17
EVIDENCE LAW

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I INTRODUCTION

NEW DEVELOPMENTS in science and technology, especially in biotechnology and information technology, have influenced the law of evidence positively as well as negatively. The new manifestations of these developments are not just confined to any legal system in particular, but are visible globally and are challenging the established norms and procedures. The only difference is that a few legal systems are better equipped in dealing with such situations whereas others are not. In some of them, the investigating officers and the judicial officers have been given adequate training and are supplied with the latest and most modern amenities whereas in others they are under trained and are still meddling with the outdated technology. In the year under survey, the existing legislations were not amended, but there were a few judicial decisions that brought in clarity to the legal lacunae that existed. The survey would be examining those judicial pronouncements to analyse the consequent developments.

II DEPOSITIONS OF A RAPE VICTIM: SHOULD IT BE TREATED AT PAR WITH THAT OF AN ACCOMPLICE OR THAT OF COMPLAINANT?

The question of law, that came up before the Supreme Court in *Mohd. Imran Khan* v. *State (Govt. NCT of Delhi)*[1] was whether the depositions of the victim of a crime of rape should be treated at par with that of an accomplice or a complainant? The court opined that a rape victim was not an accomplice to the crime but was a victim of another person's lust. A victim of rape stands at a higher pedestal than an injured witness in other crimes because of the fact that she suffers also from an emotional injury and, therefore, the evidence of the victim need not be tested with the same amount of suspicion as that of an accomplice. In the court's opinion, the Evidence Act nowhere says that the evidence of a rape victim should be corroborated in material particulars. The court stated that the victim was a competent witness under section 118 of the Evidence Act and her evidence must receive the same weight as that attached to an injured in cases of any other physical violence. The degree of care and caution that must be attached in the evaluation of her evidence

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1 (2011) 10 SCC 192.

must be the same as that of an injured complainant or witness and no more. The court said:[2]

> 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 for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

The court further said that if the victim does not have a strong motive to falsely implicate the person charged, courts should ordinarily accept her evidence without any further corroboration. It further held:[3]

> The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

III ANNUAL RETURNS OF A COMPANY: IS IT A PUBLIC DOCUMENT?

The decision of the apex court in *Anita Malhotra* v. *Apparel Export Council*[4] involves an analysis under section 138 of the Negotiable Instruments Act which came up in a case filed against a company and its directors. The appellant who was a director in the accused company had resigned from it in the year 1998 duly complying with all the requirements. Her resignation was also duly mentioned in the annual returns of the company, which was filed with the registrar of companies. Thereafter, in the year 2004 one of the cheques given by the accused company to the present respondent was dishonoured. The respondent filed a case under section 138 of Negotiable Instruments Act against the company and the appellant. The appellant had approached the High Court of Delhi for quashing the said criminal complaint. Before the high court the appellant submitted a copy of the annual return of the company as a proof of resignation, which was rejected by the high court as a proof to substantiate the resignation. Thereafter, she moved the Supreme Court under article 136 of the Constitution. Before the apex court, the appellant contended

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2 *Id.* para 16.

3 *Ibid.* To come to this conclusion the court relied on decisions like *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, AIR 1990 SC 658; *State of Punjab* v. *Gurmit Singh*, AIR 1996 SC 1393; *State of U.P.* v. *Pappu @ Yunus*, AIR 2005 SC 1248; *Wahid Khan* v. *State of Madhya Pradesh* (2010) 2 SCC 9 and *Vijay @ Chinee* v. *State of M.P.* (2010) 8 SCC 191.

4 2011 (12) SCALE 471

that annual return of the company was a public document in terms of section 74(2) of the Indian Evidence Act read with sections 159, 163 and 610 of the Companies Act and the high court ought to have accepted the same as a valid document and quashed the criminal proceedings against the appellant. Allowing the appellant's case the court held:[5]

> Inasmuch as the certified copy of the annual return…is a public document, more particularly, in view of the provisions of the Companies Act, 1956 read with section 74(2) of the Indian Evidence Act, 1872, we hold that the appellant has validly resigned from the Directorship of the Company even in the year 1998 and she cannot be held responsible for the dishonour of the cheques issued in the year 2004.

