seizure and arrest are being carried out under warrant or authorisation from Gazetted officer or if the Gazetted officer himself is carrying out the same then the search and seizure can be made at any time whether by day or by night. The proviso to section 42 (1) shall be attracted when the search, seizure or arrest is being made without warrants or authorisation and the officer is not an empowered Gazetted officer of the specified departments of the Central or the State Government.

Search, seizure or arrest may be made on prior information or there may be a chance recovery of the contraband article when the police or the other authorities empowered to investigate may, by chance, recover the contraband from possession of any person while investigating under the provisions of Code of Criminal Procedure, 1973 (2 of 1974) or while performing duties of maintenance of law and order. A careful reading of sections 41 and 42 would show that these sections are attracted only when there is prior information about the concealment of contraband article etc. in any building, conveyance or place/enclosed place.

In cases of chance recovery, the provisions of chapter V of the Act (sections 41 and 42, and 50 of the NDPS Act) are inapplicable and the procedure prescribed under chapter V shall only be followed post the recovery.

The provisions of section 42 of the NDPS Act would be applicable when search, seizure and arrest have to be made without warrant or authorisation in any building, conveyance or enclosed place. If such places are not to be entered into and searched, then the provisions of section 42 would not be applicable. [**Raju V. State of W.B., (2018) 9 SCC 708**]

Section 51 of the NDPS Act envisage that the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of NDPS Act, to all warrants issued and arrests, search and seizures made under the NDPS Act.

The provisions of section 100 and 165 Cr.PC are not inconsistent with the provisions of the NDPS Act and are applicable for effecting search, seizure or arrest under the NDPS Act also. [**State of Punjab v. Baldev Singh, (1999) 6 SCC 172**]

The Hon'ble Supreme Court in the case of **State of Punjab Vs. Balbir Singh [(1994) 3 SCC 299]** has held that the empowered officer or an authorised officer (authorised by search warrant or the authorisation) shall carry out the search according to sections 100 and 165 of the Code of Criminal Procedure, 1973 and if there is no strict compliance of sections 100 and 165 of the Code then it would not vitiate the trial but such non-compliance will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

A three-judge bench of the Hon'ble Supreme Court in the case of **Abdul Rashid Ibrahim Mansuri vs State of Gujarat [(2000) 2 SCC 513]** has held that compliance of section 42 of the NDPS Act is mandatory and failure to take down the information in writing and forthwith sending of the report to the immediate officer superior causes prejudice to the accused. The action of the officer, who claims to have exercised it on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. [Para No. 18 of **(2000) 2 SCC 513]**

The Hon'ble Supreme Court in the case of **Sajan Abraham V. State of Kerala, [(2001) 6 SCC 692]** which is also a three-judge bench decision, has held that section 42 is not mandatory and substantial compliance is sufficient.

The above conflict was resolved in the Constitution Bench judgment of **Karnail Singh V. State of Haryana, (2009) 8 SCC 539**. It has been held by the Hon'ble Supreme Court that in special circumstances and emergent situations (when the officer is on the move), and recording of the information is not practical prior to search and seizure, and would be detrimental to effectiveness of the search and seizure concerned, the requirement of writing down and conveying information to superior officer, held, may be postponed by a reasonable period which may even be after the search, entry and seizure. Literal compliance of section 42 (1) and 42 (2) is not required and substantial compliance is sufficient. It was also held that whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. Non-compliance with section 42 may not vitiate the trial if it does not cause any prejudice to the accused.

An empowered officer under section 42 (1) is obligated to reduce into writing information received by him, only when an offence punishable under NDPS act has been committed in any building, conveyance or an enclosed place, or when a document or an article is concealed in a building, conveyance or in an enclosed place. Compliance with section 42, including recording information received by empowered officer, is not mandatory, when an offence punishable under the Act is not committed in a building, conveyance or an enclosed place. Section 43 is attracted in situations, where seizure and arrest are conducted in a public place, which includes any public conveyance, hotel, shop or other places intended for the use of, or accessible to, the public. [**Raju V. State of W.B., (2018) 9 SCC 708]**

Section 43.

Power of seizure and arrest in public place:

1. any officer of any of the departments mentioned in section 42 may seize in any public place or in transit, any narcotic drugs or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this act has been committed, and, along with such drug or substance, any animal or

conveyance or article liable to confiscation under this act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under chapter VA of this act. **[Sec. 43(a)]**

2. Detain and search any person whom he has reason to believe to have committed an offence punishable under this act, and if such person has any narcotic drugs or psychotropic substance or control substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. **[Sec. 43(b)]**
3. For the purposes of this section, the expression public place includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public. **[Explanation]**

Section 43 of the NDPS Act contains provisions regarding the power of seizure and arrest in public place or in transit. Section 43 of the Act envisages situations where recovery of contraband articles happens by chance or in other words during routine check or surprise check. This section gives the authority to the officers mentioned under section 42 of the NDPS Act of seizure of the contraband articles and of the arrests of the persons who is reasonably suspected of committing an offence under the NDPS Act and any other person in his company.

The officer making the recovery does not have any prior information that recovery of the contraband drug might take place.

In the case of **Director of Revenue V. Mohd. Nisar Holia [(2008) 2 SCC 370]** it was held by the Hon'ble Supreme Court held that on plain reading, section 43 may not attract the rigours of section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of section 42, need not be complied with, only because the place where a search is to be made is a public place. If section 43 is to be treated as an exception to section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human rights of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely compliance with section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance with the said provision would not render the search, a nullity. A distinction therefore must be borne in mind between search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. In this case raid was conducted on prior information in a hotel room without complying with the provisions of section 42 of the NDPS Act. It was held that though hotel is a public place, room of a hotel may not be a public place and since the provisions of section 42 have not been complied with the acquittal of the accused was upheld.

In the case of **State of Rajasthan Vs. Jagraj Singh [(2016) 11 SCC 687]** opium was seized during search at night from a jeep. It was the prosecution case that secret information was received from informer which was recorded and thereafter SHO along with police party proceeded towards the scene and opium was seized from the jeep. In the above factual background, it was held by the Hon'ble Supreme Court that it is not a case where SHO suddenly carried out a search at a public place, when search is conducted after recording information under section 42 (1), then proviso of section 42 (1) has to be complied with. Non-compliance with sections 42 (1) proviso and section 42 (2) seriously prejudiced the accused. It was further held that personal jeep could not be treated as public transport vehicle, therefore section 43 of the NDPS Act would not be applicable.

Section 44.

Power of entry, search, seizure and arrest in offences relating to coca plant, opium poppy and cannabis plant.

The provisions of section 41, 42 and 43, shall so far as may be, apply to the offences punishable under Chapter IV and relating to coca plant, the opium poppy or cannabis plant and for this purpose references in those sections to narcotic drug, or psychotropic substance or controlled substance shall be construed as including reference to coca plant, the opium poppy and cannabis plant.

Section 50.

Conditions under which search of person shall be conducted:

1. When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted officer of any of the departments mentioned in section 42 or to nearest Magistrate. **[Sec. 50(1)]**
2. If the person to be searched requires that his search be made in the presence of Gazetted officer or Magistrate, the officer may detain the person until he can bring him before the Gazetted officer or the Magistrate. **[Sec.50(2)]**
3. The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made. **[Sec.50(3)]**
4. No female shall be searched by anyone accepting a female. **[Sec.50(4)]**
5. When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted officer or Magistrate without the possibility of the person to be searched parting with possession

of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) [**Sec.50(5)**]

6. After search is conducted under sub-section (5), the officer shall record the reason for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior. [**Sec.50(6)**]

A bare reading of section 50 shows that it is applicable in case of search of a person. It does not extend to search of a vehicle or a container or a bag or premises. A search of a baggage of a person is not the same as search of the person himself. If a person is carrying a bag or some other article with him and the narcotic drug or psychotropic substance is found from it, it cannot be said that it was found from his person. [See **Kalema Tumba V. State of Maharashtra and Another, (1999) 8 SCC 257** and **Gurbax Singh versus State of Haryana, (2001) 3 SCC 28**]. The language of section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicle or articles.

In **State of Punjab v. Balbir Singh [(1994) 3 SCC 299]** it has been held by the Hon'ble Supreme Court that: If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr. PC and when such search is completed at that stage section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 of the NDPS Act, should comply with the provisions of Section 50 of the said Act, before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact. [**State of Punjab v. Balbir Singh, (1994) 3 SCC 299**]

The Constitution Bench of the Hon'ble Supreme Court in **State of Punjab v. Baldev Singh**

[(1999) 6 SCC 172] has held that on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.

There is no specific form prescribed or intended for conveying the information required to be given under section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Section 50 in reality provides for additional safeguards which are not specifically provided by the statute. The stress is on the adoption of reasonable, fair and just procedure. No specific words are necessary to be used to convey existence of the right. Whether the requirement of section 50 has been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalisation or a straight-jacket formula. **(Krishna Kanwar @ (Smt) Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608).**

The personal search of female suspect must be conducted by another female with strict regard to decency. The name of the female official who carried out the personal search of the female concerned should also be disclosed in the documents prepared at the spot. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity. **[State of Punjab v. Baldev Singh, (1999) 6 SCC 172]**

The provision of search of a female by a female under section 50 (4) of the NDPS Act is mandatory and cannot be diluted even on the ground of non-availability of female at the time of search. In case of non-compliance of the same the conviction and sentence of the accused cannot be sustained. **[State of Punjab v. Surinder Rani, (2000) 10 SCC 429]**

It is imperative for the investigating officer to inform the suspect, orally or in writing, about his right to be searched before a Gazetted officer or a Magistrate. Failure to give such information would not vitiate the trial but render the recovery of the illicit article illegal and vitiate the conviction and sentence, if recorded only on the basis of possession of such illicit article. If the person so informed requires to be searched before a Gazetted officer or Magistrate, the empowered officer is obliged to comply else it would render the search and conviction on it, bad. Court must be satisfied about due compliance with section 50 and prosecution should get opportunity to establish such compliance. **[Para 24, 32 & 57 of State of Punjab V. Baldev Singh [(1999) 6 SCC 172].**

When an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure, comes across a person being in possession of the narcotic drug or psychotropic substances, then he must follow from that stage

onwards the provisions of the NDPS Act and continue investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from the stage in accordance with the provisions of the NDPS Act. Failure to comply with the provisions of Cr.PC in respect of search and seizure and particularly those of sections 100, 102, 103 and 165 per se would not vitiate the prosecution case. If, there is such violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the Court should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view. [Para 14 of **State of Punjab V. Baldev Singh [(1999) 6 SCC 172]**].

It is imperative on the part of empowered officer to appraise the person intended to be searched of his rights under section 50 of the NDPS Act to be searched before a Gazetted officer or a Magistrate. It is not necessary that the information required to be given under section 50 should be in a prescribed form or in writing, but it is mandatory that the suspect is made aware of the existence of his right to be searched before Gazetted officer or Magistrate, if so, required by him and this mandatory provision requires strict compliance. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. The concept of substantial compliance is neither borne out from the language of section 50 (1) nor it is in consonance with the law laid down in **Baldev Singh's case [(1999) 6 SCC 172]**. [Para No. 24 and 29 and 31 of **Vijaysinh Chandubha Jadeja V. State of Gujrat, (2011) 1 SCC 609**, Constitution Bench]

The concept of substantial compliance cannot be read into the provisions of section 50 (1) of the NDPS Act. The suspect must be told in unequivocal terms that he had a right to be searched in the presence of a Gazetted officer or a Magistrate. [**Myla Venkateswarlu V. State of Andhra Pradesh [(2012) 5 SCC 226]**].

The Hon'ble Supreme Court in the case of **Dilbagh Singh V. State of Punjab, (2017) 11 SCC 290**, has held that section 50 of the NDPS Act is not applicable in case of recovery made from the car in which the accused was travelling at the time of search and seizure from the car.

The Hon'ble Supreme Court in the case of **State of H.P. v. Pawan Kumar, (2005) 4 SCC 350** has explained the meaning of person. It has been held that the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

Section 50 is not applicable when recovery is from bag being carried by the accused. [**Jarnail Singh V. State of Punjab, (2011) 3 SCC 521**]. In the case of **State of Rajasthan V. Tara Singh, (2011) 11 SCC 559**, it has been held by the Hon'ble Supreme Court that in case of recovery of contraband from gunny bag being carried by the accused on head, section 50 is not applicable.

Section 50 cast a duty on the officer to appraise the suspect that he has a right to be searched in the presence of Gazetted officer or nearest Magistrate. The suspect may avail this officer or may deny however, the suspect cannot choose as to before whom he should be searched. He can only exercise his choice as to whether he intends to be searched in front of Gazetted officer or Magistrate. The officer conducting the search decides finally as to before whom the research should be conducted. **[Raghubir Singh Vs. State of Haryana, ((1996) 2 SCC 201)].**

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Topic No. – 47

Right of an accused to have recourse of a lawyer of his choice in criminal trials and also in appeal with reference to article 21, 22 & 39A of the Indian Constitution & Section 303 of Cr.P.C. while considering the contradicting views taken by Justice M. Katju and Justice Deepak Mishra

By
Sri Sunil Dutt Mishra,
District and Sessions Judge,
Patna.

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District and Sessions Judge,
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Right of an accused to have recourse of a lawyer of his choice in a criminal trial and also in appeal with reference to Art ides 21, 22 and 39-A of the constitution of India read with section 303 of the Code of Criminal Procedure.

Introduction:

Article 22(1) of the Constitution of India postulates that when the accused is in a position to exercise the choice meaning thereby he is capable of engaging a lawyer of his choice, in that case, no court can deny him that right. Such a right is inherent. But when the accused is not in a position to engage the services of a lawyer and prays before the court that, he be provided a lawyer at the state expense, then it would be choice of the Court and not of the accused to choose the lawyer for defending him at the trial.

There is no controversy that Article 22(1) of the Constitution and section 303 of Cr.PC provides that the accused will have the choice in the matter of his counsel for his defence and it would be his right to get himself defended through such a lawyer, yet the provision of section 304 Cr.PC cannot be construed to mean that the court is under any legal obligation to permit the accused to exercise such choice even when the accused cannot himself engage a lawyer and the court is required to provide him a counsel. In that situation, there is no right available to the accused to still choose the lawyer, whereas in the first situation he cannot be denied the right of his choice and cannot be compelled or forced to engage a lawyer or to get defended by a lawyer, not of his choice. It is the choice of the accused in that situation that has been granted by the provisions of section 303 of Cr P.C and Article 22 of the Constitution.

