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LAW OF EVIDENCE

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I INTRODUCTION

THE JUDICIAL interpretation through the decisions of Supreme Court of India on various aspects of law of evidence has been analyzed in this survey *i.e.,* of year 2012. In view of the provisions of article 141 of the Constitution which states that law declared by the Supreme Court shall be binding on all courts within the territory of India the judicial decisions and its reasoning, interpretation of law and its advancement with case by case-helps in understanding and meeting the complex challenges being faced by the society at large. The colonial legislation governing the law relating to evidence dates back to year 1872. The survey analyses the development of law and an attempt has been made to arrange under various heads sub-topics of importance in the ascending order of sections. The survey also makes references of important decisions of the Supreme Court of India in the relevant field of law by virtue of theory of precedent.

II INTERPRETATION CLAUSE

Meaning of disproved & its applicability to cases of dowry death

The Supreme Court of India in the case of *Devinder @ Kalaram* v. *State of Haryana*[1], analysed the scope of section 113-B of the Indian Evidence Act, which lays down the standard of proof for 'presumption as to dowry death' by using the word 'disproved'[2] as defined under section 3 of the Indian Evidence Act. The court stated as under:[3]

> Thus, if after considering the matters before it, the Court believes that the husband or the relative of the husband has not caused dowry death, the Court cannot convict such person or husband for dowry death under Section

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1 (2012) 10 SCC 763.

2 S. 3 Interpretation Clause: "*Disproved*" - A fact is said to be disproved when, after considering the matters 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.

3 *Devinder @ Kalaram* v. *State of Haryana,* (2012) 10 SCC 763, 768.

> 304-B of the IPC. Section 304-B, IPC, and Section 113-B of the Indian Evidence Act, 1872, in other words, only provide what the Court shall presume if the ingredients of the provisions are satisfied, but if the evidence in any case is such that the presumptions stand rebutted, the Court cannot hold that the accused was guilty and was punishable for dowry death.

The court held that unless a contrary intention appears from the context, the word disproved would require a prudent man's objective standard which is equally applicable to the cases of dowry death.

Shall presume

The expression '*shall presume'* has been defined in section 4 of the Indian Evidence Act, 1872.[4] In *Devinder @ Kalaram* v. *State of Haryana*[5], while analyzing the impact of this definition on section 113(B) of the Act, the Supreme Court has observed as under: [6]

> Thus, Section 113B read with Section 4 of the Indian Evidence Act, 1872 would mean that unless and until it is proved otherwise, the Court shall hold that a person has caused dowry death of a woman if it is established before the Court 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.

Motive

The '*motive*' of committing a particular offence/crime forms an essential component of Indian criminal jurisprudence. Any fact is relevant which shows or constitutes a motive for any fact in issue or relevant fact. However, it is not easily possible to establish, or explain for prosecution the element of 'motive' of committing a particular crime.[7] The law surrounding motive has been guided through the judicial dictum and a straight jacket formula is absent in that respect. The presence of ocular evidence which is very clear and convincing then in such cases, the establishment of motive is not a *sine qua non* for proving the prosecution case.[8] This year reiterating the above proposition of law, the Supreme Court held as under:[9]

> Motive in criminal cases based solely on the positive, clear, cogent and reliable ocular testimony of witnesses is not at all relevant. In such a fact-situation, the mere absence of a strong motive to commit the crime cannot be of any assistance to the accused. The motive behind a crime is a relevant

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4 S. 4 "*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.

5 (2012) 10 SCC 763.

6 *Id.* at 768.

7 *Bipin Kumar Mondal* v. *State of West Bengal*, AIR 2010 SC 3638.

8 *Yunis @ Karia* v. *State of Madhya Pradesh*, AIR 2003 SC 539.

9 *Darbara Singh* v. *State of Punjab*, (2012) 10 SCC 476, 482; also see *Gurcharan Singh* v. *State of Punjab*, AIR 1956 SC 460; *Rajinder Kumar* v. *State of Punjab*, AIR 1966 SC 1322; *Datar Singh* v. *State of Punjab*, AIR 1974 SC 1193; *Rajesh Govind Jagesha* v. *State of Maharashtra*, AIR 2000 SC 160.

fact regarding which evidence may be led. The absence of motive is also a circumstance which may be relevant for assessing evidence.

Proof of Motive

The statutory requirements under section 8 of the Evidence Act, 1872 on '*proof of motive*' is nothing but culmination of three elements i.e. motive, preparation and previous or subsequent conduct. The legal position on the proof of motive has been succinctly explained by the Supreme Court in *Sheo Shankar Singh* v. *State of Jharkhand*[10] as under:[11]

> Proof of motive, however, recedes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence. That is because if the court upon a proper appraisal of the deposition of the eye-witnesses comes to the conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential. Conversely even if prosecution succeeds in establishing a strong motive for the commission of the offence, but the evidence of the eye-witnesses is found unreliable or unworthy of credit, existence of a motive does not by itself provide a safe basis for convicting the accused. That does not, however, mean that proof of motive even in a case which rests on an eye-witness account does not lend strength to the prosecution case or fortify the court in its ultimate conclusion. Proof of motive in such a situation certainly helps the prosecution and supports the eye witnesses.

Highlighting the importance of 'motive' in a criminal case, the Supreme Court in the case of *Sathya Naraynan* v. *State represented by Inspector of Police*[12] has opined as under:[13]

> In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture does not take the place of proof.