IV EVIDENCE OF AN ACCOMPLICE WHO HAS NOT BEEN PUT ON TRIAL: CAN IT BE PROVED AGAINST OTHER ACCUSED?

Can the deposition of an accomplice be relied upon without making him an accused and putting him to trial? This was the specific question answered by the Supreme Court in *Prithipal Singh* v. *State of Punjab*.[6] The court while answering the question in the affirmative held that evidence in such a circumstance is required to be considered with sufficient care and caution. Section 114 illustration (b) embodies a rule of prudence cautioning the court that it may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The court said: [7]

> The legislature in its wisdom used the word 'may' and not 'must' and, therefore, the court does not have a right to interpret the word 'may' contained therein as 'must'. The court has to appreciate the evidence with caution and take a view as to the credibility of the evidence tendered by an accomplice. In case evidence of an accomplice is found credible and cogent, the court can record the conviction based thereon even if uncorroborated.

The court further held: [8]

> An accomplice who has not been put on trial is a competent witness as he deposes in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.

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5 *Id.* para 16.

6 2011 (12) SCALE 411 (1).

7 *Id.* para 19. While arriving at this conclusion the court relied on *K. Hasim* v. *State of Tamil Nadu*, AIR 2005 SC 128.

8 *Id.* para 21. The court relied on *Chandran alias Manichan alias Maniyan* v. *State of Kerala* (2011) 5 SCC 161 and *Laxmipat Choraria* v. *State of Maharastra*, AIR 1968 SC 938.

V EVIDENTIARY VALUE OF THE TESTIMONY OF AN ACCOMPLICE: DIFFERENCE BETWEEN PRACTICE AND THEORY

Similarly, in *Mrinal Das* v. *The State of Tripura*[9] the question of law was regarding the evidentiary value of the testimony of accomplice/approver, eyewitnesses and hostile witnesses under sections 114 and 133 of the Indian Evidence Act. The court opined that a conviction is not illegal merely because it is based on the uncorroborated testimony of an approver though the practice differs. In practice the approach is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars. This difference between practice and theory is because of the fact that the evidence of an approver is regarded *ab initio* open to grave suspicion. The court held that unless this suspicion is removed there could be no conviction based on his evidence. The court after analysing the ambit of section 133 of the Evidence Act along with illustration (b) to section 114 of the Evidence Act as interpreted by the same court in *Bhiva Doulu Patil* v. *State of Maharashtra*[10] held that an accomplice/approver is a competent witness but as he has participated in the commission of the offence, his evidence must be corroborated in material particulars by other independent evidence. Similarly, evidence of eyewitnesses and the hostile witnesses can be given credibility only if it is corroborated in material particulars.

VI EVIDENCE IS TO BE WEIGHED AND NOT TO COUNTED

In *Takdir Samsuddin Sheikh* v. *State of Gujarat*,[11] the apex court reiterated the general rule that the court can and may rely on the testimony of a single witness if he is wholly reliable as per section 134[12] of the Evidence Act. But if there are doubts about his testimony, the court should insist on corroboration. The court said:[13]

> …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.

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9 2011 (10) SCALE 55.

10 AIR 1963 SC 599. Reiterated the position in *Mohd. Husain Umar Kochra* v. *K.S. Dalipsinghji* (1969) 3 SCC 429; *Sarwan Singh S/o Rattan Singh* v. *State of Punjab*, AIR 1957 SC 637; *Ravinder Singh* v. *State of Haryana* (1975) 3 SCC 742; *Abdul Sattar* v. *Union Territory*, *Chandigarh*, 1985 (Supp) SCC 599; *Suresh Chandra Bahri* v. *State of Bihar*, 1995 Supp (1) SCC 80; *Ramprasad* v. *State of Maharashtra*, AIR 1999 SC 1969; *Narayan Chetanram Chaudhary* v. *State of Maharashtra* (2000) 8 SCC 457; *K. Hashim* v. *State of Tamil Nadu* (2005) 1 SCC 237; *Sitaram Sao @ Mungeri* v. *State of Jharkhand* (2007) 12 SCC 630; *Sheshanna Bhumanna Yadav* v. *State of Maharashtra* (1970) 2 SCC 122; *Dagdu* v. *State of Maharashtra* (1977) 3 SCC 68 and *Rampal Pithwa Rahidas* v. *State of Maharashtra*, 1994 Supp (2) SCC 73.