Right to legal Aid under various Statutes:

Right to free legal aid or free legal service is an essential fundamental right guaranteed by the reasonable, fair, and just liberty under Article 21 of the Constitution of India, which says, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 39-A directs the state to ensure that the operation of the legal system promotes Justice on a basis of equal opportunity, provide free legal aid by suitable legislation or schemes or any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Cr.PC, 1973 provides for legal assistance at the state expenses only to the accused facing trial in a session's court. The stage before the trial and after its conclusion is not accounted

for by Sec. 304(1). Hence, we have to look into the Legal Services Authorities Act, 1987 and Regulations and Rules made thereunder since 1995.

A separate legislation, the Legal Services Authority Act, 1987 has been enacted to constitute the legal services authorities and to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Providing free and competent legal aid in a criminal trial is a globally accepted and recognized phenomena and fundamental human right.

Montesquieu, a political philosopher said that "in the state of nature all men are equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by protection of law." The protection of law to poor, illiterate and weak is important to ensure equal Justice, legal aid is one of the means to ensure that the opportunities for securing justice are not denied to any person by reason of poverty, illiteracy etc.

The aim of Article 14 is to ensure justice. The guarantee of equal justice is meaningless if the poor or weak person cannot enforce their rights because of their poverty or illiteracy or weakness.

Legal aid is free legal assistance to the poor and weaker section of society with the object to exercise the rights given to them by law Justice P. N Bhagwati has rightly said that "*the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts* "

The combined reading of the provisions of Articles 14, 21, 22(1) and 39-A and provisions of section 304 of the Cr.PC and the provisions of the Legal Services Authorities Act, 1987, in particular section 12, provides the criteria for giving legal services. It is not the type of charge or the nature of offence committed, but the disability of the accused on account of indigence, illiteracy or any other disability of the accused which makes him entitled to free legal services at the cost of the state.

Judicial Pronouncements on Legal Aid:

In **Sukdas Vs. Union territory of Arunachal Pradesh AIR 1986 SC 991**, the Supreme Court reaffirmed the right of legal aid as fundamental right and observed:

"It may, therefore now be taken as settled law that free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve Jeopardy to his life or personal liberty and his fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed as under Article 21. Of course, it must be recognized that there may be cases involving offences such as economic offences or offences against law prohibiting prostitution may require that free legal services may not be provided by the state.

In this case, the Additional Deputy Commissioner had not informed the appellants that they were entitled to legal aid. Therefore, the appellants remained unrepresented by a lawyer, and the trial had resulted in conviction. The court held that it was a violation of the fundamental right under Article 21 and so the trial was vitiated. Consequently, the conviction and sentence recorded against the appellant were set aside.

In **Nandani Satpathy Vs. P.L. Dani [1978(2) SCC424]** the Hon'ble Supreme Court laid down certain guidelines about right of accused to consult an Advocate.

Legal aid as a vehicle of equal justice is an essential component of procedure for delivery of Justice. The absence of proper and fair trial is a violation of fundamental principles of judicial procedure.

The obligation to provide free legal services to a person not only arises when the trial commences but also when the accused for the first time is produced before the Magistrate.

Hon'ble Supreme Court in **Mohd. Ajmal Mohd. Amir Kasab @ Abu Mujahid Vs. State of Maharastra [Criminal Appeal No. 1899-1900 of 2011]** has observed, Inter- alia, that :

“.....the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We accordingly hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expenses of the state. The right flows from Article 21 and 22(1) of the constitution and needs be strictly enforced”

It is further observed that -

*"Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of a trial.. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him a lawyer before commencing the trial. 127103841 **Unless the accused voluntarily makes an informed decision** and tells the court in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused. But failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceeding or giving the accused a right to claim compensation against the state for failing to provide him legal aid. But it does*

not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage resulted in some material prejudice to the accused in the course of the trial. This would have to be judged on the facts of each.

Legal Services Authorities Act makes no distinction between a trial and an appeal to provide free legal aid to an accused or a person in custody. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate.

In **Rajoo@ Ramakant Vs. State of M.P. [(2012) 8 SCC53]** it was held by the Hon'ble Supreme Court that all poor accused must be given free legal assistance, irrespective of the severity of the crime attributed to them, at every stage of the three-tier justice delivery system and could not be restricted to that stage only. Neither the constitution nor the Legal Services Authorities Act makes any distinction between a trial and an appeal for the purposes of providing free legal aid to an accused or a person in custody. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings i.e., state of trial as well as appellate stage. It is also important to note that in view of the constitutional mandate of Article 39-A legal services or legal aid is provided to an eligible person free of cost.

In **Mohd. Hussain @ Julfikar Ali Vs. The Stale (Govt. of NCT Delhi) [(2012) 9 SCC 408]** the petitioner was an illiterate foreign national and was unable to engage a counsel to defend him. In this case, the accused was denied legal assistance. The Hon'ble S.C. held that it is the duty of the courts to ensure that the accused was dealt with Justly and fairly by keeping in view the principles of the criminal Justice system. **The right involved herein is of such nature that the denial of such right amounts to the denial of due process of law.**

A trial held without offering legal aid to an indigent accused at state cost will be vitiated and conviction will be set aside. In **Khatri V. State of Bihar II [(1981) 1 SCC 635]** several petitions were filed under Article 21 on the allegation that they were blinded by the police while they were in custody.

The Hon'ble Supreme Court emphasized that the State Governments cannot avoid their constitutional obligation to provide free legal service to poor accused by pleading financial or administrative inability. A trial held without offering legal aid to an indigent accused at state cost will be vitiated and conviction will be set aside. Providing free legal service to the poor and the needy is an essential element to any reasonable, fair, and just procedure. The provision of legal aid is fundamental to ensuring access to courts. The accused can also claim free legal aid at the appellate stage. The court took the view that the right to free legal aid would be Illusory for the indigent accused unless the trial Judge informs him of such a right.

In **Sheela Barse V Union of India [(1986) 3 SCC 596]** the petitioner Sheela Barse who was a Journalist and activist for prisoners rights informed the Supreme Court that out of the 15

women prisoners that she interviewed at Bombay Central Jail, five admitted that they had been assaulted in police lock up. It was pointed out that the arrangements for providing legal assistance to prisoners were inadequate.

It was held that failure to provide legal assurance to poor and impoverished persons violates constitutional guarantees.

Article 39-A (Directive Principles of State policy) casts a duty on the State to secure the operation of a legal system that promotes justice on the basis of equal opportunity. The right of legal aid is also a fundamental right under Article 14 (Equality before law) and 21 (Right to life and personal liberty)

In **Indira Gandhi V Raj Narain [AIR 1977 SC 69]** the general parliamentary elections held in 1971 was won by the appellant over the nearest rival Raj Narain which was challenged. The Court held "Rule of Law is a basic structure of Constitution of India. Every individual is guaranteed the rights given to him under the constitution. No one should be condemned unheard. In absence of legal aid, a trial is vitiated.

In **M.H. Hoskot V St. of Maharashtra AIR [1978 SC 1548]** the petitioner was convicted for an offence under IPC by the sessions court. High Court dismissed the appeal. Petitioner underwent the full period of imprisonment and filed an SLP along with a petition for condonation of delay contending that he had not received the certified copy of the judgment through the jail authorities. Even though the jail authority had received it, it was never delivered to him and because of this, he lost his right to appeal. It was held:

"If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to the SC for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel for such imprisoned individual for doing complete Justice. It was the State responsibility to provide free legal services to the prisoners who is indigent and disabled in securing legal services, where it is required for justice."

Conclusion:

From the above discussion of constitutional mandate, legal provisions and various decisions of Hon'ble Supreme Court it is now well settled that the accused has the choice of his counsel for his defence in trial stage or appellate stage if he is capable of engaging a lawyer of his choice and he cannot be compelled or forced to engage a lawyer or to get defended by a lawyer, not of his choice. But when the accused is not in a position to engage the services of a lawyer and prays that he be provided a lawyer at the state expense, then it would be choice of the court/Legal Services Authority and not of the accused to choose the lawyer for defending him at the trial or in appeal.

Topic No. – 48

In-camera trial in general and under special law, practice & precautions : The scope of camera trial through electronic means.

By
Ms. Anandita Singh,
Additional District & Sessions Judge,
Aurangabad.

Ms. Anandita Singh,
Additional District & Sessions Judge,
Aurangabad.

**Topic : In-camera trial in general and under special law, practice & precautions : The
scope of camera trial through electronic means.**

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In-camera trial in general and under special law, practice & precautions : The scope of camera trial through electronic means.

'The law belongs to the people. Access to the legal system is a basic right and a public good .'

Rtd. Hon'ble Beverley Mc Lachlin PC, Rtd. Chief Justice of Canada

Introduction

Open Justice is a justice delivery system where public can freely access and observe the court proceedings. The system ensures fairness in a trial. This system protects the principles of a democratic government that rests on the constitution. Justice should not only be done, but it must appear to have been done also. Open justice enables the public to see how justice is administered and by subjecting it to the public and press scrutiny, safeguards the fairness of the trial. One of the essential ingredients of a fair trial is to conduct a trial in open court and this phenomenon is an extension of the principle of open justice. The principle of open justice is based on the constitutional values and morals of fair trial and freedom of speech and expression. Success of any democracy depends heavily upon court and open trial ensure legitimacy to decisions of the Courts and a popular acceptance is thus achieved. The imperative need for open justice was emphatically stressed by Jeremy Bentham when he said, "Publicity is the very soul of Justice. It keeps the judge while trying, under trial". Open justice is a constitutional principle of highest order. Our Constitution guarantees freedom of speech and expression with certain restrictions under Article 19. Freedom of speech includes freedom of the press also.

However, every rule has an exception and to the principle of open court also the exception is conducting the trial 'in camera' which is held only when the administration of justice is disserved by adherence to open justice system. At times, the trial cannot be conducted in open court and it just and fair to have proceedings 'in camera'. A Nine Judges Bench in the case of **Naresh Shridhar Mirajkar Vs State of Maharashtra {1966 (3) SCR 744}** observed that :

21.... Having thus enunciated the universally accepted proposition in favour of open trials, it is necessary to consider whether this rule admits of any exceptions or not. Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the

trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise whereby following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasize that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court. In this connection it is essential to remember that public trial of causes is a means, though important and valuable, to ensure fair administration of justice; it is a means, not an end. It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice. That, in our opinion, is the rational basis on which the conflict of this kind must be harmoniously resolved.

These are the days when news relating to cases of violence, abuse, sexual harassment, rape, etc. sell like hot cakes in society. It has also been seen that the presence of public and press, at the trial, results in increased stress for the accused as well as the victim. It invades their privacy and also damages their social reputation. Instances of obscene questions are not infrequent and such questions are like a second assault on the already distressed emotional setup of the victim of sexual offences. A rape survivor will find it extremely uncomfortable to undergo rigorous cross-examination in a courtroom full of people, therefore, in cases like these it is necessary to hold 'in camera trial'. In family matters also private matters will be exposed to society which may deter any instances of a reunion or may affect prospects of quality life for each party. Security of the nation is also another reason for introduction of 'in camera trial'. All these facts triggered the introduction of 'in camera' trial for sensitive cases "In camera" proceedings are generally held to protect the privacy of parties in a case involving sensitive issues. Hon'ble Supreme Court in the case of **Ujjam Bai vs. State of U.P [1963 (1) SCR 778]** held that concept of 'in camera' trial is not violative of constitutional right

in regard to liberty of speech and further observed that while emphasizing the importance of public trial, we cannot overlook the fact that the primary function of judiciary is to do justice between the parties who bring their cause before it. In camera trial also prevents the society from stories which may expose their mind to evil and indecent things. In this context we may look into the legal provisions in Indian law relating to it. There are two basic procedural laws in India for civil and criminal proceedings which are - Civil Procedure Code(CPC) and the Criminal Procedure Code (Cr. P. C) . These two procedural laws govern the management of court proceedings. Both of these contain procedures to conduct the court proceeding open as well as 'in camera'.

I. Statutory Provisions for Open Trial and trial 'in camera '

i. Section 153B of the Code of Civil procedure, 1908 :

As a general rule provides for trial in open court, however, in certain cases if a presiding officer deems it fit; he may restrain parties not related to a case or any particular person from participating or from entering the Courtroom, etc.

ii. Section 327 of the Code of Criminal Procedure, 1973-

Subsection (1) of section 327 states that - place of trial shall be open court, however, proviso states that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

However, sub-section (2) of section 327 makes it mandatory to have in camera trial for rape cases and cases of other sexual offences . The main reason behind this provision is to ensure that victim of the sexual offence is not traumatized and humiliated any further.

iii. Similarly, in section 265B(4) Cr. P. C (plea bargaining), a procedure for 'in camera' proceeding is prescribed.

iv. Under section 237(2) Cr. P. C - the sessions judge has been given the power to hold in camera trial upon request of either party of the case involving defamation of the President of India, the Vice President, Governor of a State, the Administrator of Union territory, or a Minister of the Union or State or Union Territory or any other public servant in connection with the affairs of the union or state.

v. Hindu Marriage Act, 1956

Section 22 of the Hindu Marriage Act, 1956 provides for proceedings under the Act to be in camera and prohibition of publication of proceedings except judgment of constitutional courts.

vi. Family Courts Act, 1984

Section 11 of the Family Courts Act, at first provides that to all the proceedings to which this Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires.

vii. The Protection of Children from Sexual Offences Act, 2012.

Section 37 of the Act provides that the Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence.

viii. The Unlawful Activities (Prevention) Act, 1967.

Section 44 of the Unlawful Activities (Prevention) Act, 1967 provides for In camera trial. An option is given to the Court to conduct in camera trial to protect the witnesses.

ix. Parsi Marriage and Divorce Act, 1936

Section 43 of the Act provides that every suit filed under the act be heard in camera and may not be printed or published.

x. Special marriage Act, 1954

Section 33 of the Act provides that every proceeding shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or the Supreme Court printed or published with the previous permission of the court.

xi. Protection of Women against domestic violence Act, 2005-

Section 16 of the Act provides for proceedings to be held in camera if the Magistrate considers that circumstances of the case so warrants and if either party to the proceeding so desires.

xii. National Investigation Agency Act, 2008

Section 17 of the Act also provides for proceeding in camera if the Special Court, so desires.

