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EVIDENCE LAW

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I INTRODUCTION

THOUGH THE year 2010 witnessed no substantial change in the law of evidence through legislative intervention, the draft Criminal Law (Amendment) Bill, 2010 proposes to introduce certain amendments. This Bill proposes radical changes in law relating to rape, by amending the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (Cr PC) and the Evidence Act, 1872.

In the Evidence Act, the Bill proposes at making three changes. *Firstly*, it aims at inserting a new section 53A, which reads as follows:

> In a prosecution for an offence under section 376 or section 376A or section 376B or section 376C of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

Secondly, with regard to presumption as to the absence of consent in prosecution for sexual assault, the Bill aims at substituting certain words in section 114A with the following words:

> In a prosecution for sexual assault under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in his evidence before the court that he did not consent, the court shall presume that he did not consent.

Explanation.- In this section "sexual intercourse" shall mean any of the acts mentioned in clauses *(a)* to *(d)* of section 375 of the Indian Penal Code, 1860.

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Thirdly, the Bill proposes to amend the *proviso* to section 146 of the Evidence Act, 1872 as follows:

> Provided that in a prosecution for an offence under section 376 or section 376A or section 376B or section 376C of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his general immoral character, or as to his previous sexual experience with any person for proving such consent or the quality of consent..

Certain important developments were also visible through judicial interventions. Among these the decision of the Supreme Court in *Selvi* v. *State of Karnataka*[1] is a milestone in the year under the survey. The following section attempts to make an analysis through these developments.

II BURDEN OF PROOF AND DEFENCE OF INSANITY

The Supreme Court in *Sudhakaran* v. *State of Kerala*[2] held that to prove the benefit of the defence of insanity under section 84, IPC, the accused will have to prove that his cognitive faculties were so impaired as he was not in a position to know the nature of the act at the time of commission. In this case of killing the wife, the accused had taken the plea that he was suffering from *schizophrenia* and thus incapable of understanding the nature and consequences of the act performed by him. But the accused could not prove this plea because even at the time of murder he made sure that he did not hurt or discomfort his child. The court also relied on the fact that immediately after the murder, he told one of the witnesses that he was going to the police station and requested him to hold the child. The court, relying on the *ratio* of *Dahyabhai Chhganbhai Thakkar* v. *State of Gujarat*,[3] *Ratan Lal* v. *State of M.P*[4] and *M'Naghten's*,[5] held:[6]

> The appellant was capable of knowing the nature of the act and the consequences thereof on the date of the alleged incident. Whilst he had brutally and callously committed the murder of his wife, he did not cause any hurt or discomfort to the child. Rather he made up his mind to ensure that the child be put into proper care and custody after the murder. The conduct of the appellant before and after the incident

1 (2010) 7 SCC 263.
2 (2010) 10 SCC 582.
3 AIR 1964 SC 1563.
4 (1970) 3 SCC 533.
5 1843 RR 59 : 8 ER 718.
6 *Supra* note 2 at 594.

was sufficient to negate any notion that he was mentally insane, so as not to be possessed of the necessary *mens rea*, for committing the murder of his wife.

III *WIKIPEDIA* AS A SOURCE OF LAW AND PROOF OF RELATIONSHIP IN THE NATURE OF MARRIAGE'

In *D. Velusamy* v. *D. Patchaiammal*,[7] the Supreme Court while interpreting the phrase 'relationship in the nature of marriage' in the light of sections 2(f), 2(s), 3(a) and 3(iv)(a) of the Domestic Violence Act, 2005, held that this relationship which is akin to a common law marriage requires that the parties must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. The court also held that parties should also have a 'shared household' as defined in section 2(s) of the Domestic Violence Act. The apex court further stated that merely spending weekends or one night together does not constitute a 'domestic relationship' under section 2(f). Several parameters have to be satisfied in order to constitute relationships in the nature of marriage. The court held that relationship with a *keep* (a woman who is used by a man for sexual purposes) does not constitute relationship in the nature of marriage.

A brief analysis of the facts of the case reveals that in a petition filed by the respondent before the family court under section 125, Cr PC, she alleged that she was married to the appellant. She also alleged that since marriage the appellant and respondent had lived together for two or three years after which the appellant left the house and would visit the respondent occasionally. On the basis of this alleged marriage, she claimed maintenance from the appellant. The apex court 'assuming' that the respondent was not married to the appellant, went on discussing with the legality of 'domestic relationship in the nature of marriage'.