11 (2011) 10 SCC 158.

12 S.134 of Indian Evidence Act says that no particular number of witnesses is required in any case for the proof of any fact.

13 *Supra* note 11, para 10. The court relied on *Vadivelu Thevar* v. *The State of Madras*, AIR 1957 SC 614; *Sunil Kumar* v. *State Govt. of NCT of Delhi* (2003) 11 SCC 367; *Namdeo* v. *State of Maharashtra* (2007) 14 SCC 150 and *Bipin Kumar Mondal* v. *State of West Bengal*, AIR 2010 SC 3638.

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.

VII PROOF OF AGE: EVIDENTIARY VALUE OF HOROSCOPE

The question in the *Registrar General, High Court of Madras* v. *M. Manickam*[14] was regarding alteration of date of birth in SSLC book after the expiry of the stipulated period of five years[15] based on his date of birth in the horoscope. The court held that an application for altering of date of birth is a very important responsibility to be discharged because there is a general tendency amongst the employees to lower their age by altering their date of birth to lengthen their service career. It was held that to make any such alterations, there must be strong, cogent and reliable evidence in support of the contention that the date of birth entered in the service records or in the SSLC certificate was wrongly entered by mistake. Regarding the evidentiary value of horoscope, relying on *State of Punjab* v. *Mohinder Singh*[16] the court held that horoscope is a very weak piece of evidence to prove age of a person. A heavy onus lies on the person who wants to prove its authenticity and for doing so the maker who is having special means and knowledge as regards authenticity of the date, time etc. should be examined.

VIII MARK LIST AND SCHOOL LEAVING CERTIFICATE AS PROOF OF AGE

Shah Nawaz v. *State of U.P.*[17] was another case with a similar question of law. The question was regarding proof of age of a juvenile in conflict with law under rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007. The question was whether the appellant was a juvenile on the date of the occurrence and how his age could be proved? The court held that an entry relating to date of birth in the mark sheet and school leaving certificate were sufficient evidence for determining the age of the accused person.

IX HONOUR KILLINGS PROVED ON CIRCUMSTANTIAL EVIDENCE: WHAT COULD BE THE PROOF OF MOTIVE?

In *Bhagwan Dass* v. *State (NCT) of Delhi*[18] the court reiterated the settled position[19] that a person can be convicted on circumstantial evidence provided the

14 AIR 2011 SC 3658.

15 According to rule 30 of Tamil Nadu State Judicial Service Rules, pre-requisite of filing an application for alteration of date of birth was that it must be submitted within five years period.

16 (2005) 3 SCC 702.

17 AIR 2011 SC 3107.

18 2011 (5) SCALE 498.

19 As held in *Vijay Kumar Arora* v. *State Govt. (NCT of Delhi)* (2010) 2 SCC 353 and *Aftab Ahmad Ansari* v. *State of Uttaranchal* (2010) 2 SCC 583.

links in the chain of circumstances connects the accused with the crime beyond reasonable doubt. The court also reiterated the position that in cases of circumstantial evidence motive is very important, unlike cases of direct evidence where it is not so important.[20] The court in this case of honour killing, was of the opinion that both these conditions are satisfied. The fact that the victim had been killed to save the so-called honour or prestige of the family itself is a sufficient proof of motive in such crimes.

Criticising heavily on honour killings the court said: [21]

> …honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices, which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them.

X DUTY OF THE COURT UNDER SECTION 165 OF THE EVIDENCE ACT

Vikas Kumar Roorkewal v. *State of Uttarakhand*[22] was a case under section 406 of the Cr PC for transferring the trial of a murder case from the court at Uttarakhand to the one at Delhi. The petitioner claimed that the witnesses are being coerced and the sincerity of investigating and prosecuting agency is doubtful. The petitioner also contended that because of the high profile of the accused involved in this case, the Uttarakhand police was incapable and reluctant to investigate the crime. The petitioner also claimed that he, his family members and other witnesses continuously receives threats that 'they would meet the same fate as that of the deceased, if they dare to depose before the court'. The petitioner has also mentioned that the first eyewitness who was examined in the court, the driver of the deceased, turned hostile because of the threats given to him and the trial Judge who was presiding over the trial could not do anything except being a passive spectator. Emphasising on the importance of fair trial the court held that 'the State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases'.