III. Practice and Precautions:**Practice:**

In Camera is a Latin phrase meaning "in chambers" (referring to the judges chamber). In camera proceedings is used in sensitive cases especially to protect the privacy of the parties. In simple words, in camera proceeding is a proceeding carried out in private, in the absence of the public or the press. The provisions providing for in camera trial do not further provide any special

procedure, therefore, all the general rules of procedure are to be followed, however, the consequence of In Camera trial is that a person not related to cases is not allowed to witness the proceedings and only certain people eligible due to their relation to offence are allowed to participate in the trial.

Precautions:

In camera trial should ensure that interest of both victim and accused are saved. Since the concept of in camera trial is an exception to open justice system, therefore, rights of accused should not be ignored because the proceedings are outside the public review. Similarly, the rights of the victims should also not be ignored. In camera trial can be justified only when it is necessary in the interest of proper administration of justice and the general principle of open public trial ought not to be disturbed except in exceptional circumstances.

Scope of In Camera Trial through electronic means:

The entire object behind in camera trial is to protect the privacy of victim and ensure non exploitation of victim by accused during trial. Conducting in-camera trial in sensitive cases presents a challenge to keep the trial limited to stakeholders of offence only. It is no doubt correct that in modern times technology has developed substantially, however, if technology transmits the “In-camera” trial to public at large then the entire object of “In-Camera” trial falls flat.

Therefore, before conducting in camera trial through electronic means it must be ensured that no trespasser can join the proceedings. If the accused, witness, victim, and judge are at different places then it must be ensured that no stranger is sharing the space with them. It should be further ensured that only victim, accused, bench and witnesses can access the electronic means during trial. More care is to be taken while conducting in-camera trial through electronic means. To be able to conduct in camera trial through electronic means with the advent of new devices and technology is a challenge. The challenge is to confine the use of technology to selected stakeholders to protect the objectives behind an “in-camera” trial

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Topic No. – 49

Contempt of courts : Approach, practice, precautions and correct procedure.

By
Sri Kumud Ranjan,
Principal Magistrate,
Araria.

**Sri Kumud Ranjan,
Principal Magistrate,
Araria.**

Topic : Contempt of courts : Approach, practice, precautions and correct procedure.

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Contempt of courts : Approach, practice, precautions and correct procedure.

Introduction

Etymologically, contempt is the state of being despised or dishonoured. So far as the contempt of a court is concerned, any kind of conduct tending to bring administration of law and justice into disrespect may be considered as contempt of court.

According to Halsbury's Law of England "contempt of court" is "Any act done or writing published which is calculated to bring a court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court. Any episode in the administration of justice may, however, be publicly or privately criticised, provided that the criticism is fair and has been made in good faith. The absence of any intention to refer to a court is a material point in favour of a person alleged to be in contempt."¹

The contempt of Courts Act, 1971 in India, does not provide a concrete and precise definition of the term contempt of court. But section 2(a) of the Act states that contempt of court means civil contempt or criminal contempt. Further Section 2(b) deals with civil contempt and section 2(c) deals with criminal contempt.² In this way, the perusal of Section 2 clauses (a), (b) and (c) makes it crystal clear that in India, the offence of contempt of court is committed when :

1. a person willfully disobeys any judgment, decree, direction, order, writ, or other process of a court or wilfully breaches an undertaking given to a court.

Or

2. a person publishes any matter, whether by words, spoken or written, or by signs or by visible representations or otherwise or does any other act which
 - (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

1. Halsbury's Laws of England. 3rd Edn., Vol. 8, p. 7.

2. 2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "contempt of court" means civil contempt or criminal contempt;

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

- (ii) prejudices, or interferes or tend to interfere with, the due course of any judicial proceedings; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Conceptually, the Contempt of Court is a legal mechanism seeking to protect judicial institutions from motivated attacks and unwarranted and uncalled for criticism and to punish those who lower its authority and majesty. The concept relating to contempt of court is a matter concerning the fair administration of justice and it also aims at checking and punishing any kind of act hurting the dignity, authority and majesty of judicial institution.³

Through several judgments, the offence of criminal contempt has been held to cover false statements made to or about the judiciary, coercion and attempts to pervert judicial proceedings by attacking witnesses, parties, or judges, recording court proceedings without permission from the court, obstructing officers of the court from performing their functions, as well as verbal abuse and accusations of incompetence or bias against judges.⁴

Brief History

The concept of contempt of court is several centuries old. The common law principle sought to protect the judicial power of the King, who initially exercised the power himself. Later the power was enjoyed by a panel of the Judges who acted in his name. Violation of the order of a Judge was considered to be the violation of the authority of the King himself. Over the time, any kind of disobedience to the Judges, or obstruction of the implementation of their directives, or comments and actions that showed disrespect towards them or towards the administration of justice in any way, came to be punishable.⁵ Thus the concept related to the offence of contempt of courts finds its earliest trace in Common Law Principles originated in England and in colonial legislation in India. Now, so far as the legislation relating to contempt of court in India is concerned, the earliest recorded penalties can be found in Regulating Act of 1773.⁶

However, according to the Law Commission of India, the roots of contempt law in India can be traced back to the pre-independence period. The East India Company took over the territories in India, which required the King of England to issue the Charter of 1726. The Charter provided for the establishment of a corporation in each Presidency Town. The Charter of 1726 is considered to be an important landmark in the history of the legal system in India as it introduced

3. K. Venkatraman, *The Hindu explains What is Contempt of Court?*, *The Hindu*, August 02, 2020, Available on: <https://www.thehindu.com/news/national/the-hindu-explains-what-is-contempt-of-court/article32249810.ece>, Last visited on: 7th December 2020.

4. *Supreme Court Bar Association v. Union of India*, 1998 (4) SCC 409, *Sukhdev Singh v. Hon'ble CJ, S. Teja Singh*, AIR 1954 SC 186, etc.

5. M P Jain, "Outlines of Indian Legal and Constitutional History" (Lexis Nexis; Sixth edition (2010)).

6. *Ibid.*

English laws in the country. Mayor Courts were constituted in each of the Presidency Towns and were made the Courts of Record, and authorised to decide all civil cases within the respective town and subordinate areas. Subsequently, in the year 1774, the Mayor's Court at Calcutta was replaced by the Supreme Court of Judicature at Fort William, Calcutta under the Regulating Act 1773. The Mayor's Courts at Madras and Bombay were superseded by the Recorder's Courts, which were also later abolished and replaced by the Supreme Courts under the Government of India Act, 1800. While the Supreme Court at Madras came into existence in the year 1801 by the Charter of 1800, the Supreme Court at Bombay came into existence in 1824 by the Charter of 1823. The Recorder's Courts and Supreme Courts had the same powers in the matters of punishing for contempt as was exercised by the superior courts in England. The Supreme Courts were in turn succeeded by the High Courts under the Indian High Courts Act of 1861. The three High Courts of Calcutta, Bombay, and Madras had the inherent power to punish for contempt. Subsequently, in 1866, the High Court of Allahabad was established under the Indian High Courts Act, 1861 and was constituted as a court of record with the power to punish for contempt.⁷

In this way, we can see that the contemporary contempt doctrine finds its roots in the English Common Law. The phrase Contempt of Court (*contemptus curiae*) has been in use in England for eight centuries. In England, before the end of the Twelfth Century, contempt of court was a recognised expression and was applied to the defaults and wrongful acts of the suitors. As the Indian Legal System is heavily based on the principles of Common Law, originated in England, the concept of contempt of court was also adopted by the Indian Legal System.⁸

In 1867, **Peacock C.J.** laid down the Rule regarding the power to punish for contempt quite broadly in **In Re: Abdool and Mahtab**⁹ in the following words: "There can be no doubt that every Court of Record has the power of summarily punishing for contempt." Further, the Court observed that "the power to punish for contempt was unlimited, arbitrary and uncontrolled, and therefore, should be exercised with great caution and only when the case is clear beyond controversy because it is an arbitrary jurisdiction bearing no limit to the amount of fine that may be inflicted or to the term of imprisonment which may be directed and having no appeal as a matter of right against an order of attachment."¹⁰

Prior to the coming into effect of the Contempt of Courts Act, 1926, High Courts differed in their respective opinions regarding punishment for contempt of subordinate courts. The Contempt of Courts Act, 1926 was the first enactment in India relating to the law of contempt.¹¹

7. Report No. 274, Limited to the Review of Section 2 of the Contempt of Courts Act, 1971, Law Commission of India, April 2018.

8. Ibid.

9. (1867) 8 W.R. (Cr.) 32.

10. In Legal Remembrance Vs. Mithalal Ghosh, (1914) ILR 41 Cal. 173

11. The Historical Perspective of The Contempt Of Courts In India, Available at: <http://www.legalserviceindia.com/legal/article-2815-the-historical-perspective-of-the-contempt-of-courts-in-india.html>, Last visited:- 07th December 2020.

The Contempt of Courts Act, 1926 was enacted to resolve a conflict of opinions between High Courts in India on the issue whether they had the power to penalise offences of contempt committed against other subordinate courts also that fell under their respective jurisdictions¹². The 1926 Act specifically affirmed this power and allowed the High Courts to penalise contempt against subordinate courts as well as against their own judgments and proceedings. In 1952, the Contempt of Courts Act was replaced by new legislation of the same name, which expanded the power to punish for contempt from High Courts to other courts as well.

The Constitution of India, enacted in 1950, specifically established the Supreme Court of India as well as High Courts in the States of India as courts of record with the power to punish for acts of contempt as has been provided in Article 129 and 215 of the Constitution of India.

What is Contempt of Court?

As already discussed in the introduction, the Contempt of Courts Act 1971 nowhere specifically and categorically defines the term Contempt. Section 2(a) of the Act just states that contempt of court means civil contempt or criminal contempt. Thus, it categorises the offence of contempt of court into civil and criminal contempt. The Act further specifies that High Courts and the Supreme Court of India have the power to try and punish the offence of contempt, and High Courts have the power to punish acts of contempt against courts subordinate to them. According to Section 10 of the Act, every High Court shall have and exercise the same jurisdiction, powers, and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempts of itself.¹³ The proviso to this section states that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).¹⁴ Further, the Act talks about Power of High Court to try offences committed or offenders found outside jurisdiction. It states that a High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.¹⁵

The Supreme Court of India has settled that any court of record has the inherent power to

12. Statement of Purpose, Contempt of Court Act, 1971: "An Act to define and limit the powers of certain courts in punishing contempts of courts and to regulate their procedure in relation thereto."

13. Sec.10. Power of High Court to punish contempts of subordinate courts.—Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself:

14. Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

15. Sec. 11. Power of High Court to try offences committed or offenders found outside jurisdiction.—A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.

i. When a Civil Contempt is committed

ii. Criminal Contempt

For the sake of continuity, it is being reiterated here that, a sincere perusal of section 2 clauses (a), (b) and (c) makes it crystal clear that in India, the offence of contempt of court is committed when :

1. a person wilfully disobeys any judgment, decree, direction, order, writ or other process of a court or wilfully breaches an undertaking given to a court. or
2. a person publishes any matter, whether by words, spoken or written, or by signs or by visible representations or otherwise or does any other act which
 - scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
 - prejudices, or interferes or tend to interfere with, the due course of any judicial proceedings; or
 - interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

iii. The procedure as given in the Contempt Of Courts Act, 1971

In 1961, a committee headed by H.N. Sanyal, an Additional Solicitor General for the Government of India, was appointed to examine the application of contempt laws in India. The Sanyal Committee recommended that contempt proceedings should be initiated not by the courts themselves, but on the recommendation of a law officer of the government. These recommendations were incorporated in the Contempt of Courts Act 1971, which is the current legislation governing contempt of courts in India.¹⁷

16. In Re: Vijay Kurle, (2019) SCC 219, para 35 at p.103

17. *Id.* at 4

Section 14 of the Act talks about the Procedure where contempt is in the face of the Supreme Court or a High Court. It reads:

- “(1) When it is alleged, or appears to the Supreme Court or the High Court upon its own view, that a person has been guilty of contempt committed in its presence or hearing, the court may cause such person to be detained in custody, and, at any time before the rising of the court, on the same day, or as early as possible thereafter, shall (a) cause him to be informed in writing of the contempt with which he is charged; (b) afford him an opportunity to make his defence to the charge; (c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge; and (d) make such order for the punishment or discharge of such person as may be just.
- (2) Notwithstanding anything contained in sub-section (1), where a person charged with contempt under that sub-section applies, whether orally or in writing, to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the court is of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.
- (3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1) which is held, in pursuance of a direction given under sub-section(2), by a Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed to appear as a witness and the statement placed before the Chief Justice under sub-section (2) shall be treated as evidence in the case.
- (4) Pending the determination of the charge, the court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify: Provided further that the court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid.”

Section 15 of the Act talks about cognizance of criminal contempt in other cases. It reads:

- “(1) In the case of a criminal contempt, other than a contempt referred to in Section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by (a) the Advocate-General, or (b) any other person, with the consent in writing of the Advocate-General, or (c) in relation to the High Court for the Union

territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer.

- (2) In the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate-General or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.
- (3) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty. Explanation. In this section, the expression Advocate-General means (a) in relation to the Supreme Court, the Attorney-General, or the Solicitor-General; (b) in relation to the High Court, the Advocate-General of the State, or any of the States for which the High Court has been established. (c) in relation to the court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.”

Section 16 of the Act states about contempt by judge, magistrate, or other person acting judicially. It goes on as:

- “(1) Subject to the provisions of any law for the time being in force, a judge, magistrate or other person acting judicially shall also be liable for contempt of his own court or of any other court in the same manner as any other individual is liable and the provisions of this Act shall, so far as may be, apply accordingly.
- (2) Nothing in this section shall apply to any observations or remarks made by a judge, magistrate, or other person acting judicially, regarding a subordinate court in an appeal or revision pending before such judge, magistrate, or the person against the order or judgment of the subordinate court.”

Section 17 of the Act states about the procedure after cognizance. It says:

- “(1) Notice of every proceeding under Section 15 shall be served personally on the person charged, unless the court for reasons to be recorded direct so otherwise.
- (2) The notice shall be accompanied (a) in the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded; and (b) in case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.
- (3) The Court may if it is satisfied that a person charged under Section 15 is likely to abscond or keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable.