Test Identification Parade

The '*Test Identification Parade*'—a predominant feature at the investigation stage[14]; tests and strengthens the trustworthiness of the substantive evidence of a witness in a court[15]; but not itself is a piece of 'substantive evidence'[16], may be used

10 AIR 2011 SC 1403. Also see *Shivaji Genu Mohite* v. *State of Maharashtra*, AIR 1973 SC 55; *Hari Shanker* v. *State of U .P.*, (1996) 9 SCC 40; *State of Uttar Pradesh* v. *Kishanpal*, (2008) 16 SCC 73.

11 (2011) 3 SCC 654, 663, Thakur J (for V.S. Sirpurkar J and himself).

12 (2012) 12 SCC 627, per P. Sathasivam J. (as he then was), for himself and Ranjan Gogoi J.

13 *Id.* at 460.

14 *Munna Kumar Upadhyay @ Munna Upadhyaya* v. *State of Andhra Pradesh,* (2012) 6 SCC 174.

15 *Ram Babu* v. *State of Uttar Pradesh,* AIR 2010 SC 2143.

16 *Sidhartha Vashisht @ Manu Sharma* v. *State (NCT of Delhi),* (2010) 6 SCC 1; *Matru* v. *State of U.P.*, 1971 (2) SCC 75.

by the court for the purpose of corroboration[17] and always subject to the rule of prudence.[18]There is no provision in the code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade and failure to hold a test identification parade would not make inadmissible the evidence of identification in court.[19] Even further, the evidence in the form of test identification parade being a very weak piece of evidence, acts as an aid in the investigation[20]and the facts, which establish the identity of the accused persons, are relevant under section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court on oath.[21] Discussing the importance and purpose of '*Test Identification Parade*' the court in *Munna Kumar Upadhyay @ Munna Upadhyaya* v. *State of Andhra Pradesh,*[22] the court opined as under:[23]

> The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.
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> It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court.

The Supreme Court in this case further held that merely because of delay, the court should not reject the entire evidence of identification of the accused in the

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17 *Supra* note 14.

18 Exceptions to this rule is that the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

19 *Supra* note 14.

20 *Mullagiri Vajram* v. *State of A.P.,* (1993) Supp. 2 SCC 198.

21 *Ibid*.

22 (2012) 6 SCC 174.

23 *Id.* at 198. Also see *Munshi Singh Gautam* v. *State of M.P*. 2005 (9) SCC 631.

present case. More so, the accused persons were duly identified by these very witnesses in the open court, while they were deposing.[24]

Confession & its veracity (section 24-31)

Section 27 of the Indian Evidence Act, 1872 deals with the issue that '*how much of information received from accused may be proved*'.[25] This provision of the Evidence Act, 1872 has been one of the most turbulent paths/ area and has received varied interpretations by the judiciary depending upon the facts and circumstances of the each case. Year 2012 has also witnessed numerous decisions on the core issue of '*extra- judicial confession-its nature, its reliability & its applicability*' in upholding the conviction based on such piece of evidence. The Supreme Court in *Tulshiram Sahadu Suryawanshi* v. *State of Maharashtra*[26] summed up the various requirements of the section as under:

i. The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
ii. The fact must have been discovered.
iii. The discovery must have been in consequence of some information received from the accused and not by the accused's own act.
iv. The person giving the information must be accused of any offence.
v. He must be in the custody of a police officer.
vi. The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
vii. Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

The Supreme Court has been very cautious and always puts a greater care in cases where in the conviction has been based on account of extra- judicial confession which has been made out under section 27 of the Evidence Act as per provision of section 164 of the Cr PC. The court has held that such piece of evidence is a 'weak type of evidence'[27], 'requires appreciation with a great deal of care and caution'[28], 'must be supported and corroborated by independent & other evidence'[29], 'should

24 *Ibid.*
25 S. 27.
26 (2012) 10 SCC 373.
27 *Balwinder Singh* v. *State of Punjab* (1995) Supp. 4 SCC 259; also see *Kavita* v. *State of Tamilnadu.,* (1998) 6 SCC 108.
28 *Ibid*; also see *Pakkirisamy* v. *State of T.N.*, (1997) 8 SCC 158.
29 *Sahadevan* v. *State of Tamil Nadu* (2012) 6 SCC 403; *Pakkirisamy* v. *State of T.N.* (1997) 8 SCC 158; *Thimma and Thimma Raju* v. *State of Mysore* (1970) 2 SCC 105; *Mulk Raj* v. *State of U.P.*, AIR 1959 SC 902; *Sivakumar* v. *State* (2006) 1 SCC 14; *Shiva Karam Payaswami Tewari* v. *State of Maharashtra* (2009) 11 SCC 262; *Mohd. Azad* v. *State of W.B.* (2008) 15 SCC 449; *Sansar Chand* v. *State of Rajasthan* (2010) 10 SCC 604.

be proved like any other facts'[30] and 'the value of the same depends upon the veracity of the witnesses to whom it is made'.[31] In cases of extra- judicial confessions, where exists a valid suspicious circumstances, the court held that its credibility becomes doubtful and loses its importance. An extra- judicial confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.[32] The underlying principle of law which emanates from a series of judicial dictum is that a conviction can be validly based upon extra- judicial confession, however, the degree of care and caution in such cases must be of high resolute. The Supreme Court has also held by placing reliance on extra-judicial confession by the courts below in absence of other corroborating material as unjustified and set aside the conviction in absence of verification of main features of such confession.[33]

Retraction from extra-judicial confession

The retraction from the confession by the accused lowers the quality of evidence. The extra- judicial confession by its very nature is a weak piece of evidence and in cases of retraction of the same-the possibility of conviction based on the same should be the rule of exception. However, the Supreme Court has held that there is no inflexible rule that the court must invariably accept the refraction; nevertheless, it is unsafe for the court to rely on the retracted confession, unless the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.[34]