The court, relying on the definition of 'Common Law marriage' as given in *wikipedia* and relating it with the 'domestic relationship in the nature of marriage', identified the following as the requirements of such a relationship:[8]

(a) The couple must hold themselves out to society as being akin to spouses.
(b) They must be of legal age to marry.
(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses *for a significant period of time*.

7 (2010) 10 SCC 469.
8 *Id*. at 477.

Thereafter, the court held that to prove a "[*R*]*elationship in the nature of marriage* under the 2005 Act, the above mentioned requirements must be fulfilled and in addition the parties must have lived together in a *shared household* as defined in section 2(*s*) of the Act. Merely spending weekends together or a one night stand would not make it a *domestic relationship*."[8a]

IV PRESUMPTION UNDER S. 113-A, EVIDENCE ACT AND ITS LINK WITH SS. 498-A AND 306, IPC

In *Thanu Ram* v. *State of M.P*,[9] the question was regarding the element of instigation and cruelty in an offence under sections 107, 306 and 498A, IPC read with section 113-A of the Evidence Act. In the present special leave petition, the Supreme Court held that ordinarily a woman in an advanced stage of pregnancy would not commit suicide even when treated with cruelty. But only in extreme circumstances may a woman decide to take the life of herself and her unborn child. The facts of the case in brief were as follows: The deceased committed suicide within seven years of her marriage with the petitioner, that too when she was pregnant. Before her death, when she was in the deathbed, she had made a dying declaration to the *naib tahsildar*. Before making the dying declaration, she was examined by a doctor who testified that the deceased was in a fit mental condition to make the dying declaration. On the basis of this dying declaration, the petitioner and his parents were tried and convicted under sections 498A and 306, IPC. The trial court and the High Court also relied on section 113A of the Evidence Act.

The petitioners, before the Supreme Court, questioned the sustainability of convicting them under these sections on the basis of the aforesaid dying declaration. They urged that the courts below had failed to notice the main ingredient of the offence under section 306, IPC, namely the question of abetment in the commission of such suicide, which has been spelt out in section 107, IPC. The petitioner also pointed out that "[I]n order to abet the doing of a thing, the abettor must be found to have instigated any person to do such thing or engage with one or more person or persons in any conspiracy for the doing of that thing."[10] The petitioner further contended that "[T]he meaning of the expression *cruelty* used in Section 498-A IPC cannot be linked up with an offence under Section 306 IPC, unless the *intention* as mentioned in Section 107 IPC or the presumption available under Section 113-A of the Evidence Act, were duly satisfied." It was further submitted that in the instant case, there was no evidence on record to indicate that he had, in any way, instigated the deceased with the intention of making her commit suicide and, thus, the charge under section 306, IPC cannot be sustained.

8a *Id.* at 477.
9 (2010) 10 SCC 353.
10 *Id.* at 356.

The petitioners also pointed out a contradiction in the evidence related to dying declaration as given by two prosecution witnesses. When the *naib tahsildar*, who recorded the declaration, stated that it was made in *Chattisgarhi* (a regional language) and was translated by him to Hindi, the doctor who was at the spot had said that it was made and recorded in Hindi. The petitioner referred to a three-judge bench decision of the apex court in *Ramesh Kumar* v. *State of Chhattisgarh*,[11] wherein it was held that merely because an accused was found guilty under section 498A, IPC, he should not necessarily be held to be guilty under section 306, IPC on the basis of the same evidence. It was held that in order to make out a case under section 306, IPC, the requirements of section 113-A of the Evidence Act would have to be satisfied, having particular regard to the element of instigation and that there must be a reasonable certainty to incite the conspiracy. Reliance was also placed on the *ratio* of *Amalendu Pal* v. *State of W.B*,[12] wherein the Supreme Court had held that in the absence of any direct evidence to show that the accused had by his acts instigated or provoked the deceased to commit suicide, the offence could not be brought within the ambit of section 306, IPC, although the conviction under section 498A, IPC was upheld. The counsel for the petitioners also contended that in the absence of any proven intention on the part of the petitioner to instigate the deceased into committing suicide by his actions, his conviction under section 306 IPC could not be sustained and was liable to be set aside, even if the evidence adduced made out a case under section 498-A IPC.[13] These contentions were strongly resisted by the state, arguing that nothing had been elucidated in the trial court by the defence from the evidence of *naib tahsildar* and the doctor, which could cause the evidence of the said witnesses to be disbelieved. Instead, the trial court had observed that the dying declaration of the deceased had been recorded correctly prior to her death. The counsel for the state also submitted that the acts of cruelty committed by the accused against the deceased had been clearly demonstrated from the evidence of the parents and brothers of the deceased. It was also contended that the said acts of mental, physical abuse and cruelty, were sufficient to drive a young woman to commit suicide within 7 years of her marriage, notwithstanding the fact that she was six months' pregnant and this fact was known to the petitioner. It was submitted that the intention of the petitioner to instigate and/or provoke the victim into committing suicide was writ large on the available evidence and the judgment of conviction and sentence of the trial court, which was affirmed by the High Court, did not warrant any interference.