- (4) Every attachment under sub-section (3) shall be effected in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908), for the attachment of property in execution of a decree for payment of money, and if, after such attachment, the person charged appears and shows to the satisfaction of the court that he did not abscond or keep out of the way to avoid service of the notice, the court shall order the release of his property from attachment upon such terms as to costs or otherwise as it may think fit.
- (5) Any person charged with contempt under Section 15 may file an affidavit in support of his defence, and the court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary, and pass such order as the justice of the case requires.”

Section 18 talks about hearing of cases of criminal contempt to be by Benches. It reads:

- “(1) Every case of criminal contempt under Section 15 shall be heard and determined by a Bench of not less than two Judges.
- (2) Sub-section (1) shall not apply to the Court of a Judicial Commissioner.”

Further, Section 19 of the Act talks about Appeals and section 20 talks about the limitation for actions for contempt. According to section 20, no court shall initiate any proceedings of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

In this way, the procedure for trying cases of contempt of court is provided in the Contempt of Courts Act 1971. Proceedings for contempt can be initiated by courts (that is by the Supreme Court or the High Courts) *suo motu*, i.e. by themselves, and require a notice in writing to be sent to the person alleged to have committed contempt to appear before the court when the contemptuous act or words occur in the presence of the court. Courts are required to conduct these hearings as soon as possible, and preferably on the same day when the acts of contempt have been committed in their presence. Persons accused of contempt have the right to be heard in their defence and courts can take evidence regarding the case as well. Detention in custody is permissible during a trial for contempt.

When contemptuous acts or words are alleged to have occurred outside a courtroom, proceedings for contempt in the High Courts or Supreme Courts can only be carried out with the permission of the relevant law officer. In the case of High Courts, the consent of the State's Advocate General is required, and in the case of the Supreme Court, the consent of either the Attorney General of India or the Solicitor General of India is required. Proceedings for contempt in the Supreme Court are also subject to an additional set of regulations, known as the 'Rules to Regulate Proceedings for Contempt of Supreme Court'.

Punishment

Both civil and criminal contempt share the same punishment under the Contempt of Courts Act 1971. The Act allows for a maximum term of imprisonment for six months, and this can be supplemented with a fine of up to ₹2000. The Contempt of Courts Act 1971 also specifically allows courts to forgo the punishment if an apology is made to the court, and may use their discretion to determine whether the apology has been sufficient.

Section 12 of the Act states about punishment for contempt of court. It provides:

- “(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both: Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation. An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

- (2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.
- (3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.
- (4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person:

Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

- (5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the

court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation For the purpose of sub-sections (4) and (5) (a) company means any body corporate and includes a firm or other association of individuals; and (b) director, in relation to a firm, means a partner in the firm.”

Defences

Contempt of court is also a ground on which the right to freedom of speech in India can be restricted. Fair and accurate reporting of judicial proceedings will not amount to contempt of court. Nor is any fair criticism on the merits of a judicial order after a case is heard and disposed of. For many years, truth was seldom considered a defence against a charge of contempt. There was an impression that the judiciary tended to hide any misconduct among its individual members in the name of protecting the image of the institution. The Act was amended in 2006 to introduce truth as a valid defence, if it was in public interest and was invoked in a bona fide manner.¹⁸

Thus, the Contempt of Courts Act allows three defenses to the charge of contempt. It allows an exemption for those who innocently publish or commit acts that would otherwise amount to contempt, if they reasonably believe that there were no ongoing judicial proceedings regarding these acts, or if they reasonably believe that the content of their words or actions did not contain anything contemptuous. The Act also specifically exempts fair and accurate reporting on judicial proceedings, and fair criticism of the judiciary. In 2006, the Contempt of Courts Act 1971 was amended to allow truth as a defense to contempt, provided that the person claiming this defence was acting in public interest.

Conclusion & Way forward

In 1969, a challenge to the constitutional validity of the Contempt of Courts Act 1971 was dismissed by the Supreme Court of India, which found the law to be substantively valid.¹⁹ In 2020, lawyer and activist Prashant Bhushan, along with journalist and politician Arun Shauri and publisher N. Ram, filed a petition challenging the constitutional validity of the Contempt of Courts Act again.²⁰

18. Sec.13. Contempts not punishable in certain cases.—Notwithstanding anything contained in any law for the time being in force,—

(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.

19. Apurva Vishwanathan, Contempt Act challenged by Prashant Bhushan: Plea reopens old debate, courts have leaned in favour of law to punish, *The Indian Express*, August 2nd 2020, available at:- <https://indianexpress.com/article/india/sc-contempt-prashant-bhushan-case-6534833/>, Last visited on:- December 7th 2020.

20. Shourie, Bhushan, N Ram challenge validity of criminal contempt in SC, say it curbs free speech, *The Print*, August 01,2020, Available on:- <https://theprint.in/judiciary/shourie-bhushan-n-ram-challenge-validity-of-criminal-contempt-in-sc-say-it-curbs-free-speech/472491/>, Last visited:- December 07th, 2020.

Courts' powers to punish for criminal contempt have been repeatedly criticized by former judges and lawyers as having a chilling effect on freedom of speech, being too broad and vague in its definition, and lending itself to misuse to shield the judiciary from criticism.²¹ Senior Advocate Sanjay Hegde argued that the offence of "scandalizing the court" is "incapable of precise definition," and that it derives from English law, where it has since been abolished.²²

In 2011, retired Supreme Court judge and former Press Council of India Chairman, Markandey Katju, called for amendments to the Contempt of Courts Act 1971 to allow the media to report better on law and judiciary-related matters.²³

In March 2018, the Law Commission of India was tasked by the Government of India with re-examining section 2 of the Contempt of Courts Act 1971, which defines the offence of contempt. The Commission was asked to examine a proposal that suggested that contempt of court should be limited to cases of civil contempt, i.e. disobedience of court orders, and should not include the offence of 'scandalising the court', i.e. criminal contempt. The Commission recommended the retention of the offence of 'criminal contempt' in India, noting that courts in India continue to use it widely, unlike other countries in which offences such as 'scandalising the court' have fallen into disuse. The Commission also noted that the power of courts to penalise contempt was inherent, and would continue to exist even if the Act was amended or deleted altogether.²⁴

The role of the judiciary and its power regarding Contempt of Court has been visible across the continents. The law relating to contempt of court has developed over the centuries as a means, whereby, the courts may act to prevent or punish conduct that tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular or generally.

Freedom of speech is indeed a fundamental right guaranteed by the Constitution of India. But, the same has been made subject to certain reasonable restrictions as has been provided by Article 19 of the Constitution of India. So reasonable restrictions are always guiding the right to freely speak and express in relation to contempt of court.

The law relating to Contempt of Courts is necessary as they ensure the safety of the Indian Judicial System against all kind of unwelcome, scandalous, or unwarranted words or act and thereby ensure the independence of judiciary which is a basic feature of the Constitution.



21. Murali Krishnan, Contempt of Court Provision Vague: Former Supreme Court, High Court Judges, Hindustan Times, August 24, 2020, available at: - <https://www.hindustantimes.com/india-news/contempt-of-court-provision-vague-former-sc-hc-judges/story-0rzJODbOyIlrqrJhQwxnM.html>, last visited on:- December 7th, 2020

22. Sanjay Hegde, Vague Definition of Criminal Contempt, The Frontline, September 11, 2020, available at: - <https://frontline.thehindu.com/cover-story/vague-definition/article32439112.ece>, last visited on:- December 7th, 2020.

23. Contempt of Court Act needs to be amended for media: Katju, The Indian Express, April 26, 2012, available at: - <https://indianexpress.com/article/cities/pune/contempt-of-court-act-needs-to-be-amended-for-media-katju/>, last visited on:- December 07th, 2020.

24. Krishnadas Rajgopal, Reviewing the Contempt of Court Act, The Hindu, April 20, 2018, available at: - <https://www.thehindu.com/opinion/op-ed/reviewing-the-contempt-of-courts-act/article23606610.ece>, last visited on:- December 07th, 2020.

Topic No. – 50

Protection of Judicial Officer under Judges Protection Act & other statutes in the discharge of official duty.

By
Sri Dev Raj,
Civil Judge Senior Division,
Araria.

**Sri Dev Raj,
Civil Judge Senior Division,
Araria.**

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Protection of Judicial Officer under Judges Protection Act & other statutes in the discharge of official duty.

“There can be no Government of law without a fearless, independent judiciary. The independence of the judge is the chief of all the cardinal judicial values. He must be entirely free from all external influence and subservient only to his own conscience.”¹

Introduction

The protection of judges finds its foundation in the concept of two theories i.e. ‘Independence of Judiciary’ and ‘Rule of Law’, respectively. The broader principle- ‘Rule of Law’ cannot be imagined in the absence of an independent and fearless judiciary. Such phenomenon will lead to make a polity ‘Rule by Law’ instead of ‘Rule of Law.’ History is full of such examples wherein polities became ‘Rule by Law.’ The founding fathers of the Constitution of India, cognizant of such realities, never wanted India to become a polity where ‘Rule by Law’ prevails, hence they ensured that the Constitution of India provides an independent and fearless judiciary. The concept or theory of ‘Independence of Judiciary,’ among other components, necessitates protection of judges as without the latter the former can never be achieved.² It is pertinent to note that judges discharge the judicial functions and by the nature of their work, they are the arbiter of the ‘Independence of Judiciary.’ A fearful or apprehensive judge cannot ensure a judiciary to be independent. A judge under threat, of any sort, will be a threat to ‘independence of the judiciary’ and ‘Rule of Law.’ Thus, Independence of the Judiciary and protection of judges are interdependent and co-relative. “Every judge of the courts of this law from the highest to the lowest should be protected to the same degree and liable to the same degree what he does may be outside his jurisdiction - in fact, or in law but so long as he honestly believes it to be within his Jurisdiction he should not be liable.”³

Discharge of Judicial Function is Sovereign Function

Discharge of judicial function is a sovereign function of the State. The peremptory nature of the judiciary has been reiterated by the judicial observations, time and again, which will be helpful as to why ‘protection of judges’ is an inseparable necessity, for the discharge of impartial, effective, and an independent judiciary. For the purpose, an observation of the Supreme Court of India is important-

1. Justice Bernard L. Shientag

2. Judicial independence can be defined as a characteristic of individual judges or as a characteristic of the judiciary as a whole. Neither conception is indisputably preferable to the other as a practical matter. On the one hand, if judicial independence is guaranteed at the institutional level but not at the individual level, individual judges can be forced to obey the wishes of the leadership of the judiciary, which may result in a less-than-wholehearted enforcement of the rule of law. Available at:- <https://www.britannica.com/topic/judicial-independence> Last visited on-

3. Since v. Moore (1975) QBD 118

“a Judicial Officer is not an ordinary government servant. He exercises sovereign judicial functions and powers of the State. Judicial Officer holds office of great trust and responsibility and his conduct must be beyond suspicion. Personality of an honest Judicial Officer is an ultimate guarantee to justice. A slightest dishonesty by him may have disastrous effects.”⁴

The above judicial observation reiterates the sovereign nature of duty discharge by a judicial officer, which is distinct and different from any other services under the patronage of the state. Another observation in the line is-

“Judicial service as well as legal service are not like any other services. They are missions for serving society. The mission is not achieved if the litigant who is waiting in the queue does not get his turn for a long time. Chief Justices and Chief Ministers have resolved that all cases must be disposed of within five years which by any standard is quite a long time for a case to be decided in the first court. Decision of cases of undertrials in custody is one of the priority areas. There are obstructions at every level in enforcement of right of speedy trial. Vested interests or unscrupulous elements try to delay the proceedings. Lack of infrastructure is another handicap. In spite of all odds, determined efforts are required at every level for success of the mission. Ways and means have to be found out by constant thinking and monitoring. Presiding Officer of a court cannot rest in the state of helplessness.”⁵

Another judicial observation of a Three Judges’ Bench of the Supreme Court of India is on the point, which characterizes the judicial functions and services, wherein it was observed:

“the judicial service is not service in the sense of 'employment. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature, and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State-power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the Judges and the administrative executive. This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another

4. High Court of Judicature at Patna v. Shiveshwar Narayan, (2011) 15 SCC 317

5. Hussain Vs. Union of India, AIR 2017 SC 1362 (para 26).

important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrement's and thus to impede them in the proper discharge of their duties is to impair and whittle away justice itself.”⁶

Thus, through the above judicial observations, it is clear that judicial function is a sovereign function of the State and distinct from the other services of the State. Such is the nature of the judicial function, tasked with the duty to uphold the rule of law that it makes the protection of judges to hold high the mast of independence of the judiciary, which is a basic structure of the Constitution.⁷

Protection of Judges from whom and how?

Alexander Hamilton said that the judiciary is the “least dangerous” branch, having “no influence over either the sword or the purse,” and is, therefore, least capable of defending itself against the other branches.⁸

The Judges, while discharging judicial functions, usually encounter three sorts of scenarios i.e. (i) disputes between private parties, (ii) disputes between government actors, and (iii) dispute between private actors and government actors. While encountering the first scenario, wherein private parties are involved, there is a threat of intimidation or bribery to the court by the parties. In such scenarios, the government may act as the shield to protect the judges and ultimately the independence of the judiciary.

In the second scenario, wherein two different agencies/actors of the government are warring with each other on some or the other issue, the scenario is relatively favourable to the judges deciding the matter. Since the government itself is warring with each other, hence, the chances of intimidation or influence are almost negligible.

However, in the third scenario, wherein the private parties and government agencies are involved, the latter being at the superior position in terms of power bargain, the probability of intimidation and influence is very high consequently a potent threat to the independence of the judiciary.

Now the question arises as to how to protect the judicial independence? With the passage of time and gaining experience with the happenings around the world, political scientists have suggested various measures to protect the independence of the judiciary:

6. All India Judges' Association Vs. Union of India & Others, AIR 1993 SC 2493 at Para 4.

7. State of Bihar v. Balmukund Sah (2000) 4 SCC 640

8. <https://www.britannica.com/topic/judicial-independence>

- (i) Limiting government discretion over judicial salaries.
- (ii) Placing heavy restrictions on the removal of judges from office.
- (iii) Fixing the minimum jurisdictions that Courts are to possess.
- (iv) Relieving judges from the personal liability for the acts performed in the course of their duties.

These tools have remained tested on the touchstone of the time, across the polities, to minimize the threat on the independence of the judiciary.⁹ In India, the abovementioned tools have been brought into, for the purpose, by various enactments.