The apex court further observed that the trial judge in this case failed to take a participatory role rather than acting like a mere tape recorder to record whatever has been stated by the witnesses. The court allowing the transfer petition held: [23]

> …Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers.

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20 As held by the Supreme Court in *Wakkar* v. *State of Uttar Pradesh* (2011) 3 SCC 306.
21 *Supra* note 17, para 28.
22 (2011) 2 SCC 178.
23 *Id*. para 15.

The court further held: [24]

> …the petitioner has been able to show the circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court…in spite of receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eye-witnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition.

XI CONVICTION WITHOUT PROVING THE DOCUMENT THAT WAS RELIED ON FOR SUCH CONVICTION

In the case of *Ashok Tshering Bhutia* v. *State of Sikkim,*[25] the appellants were convicted for the offences punishable under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 by the trial court. The appellant appealed to the high court by contending that a large number of documents relied upon by the trial judge had not been proved in evidence and therefore, the judgment of the trial court suffered from fundamental procedural errors and stood vitiated. The high court instead of deciding the appeal taking into account the aforesaid argument remanded the matter to the trial court giving an opportunity to the prosecution to prove those documents. Even after this the prosecution could not prove some of those documents heavily relied upon by the prosecution.

Before the apex court, the appellant contended that there was a procedural error committed by the prosecution by not proving the documents. He further contended that high court should not have remanded the matter because it tantamounts to giving an opportunity to the prosecution to fill up any lacunae in its case and since these procedural errors are not curable the entire prosecution proceedings should be vitiated. The state vehemently opposed the appeal pointing out that the documents were not proved even after remanding them, does not affect the merits of the case, as the same cannot be a ground for disbelieving the said documents.

After hearing both the parties, the apex court held that additional evidence at appellate stage is permissible, if there is a case of failure of justice. But such power should be exercised sparingly and only in exceptional cases where the court is satisfied that directing additional evidence would serve the interests of justice. The court held: [26]

> It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the

24 *Id*. para 17.
25 AIR 2011 SC 1363.
26 *Id*. para 15.

> concepts of fair play, justice and the well being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

In the instant case, the apex court allowing the appeal held that the judgments of the courts below suffered from a fundamental procedural error. It held that though it is permissible in law to prove the documents by adducing additional evidence, but by no stretch of imagination it can be said that an accused could be convicted without proving the documents that are relied upon by the prosecution.

Similarly, the same question was again raised in *H. Siddiqui (dead) by L.Rs.* v. *A. Ramalingam*.[27] The brief facts were as follows. Respondent's brother sold a property that belonged to the respondent to the appellant, on the basis of a power of attorney that was allegedly signed by the respondent. However, the respondent has specifically denied the execution of such a power of attorney. During the trial the photocopy of that power of attorney was produced but not the original. The trial court decreed the suit without even framing an issue in this regard. The high court set aside the judgment and decree of the trial court, on appeal filed by the respondent, stating that the sale consideration was inadequately calculated in terms of the market price.

The Supreme Court on appeal viewed that even though section 65[28] of Indian Evidence Act provides for permitting the parties to adduce secondary evidence, such a course is subject to a large number of limitations. The court held that a court cannot permit a party to adduce secondary evidence if the original documents are not produced and also without leading to any factual foundation for giving secondary evidence. The court held: [29]

> Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

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27 AIR 2011 SC 1492.

28 S.65 illustrates the cases in which secondary evidence relating to documents may be given.

29 *Supra* note 27 para 10. The court referred to the decisions in *The Roman Catholilc Mission* v. *The State of Madras,* AIR 1966 SC 1457; *State of Rajasthan*. v. *Khemraj,* AIR 2000 SC 1759; *Life Insurance Corporation of India* v. *Ram Pal Singh Bisen* (2010) 4 SCC 491 and *M. Chandra* v. *M. Thangamuthu* (2010) 9 SCC 712.