The Supreme Court in the case of S*ahadevan* v. *State of Tamil Nadu*[35] has restated the principles which make an extra-judicial confession an admissible piece of evidence:

i. The extra-judicial confession is weak evidence by itself. It has to be examined by the court with greater care and caution.
ii. It should be made voluntarily & true in a fit state of mind and should be truthful.
iii. It should inspire confidence.
iv. The words of witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime.
iv. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

30 *Kavita* v. *State of Tamil Nadu* (1998) 6 SCC 108; Also see *State of Rajasthan* v. *Raja Ram,* (2003) 8 SCC 180.
31 *Ibid.*
32 *Supra* note 30.
33 *Alok Nath Dutta* v. *State of W.B.* (2007) 12 SCC 230.
34 *Rameshbhai Chandubhai Rathod* v. *State of Gujarat* (2009) 5 SCC 740.
35 (2012) 6 SCC 403.

v. For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
vi. Such statement essentially has to be proved like any other fact and in accordance with law.

An extra- judicial confession attains greater credibility and evidentiary value if:-

i. it is supported by a chain of cogent circumstances on record to support it.[36]
ii. corroborated by other prosecution evidence.[37]
iii. does not suffer from any material discrepancies and inherent improbabilities.[38]
iv. it is proved like any other fact in accordance with law.[39]
v. it was made before a person who has no reason to state falsely and his evidence is credible.[40]
vi. it is not the result of inducement, threat or promise as envisaged under section 24 of the Act and brought above in suspicious circumstances to circumvent sections 25 & 26 of the Act.[41]
vii. it depends upon the veracity of the witness to whom it has been made.[42]
viii. where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.[43]
ix. the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872.[44]

No absolute rule or universal principles can be carved out for the admissibility of extra-judicial confessions; however, the sufficient guidelines have been incorporated through the judicial decisions of the Supreme Court of India. The court while examining the acceptability and evidentiary value of the extra-judicial confession must adhere to the guiding norms and principles which have been developed through the case laws. As stated earlier, a number of decisions have been rendered by the Supreme Court in the survey year 2012 including *Jitender Kumar* v. *State of Haryana*[45], *Sahadevan* v. *State of Tamilnadu*[46], *Sandeep* v. *State of Uttar Pradesh*[47], *Jagroop Singh* v. *State of Punjab*[48]. However, the proposition

36 *Tulsi Ram Sahadu Suryavanshi* v. *State of Maharashtra* (2012) 10 SCC 373.
37 *Supra* note 29.
38 *Ibid*.
39 Also see *Kavita* v. *State of Tamil Nadu* (1998) 6 SCC 108; *S.K. Yusuf* v. *State of West Bengal* (2011) 11 SCC 754; *Pancho* v. *State of Haryana* (2011) 10 SCC 165.
40 *Jagroop Singh* v. *State of Punjab* (2012) 11 SCC 768.
41 *Ibid.*
42 *State of Rajasthan* v. *Raja Ram* (2003) 8 SCC 180.
43 *Supra* note 27.
44 *Supra* note 14.
45 (2012) 6 SCC 204.
46 (2012) 6 SCC 403.
47 (2012) 6 SCC 107.
48 (2012) 11 SCC 768.

of law which was discussed relied and affirmed by the Supreme Court on the admissibility of extra-judicial confession has already been listed out in the preceding paragraphs. Another important issue which was under consideration in the case of *Sahadevan* v. *State of Tamilnadu*[49] as to when the cover of ban against admissibility of statement of accused to police gets lifted. The court observed and reiterated the proposition of law as enumerated in the matter of *State of Rajasthan* v. *Bhup Singh*[50] as under:

(i) A fact should have been discovered in consequence of the information received from the accused;
(ii) He should have been accused of an offence;
(iii) He should have been in the custody of a police officer when he supplied the information;
(iv) The fact so discovered should have been deposed to by the witness.

The court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence. The aspect which the court has to consider in the present case is whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not and most importantly the link with and effect of the same vis-à-vis the commission of the crime. The court held that if once recoveries were made in furtherance to the statement of the accused, non-examination of one of them, by itself, shall not vitiate the recovery of; make the articles inadmissible in evidence.[51]

The Supreme Court further held that the courts have to consider whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not and most importantly the link with and effect of the same *vis-à-vis* the commission of the crime.[52] These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

Dying declaration

The case on 'dying declaration' in year 2012 before the Supreme Court of India reiterates the principle laid down by Supreme Court in *Bable* v. *State of Chhattisgarh*[53]. It observed as under:[54]

> To the rule of inadmissibility of hearsay evidence, oral dying declaration is an exception. The dying declaration in this case is reliable, cogent and explains the events that had happened in their normal that such events actually happened as established by the prosecution. Once there exists reliable, cogent and credible evidence against one of the accused, the mere

49 (2012) 6 SCC 403.
50 (1997) 10 SCC 675.
51 *Supra* note 29.
52 *Ibid.*
53 (2012) 11 SCC 181.
54 *Id.* at 187.

> acquittal of other accused will not frustrate the case of the prosecution. Where the High Court, exercising its judicial discretion ultra-cautiously, acquitted the unnamed accused in the FIR, there the High Court for valid reasons held the present appellant guilty of the offence. Of course which was not only a mere possibility but leaves no doubt?.