Laws governing services of Judicial Officers

Various laws governing the services of Judicial Officers are as under:

- Articles 309, 310 & 311 of the Constitution of India
- The Judicial Officers' Protection Act, 1850
- The Judges (Protection) Act, 1985
- Section 52 IPC
- Section 77 IPC
- Section 228 IPC
- Section 197 Cr.PC
- Bihar Judicial Officer's Conduct Rules, 2017.
- Bengal, Agra, and Assam Civil Courts Act, 1887
- Section 19 of the Prevention of Corruption Act, 1988
- Sub-sections (6), (7), (12) of Section 57 of the Evidence Act, 1872
- Section 114(e) of the Evidence Act, 1872
- Contempt of Courts Act, 1971
- Principles of Natural Justice
- G.Os. & Government Notifications
- Judicial Pronouncements
- Scheme of Destiny and Divinity.
- Constitution of India, arts. 121, 124 (2), (5) and 146
- S.121, Indian Evidence Act, 1872
- Judicial Officers' Protection Act, 1850

9. <https://www.britannica.com/topic/judicial-independence>

Conditions of service of Judicial Officers

Generally speaking, subject to the rules governing the services of the civil servants, the following are the conditions of service applicable to them: (i) Salary or wages (ii) Periodical increments (iii) Seniority (iv) Promotion (v) Leave (vi) Provident fund (vii) Gratuity (viii) Subsistence allowance during suspension (ix) Disciplinary proceedings (x) Tenure or termination of service (xi) Deputation (xii) Transfer (xiii) Superannuation (xiv) Pension.

The doctrine of Pleasure vis a vis Judicial Officer- Article 310 of the Constitution of India provides that a civil servant holds his post during the pleasure of the President or the Governor of the State. In **Union of India v. Major S.P. Sharma**¹⁰, a Three-Judge Bench judgment, it was observed that the 'doctrine of pleasure' is a constitutional necessity, for the reasons that the difficulty in dismissing those public servants whose continuance in office is detrimental to the State would, in case necessity arises to prove some offence to the satisfaction of the court, be such as to seriously impede the working of public service. Article 309 of the Constitution is subject to the provisions of the Constitution. Hence, the rules and regulations made relating to the conditions of services under Article 309 are subject to Articles 310 and 311 of the Constitution.

The Supreme Court again got a chance to further elaborate the doctrine of pleasure in **B.P. Singhal Vs. Union of India**,¹⁰ a Five Judges' Bench, wherein it was opined that there is distinction between the doctrine of pleasure as it existed in a feudal setup and the doctrine of pleasure in a democracy governed by rule of law. The Court went on to observe that in a nineteenth century feudal setup, unfettered power and discretion of the crown was not an alien concept. However, in a democracy governed by rule of law, where arbitrariness in any form is eschewed, no government or authority has the right to do what it pleases. The doctrine of pleasure does not mean a license to act arbitrarily, capriciously, or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for the public good.

Further, in the **Union of India v. Major S.P. Sharma**,¹² a three Judges' Bench judgment, it was held that the "pleasure doctrine" is a constitutional necessity for the reason that the difficulty in dismissing those public servants whose continuance in office is detrimental to the State, would in case necessity arises to prove some offence to the satisfaction of the court, be such as to seriously impede the working of public services. It was also held that Article 309 of the Constitution is subject to the provisions of the Constitution. Hence, the rules and regulations made relating to the conditions of service under Article 309 are subject to Articles 310 and 311 of the Constitution. It is worth mentioning that the opening words of Article 310 "Except as expressly provided by this Constitution" make it clear that a government servant holds the office during the pleasure of the

10. (2014) 6 SCC 351

11. (2010) 6 SCC 331

12. (2014) 6 SCC 351

President or the Governor except as expressly provided by the Constitution. From a bare perusal of the provisions contained in Article 311 of the Constitution, it is manifestly clear that clauses (1) and (2) of Article 311 impose restrictions upon the exercise of powers by the President or the Governor of the State of his pleasure under Article 310(1) of the Constitution. However, proviso to Article 311(2) makes it clear that Article 311(2) shall not apply inter alia where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold an enquiry before termination of service.

Again, in **B.P. Singhal Vs. Union of India**,¹³ a Five Judges' Bench, it was observed that in a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no government or authority has the right to do what it pleases. Where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the authority, but can only be for valid reasons. The doctrine of pleasure is not a licence to act with unfettered discretion, to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of pleasure.

The Judicial Officers' Protection Act, 1850:

The Judicial Officers' Protection Act, 1850 consists of only one section. The legislature enacted this very Act in order to provide protection to the judicial officers acting in good faith in their judicial capacity. A careful perusal of the all provisions would show that sub-section (1) of Section 3 of the Judges' (Protection) Act, 1985 clearly provides that no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in discharge of his official or judicial duty or function.¹⁴ The Supreme Court of India also held in **Rahendra Baglari v. The Sub-Divisional Judicial Magistrate**,¹⁵ protection available to a Judge by virtue of Section 1 of the Judicial Officers' Protection Act, 1850 is in respect of any action taken in good faith; whereas the protection available under Section 3(1) of the Judges (Protection) Act, 1985 is absolute and is available not only to a sitting Judge but also to an Ex-Judge in respect of the actions taken or words spoken by him while discharging his official or judicial functions. It has been observed as under:

“A conjoint reading and understanding of the Act of 1850 and the Act of 1985 make it clear that protection available to a Judge under Judicial Officers' Protection Act, 1850 is in

13. (2010) 6 SCC 331

14. Section 1 of the 1850 Act- Non liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders—No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

15. W.P.(C) No. 3057/2020, decided on 15-9-2020.

respect of any action taken in good faith; whereas the protection available under the Judges' (Protection) Act, 1985 is absolute and is available not only to a sitting Judge but also to an Ex-Judge in respect of the actions taken or words spoken by him while discharging his official or judicial functions."

The Court further observed in **Narasinha Shankar v. Imam Valad Mohamad**,¹⁶ that if in passing every wrong or illegal judicial order, the concerned Judge is sued before the higher judicial forum, it shall result in demoralising the judicial officers, particularly, at the adjudicating level, other than the public losing faith in the judiciary. In case a purported illegal order is passed on wrong facts, law always provides for filing of appeal, revision, or writ petition against the order, however, not by impleading the Judge to seek his accountability. It is for this purpose that the Judges have been given protection by legislations such as the Act of 1850 and Act of 1985 grants protection to a judicial officer for any act done or ordered to be done by him in the discharge of his judicial duty.¹⁷

Protection under the Judicial Officers' Protection Act, 1850 when available?

Now the question arises as to when the protection is available to a Judicial Officer? The question was answered by the Hon'ble Supreme Court in the matter of **Anowar Hussain v. Ajoy Kumar Mukherjee**,¹⁸ wherein it was held that where an Executive Officer/Sub-Divisional Officer was holding two offices----one as Executive Office as a Sub-Divisional Officer and the other as Judicial Officer as Sub Divisional Magistrate and had ordered the arrest of a person for an offence u/s 436 IPC but the proceedings were closed without any trial and thereafter the aggrieved person filed a suit for damages against the Sub-Divisional Officer, the Supreme Court, interpreting the scope of Section 1 of the Judicial Officers' Protection Act, 1850 held that :

"In view of the admission made by the SDO that he had not taken cognizance as a Magistrate of the offence against the plaintiff before ordering his arrest, and his main defence that he had acted under the direction of his Superior Executive Officer, he must be held to have acted in his executive capacity and not in discharge of his duties as a Magistrate and hence was not entitled to protection under the 1850 Act. The Judicial Officers Protection Act, 1850 protects a judicial officer only when he is acting in his judicial capacity and not in any other capacity. If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no inquiry will be entertained whether the act done or ordered to be done was erroneous, irregular or even illegal, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered to be done is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected, if at the time

16. (1903) 5 Bom. L.R. 667

17. See also; Sailajanand Pande v. Suresh Chandra Gupta, AIR 1969 Pat 194.

18. AIR 1965 SC 1651

of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression “jurisdiction” does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter.”

Further, in **Rachapudi Subba Rao v. Advocate General, A.P.**,¹⁹ the Court laid down the test as to when the protection is available to the Judicial Officer under the Act and observed thus:

“If the judicial officer is found to have been acting in the discharge of his judicial duties, then, in order to exclude him from the protection of Sec. 1 of the Judicial Officers Protection Act, 1850 the complainant has to establish that--- (i) the judicial officer complained against was acting without any jurisdiction whatsoever; and (ii) he was acting without good faith in believing himself to have jurisdiction. The expression “jurisdiction” in this section has not been used in the limited sense of the term, as connoting the ‘power’ to do or order to do the particular act complained of, but is used in a wide sense meaning ‘generally the authority of the judicial officer to act in the matters’. Therefore, if the judicial officer had the general authority to enter upon the enquiry into the cause, action, petition or other proceedings in the course of which the impugned act was done or ordered by him in his judicial capacity, the act, even if erroneous, will still be within his ‘jurisdiction’, and the mere fact that it was erroneous will not put it beyond his ‘jurisdiction’. Error in the exercise of jurisdiction will not put it beyond his ‘jurisdiction’. Error in the exercise of jurisdiction is not to be confused with lack of jurisdiction in entertaining the cause or proceeding.”

The Judges (Protection) Act, 1985

With the growing concern of independence of judiciary around the globe, the Parliament passed The Judges (Protection) Act, 1985 to provide certain additional protections to Judges and Magistrates in addition to what was already available to them under The Judicial Officers’ Protection Act, 1850. Certain important provisions contained under the Judges (Protection) Act, 1985 are as under:

“Sec. 3. Additional Protection to Judges.—(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-sec. (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. (2) Nothing in sub-sec. (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge.”

19. (1981) 2 SCC 577

“Sec.4- **Saving**—The provision of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force providing for protection of Judges.”

The Judges (Inquiry) Act, 1968:

The Judges (Inquiry) Act, 1968 has been enacted by the Parliament to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith. This Act does not cover the matter of protection to the Judicial Officers of the subordinate judiciary and exclusively deals with the matters like misbehaviour or incapacity of the Judges of the Supreme Court and High Courts.

Protection of Judges Under the I.P.C.

“**Section 77:** Nothing is an offence which is done by a Judge when acting Judicially in the exercise of any power which is or which in good faith he believes to be, given to him by law.”

Section 78 grant immunity to Judges and to those who carry out their orders. Section 77 extends protection to a Judge with respect to acts done by him in discharge of his duties even if he exceeds the jurisdiction granted to him by the law and prosecutes a man for committing the alleged offence provided it was done in good faith. Exception: The aforesaid privilege does not extend to acts when a Judge knowingly exceeds his authority does something contrary to law. Section 219 and 220 IPC are illustrative of such situation.

“**Section 219:** Whoever being a public servant corruptly or maliciously makes or pronounces at any stage of a Judicial Proceeding, any report, order, verdict or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or both.”

Section 220 provides that whoever, being in any office which gives him legal authority to commit persons for trial or to confinement or keep the persons in confinement, corruptly or maliciously commits any person for trial or confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or both. The application of Section 220 is general while the application of Section 219 is specific and covers Judicial officer

Jurisdiction for exempting a Judge from Criminal Liability.

In **Chunder Nararyan Singh v. Brij Bulle Hoyee**,²⁰ Markby J. observed that the duties which a magistrate or judge usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offense or to vindicate the rights of a private individual and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that

20. (1847) 14 Berg LR 254

independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular Judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights or punish the misconduct of any given person whatever form their proceedings may take or however informal they may be.

Section 228 of I.P.C

Whoever intentionally offers any insult, or causes any interruption to any public servant while such public servant is sitting in any stage of Judicial Proceedings, shall be punished with simple Imprisonment for a term which may be extended to six months or with fine which may extend to one thousand rupees or both.

Powers of Judicial Officers u/s 228 IPC & Sec. 345 CrPC: In case any person intentionally offers any insult or causes any interruption in the judicial functioning of the court, the presiding officer may proceed summarily against such person u/s 345 CrPC and may punish him u/s 228 of the IPC.

Intimidation of Judges with a view to secure orders as per the wish of the lawyer and litigant.

In **M/s. Chetak Construction Ltd v. Om Prakash**,²¹ it was held that-

“no lawyer or litigant can be permitted to browbeat the Court or malign the Presiding Officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and Rule of Law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be allowed to terrorize or intimidate Judges with a view to secure orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. A litigant cannot be permitted 'choice' of the 'forum' and every attempt at "forum shopping" must be crushed with a heavy hand. At the same time, it is of utmost importance to remember that Judges must act as impartial referees and decide cases objectively, uninfluenced by any personal bias or prejudice. A Judge should not allow his judicial position to be compromised at any cost. This is essential for maintaining the integrity of the institution and public confidence in it. The credibility of this institution rests on the fairness and impartiality of the Judges at all levels. It is the principle of highest importance, for the proper administration of justice, that judicial powers must be exercised impartially and within the bounds of law. It must always be remembered that justice must not only be done but it must also be seen to be done.”

The Court further observed in **In re Ajay Kumar Pandey, Advocate**,²² that-

“Does the law give a lawyer, unsatisfied with the result of a case, any licence to permit himself the liberty of scandalizing a Court by casting unwarranted imputations against the

21. AIR 1998 SC 1855 at paras 19 & 20

22. AIR 1998 SC 3299

Judge in discharge of his judicial functions? Does the lawyer enjoy any special immunity under the Contempt of Courts Act, 1971 where he is found to have committed a gross contempt of Court? The answer has to be an emphatic No. In the instant case, the alleged contemnor has been making continuous attempts to subvert the course of justice in whichever Court his case was. He has been acting not only as if he is above the law but as if he is law unto himself. Notwithstanding his own assessment of his 'merit and 'competence' as stated by him in the memo of petitions, the alleged contemnor appears to be blissfully ignorant of the role of a lawyer and the law relating to drafting of pleadings which must be precise and not scandalous or abusive. By filing the applications, and the petition, as a party in person, couched in very objectionable language, he has permitted himself the liberty of indulging in an action which does little credit to the noble profession to which he belongs. An advocate has no wider protection than a layman when he commits an act which amounts to contempt of Court. It is most unbecoming for an advocate to make imputations against the Judge only because he does not get the expected result which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a license to commit contempt of the Court by intimidating the Judges or scandalizing the Courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary and which has the tendency to interfere in the administration of justice and undermine the dignity of the Court and the majesty of law. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for upholding the majesty of the law. Judges and Courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of Court. However, when from the criticism, a deliberate, motivated and calculated attempt is discernible to bring down the image of the judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute; the Courts must bicker themselves to uphold their dignity and the majesty of the law. The alleged contemnor, has, undoubtedly committed contempt of the Court by the use of the objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalizing the Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality, or fairness of a Judge in the discharge of his judicial functions, as it undoubtedly amounts to an interference with the due course of administration of justice. No litigant, even a lawyer appearing in person in his own cause, can be permitted to overstep the limits of fair, bona fide and reasonable criticism of the judgment and bring the Courts generally into disrepute or attribute motives to the Judges rendering the judgment. Perversity calculated to undermine the judicial system and the prestige of the Court cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened. Liberty of free

expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the Judges or the Courts in relation to judicial matters. In the established facts of the case, the alleged contemnor would be guilty of gross contempt of Court and liable to be convicted accordingly. The alleged contemnor sentenced to undergo simple imprisonment for a period of four months and to pay a fine of Rs. 1,000/- (one thousand) and in default of payment of fine, to further undergo simple imprisonment for a period of 15 days. Since the contemnor has abused professional privileges while practicing as an Advocate, the Supreme Court also directed that the copy of the judgment together with the relevant record be forwarded to the Chairman, Bar Council of India, who may refer the case to the concerned committee for appropriate action as is considered fit and proper.