Criticising heavily about the method followed by the trial court[30] in adducing the secondary evidence, the apex court observed: [31]

> In our humble opinion, the Trial Court could not proceed in such an unwarranted manner for the reason that the Respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value."

The court also distinguished between the admissibility of a document and the probative value of a document and held "… it is the duty of the court to examine whether documents produced in the court or contents thereof have any probative value."[32] It also criticised the decision of the high court. The court said that the high court should have independently assessed the relevant evidence and come up with findings that are well founded and quite convincing.

XII DISTINCTION BETWEEN THE PRESUMPTION UNDER SECTION 113A AND SECTION 113B

In *Bansi Lal* v. *State of Haryana*[33] the appellant was convicted under sections 498A, 304B and 306 of the IPC. The facts of the case reveal that immediately after one year of marriage between the deceased and the appellant, the deceased had gone to her parental home unable to resist the cruelty and harassment from the appellant. After staying there for fourteen months she went back to her matrimonial home at the assurance given by the *panchayat* that the appellant or his family members would not humiliate or subject her to cruelty or harassment. But even after that there were demands of dowry by the appellant, which ultimately led to the untimely death of the appellant's wife. Before the apex court the appellant contended that while considering the case under section 498A, cruelty has to be proved during

30 The trial court had decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. The trial court also took note of the fact that the respondent had specifically denied execution of power of attorney authorising his brother to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant to call upon to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother and, therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised his brother to alienate the suit property.

31 *Supra* note 27, para 12.

32 *Id*. para 14.

33 AIR 2011 SC 691. See also *Parimal* v. *Veena @ Bharti*, AIR 2011 SC 1150 and *Rangammal* v. *Kuppuswami,* AIR 2011 SC 2344 where the court held that burden of proving fact lies upon person, who asserts it.

the close proximity of time of death. It was further argued that cruelty also should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide. He further contended that such a continuous cruelty or harassment was absent in this case.

The apex court while looking into the nature of presumption under sections 113A and 113B of the Evidence Act, observed that under section 113B, the legislature in its wisdom has used the word *shall* thus, making it mandatory 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 unless it is rebutted by the accused. Here the only requirement is that death of a woman has been caused by means other than any natural circumstances and that death has been caused or occurred within seven years of her marriage and her husband or any relative of the husband had subjected such woman to cruelty or harassment in connection with any demand of dowry. Where as in section 113A, the court observed that, the court has discretion and the court may presume abatement of suicide. Once the prosecution establishes the aforesaid essential ingredients, it is the duty of the court to raise a presumption that the accused has caused the dowry death. The court in each case has to analyse the facts and circumstances leading to the death of the victim and decide whether there is any proximate connection between the demand of dowry and the act of cruelty or harassment and the death.[34]

XIII CONSTITUTIONALITY OF SHIFTING OF BURDEN OF PROOF UNDER SECTION 57A OF THE ABKARI ACT

In *Chandran* v. *State of Kerala,*[35] the appellants were convicted for various offences punishable under sections 120B, 302, 307, 326, 328 and 201 read with section 34 of the IPC and also under sections 55(a)(g)(h)(i), 57A and 58 of the Abkari Act. The main question that came up before the apex court was regarding the constitutionality of shifting of burden of proof to the accused under section 57A (5) of the Abkari Act for mixing or permitting to mix any noxious substance which is likely to endanger human life with any liquor or intoxicating drug.[36]

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34 The court referred to *T. Aruntperunjothi* v. *State through S.H.O., Pondicherry*, AIR 2006 SC 2475; *Devi Lal* v. *State of Rajasthan*, AIR 2008 SC 332; *State of Rajasthan* v. *Jaggu Ram*, AIR 2008 SC 982; *Anand Kumar* v. *State of M.P*., AIR 2009 SC 2155 and *Undavalli Narayana Rao* v. *State of Andhra Pradesh,* AIR 2010 SC 3708.