11 (2001) 9 SCC 618.
12 (2010) 1 SCC 707.
13 *Id*. at 360.

The apex court held that the differences between the provisions of sections 498A[14] and 306, IPC,[15] in the light of section 107, IPC and section 113-A of the Evidence Act assume importance. The question of law was whether in the absence of any intention on the part of appellant to instigate the deceased to commit suicide, will it amount to cruelty within the meaning of section 498A, IPC alone or also within the meaning of section 107, IPC[16] and section 113-A of the Evidence Act.[17] The court analysed these questions on the presumption that a woman in an advanced stage of pregnancy would not commit suicide even when treated with cruelty except for extreme circumstances. Regarding the question of ambiguity in the dying declaration, the court said that there was no ambiguity or irregularity as far as the dying declaration was concerned and it had been stated in clear and simple language

14 Section 498-A. *Husband or relative of husband of a woman subjecting her to cruelty*.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
Explanation.—For the purposes of this section, 'cruelty' means—
(*a*) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(*b*) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

15 Section 306. *Abetment of suicide*.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

16 Section 107. *Abetment of a thing*.—A person abets the doing of a thing, who—*First*.—Instigates any person to do that thing; or *Secondly*.—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 in order to the doing of that thing; or *Thirdly*.—Intentionally aids, by any act or illegal omission, the doing of that thing.
Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act

17 Section 113-A. *Presumption as to abetment of suicide by a married woman*.—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 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.
Explanation.—For the purposes of this section, 'cruelty' shall have the same meaning as in Section 498-A of the Penal Code (45 of 1860).

that the victim had been treated with both mental and physical cruelty and the victim had stated quite candidly how she poured kerosene on her body and set herself on fire. The court, relying on other prosecution witnesses, further clarified that the element of instigation as understood within the meaning of section 107, IPC was duly satisfied in the present case in view of the provisions of section 113-A of the Evidence Act, 1872.[18] The court held that depending opon the circumstances of each case, the presumption as indicated by section 113-A is that such suicide had been abetted by her husband or by such relative of her husband.

The court, applying the logic of the explanation to section 113-A of the Indian Evidence Act, which indicates that the term cruelty would have the same meaning as in section 498A, IPC, further held that if the degree of cruelty was such as to warrant a conviction under section 498A, IPC, the same may be sufficient for a presumption to be drawn under section 113-A of the Evidence Act in harmony with the provisions of section 107, IPC. Replying to the appellants contention about the differences in relation to the provisions of section 498A and section 306, IPC, the court held that the big difference between sections 306 and 498A, IPC was that of intention. Dismissing the petition, the court further held:[19]

> Section 113-A of the Evidence Act establishes a link between an offence under Sections 498-A, 107 and 306 IPC, thereby permitting the court to presume the commission of an offence under Section 107 IPC on the basis of evidence adduced to prove an offence under Section 498-A IPC. As mentioned hereinbefore, the evidence of [Prosecution Witnesses] are sufficient to establish the prosecution case against the petitioner under Section 498-A IPC and Section 306 IPC.