The Court further dealt the issue of protection of judges from the litigants in **Khanapuram Gandaiah v. Administrative Officer**,²³ and observed that:

“judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a Judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the Judge had come to a particular decision or conclusion. A Judge is not bound to explain later on for what reason he had come to such a conclusion. A Judge cannot be expected to give reasons other than those that have been enumerated in the judgment or order. The application filed by the petitioner before the public authority is per se illegal and unwarranted. A judicial officer is entitled to get protection and the object of the same is not to protect malicious or corrupt Judges, but to protect the public from the dangers to which the administration of justice would be exposed if the judicial officers concerned were subject to inquiry as to malice, or to litigation with those whom their decisions might offend. If anything is done contrary to this, it would certainly affect the independence of the judiciary. A Judge should be free to make independent decisions.”

The Hon’bel Apex Court in **Donga Singh v. B.K. Pandey**²⁴ took a harsh view in a case where police officers entered the court and assaulted the presiding officer of the court.

Extent of power of the Governor to punish Judicial Officers

It is undisputed that the appointing authority in respect of the state Judicial Service is the Governor. As such, the Governor is empowered to impose a major punishment of dismissal, removal, or reduction in rank under Article 322(1) of the constitution. The High court is not empowered to pass an order of dismissal, removal, etc but in view of Article 235 of the

23. (2010) 2 SCC 1 at paras 11 & 13

24. 2004 Cril. J. 2084 SC

Constitution, the Governor is not empowered to conduct disciplinary action or set up an inquiry rather it is only the High Court who has to conduct an inquiry into the charges against Judicial officers and send its report with the recommendations to the Governor. In the **Registrar, High Court of Madras v. Rajaih**,²⁵ the Apex court held that the Governor cannot take any action against a member of subordinate Judicial service without and contrary to the recommendation of High Court and Governor is bound by the recommendations of the High Court made to him under Article 235 of the Constitution.²⁶ Further, it was also held that the true import of Article 235 of the Constitution is that the order of removal from service of a person holding the substantive rank of District Munsiff has to be made only by the Governor even though the Governor must act in accordance with the recommendation of the High Court which is binding on the Governor.²⁷

Superintendence of High Court over Subordinate Courts

Article 235 of the constitution narrates that the control over districts Courts and Courts subordinates thereto is vested in the High courts. Besides Article 235, superintendence vested in the High Court by Article 227 over all subordinate courts in the stage also imports control as there can be no superintendence without control. It will not out of place to mention *Shamsher Singh v. State of Punjab* wherein the Hon'ble Apex Court held that the members of the Subordinate Judiciary are not only under the control but also under the care and custody of the High Court.²⁸

Further, in the case of *Registrar, High Court of Madras v. R. Rajiah*,²⁹ the Honorable Apex Court held that Article 235 meant that it is for the High Court to hold inquiries into the conduct of Judicial officers who are entitled to the protection under Article 311 (2) of the commission. The High Court while exercising its power of control over the subordinate Judiciary is under a constitutional obligation to guide and protect Judicial officers from being harassed or annoyed by trifling complaints relating to Judicial order so that the officers may discharge their duties honestly and independently unconcerned by the ill-conceived or motivated complaints made by unscrupulous lawyers and litigants.

Again, in **State of Uttrachanchal v. Alok Sharma**,³⁰ the Hon'ble Apex Court emphasized that an independent and honest Judiciary being a sine qua non for the rule of law, the High Court should seek to protect honest judicial officers against ill-conceived charges and allegations.

25. AIR 1988 SC 1388

26. B.S. Yadav Vs. State of Haryana, (1981) 1 SCR 1024.

27. Chief Justice of AP Vs. LVA Dixitulu, (1979) 2 SCC 34.

28. The position was reiterated in *Baldev Raj v. Punjab and Haryana High Court*, wherein it was held that the sole and exclusive disciplinary control over subordinate Judiciary is vested in the High Court and its recommendation is binding on the Government.

29. AIR 1988 SC 1388

30. (2009) 7 SCC 647

Raising the bar of protection for the Judicial Officers, the Supreme Court of India in **State of Haryana v. Inder Prakash**,³¹ held that if the High Court's recommendation were not binding on the state then unfortunate consequences will follow. It is in the public interest that the state accepts the High Court's recommendations. Thus, the state Could not pass an order of compulsory retirement of a judicial officer when the High Court has made no such recommendation.

Pre-conditions of FIR & Arrest of Judicial Officers

Any protection to a Judicial Officer cannot be said to be a protection unless such protection includes the protection from arrest and registration of FIR. However, total immunity from the FIR and arrest cannot be said to be a position in a democratic nation governed by rule of law. Thus, certain restrictions and safety can be imposed to extend a sense of security and protection to the Judicial Officers. The Apex Court, in **U.P. Judicial Officers' Association v. Union of India**,³² observed that-

“there is, however, apprehension that the executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded. The Act no doubt provides certain safeguards. Section 6 providing for prior sanction from the competent authority and direction that no court shall take cognizance of the offence under Section 5(1) without such prior sanction is indeed a protection for Judges from frivolous and malicious prosecution. It is a settled law that the authority entitled to grant sanction must apply its mind to the facts of the case and all the evidence collected before forming an opinion whether to grant sanction or not. Secondly, the trial is by the court, which is independent of the executive. But these safeguards may not be adequate. Any complaint against a Judge and its investigation by the CBI, if given publicity, will have a far-reaching impact on the Judge and the litigant public. The need, therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless Judges are not harassed. They should be protected.”

The three Judges' Bench of the Supreme Court of India, on being reported of the harassment to the Judicial Officers across the nation, strongly objected and iron handedly dealt with, while deciding the issue in **Delhi Judicial Service Association Tis Hazari Courts Delhi v. State of Gujarat**.³³ The Court, laid down various guidelines to insure the protection of the Judicial Officers-

1. No Judicial Officer should visit a Police Station on his own except in connection with his official and judicial duties and functions. If it is necessary for a Judicial Officer or a

31. AIR 1976 SC 1841

32. (1994) 4 SCC 687

33. AIR 1991 SC 2176

Subordinate Judicial Officer to visit the Police Station in connection with his official duties, he must do so with prior intimation of his visit to the District & Sessions Judge.

2. Supreme Court has power under Article 129 of the Constitution to punish a contemnor having committed contempt of Sub-ordinate Courts. Contempt of Courts Act, 1971 does not impinge upon such powers of the Supreme Court.
3. Police Officials involved in assault, arrest and handcuffing of Chief Judicial Magistrate are liable both for disciplinary proceedings and also for criminal contempt of court.
4. If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.
5. If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the Subordinate Judiciary, a technical or formal arrest may be affected.
6. The fact of such arrest should be immediately communicated to the District & Sessions Judge of the concerned district and the Chief Justice of the High Court.
7. The Judicial Officer so arrested shall not be taken to a police station without the prior order or directions of the District & Sessions Judge of the concerned district, if available.
8. Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisors and Judicial Officers including the District & Sessions Judge.
9. No statement of a Judicial Officer who is under arrest be recorded nor any panchnama be drawn up nor any medical tests be conducted except in the presence of the Legal Advisor of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available.
10. There should be no handcuffing of a Judicial Officer. If however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District & Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the Police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the police officers causing the arrest will be responsible for such arrest and handcuffing and would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

11. The above guidelines are not exhaustive but these are minimum safeguards which must be observed in case of arrest of a judicial officer. These guidelines should be implemented by the State Governments as well as by the High Courts.

The concern for protection of Judicial Officers also rose for consideration of the Supreme Court of India in **U.P. Judicial Officers' Association v. Union of India**,³⁴ wherein It was laid down that "No crime or criminal case shall be registered against a judicial officer in respect of anything allegedly done or purported to be done in discharge of his duty or in his capacity as holder of such judicial office without prior permission of Chief Justice of the High Court concerned."

The Court again took the opportunity to protect the Judicial Officers from levelling of false charges when it ruled in **Vishram Singh Raghuvanshi Advocate v. State of UP**.³⁵ While dismissing the appeal, it ruled thus:

"The contempt jurisdiction is to uphold majesty and dignity of the law Courts and the image of such majesty in the minds of the public cannot be allowed to be distorted. Any action taken on contempt or punishment enforced is aimed at protection of the freedom of individuals and orderly and equal administration of laws and not for the purpose of providing immunity from criticism to the judges. The superior Courts have a duty to protect the reputation of judicial officers of subordinate Courts, taking not of the growing tendency of maligning the reputation of judicial officers by unscrupulous practicing advocates who either fail to secure desired orders or do not succeed in browbeating for achieving ulterior purpose. Such an issue touches upon the independence of not only the judicial officers but brings the question of protecting the reputation of the institution as a whole. The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. Liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution, much less the judiciary".

The protection to the Judicial Officer to be ensured not only from the outside but such also from within the judicial set up too, without which the protection cannot be said to be a meaningful protection, and for the purpose the onus lies on the concerned High Court. The Supreme Court observed that High Court must protect the honest judicial officers, in the matter of Registrar General, High Court of **Gujarat v. Jayshree Chamanlal Buddhbhatti**.³⁶

34. (1994) 4 SCC 687

35. AIR 2011 SC 2275

36. 2014 (1) SLJ 130 (SC)

In the case noted above, a probationer lady Civil Judge (Junior Division) of Gujarat faced several difficulties from her sub-ordinate staff and wrote several letters to the District Judge by recording their objectionable conduct but there was no response to her letters and she was ultimately awarded adverse entries in her ACR by the District Judge and the same was also approved by the High Court. Her services were terminated by the High Court on the basis of the said adverse entries and also on the ground that she used to cross permitted lines of behavior while talking to her male colleagues.

The Supreme Court also suggested to the High Courts to be extremely cautious and careful in summoning the Judicial Officers and directed to hold the proceeding in camera when matter is pertaining to such officers.³⁷

Further, the Supreme Court of India understood that Annual Confidential Report (ACR) is a very important aspect of career for judicial officers as the career escalation rests on it. It dealt with the issue of ACR in **Registrar General, Patna High Court v. Pandey Gajendra Prasad**³⁸ and observed that the process of evaluation of a Judicial Officer needs immediate and necessary reform.³⁹ And such ACR recorded for the Judicial Officer after evaluation, no matter whatever the comments of it be, must be communicated to the concerned officer.⁴⁰ Further, any recording of

Quashing her termination order, the Hon'ble Supreme Court has held that since the probationer lady Judicial Officer was facing hostile atmosphere of staff and Bar, her complaint made to the District Judge was also not attended to rather adverse entries in her ACR were recorded and the Vigilance Judge of the High Court appear to be biased against her and had not provided her any opportunity to defend her and, therefore, her termination was bad in law. The Supreme Court further observed that when the misconduct leading to termination order is stigmatic in nature, even a probationer is entitled to enquiry as such penalty attracts Article 311 of the Constitution even to a probationer. The Supreme Court also observed that no enquiry can be held behind the back of the delinquent/Judicial Officer. The High Court must protect honest Judicial Officers.

Similar position was maintained in *Nirmala J. Jhala v. State of Gujarat*, AIR 2013 SC 1513, It was held that Article 235 of the Constitution confers supervisory jurisdiction on High Courts over sub-ordinate judiciary. A duty is also cast on the High Court to protect the honest Judicial Officers as that is paramount for survival of judicial system.

Also, Hon'ble the CJI, vide his D.O. No. CJI/CC/Comp/2014/1405 dt. 3.10.2014, addressed to the Chief Justice of all the High Courts, has asked the High Courts and subordinate judiciary not to entertain any complaint against a judicial officer unless it is accompanied by sworn affidavits and verifiable material to substantiate the allegation.

37. In *Rajendra Prasad v. State of UP*, Writ Petition (M/B) No. 9736/2013

It was observed that High Court has discretion to summon a person whose attendance is necessary in the Court for deciding the case. When the summoning of a serving Judicial Officer is concerned, the Court must record sufficient reasons for summoning him or her and give sufficient indication for the purpose for which he or she is summoned to the High Court. The judicial officers discharge important judicial functions under the supervision of the court. The High Court is required to be extremely careful when summons are issued to the judicial officers to appear in the Court. It is only when the allegations are substantiated that the Court may, if it is necessary to decide any case and if it is absolutely necessary in a rarest of rare case to summon the judicial officer after recording reasons on record, and if such necessity arises the proceeding should be held in camera, so that the judicial officer is not put to embarrassment and is not required to face the same litigants, who are appearing or have appeared in Court. So far as possible the proceedings should be concluded on affidavits filed by the judicial officer concerned. See: 30 Judgment dated 10.04.2014 passed by the Division Bench of the Hon'ble Allahabad High Court comprising Hon'ble Sunil Ambwani & Hon'ble Devendra Kumar Upadhyaya, JJ.

38. AIR 2012 SC 2319

39. The process of evaluation of a Judicial Officer is intended to contain a balanced information about his performance during the entire evaluation period. Experience however shows that it is deficient in several ways, being not comprehensive enough to truly reflect the level of work, conduct and performance of each individual on one hand and unable to check subjectivity on the other. Undoubtedly, ACRs play a vital and significant role on the assessment, evaluation and formulation of opinion on the profile of a judicial officer, particularly, in matters relating to disciplinary action against a Judicial Officer. The ACRs of such Officer hold supreme importance in ascertaining his conduct, and therefore, the same have to be reported carefully with due diligence and caution. There is an urgent need for reforms on this subject, not only to bring about uniformity but also to infuse objectivity and standardization.