35 AIR 2011 SC 1594.

36 S. 57A(5) of the Indian Evidence Act says thus: "Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872)- where a person is prosecuted for an offence under Sub-section (1) or Sub-section (2) the burden of proving that he has not mixed or permitted to be mixed or, as the case may be, omitted to take reasonable precautions to prevent the mixing of, any substance referred to in that Sub-section with any liquor or intoxicating drug shall be on him; where a person is prosecuted for an offence under Sub-section (3) for being in possession of any liquor or intoxicating drug in which any substance referred to in Sub-section (1) is mixed, the burden of proving that he did not know that such substance was mixed with such liquor or intoxicating drug shall be on him".

Section 57(A) is extremely general and it refers not only the licence holders but also anybody who mixes or permits to be mixed any substance, which is likely to endanger human life with any liquor. It is significant to note that if, as a result of such act of mixing of the liquor with noxious or dangerous substance death is caused, the extreme penalty of death is provided. The section also shifts the burden of proof that normally lies on the prosecution.[37] The apex court in this case applied the ratio of *P.N. Krishna Lal* v. *Govt. of Kerala*[38] wherein the Supreme Court had upheld the constitutional validity of section 57A of the Abkari Act. In *Krishna Lal* the validity of section 57A was challenged on the basis of the Universal Declaration of Human Rights (UDHR) and the International Convention for Civil and Political Rights (ICCPR), to which India is a party. It was suggested that in criminal jurisprudence the prosecution has to prove all the ingredients of the offence with which the accused has been charged. But sub-section (5) of section 57A relieves the prosecution of its duty to prove its case beyond reasonable doubt. It was also contended that it violates fundamental rights guaranteed under articles 20(3), 14 and 21 of the Constitution of India. It was further argued that though sections 299 and 300 of IPC make a distinction between culpable homicide and murder, section 57A has done away with such a distinction and mere death of a person by consumption of adulterated arrack, makes the offender liable for conviction and imprisonment for life or penalty of death.

The court in *Krishna Lal* held that the rule that burden of proof is always on the prosecution to prove the offence beyond reasonable doubt gets modulated with the march of time. The court held that the object of section 57A was to prevent recurrence of large-scale deaths or grievous hurt to the consumers of adulterated liquor mixed with noxious substance and in doing so the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference to domestic law.[39] Further, after detailed analysis, the court held that section 57A was not in violation to the provisions of UDHR, ICCPR or the Indian Constitution. The court also noted that such shifting of burden is not alien to the law of evidence because sections 105 and 106 provide exceptions to it. Further, for example, section 113A of the Evidence Act raises a presumption as to abatement of suicide by a married woman by her husband or his relatives and 114A raises presumption of absence of consent in a rape case. Similarly the object of section 57A, is to put down the menace of adulteration of arrack etc. by prescribing deterrent sentences.

XIV CONVICTION ON THE BASIS OF EXTRA JUDICIAL CONFESSION: ROLE OF JUDICIARY

In *Arup Bhuyan* v. *State of Assam,*[40] the appellant, an accused under TADA, was convicted by the trail court on the basis of an uncorroborated confession which

37 Ss.101 and 102 of the Indian Evidence Act.

38 1995 Supp (2) SCC 187.

39 While doing so the court also had referred to a decision of the European Court of Human Rights in *Salabiaku* v. *Grance* (1988) 13 EHRR 379.

40 AIR 2011 SC 957.

he had made before the superintendent of police noting that extra judicial confession before a police officer though not admissible under section 25 of the Indian Evidence Act is very much admissible under section 15 of the TADA. The apex court holding that it will not be safe to convict the accused on the basis of alleged confessional statement, went into the nature of confessions made by accused in India. The court noted that there is a 'wide spread and rampant practice' of using third degree methods for extracting confessions from the accused by police in India. It is mainly because the police in our country are not trained in scientific investigation similar to that of the police in western countries. They also do not possess technical equipments for scientific investigation. Under these circumstances the court held that the judiciary have to be cautious in accepting confessions made to the police.