V PROOF OF DISABILITY IN MOTOR ACCIDENT CLAIM AND ROLE OF TRIBUNAL WHEN MEDICAL EVIDENCE IS TENDERED

In *Raj Kumar* v. *Ajay Kumar*,[20] the question was regarding assessment of the extent of permanent disability. The court held that the tribunal should not be a silent spectator when medical evidence was tendered in regard to the injuries and their effect, in particular the extent of the permanent disability. Sections 168 and 169 of the Motor Vehicles Act, 1988 make it evident that the

18 It provides for a presumption to be arrived at regarding abetment of suicide by a married woman and certain criteria. The first criterion is that such suicide must have been committed within 7 years from the date of the victim's marriage. The second condition is that the husband or such relative of the husband had subjected the victim to cruelty which led to the commission of suicide by the victim.

19 *Supra* note 9 at 360.

20 2010 (12) SCALE 265.

tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and a seeker of truth who is required to 'hold an enquiry in to the claim' for determining the 'just compensation'. The tribunal should, therefore, take an active role to ascertain the true and correct position so that it can assess the 'just compensation'. While dealing with personal injury cases, the tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment for understanding the medical evidence and assessing the physical and functional disability. The tribunal may also keep in view the first schedule to the Workman's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries in the case of workman. The court also held that while a doctor was giving medical evidence, it might use many technical medical terms. The tribunal should instruct him to state, in addition, the simple non-medical terms that explain the nature and the effect of the injury. If a doctor gives evidence as to the percentage of permanent disability, the tribunal has to seek clarification as to whether such percentage of disability was the functional disability with reference to the whole of the body or with reference to a limb. If the percentage of permanent disability was stated with reference to a limb, the tribunal will have to seek the doctor's opinion as to whether it was possible to deduce the corresponding functional permanent disability with reference to the whole body and, if so, the percentage.

VI BURDEN OF PROOF IN A CASE RELATING TO DISMISSAL OF A LABOURER WITHOUT HOLDING A DOMESTIC INQUIRY

A labourer was dismissed from the service on the allegation that he had participated in a tool down strike without holding a domestic inquiry. Against this, at the first instance, the labour court held that it was for the management to prove, by adducing cogent evidence, that order of dismissal passed against workman was legal. But later, on a motion moved by the management, the labour court shifted the onus to prove from the management to the workman. Thereafter, the High Court also stood with the second decision of the labour court. Against this, the Supreme Court decided in *Amar Chakravarty* v. *Maruti Suzuki India Ltd*.[21] that the onus would lie on the management. The court held:[22]

> Whilst it is true that the provisions of the Evidence Act, 1872 per se are not applicable in an industrial adjudication, it is trite that its

21 2010 (12) SCALE 536.
22 *Id*., para. 13.

> general principles do apply in proceedings before the Industrial Tribunal or the Labour Court, as the case may be… In any proceeding, the burden of proving a fact lies on the party that substantially asserts the affirmative of the issue, and not on the party who denies it…. Therefore, it follows that where an employer asserts misconduct on the part of the workman and dismisses or discharges him on that ground, it is for him to prove misconduct by the workman before the Industrial Tribunal or the Labour Court, as the case may be, by leading relevant evidence before it and it is open to the workman to adduce evidence contra. In the first instance, a workman cannot be asked to prove that he has not committed any act tantamounting to misconduct.

VII WITHDRAWAL OF PARDON BY THE PROSECUTION: THEREAFTER CAN THE CO-ACCUSED CROSS-EXAMINE HIM?

State of Maharashtra v. *Abu Salem Abdul Kayyum Ansari*[23] was a case under sections 133 and 154 of the Evidence Act, 1872. The question of law in this case was whether the accused had a right to cross-examine an accomplice who had been tendered in evidence by the prosecution as an approver but later on the pardon tendered to him was withdrawn on a certificate of the public prosecutor under section 308, Cr PC. The Supreme Court held that the principle of tendering a pardon to an accomplice was to unravel the truth in a grave offence so that guilt of the other accused persons in a crime could be brought home. The court was of the opinion that, in the instant case, the court below seriously erred in treating the concerned respondent as hostile witness. It failed to consider that pardon granted and accepted by him was conditional pardon in as much as it was on condition of his making true and full disclosure of all facts concerning commission of crime and once pardon granted to him stood forfeited his position was again relegated to that of an accused from that of a witness. Thereafter, there was no justification in permitting the defence to cross-examine him.