The another case which came before the Supreme Court is *Surinder Kumar* v. *State of Punjab,*[55]the Supreme Court of India held that there is no prescribed format for recording a dying declaration and observed as under: [56]

(i) There is no obligation that a dying declaration should be recorded in a question- answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situations or because of the pain or agony that victim might be suffering at that point of time.
(ii) It is not obligatory that either on executive magistrate or a judicial magistrate should be present for recording a dying declaration.
(iii) There is sufficient that there is evidence available to show that the dying declaration is voluntary & truthful.

Expert witnesses

The Indian Evidence Act, 1872 does not define 'Expert Witness' but section 45 of the Act defines as who all are called 'experts'. The 'expert witnesses' having special skills or knowledge needs to be distinguished from the 'ordinary witnesses' but, their interpretations and weights to such opinion of the expert witnesses should be given in an ordinary manner.[57]

In *Sandeep* v. *State of Uttar Pradesh,*[58] the medical report based on DNA profiling; which concluded that the accused was the biological father of the recovered foetus of the deceased, is the relevant circumstance to prove the guilt of the accused. The court further held that in absence of any categorical contrary evidence, would not vitiate the medical report on ground of delay and improper preservation of the foetus.

Medical evidence

In *Jitender Kumar* v. *State of Haryana*[59] the Supreme Court reiterated the golden principle on admissibility of medical evidence stated as under: [60]

> Medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms.

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55 (2012) 12 SCC 120.
56 *Ram Krushna Roy* v. *State of Orissa* (2012) 12 SCC 775.
57 *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, AIR 2010 SC 1162.
58 (2012) 6 SCC 107.
59 (2012) 6 SCC 204; also see, *Shivappa* v. *State of Karnataka* (1995) 2SCC 76; *Jabbar Singh* v. *State of Rajasthan* (1994) SCC (Cr.) 174.
60 *Id.* at 223.

The aforementioned case involved the ascertainment of occurrence of death based on the digestion of food which needed to be determined medically. The Court relying on the *locus classicus* treatise in the field *i.e.*, Modi's book on Medical Jurisprudence and Toxicology- held that as like any other evidence, medical evidence is an opinion evidence, a large number of factors are responsible for drawing an inference in this regard.

Post- mortem report (a medical evidence) should be in corroboration with eye-witnesses

In *Balaji Gunthu Dhule* v. *State of Maharashtra*[61], the Supreme Court opined that the conviction based upon post-mortem report for an offence under section 302 of the IPC neglecting the entire evidence of the eye-witness of the crime by the high court is bad in law. It opined and reiterated that any such medical evidence (in the instant case post-mortem report) should be in corroboration with the evidence of eye-witness and cannot be evidence sufficient to reach the conclusion for convicting the appellant.[62]

The eye-witnesses have a greater probative and evidentiary value, has been rightly upheld by the Supreme Court; as Bentham remarked once, 'Witnesses are the eyes and ears of justice'. Eyewitnesses' account would require a careful independent assessment and evaluation for its 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 credit worthy; consistency with 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.

Inconsistency between medical and ocular witnesses

The issue of inconsistency between two set of evidence i.e. medical and ocular evidence and which set of evidence should be given primacy over the other has been considered in several judgment by the Supreme Court in the survey year 2012. However, the proposition of law which emerges out from the analysis of these decisions remains free from chaos. In *Darbara Singh* v. *State of Punjab,*[63]the Supreme Court of India stated with all clarity in following words: [64]

So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis- a-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence

61 (2012) 11 SCC 685.
62 *Ibid*.
63 (2012) 10 SCC 476
64 *Ibid.*

completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved.

Medical evidence being an opinion of expert; categorized as 'expert witnesses' takes a back seat in comparison to oral evidence and it has greater evidentiary value.[65] The absoluteness and universality of the aforementioned proposition of law suffers from exceptions as the Supreme Court has opined as under: [66]

> The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefore.
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> It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-à-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report.

However, in an event, the ocular evidence being cogent, credible and trustworthy, minor variance, if any with the medical evidence is not of any consequence. If the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitness account which had to be tested independently and not treated as the "variable", keeping the medical evidence as constant.[67]

Public documents

The Supreme Court in *Anita Malhotra* v. *Apparel Export promotion Council*[68] had held that the certified copy of Annual Return of a company is a public document in view of the provisions of the Companies Act, 1956 read with section 74(2) of the Indian Evidence Act, 1872. In the present case, based on the veracity of annual return filed by company, the court concluded that the appellant has validly resigned from the directorship of the company in the year 1998 and she cannot be held responsible for the dishonor of cheques issued in the year 2004. As the Evidence Act defines as to what will constitute as 'Public Document'[69] in contrast of the

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65 *Kuria* v. *State of Rajasthan* (2012) 10 SCC 433; also see *Abdul Sayeed* v. *State of Madhya Pradesh* (2010) 10 SCC 259; *State of U.P.* v. *Hari* (2009) 13 SCC 542; *Bhajan Singh @ Harbhajan Singh* v. *State of Haryana* (2011) 7 SCC 421.

66 *Baso Prasad* v. *State of Bihar* 2006 (13) SCC 65.

67 *Krishnan* v. *State* (2003) 7 SCC 56.

68 (2012) 1 SCC 520.

69 S.74 of the Evidence Act, 1872 reads as under:
74. Public Documents:- The following documents are public documents:-
(1) Documents forming the acts, or records of the acts –
(i) of the sovereign authority,
(ii) of official bodies and tribunals, and
(iii) of public officers, legislative, judicial and executive of any part of India or of the Commonwealth, or of a foreign country;
(2) Public records kept in any State of private documents.

'Private Documents',[70] the credibility and evidentiary value of the public documents in absence of contrary – needs to be upheld without any compromise.