40. *Sukhdev Singh v. Union of India*, (2013) 9 SCC 566 Overruling its two earlier Division Bench rulings reported in the cases of (i) *Satya Narain Shukla Vs. Union of India*, (2006) 9 SCC 69 and (ii) *K.M. Mishra Vs. Central Bank of India*, (2008) 9 SCC 120 and giving approval to its earlier Division Bench ruling reported in the case of *Dev Dutt Vs. Union of India*, (2008) 8 SCC 725, a Three-Judge Bench of the Hon'ble Supreme Court, in the case noted below has ruled thus : "In our opinion, the view taken in *Dev Dutt* that every entry in ACR of a public servant must be communicated to him/

ACR by the High Court, which is recorded without assessment of the work and conduct of the officer, shall be liable to be treated as non-est for all intents and purposes.⁴¹

In **Braj Kishore Thakur v. Union of India**,⁴² the Apex Court ruled that “the High Courts should not ask the subordinate Judicial Officers to send up report in defence of their judicial orders as reasons in support of a judicial order can appear only in the order itself and it is an unwholesome practice to compel a Judicial Officer to write a report subsequently in defence of his conclusions.”

Protection to Judicial Officers Against Executive as Litigant

In the matter of **U.P. Judicial Officers’ Association v. Union of India**,⁴³ it was held that-

“there is, however, apprehension that the executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded. The Act no doubt provides certain safeguards. Section 6 providing for prior sanction from the competent authority and direction that no court shall take cognizance of the offence under Section 5(1) without such prior sanction is indeed a protection for Judges from frivolous and malicious prosecution. It is a settled law that the authority entitled to grant sanction must apply its mind to the facts of the case and all the evidence collected before forming an opinion whether to grant sanction or not. Secondly, the trial is by the court, which is independent of the executive. But these safeguards may not be adequate. Any complaint against a Judge and its investigation by the CBI, if given publicity, will have a far-reaching impact on the Judge and the litigant public. The need, therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless Judges are not harassed. They should be protected.”

her within a reasonable period is legally sound and helps in achieving three-fold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR - Poor, fair, average, good or very good - must be communicated to him/her within a reasonable period.”

41. *Shakti Kumar Gupta v. State of J&K*, AIR 2016 SC 832. Where a member of Higher Judicial Service of the State of J&K was prematurely retired by the Full Court of J&K High Court on the basis of his annual confidential report by saying that he had not submitted his Self Assessment Report, the Supreme Court disapproved recording of the adverse ACR of the Judicial Officer by observing that merely because the Judicial Officer had not submitted his Self Assessment Report, the same cannot be a ground to record his ACR as "Average". Such recording of ACR cannot be taken as truthful Assessment of various constituents of the Judicial Officer's work and conduct. Evaluation of an Officer can be done on the basis of record accessible and available to the High Court. ACR bereft of any assessment of work and conduct of the Judicial Officer is liable to be treated as non est for all intents and purposes.

42. AIR 1997 SC 1157

43. (1994) 4 SCC 687

The Supreme Court of India further extended the protection in **Jogendrasinhji Vijaysinghji v. State of Gujarat**,⁴⁴ wherein it was held that Civil Court or its Presiding Officer cannot be impleaded as party in Writ, Appeal or Revision, etc. It was opined that the civil courts, which decide matters, are courts in the strictest sense of the term. Neither the court nor the Presiding Officer defends the order before the superior court. If the High Court, in exercise of its writ jurisdiction or revisional jurisdiction, as the case may be, calls for the records, the same can always be called for by the High Court without the court or the Presiding Officer being impleaded as a party. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties.

Protection when not available to the Judicial Officers

As discussed earlier in this article, complete immunity to any authority, in a democratic republic polity governed by the principle of Rule of Law, cannot be extended and judicial officers cannot be the exception to the rule. In the matter of **Indra Pati Singh v. State of U.P.**,⁴⁵ it was held that no protection under the 1850 Act can be extended when the concerned is not acting judicially. Further, the Court held that when a Judicial Officer is adopting unfair means in LL.M examination, the protection under the Act cannot be said to be available.⁴⁶ Further, it was held that any act done in negligence by a judicial officer, detrimental to the litigant enough to cause him infringement of fundamental right of life and personal liberty, shall not let him hide behind the protection of the 1850 Act.⁴⁷

44. (2015) 9 SCC 1

The position in the above noted case was also maintained in *Savitri Debi v. District Judge, Gorakhpur & 2*. IV Addl. Civil Judge (Junior Division), 1999 (2) SCC 577 2.

Also, in *Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 SCC 749. It was observed in both the above noted case that the practice of impleading judicial officers, who had disposed of the civil proceedings, as parties in writ petitions under Article 226 or in SLP under Article 136 of the Constitution, has been strongly deprecated by the Supreme Court. It has been further directed by the Supreme Court that such practice should be stopped as the judicial officers cannot be in any way equated with the officials of the State.

45. 1986 All LJ 1258 (All), wherein some record sent by the court of Magistrate to a Sarpanch acting under U.P. Panchayat Raj Act, 1947 got lost and on enquiry against the Sarpanch, plea was taken by him regarding protection under the provisions of the Judicial Officers Protection Act, 1850, it was held by the Allahabad High Court that since the Sarpanch was not acting as a court or judicial tribunal, therefore, he was not entitled to any protection u/s. 1 of the 1850 Act.

46. *Daya Shankar v. High Court of Allahabad*, AIR 1987 SC 1469 Where a Munsif Magistrate had appeared in LL.M. examination held by the Aligarh Muslim University and was caught by the invigilator using unfair means and was first suspended and after departmental enquiry by the Allahabad High Court, was removed from service, the Supreme Court held that judicial officers cannot have two standards, one in the Court and another outside the Court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. A judicial officer, who has been found guilty of using unfair means in the LL.M. Examination, is undoubtedly not a fit person to be retained in judicial service and as such the Supreme Court refused to extend the benefit of Sec. 1 of the Judicial Officers' Protection Act, 1850 to the delinquent Munsif Magistrate.

47. In *State of UP v. Tulsi Ram*, AIR 1971 All 162, wherein an accused was convicted by the trial court but on appeal was acquitted by the Allahabad High Court and even after the order of the High Court having been notified to the Judicial Magistrate concerned, he issued NBW against the acquitted accused and got him arrested, it was held by the Allahabad High Court that a committal Magistrate complying with an order certified u/s 425 CrPC does not act under that

The Court got an opportunity to examine in *S.D. Joshi v. High Court of Judicature at Bombay*,⁴⁸ that whether the Family Courts comes under the definition of Judicial Officer? It was held that the Judges presiding over family courts are neither members nor integral part of judicial services. The word “judicial officer” has not been defined in the Constitution of India. A family court judge cannot be considered for elevation to High Court. Again, in *High Court of Judicature at Patna v. Shiveshwar Narayan*,⁴⁹ wherein the honesty of the officer was in question, it was observed that even a slightest dishonesty is disastrous for a Judicial Officer, and in the circumstances, protection cannot be extended.

In *Shakti Kumar Gupta v. State of J&K*⁵⁰, wherein a member of Higher Judicial Service of the State of J & K was prematurely retired by the Full Court of J&K High Court on the basis of credible complaints found periodically with regard to his conduct, it has been held by the Supreme Court that the order of premature retirement of the Judicial Officer was justified. The fact that the Supreme Court had held the adverse ACR of the Judicial Officer recorded by the High Court in the absence of assessment of his work and conduct as non est was immaterial. Thus, protection could not be extended to the officer. Also, ‘why’ and ‘what’ ‘reasons’ judge applied to arrive at a particular decision, held, cannot be sought under the RTI Act, 2005.⁵¹ Moving on, when a judicial officer used unparliamentary languages for an advocate, before the District Judge, on moving transfer petition in a matter, the Court held that it is not connected with the official duty of the officer.⁵²

provision but only performs a ministerial and not a judicial act or a protected executive function. If he negligently signs arrest warrants against acquitted persons he is not protected by Section 1 of the Judicial Officers’ Protection Act, 1850. Even if he does so out of negligence of his subordinate, he will still be liable for damages. He will not be relieved of his liability by the failure to implead that subordinate in the suit for damages, even if the latter can be considered a joint tortfeasor.

48. 2011(1) SCJ 169

49. 2011 (3) SLJ 392 (SC)

50. AIR 2016 SC 832

51. *Khanapuram Gandaiah v. Administrative Officer*, AIR 2010 SCC 615.- It was observed that information as to ‘why’ and for what ‘reasons’ judge had come to a particular decision or conclusion cannot be sought under the RTI Act, 2005. A Judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain later on for what reasons he had come to such a conclusion. A Judicial Officer is entitled to protection under the provisions of the Judicial Officers’ Protection Act, 1850 and the object of the same is not to protect malicious or corrupt judges but to protect the public from the dangers to which the administration of justice would be exposed if the concerned judicial officers were subject to inquiry as to malice, or to litigation with those whom their decisions might offend. If anything is done contrary to this, it would certainly affect the independence of the judiciary. A judge should be free to make independent decisions.

52. *B.S. Sambhu v. T.S. Krishnaswamy*, AIR 1983 SC 64, wherein the appellant, a Munsif Magistrate, by a letter to the District Judge submitted his remarks against the allegations made by the respondent, an advocate, in a transfer petition for transfer of a suit pending in appellant’s Court and while so doing, called the respondent ‘rowdy’, “a big gambler” and “a mischievous element” and on this letter being read in open court, the respondent filed criminal complaint against the appellant without the sanction contemplated u/s 197 CrPC, it was held that the act complained of had no connection with the discharge of official duty of the appellant. Hence Sec. 197 CrPC was not in any way attracted.

Conclusion

Judges and courts exist to protect our liberties and our most fundamental and sacred rights as set forth in the constitution, as well as to protect us from unlawful and unwarranted intrusion into our lives from the government. Without the courts, there is no justice, there is no freedom. The courts, judges, are responsible for administering justice without fear or favor; to be fair, just, and impartial. John Marshall said: “The power of Judiciary lies, not in deciding cases, not in imposing sentences, not in punishing for contempt, but in the trust, faith and confidence of the common man.” If Judiciary loses the trust, faith, and confidence of the common man, that will be the end of rule of law and democracy. There cannot be a strong and vibrant Judiciary unless the Judges are persons of integrity. But at the same time, it is not to be forgotten that “Judicial independence is not a freedom to do what you like or what you consider as just and equitable. You are required to render justice in accordance with law, and not justice as per your convictions or what you consider as just. It is undisputed that Judicial Independence forms the bedrock of Justice delivery system.” Further, the warning of Justice Cardozo fits well i.e. “The Judge, even when he is free, is still not wholly free. He is not innovative at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of fairness and justice. He has to draw his inspiration from well consecrated principles. He is not to yield to spasmodic sentiments, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated in the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.”



Topic No. – 51

Sanction for Prosecution : Requirement, Effect & Consequences.

By
Sri Nitesh Kumar,
Civil Judge Senior Division,
Siwan.

Sri Nitesh Kumar,
Civil Judge Senior Division,
Siwan.

Topic : Sanction for prosecution : Requirement, Effect & Consequences.

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Sanction for Prosecution : Requirement, Effect and Consequences

Introduction:

It is a well known fact that if a public servant is to be prosecuted for an offence which has ensued from any act concerning his official duty, a sanction of appropriate authority would be a prerequisite. Sanction in general means “prior permission or approval of the authority to validate something”. Black’s Law dictionary defines ‘sanction’ as a part of law used to inflict a penalty for its violation and seeks its obedience.¹ In this present paper, we are going to deal with various aspects of sanction for prosecution, its requirement, effect and consequences.

Statutory provisions dealing with sanction:

The statutory provision relating to sanction has been given in several statutes. First of all, in the Criminal Procedure Code, 1973, section 132 states about the sanction. Section 132 of Cr.PC provides protection against prosecution for acts done under Sections 129 to 131 of Cr.PC. Sanction of Government, Central or State, as the case may be, is needed before initiating criminal proceedings in respect of an act done by public servants in connection with the dispersal of unlawful assemblies by force. Again Section 188 of Cr.PC mandates the sanction in case of an offence committed outside India, section 196 of Cr.PC. mandates for the sanction in case of prosecution for offences against the State and also for criminal conspiracy to commit such offences and Section 197 of Cr.PC states about the prosecution of Judges and public servants. As per sections 121 to 130 IPC, prior sanction of Central or State government is necessary for taking cognizance of offences against the state.

When an accused is charged with the offence of conspiracy to commit the offence punishable with imprisonment for a period less than two years e.g. section 227, IPC and section 296, IPC the consent of State Government or the District Magistrate is necessary. The sanction to prosecute has been dethroned from the position it occupied before the coming into force of the 1973 Code. Apart from Cr.PC sections 6 (The Prevention of Corruption Act), section 39 (Arms Act), section 7 (The Explosive Substance Act), section 10 (The Essential Commodities Act) require that no Court shall take cognizance of offence committed in connection with such sections without obtaining previous sanction of competent authority.

Sanction: A protective shield

A pertinent question related to sanction is why sanction is necessary to prosecute? Provisions related to sanction provides protection to responsible public servant against institution of possibly

1. Black’s Law Dictionary, 6th Edition, p. 1341

vexatious criminal proceedings for offences alleged to have been committed by them, while they are acting or purported to act as public servant. Sanctions are favoured basically on three grounds

- (a) frivolous cases are not filed,
- (b) public servants are not harassed unnecessarily, and
- (c) efficacy of administrative machinery is not tampered.

The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in discharge of official duty without reasonable cause. Provision of sanction is designed to facilitate effective and unhampered performance of official duty by public servant by making provisions for scrutiny into allegations by superior authorities and proper sanction for prosecution as a condition precedent to the cognizance by the court. In short, we can say that object is to guard public servants against vexatious or malicious proceedings in a court of law. It was thought to be necessary to have a well-considered opinion of a superior authority before initiation of criminal proceedings against a public servant. To ensure the fearless performance of their duties, the law provides protections from false, vexatious and malafide prosecution. The issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts are in dereliction of duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative.