VIII STANDARD OF PROOF IN CRIMINAL CONTEMPT PROCEEDINGS IS THE SAME AS THAT IN CRIMINAL PROCEEDINGS

The brief facts of the case in *R.S. Sujatha* v. *State of Karnataka*[24] reveal that in a proceeding initiated by the state against a civil servant on the charges of corruption, the civil servant had approached the central administrative

23 (2010) 10 SCC 179.
24 2010 (12) SCALE 556.

tribunal for quashing the said charges. The tribunal, instead of adjudicating on the merits of the case, initiated contempt of court proceedings holding that the civil servant had made some incorrect statements in the 'original application' filed by her intentionally. Thereafter, she was held guilty of perjury as well as criminal contempt of the which imposed punishment of imprisonment and fine. The apex court on appeal held that the tribunal had failed to appreciate that criminal contempt proceedings were quasi-criminal in nature and burden and standard of proof required was the same as required in criminal cases. The court held that an alleged contemnor cannot be punished without proving the case according to the settled principles of evidence and definitely not merely on conjectures and surmises.

IX STANDARD OF PROOF IN BRIBE CASES

In *C.M. Sharma* v. *State of A.P.*[25] the question of law was whether mere recovery of currency notes from the accused would constitute the offence of illegal gratification or is to be proved that the accused voluntarily accepted the money knowing it to be bribe. The High Court had convicted the appellant for offences under section 7 and 13 (1) (d) with section 13(2) of the Prevention of Corruption Act, 1988. Allegedly, the appellant had demanded money from a contractor as he had passed his bills. When the contractor went along with shadow-witness on the day for payment of bribe, the appellant had asked shadow-witness to leave his chamber. Thereafter, the appellant made the demand for payment of illegal gratification from the contractor. There were also other evidence like positive sodium carbonate test report, which proved his guilt. On the basis of the evidence, the court held:[26]

> [M]ere recovery of currency notes itself does not constitute the offence under the Act, unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be bribe. In the facts of the present case, we are of the opinion that both the ingredients to bring the act within the mischief of Sections 7 and 13(1)(d)(ii) of the Act are satisfied.

X PRESUMPTION OF ADOPTION IF DONE ACCORDING TO PREVALENT CUSTOMS

The Supreme Court in *Atluri Brahmanandam (d), Thr. LRs*. v. *Anne Sai Bapuji*[27] held that if a person adopts a child according to the customs prevalent at that time, the presumption would arise in favour of such adoption.

25 2010 (12) SCALE 381.
26 *Id.*, para. 15.
27 2010 (12) SCALE 157.

The respondent was the adopted son of one late Anne Seetharamaiah and the fact remained unchallenged that he was adopted when he was more than 15 years of age. To prove the validity of the adoption, he was relying upon the exception of a valid custom as provided in section 10(iv) of the Hindu Adoptions and Maintenance Act, 1956.[28] He could also prove the existence of such a custom by leading cogent and reliable evidence. Dismissing the appeal, the Supreme Court held that since custom related to the adoption was also recorded in a registered deed of adoption, court had to presume that adoption had been made in compliance with provisions of Act. The court held that if any adoption was made according to the customs prevalent at that time, the presumption would arise in favour of such adoption.

XI APPLICABILITY OF S. 78(6) OF THE EVIDENCE ACT

The appellant and few others in *Monica Bedi* v. *State of A.P.*[29] were convicted for the charges of criminal conspiracy for their involvement in securing a passport by the appellant in a false name and address. The trial courts and the High Court appreciated the evidence available on record and were of the opinion that these evidences were cogent and consistent which in clear and categorical terms proved the involvement of all the accused in the crime. On appeal to the Supreme Court, the counsel for the appellant contended that the prosecution did not submit the original of the passport in question. Instead a photostat copy was submitted and it was an inadmissible document as it was not authenticated by the legal keeper as provided under section 78(6)[30] of the Indian Evidence Act. The submission was that no prosecution could be launched based on such inadmissible document. The High Court, after elaborate consideration of the matter, came to the conclusion that section 78(6) of the Evidence Act dealt with public document of any other class in a foreign country. In the present case, the original of the passport in question was issued by the competent authorities in India and, therefore, section 78(6) had no application whatsoever to the facts of this case.

28 Section 10, "*Persons who may be adopted*.- No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely- (i) he or she is a Hindu; (ii) he or she has not already been adopted; (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption; (iv) *he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption*."

29 2010 (11) SCALE 629.