Burden of proof under section 106

Section 106 of the Indian Evidence Act, 1872 casts an onus of proving a fact on a person, which is especially within the knowledge of such person. Dealing on the importance of such a provision in the case of *Prithipal Singh* v. *State of Punjab,*[71] the court stated that it is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.[72] However, cautioning against the abuse of section 106 of the Indian Evidence Act, 1872, the Supreme Court has held as under: [73]

> It is impossible for prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond 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.

Certainly, the rule that application of section 106 of the Evidence Act, 1872 does not absolve or relieve the prosecution of its burden to prove the guilt of accused beyond reasonable doubt.

Court may presume existence of certain facts

Further in the case of *Tulshiram Sahadu Suryawanshi* v. *State of Maharashtra*[74], the Supreme Court of India had an occasion to interpret the provision of section 114[75] in light of provision contained in section 106 of the Indian Evidence Act, 1872. The presumption contained under section 114 of the Act is rebuttable and if there is any such circumstance weakening such presumption; it cannot be ignored by the court.[76] The court read the two provisions very harmoniously and observed as under:[77]

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70 S.75 of the Evidence Act, 1872 read as under:
75. Private Documents – All other documents are private.

71 (2012) 1 SCC 10.

72 *Sandeep* v. *State of Uttar Pradesh* (2012) 6 SCC 107.

73 *Shambhu Nath Mehra* v. *The State of Ajmer,* AIR 1956 SC 404; *Sucha Singh* v. *State of Punjab,* AIR 2001 SC 1436; and *Sahadevan @ Sagadevan* v. *State rep. by Inspector of Police, Chennai,* AIR 2003 SC 215.

74 (2012) 10 SCC 373.

75 See s.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.

76 *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy,* AIR 2005 SC 800.

77 *Tulshiram Sahadu Suryawanshi* v. *State of Maharashtra,* (2012) 10 SCC 373, 381.

> 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 precise 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.

However, it is important to note down that while having a valid presumption and reverse burden of proof as envisaged under section 106 of the Evidence Act, the court has always approached very cautiously and it has stressed on only and 'especially' those facts which are pre-eminently or exceptionally within the knowledge of accused.

Doctrine of estoppel

The principle of estoppel, recognised as a facet of 'equity' has its root in the common law system; the object of which is to prevent fraud and secure justice between the parties by promotion of honesty and good faith.[78] In the survey year 2012, the lone case which discussed the 'doctrine of estoppel'–which also finds its place in chapter VIII of (section 115- 117) the Indian Evidence Act, 1872 in *Chandrasekaran* v. *Administrative Officer.*[79] The case at hand envisaged a situation wherein the tenure-holders/persons interested in land neither filed any objection under Land Acquisition Act, 1894 nor they chose to challenged the very proceedings of 'land acquisition'. The Supreme Court discussing the 'doctrine of election' as a facet of 'doctrine of estoppel' held that they cannot be permitted to challenge the acquisition proceedings on any ground after three decades. The Supreme Court observed as under: [80]

> A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience…..
>
> …….The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

78 *Maddanappa* v. *Chandramma*, AIR 1965 SC 1812.
79 (2012) 12 SCC 133.
80 *Id.* at 150.

The 'doctrine of election' *vis-à-vis* 'doctrine of estoppel' being an equitable principle of law, has always been read as a convenient tool to tilt in favour of law and not against violation thereof.

Non- examination of witness

Whether the non- examination of all the witnesses in a case at trial stage will impact the outcome of the case in favour of accused or not was another issue of law which was dealt by the Supreme Court in the case of *Sandeep* v. *State of Uttar Pradesh*.[81] The court answered the question of law in negative in a succinct manner stating that all the witnesses of the prosecution need not be called and it is sufficient if witnesses who were essential to the unfolding of the narrative are examined.[82] The rule that once the witnesses who were examined were able to unfold the narration of events in a cogent and convincing manner and the non-examination of other witnesses does not affect the case of the prosecution.[83]

Hostile witnesses

In the case of *Sathya Naraynan* v. *State represented by Inspector of Police*[84], the issue which emerged for the consideration of Supreme Court is that whether corroborated part of evidence of hostile witnesses are admissible or not. The Supreme Court held that the evidence of hostile witnesses regarding the commission of offence is admissible. It cited the decision of *Mrinal Das* v. *State of Tripura*[85] with approval and observed as under:[86]

> It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

81 (2012) 6 SCC 107.
82 *Id.* at 124.
83 *Taj Prakash* v. *State of Haryana* (1996) 7 SCC 322.
84 (2012) 12 SCC 627.
85 (2011) 9 SCC 479, 505.
86 *Id.* at 506.

Sterling worth witnesses

The Indian Evidence Act, 1872 does not define the expression 'Sterling-Worth Witnesses' and does not classify the witness in any manner. The expression 'sterling –worth witnesses' is reflective of the idea of value and credibility of the evidence by such witnesses and it has been very lucidly explained by the Supreme Court in *Kuria* v. *State of Rajasthan*[87] as under:[88]

> 'Sterling worth' is not an expression of absolute rigidity. The use of such an expression in the context of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the witnesses, if any, noticed by the Court. Linguistically, 'sterling worth' means 'thoroughly excellent' or 'of great value'.This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. It is only an expression that is used for judging the worth of the statement of a witness. To our mind, the statements of the witnesses are reliable, trustworthy and deserve credence by the Court. They do not seem to be based on any falsehood.