An offence committed entirely outside the scope of the duty of public servant, would certainly not require sanction. If in doing an official duty a public servant has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the public servant of the protection of government sanction for initiation of criminal action against him. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. Protection is not available to the public servant for every offences committed by them. It is available only when an alleged act is reasonably connected with the discharge of official duty and official duty is not merely a cloak for the objectionable act.

The necessity of obtaining sanction to prosecute is indicated in peremptory language, where legislature thought, it should be made a precondition. A criminal proceeding cannot be deliberately launched without obtaining sanction wherever sanction is required by law. Once there is a sanction, the bar on the court's jurisdiction to take cognizance of the offence is removed.

Sanction to prosecute is to be taken before filing a complaint or F.I.R. According to Section 197 Cr.PC. Two conditions are to be fulfilled:

- (i) accused should be a public servant that too removable from office either by the Union government or the State government and
- (ii) such public servant has been made an accused of an offence alleged to have been committed while acting or purporting to act in due discharge of his official duty.

Recently, the Hon'ble Supreme court on 18th June 2020, in the matter of **D. Devaraja vs Owais Sabeer Hussain**² [Criminal Appeal No. 458 of 2020] pronounced that the protection given under Section 197 Cr.PC is available if there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be a ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him.

As distinguished from Section 197 of Cr.PC, under Section 19 of Prevention of Corruption Act 1988, a sanction is required not only for prosecuting public servants removable by the Appropriate Government but for all the other public servants as well. Further, Section 197 doesn't mandate taking sanction in cases of bribery (bribery being considered outside the purview of official duty), as the same is regulated by the Prevention of Corruption Act, 1988 in which sanction is essential. In this respect, in the case of **Subramaniam Swamy vs Manmohan Singh**³ (Civil Appeal No. 1193 of 2012), Hon'ble Apex Court has observed that Parliament should enact the law for granting the sanction within certain time period and in case the appropriate authority has not given sanction, there should be provision relating to the deemed sanction.

To protect the responsible public servants, our legislatures have enacted several provisions against the frivolous proceedings. There is a statutory duty imposed upon the sanctioning authority that in case of reporting of any offence said to be committed by any public servant, the sanctioning authority shall carefully scrutinise the materials as well as allegations and after the careful scrutiny, sanction to prosecution shall be granted. In the case of **State of Bihar vs P.P. Sharma**⁴, it has been held by the Hon'ble Apex Court that sanction under section 197 of Cr.PC is not an empty formality. It is essential that the provisions for sanction needs to be observed with complete strictness. To comply with the provisions of Section 197, it must be proved that the sanction was given in respect of facts constituting the offence with which the accused was charged. The court further held that, *"It is equally well settled that before granting sanction, the authority or the appropriate government must have before it, the necessary report and the material facts which prima facie establish the commission of offence charged for and appropriate government would apply their mind to those facts."*

Effect of error or irregularity in sanction:

So far the effect of sanction is concerned, Section 465 of the Code of Criminal Procedure expressly lays down that any error or irregularity in any sanction for prosecution shall not be a ground for reversing an order of conviction by the appellate court unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby. Section 465 of the Code of Criminal Procedure says that any error or irregularity in any sanction for the prosecution shall not

2. (2020) 7 SCC 695

3. (2012) 3 SCC 64

4. AIR 1991 SC 1260

be the ground for vitiating the prosecution. In the case of **State of Orissa vs Mrutunjaya Panda**⁵, the Hon'ble Apex Court laid down that, "If a public servant has been proceeded against without obtaining valid sanction, Section 465 of Cr.PC may be invoked."

Hon'ble Apex Court as well as various Hon'ble High Courts have delivered several judicial pronouncements in respect of consequences of sanction or absence thereof. Hon'ble Apex Court, in case of **R.R. Chari vs State of U.P.**⁶, said that, "Sanction to prosecute a public servant is pre-condition before a court can take cognizance of an offence." Again, Hon'ble Apex Court has held, in the case of **Rakesh Kumar Mishra vs State of Bihar**⁷, that the mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete the very cognizance is barred, i.e. the complaint, cannot be taken notice of. According to Black's Law Dictionary⁸, the word 'Cognizance' means 'Jurisdiction' or 'the exercise of Jurisdiction' or 'power to try and determine cause'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

Conclusion:

To sum up, obtaining of sanction contemplated under Section 197 Cr.PC is sine qua non for prosecution of a public servant, whether he is in service or is retired one. Further, Hon'ble Supreme Court, in **Mohd. Iqbal Ahmad vs State of Andhra Pradesh**⁹, reported in [AIR 1979 SC 677], has held, "... that any case instituted without a proper sanction must fail because this being a manifest defect in prosecution, the entire proceedings are rendered void ab initio."

The statutory provisions as well as the judicial pronouncements, have established that if any act is done by any public servant in discharging their official duty and that act falls in the purview of an offence, in that case, sanction is a mandatory provision for the protection of public servant. It is a well recognised principle of law that sanction is a legal requirement that empowers the court to take cognizance so far as the public servant is concerned. If at all the sanction is an absolute requirement. If the court takes cognizance without it, it becomes illegal. Therefore, an order to overcome any illegality the duty of the court is that even at any subsequent stage if the question of sanction is raised the court shall consider it.



5. (1998) 2 SCC 414

6. AIR 1951 SC 207

7. AIR 2006 SC 820

8. Black's Law Dictionary, 4th Edition Rev., p. 325.

9. AIR 1979 SC 677

Topic No. – 52

***Territorial jurisdiction of criminal court in continuing offences,
especially matrimonial disputes & issues relating to limitation
from section 467 to 473 of the Cr.P.C..***

By
Ms. Rachna Srivastava,
Additional District & Sessions Judge,
Muzaffarpur.

**Ms. Rachna Srivastava,
Additional District & Sessions Judge,
Muzaffarpur.**

**Topic : Territorial jurisdiction of criminal court in continuing offences, especially
matrimonial disputes & issues relating to limitation from
section 467 to 473 of the Cr.P.C..**

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Territorial Jurisdiction of Criminals Court in Continuing offences especially Matrimonial Dispute and issues relating to limitation from section 467 to 473 CrPc.

Legal provisions dealing with Jurisdiction of Criminal Courts:

Chapter 36 of the Code of Criminal Procedure mentions about limitation for taking cognizance of certain offences. Under the umbrella of this chapter section 467 to 473 come into play.

Section 467 provides definitions in which it has been mentioned that period of limitation “means the period specified in section 468 for taking cognizance of the offence”.

Section 468 enumerates the conditions for taking cognizance after lapse of the period of limitation which is according to sub cl (2) of section 468

- six months - if the offence is punishable with fine only
- one year - if the offence is punishable with imprisonment for the term not exceeding one year and
- three years - if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

Section 469 states about commencement of the period of limitation which is -

- a. on the date of offence.
- b. where the commission of offence was not known to the person aggrieved by the offence or to any police officer, the first day - when such offence comes to the knowledge of aggrieved persons or to any police officer.
- c. where it is not known by whom the offence was committed, the first day - on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making an investigation.

Section 470 states about exclusion of time in certain cases and section 471 talks about the exclusion of date on which the court is closed.

Section 472 mentions about continuing offences and the last section of this chapter that is section 473 mentions about the extension of the period of limitation in certain cases.

So, section 472 of the Criminal Procedure Code is the first place where we find glimpses about the continuing offence under criminal law. The expression continuing offence has not been defined in the code because it is one of that expression which do not have a fixed connotation or a static import and that is the reason why the concept of continuing offence cannot be put into a strait jacket. A continuing offence is susceptible to continuance and distinguishable from one which is

committed once and for all. The question whether a particular offence is a continuing offence or not must therefore necessarily depend upon the language of the statute which creates the offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence. The concept of continuing offence does not wipe out the original guilt but it keeps the contravention alive day to day.

An offence under section 498A of the IPC has been counted as continuing offence because when section 498A is brought to use in the case of cruelty on women the law of limitation is not that rigid to non suit the aggrieved wife. In an offence under section 498A IPC the last act of cruelty would be the starting point of limitation.

Chapter XIII of the Criminal Procedure Code mentions about the jurisdiction of the criminal Code in inquiries and trial. Under this chapter section, 177 states about ordinary place of inquiry and trial and says that every offences ordinarily be inquired into and tried by the court within whose jurisdiction it was committed. Further section 178 sub clause (c) mentions that where an offence is a continuing one and continues to be committed in more local areas than one it may be inquired into or tried by a court having jurisdiction over any of such local areas.

Matrimonial offences:

Under criminal law, the matrimonial disputes classified into matrimonial offences are under section 304B and 498A IPC and to some extent under the Domestic Violence Act. Under section 304B IPC the maximum punishment which can be awarded is not less than 7 years but which may extend to imprisonment for life. Hence, for the applicability of section 304 B IPC, the bar of limitation as provided under section 468 of CrPc does not come in the way. But under section 498A IPC the maximum punishment which can be awarded is three years of imprisonment and fine. Hence, for the applicability of section 498A IPC, the role of limitation comes into play since after the expiry of three years cognizance cannot be taken of the offence which is committed against the wife. The Hon'ble Patna High Court had an opportunity to consider the fact that whether the offence under section 498A IPC is continuing one or not in the case of **Upender Rai versus State of Bihar and Anr. [Criminal Misc. Nos 12180 of 2014]** In this case after discussing the relevant laws of the Criminal Procedure Code and Indian Penal Code and also number of judgment of the Hon'ble Apex Court, it was held that the offence under section 498A IPC is a continuing one. In the said case the Hon'ble Patna High Court had discussed the case of **Bhura Ram versus State of Rajasthan 2008 (11) SCC 103** wherein the Apex Court has held that the offence is a continuing one because the consequences of the act of harassment and ill-treatment meted out to the complainant is continued.

Conclusion:

In summary, we may conclude that the matrimonial dispute which is classified as the offence under section 498A IPC and section 3/4 of Dowry Prohibition Act is counted as continuing

offence by the various decision of Hon'ble Apex Court and of Patna High Court, the period of limitation will start running from the last alleged act of cruelty made by the complainant and will continue to run till the complainant alleges its consequences which may be in terms of different kind of threat perception and demand. Taking cognizance of the offence alleged under section 498A IPC will certainly depend upon the nature and content of the complaint made by the complainant.

REFERENCE:-

- i. Criminal Misc Nos 12180 of 2014 titled as Upender Rai versus State of Bihar and Anr.
- ii. Bhura Ram versus State of Rajasthan 2008 (11) SCC 103
- iii. Mohd. Yousuf vs. Afaq Jahan and Ors. AIR 2006 SC 705.
- iv. CREF Finance Ltd. vs. Shree Shanthi Homes Pvt. Ltd. (2005) 7 SCC 467 (Difference between taking of cognizance and summoning of an accused in a complaint case.)
- v. Chandra Deo Singh v. Prokash Chandra Bose [1964] 1 SCR 639 and Vadilal Panchal vs. Dattatrya Dulaji Ghadigaonker [1961] 1 SCR 1.
- vi. (2008) 2 SCC 492;
- vii. Sashi Jena v. Khadal Swain, (2004) 4 SCC 236
- viii. Part I, Chapter IV, Complaints (Section 200 to 203, Criminal Procedure Code) of the Criminal Court Rules of High Court of Judicature at Patna.
- ix. National Small Industries Corpn. Ltd. v. State (NCT of Delhi), (2009) 1 SCC 407
- x. Section 202(1) of the Code of Criminal Procedure.
- xi. Pepsi Food Ltd vs Spl Judicial Magistrate (1998) 5 SCC 749.
- xii. Chandra Deo Singh v. Prokash Chandra Bose, AIR 1963 SC 1430 : 1963 (2) Cr LJ 397
- xiii. Daleep Singh v. Smt. Magan, 1996 Cr LJ 190 (Raj).
- xiv. ILR (1939) Kant 277 : AIR 1939 Sind 208 ; AIR 1938 Sind 192 : 1939 AMLJ 41.
- xv. AIR 1952 VP 49 ; 1963 (2) Cr LJ 712 (Cal).
- xvi. 60 Bom LR 107 : AIR 1958 Bom 335 : 1958 Cr LJ 1134 : ILR (1958) Bom 1242. This case was reversed in AIR 1960 SC 1113 on a different point.
- xvii. Vadilal Panchal v. Dattatraya Dulaji Gha Digaonkar, (1961) 1 SCR 1 : AIR 1960 SC 1113 : 1960 Cri LJ 1499.
- xviii. Vadilal Panchal v. Dattatraya Dulaji Gha Digaonkar, (1961) 1 SCR 1 : AIR 1960 SC 1113 : 1960 Cri LJ 1499.
- xix. Dr. A.K. Bhattacharjee v. Shyamal Nag, 1999 Cr LJ 4763 (Gau).
- xx. Section 201 of the Code of Criminal Procedure.
 1. Abhijit Pawar vs. Hemant Madhukar Nimbalkar (2017) 3 SCC 528.
 2. Atul Kumar Agrawal vs. The State of Bihar 2008 (3) PLJR 662.

- xxi. Criminal Miscellaneous No.16384 of 2013, decided on 02-05-2014.
- xxii. Daya Shankar Prasad Shara vs. State of Bihar 2011(2) PLJR 63. Jageshwar Prasad Sah vs State of Bihar 2010(4) PLJR 808.
- xxiii. 2013 (2) PLJR 556; Abdul Raquib and Ors. vs. The State of Bihar. MANU/BH/1299/2011; Dhanpat Kumar vs. State of Bihar 2020 (1) PLJR 470; Kanhaiya Prasad vs. The State of Bihar (PATNA HC) : MANU/BH/0641/2015. Amar Nath Pandey vs. The State of Bihar 2017 (3) PLJR 247.
- xxiv Jayshree Ujwal Ingole vs. State of Maharashtra (2017) 14 SCC 571, (2010) 3 SCC 480 (Kusum Sharma vs. Batra Hospital); (2009) 3 SCC 1 (Martin F. D'Souza vs. Mohd. Ishfaq);
- xxv. Bihar Medical Service Institution and Person Protection Act, 2011, and Bihar Medical Service Institution and Person Protection RULES, 2018,
- xxvi. Brijnath Sahai v. Babu Lal: 1956 BLJR 575, and Jugeshwar Choudhary v. A Lakra 1966 BLJR 693,
- xxvii. Awdesh Kumar Mehta vs. State of Bihar MANU/BH/1259/2006]