30 Section 78. Proof of other official documents: The following public documents may be proved as follows -. ...(6) Public documents of any other class in a foreign country,- *by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of an Indian consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country.*

XII EVIDENTIARY VALUE OF DYING DECLARATION NOT IN QUESTION ANSWER FORM

In *Om Pal Singh* v. *State of U.P.*,[31] the trial court had convicted the accused for murder based on the testimony of the eyewitnesses corroborated by the medical evidence and the dying declaration. The High Court had also confirmed the judgement of the trial court. On appeal to the Supreme Court, the appellant contended that the dying declaration cannot be accepted as a valid piece of evidence because it was not in a question and answer form and no doctor had given a certificate certifying the fitness of the victim to make a dying declaration. Rejecting these contentions, the apex court held that "merely because, it is not in question and answer form would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration…The statement made by the injured is candid, coherent and consistent. We see no reason to disbelieve the same."[32]

XIII UNLAWFUL ASSEMBLY: CONVICTION ON THE BASIS OF DEPOSITION OF A SOLE EYEWITNESS

The question whether an accused charged under section 149 for unlawful assembly could be convicted merely on the basis of eyewitness came up for consideration in *Ranjit Singh* v. *State of Madhya Pradesh*[33] in which the High Court had dismissed the appeals against judgment and order passed by session's court convicting the appellant. On appeal, the apex court held that in a case involving an unlawful assembly with a very large number of persons, there was no rule of law that required that there could not be any conviction on testimony of a sole eye-witness, unless that court was of view that testimony of such sole eye-witness was not reliable. The court held:[34]

> Though, generally it is a rule of prudence followed by the courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident in a fit case the court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner.

31 2010 (11) SCALE 621.
32 *Id*., para. 22.
33 AIR 2011 SC 255.
34 *Id*., para. 22.

XIV INTERESTED WITNESSES

The accused in *Myladimmal Surendran* v. *State of Kerala*[35] were convicted by the trial court for unlawful assembly and murder under section 149 and 302, IPC and the High Court had confirmed the conviction of the accused. In appeal before the Supreme Court, the question was whether the High Court was justified in convicting the appellant on the basis of the testimony by the wife of the victim. The facts revealed that the evidence given by the wife of the deceased was unimpeachable and could not be discarded. When the appellants submitted that the evidence given by the wife cannot be the basis of conviction since she was an interested witness, the apex court held that merely because she happened to be the wife of the deceased could not justify her being branded as an interested witnesses. Moreover, evidence of wife was followed by consistent evidence given by other witnesses and dying declaration made by the victim further corroborated it. The court relied on the decision in *State of Rajasthan* v. *Smt. Kalki*,[36] where in the Supreme Court had held:[37]

> 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 eye witness in the circumstances of a case cannot be said to be 'interested' in the instant case PW1 had no interest in protecting the real culprit, and falsely implicating the respondents.

The court further criticised the attitude of casually branding material witnesses to crimes of violence as chance witnesses. The court emphasized the *ratio* of *Sachchey Lal Tiwari* v. *State of U.P.*[38] where it was observed as follows:[39]

> Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is

35 AIR 2010 SC 3281.
36 (1981) 2 SCC 752.
37 *Id.* at 753.
38 (2004) 11 SCC 410.
39 *Id.* at 413.

> borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence.

XV PROOF OF *POSSESSION* AND *CONSCIOUS POSSESSION* OF CONTRABAND ARTICLES

Dehal Singh v. *State of Himachal Pradesh*,[40] was a case registered under sections 20, 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellant had been convicted under section 20 of Act by the trial court. Thereafter, the High Court had dismissed the appeal against the order of conviction. In the present appeal before the Supreme Court, it was held that that section 35 of the NDPS Act recognizes that once possession was established, the court could presume that the accused had culpable mental state, meaning thereby that he had possession consciously. A presumption of conscious possession was available under section 54 of the NDPS Act, which provided that the accused might be presumed to have committed the offence unless he had accounted for the possession of contraband satisfactorily. However, in this case, the factual scenario revealed that not only the possession but also a conscious possession had been established. The court held:[41]

> Both the appellants have been found travelling in the car from which Charas was recovered and, therefore, they were in possession thereof. They knew each other. They were not travelling in a public transport vehicle. Distinction has to be made between accused travellingby public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognizes that once possession is established the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband.