Classification of witnesses

The classification of witness on the basis of reliability of their deposition and evidence has been a judicial contribution to the existing jurisprudence of criminal trial in India. In the case of *Alagupandi* v. *State of Tamilnadu,*[89] the Supreme Court discussed the categorization of oral testimony of the witnesses into three categories into (a) wholly reliable; (b) wholly unreliable; and (c) neither wholly reliable nor wholly unreliable.[90]The Supreme Court in the present case observed as under:[91]

> 22. In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. […]
>
> 25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of

87 (2012) 10 SCC 433.
88 *Id.* at 445.
89 (2012) 10 SCC 451.
90 *Lallu Manjhi* v. *State of Jharkhand* (2003) 2 SCC 401.
91 *Id.* at 458.

the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

Related witness & interested witness

In the case of *Raju @ Balachandran* v. *State of Tamil Nadu,*[92] the Supreme Court of India re-pondered upon the question of difference between a related witness and an interested witness. Citing and examining relevant precedents on the moot point, the court approached the peculiar question as to whether a wife of deceased is merely related witness or interested witness or just a natural witness to the crime. The Supreme Court in this case had a different view from the decision of *State of Rajasthan* v. *Kalki,*[93] wherein the wife of the deceased was held to be merely a related witness as under:[94]

> 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 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".

The Supreme Court *Raju @ Balachandran* v. *State of Tamil Nadu*[95] termed the approach of the Supreme Court in the *Kalki case* as 'too narrow' and opined that it 'needs a rethink'. The court observed as under:

> 23. The wife of a deceased (as in Kalki), undoubtedly related to the victim, would be interested in seeing the accused person punished – in fact, she would be the most interested in seeing the accused person punished. It can hardly be said that she is not an interested witness. The view expressed in Kalki is too narrow and generalized and needs a rethink.

Moreover the Supreme Court also doubted the correctness of view taken by the Constitution Bench in *State of Bihar* v. *Baswan Singh*[96] that a "natural witness"

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92 (2012) 12 SCC 701; also see *Govindaraju* v. *State* (2012) 4 SCC722, 739.

93 (1981) 2 SCC 752.

94 *Id.* at 754.

95 (2012) 12 SCC 701, 707. Also see *State of Rajasthan* v. *Kalki* (1981) 2 SCC 752.

96 *State of Bihar* v. *Basawan Singh*, AIR 1958 SC 500. In this case, a trap witness (who would be a natural eyewitness) was considered an interested witness since he was "concerned in the success of the trap". The Constitution bench held:
"The correct Rule is this: if any of the witnesses are accomplices who are particeps criminis in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person."

or "the only possible eyewitness" cannot be an interested witness. This decision of the Supreme Court discussed the four category of witnesses namely (i) a third party disinterested and unrelated witness (such as a bystander or passer-by); (ii) a third party interested witness (such as a trap witness); (iii) simply a related-cum- an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; (iv) a related- cum- interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused.

However, the court did not laid down the rationale behind such classification when the statute book does not categorizes the set of witnesses strictly on the related or unrelated to the victims of the crime. Further, through this decision, however, the Supreme Court has made a rule of caution while examining the evidence of related & interested witnesses in following words:[97]

> A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.

The very premise of such caution rests on the vitality of appreciation of the evidence of a witness. It has categorically stated that the evidence of a related and interested witness who also has a kind of enmity with the accused, then in all such cases such evidence needs to be scrutinized with great care and caution.

The appreciation of evidence should be governed by its own facts and hardly there can be any general rule for it.[98] As a rule of general prudence, the Supreme Court has also opined in the case of *Darya Singh* v. *State of Punjab*[99] that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities taken into account. However, in this very case, the court has very rightly observed and rejected the proposition that a witness who is relative to the deceased as well as shares hostility against the accused, his evidence can never be accepted unless it is corroborated on material particulars. It observed as under:[100]

> On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.

In sum, the decision of *Raju @ Balachandran* v. *State of Tamil Nadu*[101] has certainly invigorated the existing jurisprudence on appreciation of evidences by

97 *Raju @ Balachandran* v. *State of Tamil Nadu* (2012) 12 SCC 701, 707.
98 *Dalip Singh* v. *State of Punjab* 1954 SCR 145.
99 AIR 1965 SC 328.
100 *Id.* at 331.
101 (2012) 12 SCC 701.

the related and interested witness in a criminal case. It very succinctly held that where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. It approved the view of Supreme Court in the case of *Dalip Singh* v. *State of Punjab*[102] and *Sarwan Singh* v. *State of Punjab*:[103]

> The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinized with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration.

Contradictions/ omissions in the versions of the witnesses

In the case of *Jagroop Singh* v. *State of Punjab*[104], the Supreme Court encountered the question of law surrounding as to credibility of an evidence when there are omissions, contradictions or improvements in the versions of the witnesses and to what extent they impact the case if the prosecution. The Supreme Court after examining the judicial precedents on the subject matter held that a minor discrepancy cannot be regarded to have created any dent in the prosecution story.[105]

The position of law which emerges from the various judicial precedents on the issue was reiterated in this case as under:

(i) That the contradictions/omissions must be of such nature which materially affects the trial.[106]
(ii) That minor contradictions, inconsistencies, embellishments or improvements which do not affect the core of the prosecution case should not be made a ground to reject the evidence of the witness in entirety
(iii) That the omissions which amount to contradictions in material particulars, i.e., go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.[107]

Evidence of accomplice

Section 133 of the Indian Evidence Act, 1872 states that an accomplice is a competent witness against an accused person and conviction is not illegal merely