Another question that came up before the court was whether a mere membership in a banned organisation is a sufficient reason for incriminating a person? The court noted that the judiciary in India[41] is in conformity with the opinion of the US judiciary[42] in rejecting the doctrine of 'guilt by association.' Taking the view that section 3(5) of TADA, which makes a mere membership in a banned organisation a crime, cannot be read literally as it violates articles 19 and 21 of the Constitution, the court held: [43]

> …mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

XV PROCEDURAL REQUIREMENTS UNDER SECTION 164 Cr PC

The case, *Rabindra Kumar Pal* v. *Republic of India*[44] (known as *Graham Steins* murder case) related to the murder of one foreigner, Mr. Graham Steins and his two children. The accused persons burned them to death while they were sleeping inside their vehicle. The prosecution could clearly prove the case against the two main accused in this case. They were clearly identified by photo and their involvement was also sufficiently corroborated by other evidence.

At the same time, regarding other accused, the main evidence with the prosecution was their confessional statement. The procedural requirements for recording confession under section 164 Cr PC were not adhered to in this case. There were serious procedural lapses in extracting confessions from the accused since many of these confessional statements were recorded immediately after the

41 *State of Kerala* v. *Raneef,* 2011 (1) SCALE 8.

42 *Elfbrandt* v. *Russell*, 384 U.S. 17 (1966). Also see *Clarence Brandenburg* v. *State of Ohio,* 395 U.S. 444 (1969) where the U.S. Supreme Court held that mere 'advocacy or teaching the duty, necessity, or propriety' of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed 'to teach or advocate the doctrines of criminal syndicalism' is not *per se* illegal.

43 *Supra* note 41, para 16.

44 (2011) 2 SCC 490.

long CBI custody. Looking into the scenario the court reiterated the settled principle[45] that the provisions of section 164 of the Cr PC must be complied with not only in form, but also in essence. Further, the court laid down the following principles that must be followed in form as well as in substance.

(i) The provisions of section 164 of Cr PC must be complied with not only in form, but also in essence:
(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.
(iii) The magistrate should ask the accused as to why he wants to make a statement, which surely shall go against his interest in the trial.
(iv) The maker should be granted sufficient time for reflection.
(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.
(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.
(vii) Non-compliance of section 164 of Cr PC goes to the root of the magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.
(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.
(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.
(x) Confession of a co-accused is a weak type of evidence.
(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement.

On the basis of the aforesaid reasons, the Supreme Court acquitted all the accused other than the two main accused.

45 As laid down by the apex court in *Bhagwan Singh* v. *State of M.P.* (2003) 3 SCC 21; *State of U.P.* v. *Singhara Singh,* AIR 1964 SC 358; *Shivappa* v. *State of Karnataka* (1995) 2 SCC 76; *Shankaria* v. *State of Rajasthan* (1978) 3 SCC 435; *Dagdu* v. *State of Maharashtra* (1977) 3 SCC 25; *Davendra Prasad Tiwari* v. *State of U.P.* (1978) 4 SCC 46; *Kalawati* v. *State of Himachal Pradesh,* 1953 SCR 546; *State through Superintendent of Police, CBI/SIT* v. *Nalini* (1999) 5 SCC 253; The Privy Council in *Bhuboni Sahu* v. *R.*, AIR 1949 PC 257; *Kashmira Singh* v. *State of M.P.*, AIR 1952 SC 159; *Haricharan Kurmi* v. *State of Bihar*, AIR 1964 SC 1184 and *State of Maharashtra* v. *Dau* (2000) 6 SCC 269.

XVI CONCLUSION

An analysis of the aforesaid decisions reveals the approach of the Supreme Court of India to the Indian Evidence Act during the year 2011. In the survey year too the court continued to follow the established principles of evidence law. In *Arup Bhuyan*[46] the court again asserted its zeal of fairness when it condemned the 'wide spread and rampant practice of torture' while extracting confessions. It can also be seen that in several decisions pertaining to alterations in the birth certificate, dowry deaths and socio-economic offences, including the one, which rejected the *doctrine of guilt by association*, the Supreme Court has shown its proclivity for the principles of fair trial based on the due process of law and procedural justice in parties in criminal disputes.

46 *Supra* note 40.