40 2010 Cri LJ 4715.
41 *Id.*, para. 22.

XVI CONDUCTING TEST IDENTIFICATION PARADE IN HASTY MANNER

The facts of *C. Muniappan* v. *State of Tamil Nadu*[42] reveal that the accused were allegedly members of a mob consisting of approximately 150 people, burnt a bus containing students of Tamil Nadu Agricultural University and thereby murdered three girl students. The trial court convicted the accused under section 4 of the Tamil Nadu Property (Prevention of Damage & Loss) Act, 1992 read with 114, IPC and section 302, IPC. The High Court had confirmed the conviction. The question raised in appeal by the appellants was regarding validity of test identification parade conducted through which they were identified. The court held:[43]

> Test Identification Parade is a part of the investigation and is very useful in a case where the accused are not known before-hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court. The Test Identification Parade provides for an assurance that the investigation is proceeding in the right direction and it enables the witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them at the time of commission of offence. The accused should not be shown to any of the witnesses after arrest, and before holding the Test Identification Parade, he is required to be kept "baparda".

Thereafter, the counsel appearing for the appellants, raised an objection that the entire proceeding of identification parade was conducted in full haste and, thus, could not be treated to be a proper identification. It was contended that the identification parade had been concluded within a short span of 2 hours and 25 minutes. Eighteen witnesses were there, having three rounds each. Therefore, one round was completed in three minutes. With regard to this contention, the court held that the trial courts had gone through this aspect in detail. The judicial magistrate who conducted the test identification parade was examined in the court. From his examination, it was evident that the jail authorities as per his direction had made all preparations and arrangements in advance. Arrangements of standing of the accused along with other inmates in jail of the same height and complexion had already been made. Most importantly, the Supreme Court observed that "[F]or reasons best known to the defence, no question had been asked to the said Judicial Magistrate (PW.89) in his cross-examination as to how he could conclude the said

42 AIR 2010 SC 3718.
43 *Id*., para 36.

proceedings within such a short span of time. Thus, the submission is not worth consideration."[44]

XVII CONVICTION ON THE BASIS OF THE REPORT OF THE HANDWRITING EXPERT, BUT WITHOUT EXAMINING THE EXPERT

In *Keshav Dutt* v. *State of Haryana*,[45] the trial court had convicted the appellant under section 13(1)(d) of the Prevention of Corruption Act for the alleged demand of bribe by him and other accused. This decision of the trial court was affirmed by the High Court. In the appeal to the Supreme Court, it was held that the appellant neither received the money nor was he present at the spot from where the other accused were apprehended. It was only the report of the handwriting expert that connected the appellant with the offence on account. The report of the handwriting expert stated the communication demanding bribe was in his handwriting. But the handwriting expert was not examined in the court. So the question of law was whether the opinion of a handwriting expert could be admitted in evidence without examining him. The court held that whenever the trial court or High Court chose to rely on the report of the handwriting expert, it ought to have examined the expert in order to give an opportunity to the accused to cross-examine him.

XVIII PICKING UP SENTENCES FROM *HERE AND THERE* FROM THE TESTIMONY OF WITNESSES BY THE HIGH COURT

In *State of U.P.* v. *Krishna Master*,[46] the accused were charged with murder under section 302, IPC. The trial court had convicted them with capital punishment. But the High Court reversed the decision of the trial court and acquitted them. On appeal, the Supreme Court held that the High Court recorded reasons for acquittal of the respondents which were not borne out from record and quite contrary to evidences adduced by reliable eyewitnesses. The High Court had not taken into consideration full text of evidence adduced by witnesses and picked up sentences here and there from testimony of witnesses to come to a particular conclusion. The court held that it was not justified for the High Court to upset well reasoned conviction of the respondents recorded by the trial court. But since the incident had taken place 20 years ago, to sentence the respondents to death after their acquittal was not justified. Hence, the apex court in the interest of justice sentenced the respondents with rigorous imprisonment for life instead of capital punishment.

44 *Id.* at para 40.
45 (2010) 9 SCC 286.
46 AIR 2010 SC 3071.