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102 AIR 1954 SC 364.
103 (1976) 4 SCC 369, 376; also see *Waman* v. *State of Maharashtra* (2011) 7 SCC 295; *Israr* v. *State of Uttar Pradesh* (2005) 9 SCC 616; *S. Sudershan Reddy* v. *State of Andhra Pradesh* (2006) 10 SCC 163; *State of Uttar Pradesh* v. *Naresh* (2011) 4 SCC 324; *Jarnail Singh* v. *State of Punjab* (2009) 9 SCC 719; *Vishnu* v. *State of Rajasthan* (2009) 10 SCC 477.
104 (2012) 11 SCC 768.
105 *Id.* at 779.
106 *State Rep. by Inspector of Police* v. *Saravanan* (2008)17 SCC 587.
107 *Sunil Kumar Sambhudayal Gupta* v. *State of Maharashtra* (2010) 13 SCC 657.

because it proceeds upon the uncorroborated testimony of an accomplice. In *Prithipal Singh* v. *State of Punjab,*[108] another point of law under consideration was on the credibility of evidence of accomplice. The Supreme Court speaking through *Dr. B.S. Chauhan* J observed as under:[109]

> An accomplice is a competent witness and conviction can lawfully rests upon his uncorroborated testimony, yet the court is entitled to presume and may indeed, be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless the evidence is corroborated in material particulars, which means that there has to be some independent witness tending to incriminate the particular accused in the commission of the crime.

Evidence of sole eye- witness

The issue as to whether conviction can be based on the evidence of sole witness *vis-à-vis* related/ interested witness was considered in two cases namely *Prithipal Singh* v. *State of Punjab*[110] and *Alagupandi* v. *State of Tamilnadu.*[111]The cardinal principle which governs the field is that absence of independent witnesses and plurality of witnesses does not absolve the accused from the guilt. It is also not the universal rule that in such a situation, the prosecution evidence based on sole witness should be nagatived and benefit of doubt should be given to the accused.

In *Prithipal Singh* v. *State of Punjab,*[112] the Supreme Court upholding 'the rule of conviction of a person on the sole testimony of a single witness' opined as under:

> 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. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

The various principles in this regard which can be culled out from the numerous decisions including the *Alagupandi* v. *State of Tamilnadu*[113] are as under:

(i) It is not the quantity but the quality of the evidence which would bring success to the case of the prosecution or give benefit of doubt to the accused.[114]

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108 (2012) 1 SCC 10.

109 *Id.* at 26. Also see *Rameshswar* v. *The State of Rajasthan*, AIR 1952 SC 54; *Sarwan Singh Rattan Singh* v. *State of Punjab,* AIR 1957 SC 637.

110 (2012) 1 SCC 10.

111 (2012) 10 SCC 451.

112 (2012) 1 SCC 10; also see *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; *Bipin Kumar Mondal* v. *State of West Bengal,* AIR 2010 SC 3638.

113 (2012) 10 SCC 451.

114 *Mano Dutt* v. *State of U.P.* (2009) 13 SCC 790.

(ii) There is no bar in law in examining family members, or any other person, as witnesses.[115]

(iii) When the statement of witnesses, who are relatives, or are parties known to the affected party, 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 witness was family member or interested witness or person known to the affected party.[116]

(iv) Where such sole- cum- related witness are the natural or the only eye witness available to give the complete version of the incident, because of the circumstances and situations.

(v) It is clear that Indian legal system does not insist on plurality of witnesses.[117]

(vi) It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction.[118]

(vii) A witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive."[119]

(viii) Statement of every related witness cannot, as a matter of rule, be rejected by the Courts.

(ix) It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case.[120]

(x) If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon.[121]

(xii) If after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

Indian legal regime has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The two aforementioned judgment on the subject matter examines the precedent and has

115 *Ibid.*

116 *Ibid.*

117 Neither the legislature (S. 134 of the Evidence Act, 1872) nor any of the judicial decisions so far mandates that there must be particular number of witnesses to record an order of conviction against the accused. See, *Alagupandi* v. *State of Tamilnadu*, (2012) 10 SCC 451.

118 *Namdeo* v. *State of Maharashtra* (2007) 14 SCC 150.

119 *Ibid.*

120 *Satbir Singh* v. *State of Uttar Pradesh* (2009) 13 SCC 790.

121 *Ibid.*

upheld the correct position of law on the issue. The progress so far in the *Prihipal Singh Case*[122] records a note of caution that in cases where there are about the testimony, the court will insist on corroboration of the same.

Cross- examination of witnesses

In *Mohd. Hussain* v. *State (Govt. of NCT of Delhi),*[123] the Supreme Court reiterated the importance and relevance of right to cross-examination of a witness in criminal jurisprudence; which is not only a statutory right[124] rather also a kind of natural right.[125] It is a distinct and independent right conferred to the opposite party. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:

(1) to destroy or weaken the evidentiary value of the witness of his adversary;
(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."[126]

Re-appreciation of evidence by the appellate court (SC) in criminal matters

The principle of law that the appellate courts in India in criminal matters have a limited role in re- appreciating the evidences as determined and considered by the trial courts/courts below except the compelling circumstances. The Supreme Court in *State of Rajasthan* v. *Shera Ram @ Vishnu Dutta,*[127] reaffirmed the above proposition of law while discussing the scope of interference by appellate courts in an order of acquittal and reiterated as under:

> The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

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122 (2012) 1 SCC 10.
123 (2012) 2 SCC 584.
124 S.137 of the Indian Evidence Act, 1872 defines it as under:
Cross–Examination – The examination of a witness by the adverse party shall be called his cross- examination.
125 *Jayendra Vishnu Thakur* v. *State of Maharashtra* (2009) 7 SCC 104.
126 *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569, 686.
127 (2012) 1 SCC 602.