XIX USING OF DNA TEST TO DETERMINE THE PATERNITY OF A CHILD

In *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women*,[47] the question related to the paternity of a child in a matrimonial dispute that was pending before a district court. The High Court *suo motu* directed a DNA test to be conducted in this case. The important question of law before the Supreme Court was whether the High Court was justified in issuing direction for DNA test of the child and the appellant, specially when the matrimonial dispute was pending before a district forum. The Supreme Court held that where the paternity of a child was in issue before the court, the use of DNA was an extremely delicate and sensitive aspect and the court can give any order for DNA only if a strong *prima facie* case was made out. It was further held that the courts must be cautious in using scientific tools, which might result in the invasion of right to privacy of an individual. The court opined that if scientific tools were used without caution it may not only be prejudicial to the rights of the parties but may have devastating effect on the child. The court further held that when there was an apparent conflict between the right to privacy of a person, *i.e.* not to submit himself forcibly to medical examination and the duty of the court to find out the truth, the court must exercise its discretion only after balancing the interests of the parties. The court held:[48]

> One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed.

47 AIR 2010 SC 2851.
48 *Id.*, para. 13.

XX NARCO ANALYSIS, POLYGRAPH AND BEAP: WHETHER PERSONAL TESTIMONY?

In *Selvi* v. *State of Karnataka*,[49] the question of law related to the constitutionality of involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and brain electrical activation profile (BEAP) test for the purpose of investigating criminal cases in the light of fundamental rights available to the citizens under article 20(3) of the Constitution of India including the accused persons, suspects or witnesses in an investigation who have been subjected to these tests without their consent. The Supreme Court held that compulsory administration of the above-mentioned techniques violates the 'right against self-incrimination'. The court was of the opinion that the scope of article 20(3) extends to the investigative stage in criminal cases and when read with section 161(2), Cr PC, it protects the accused persons, suspects as well as witnesses who are examined during investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects a person's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. The court further stated that article 20(3) aims at preventing the forcible 'conveyance of personal knowledge that is relevant to the facts in issue.' The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence.

Further, the court also observed that compelling someone to undergo these tests violates the standard of 'substantive due process', which is the basis of personal liberty and right to life. Such a violation will occur irrespective of whether these techniques were forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The court, therefore, held that these techniques cannot be read into the statutory provisions which enable medical examination during the investigation in a criminal case. The Supreme Court held that "no individual should be forcibly subjected to undergo these tests'.

With regard to the question whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses, the court analysed the issue in detail. It referred to the settled position that the protective scope of article 20(3) read with section 161(2), Cr PC was available only against compulsory extraction of oral testimony. However, the compulsory extraction of material evidence lay outside the protective scope of article 20(3) in the case of documentary evidence. The court also opined that even an oral or written testimony could be required

49 (2010) 7 SCC 263.

under compulsion if it was to be used for the purpose of identification or comparison with materials and information that was already in the possession of the investigators.

The court opined that a narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the 'right against self-incrimination'. But at the same time, the results obtained from polygraph examination or a BEAP test were not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a 'positive volitional act' on the part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and, thereby, excluded from the protective scope of article 20(3). The court held that even though the actual process of undergoing a polygraph examination or a BEAP test was not the same as that of making an oral or written statement, the consequences were similar. By making inferences from the results of these tests, the examiner was able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests were different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses were directly correlated to mental faculties. Thus the court held:[50]

> [T]he results obtained from tests such as polygraph examination and the BEAP test should also be treated as "personal testimony", since they are a means for "imparting personal knowledge about relevant facts". Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narco analysis technique, polygraph examination and the BEAP test) come within the scope of "testimonial compulsion", thereby attracting the protective shield of Article 20(3).

XXI CONCLUSION

The analysis of the judicial decisions exposes the momentous contributions made by the Supreme Court of India in the development of the law of evidence during 2010. The law of evidence for its dynamic nature and unique relationship with the other branches of law like the Constitution and human rights has been playing a vital role in ensuring the supremacy of rule of law. This year also, as in the past, the court maintained its proclivity to the established principles of evidence law while ascertaining the element of

50 *Id.* at 358.

fairness in the criminal trial. This can be further seen in decisions on some of the important topics such as burden of proof, evidentiary value of narco analysis and dying declaration. In this context, it worth noting that the survey makes obvious the general trend that the procedural due process is no less important than the substantive due process, especially in the field of administration of criminal justice. A few other decisions prove the fact that the judicial process involved in the criminal adjudication is more in the nature of balancing the conflicting rights and varying interests of the community at a given point of time.