In catena of decisions, the Supreme Court has observed and pointed out the circumstances in which the decision of acquittal can be interfered and reversed by the appellate courts as:

(i) Once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal.[128]
(ii) When there were substantial and compelling reasons for doing so.[129]
(iii) To ensure that miscarriage of justice is prevented.
(iv) In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not.[130]
(v) If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.[131]
(vi) Where it is possible to take only one view *i.e.*, the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal.[132]

The golden rule is that the court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience. There is no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If, upon scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside.[133] It is important to note that the expressions like 'substantial and compelling reasons'; 'good and sufficiently cogent reasons'; and 'strong reasons', are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion. But, in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at

128 *State of Rajasthan* v. *Shera Ram @ Vishnu Dutta*, (2012) 1 SCC 602.
129 *State of M.P.* v. *Bacchudas* (2007) 9 SCC 135, 138-139.
130 *Bhagwan Singh* v. *State of M.P.* (2003) 3 SCC 21.
131 *Shivaji Sahabrao Bobade* v. *State of Maharashtra* (1973) 2 SCC 793; also see *Ramesh Babulal Doshi* v. *State of Gujarat* (1996) 9 SCC 225; *Jaswant Singh* v. *State of Haryana,* (2000) 4 SCC 484; *Raj Kishore Jha* v. *State of Bihar* (2003) 11 SCC 519; *State of Punjab* v. *Karnail Singh* (2003) 11 SCC 271; *State of Punjab* v. *Phola Singh* (2003) 11 SCC 58; *Suchand Pal* v. *Phani Pal* (2003) 11 SCC 527; *Sachchey Lal Tiwari* v. *State of U.P.* (2004) 11 SCC 410.
132 *Suman Sood* v. *State of Rajasthan* (2007) 5 SCC 634.
133 *State (Delhi Administration)* v. *Laxman Kumar* (1985) 4 SCC 476; also see *Raj Kishore Jha* v. *State of Bihar,* AIR 2003 SC 4664, *Inspector of Police, Tamil Nadu* v. *John David*, JT 2011 (5) SC 1.

a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.[134]

Prosecution must be based on cogent evidence

The cardinal principle of criminal law *i.e.,* 'presumption of innocence till one is proved guilty' was the subject matter of discussion by Supreme Court in the matter of *Kailash Gour* v. *State of Assam.*[135] Having declared it as the facet of human right,[136] the Supreme Court engrafted the principle as a part of the salutary principle of criminal jurisprudence in India subject to the statutory exceptions.[137] The issue before the court was whether any deviation is permissible from the aforesaid principle of criminal jurisprudence where it is established that the investigation by the police has been carried out in an inefficient, inadequate and inept handling of the investigation by the police and whether in such situations, the principle can be compromised or not? The Supreme Court of India observed as under:[138]

> It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence.

Stating on the flawed and sordid investigative agency, the Supreme Court observed as under:[139]

> That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arsing from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice. The prosecution it is axiomatic, must establish its case against the accused by leading evidence that is accepted by the standards

134 *Sanwat Singh* v. *State of Rajasthan,* AIR 1961 SC 715.

135 (2012) 2 SCC 34.

136 *Ganesan* v. *Rama Sraghuraman* (2011) 2 SCC 83; also see (2011) 4 SCC 324; *Narendra Singh* v. *State of M.P.* (2004) 10 SCC 699; *Ranjit Singh Brahmajeet Singh Sharma* v. *State of Mahsrashtra* (2005) 5 SCC 294.

137 *Ibid.*

138 *Kailash Gour* v. *State of Assam* (2012) 2 SCC 34, 49.

139 *Id. a*t 50.

> that are known to criminal jurisprudence regardless whether the crime is committed in the course of communal disturbances or otherwise. In short there can only be one set of rules and standards when it comes to trials and judgment in criminal cases unless the statute provides for any thing specially applicable to a particular case or class of cases.

The Supreme Court laid down with all clarity that there will be one set of rules and standards for all the trials and judgment in criminal cases unless the statute provides differently.

Power to deal with evidence taken before another judge

Order XVIII, rule 15 of the CPC deals with the 'Power to deal with evidence taken before another judge'-which in turn envisages a situation wherein the due to death, transfer or other cause – if a judge does not conclude the trail of a suit, then in all such cases his successors may deal with such evidence or memorandum taken before the previous judge. In *Rasiklal Manikchand Dhariwal* v. *M.S.S. Food Products,*[140] the Supreme Court affirming the rules inscribed in order XVIII, rule 15 of the CPC held that such power has been duly conferred by the statute. Explaining the objective and purpose of such provisions even if the evidence has not been recorded before that particular judge held as under: [141]

> The idea behind this provision is to obviate re-recording of the evidence or re-hearing of the suit where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit and to take the suit forward from the stage the predecessor Judge left the matter. The trial of a suit is a long drawn process and in the course of trial, the Judge may get transferred; he may retire or in an unfortunate event like death, he may not be in a position to conclude the trial. The Code has taken care by this provision that in such event the progress that has already taken place in the hearing of the suit is not set at naught. This provision comes into play in various situations such as where part of the evidence of a party has been recorded in a suit or where the evidence of the parties is closed and the suit is ripe for oral arguments or where the evidence of the parties has been recorded and the Judge has also heard the oral arguments of the parties and fixed the matter for pronouncement of judgment. The expression 'from the stage at which his predecessor left it'; is wide and comprehensive enough to take in its fold all situations and stages of the suit. No category or exception deserves to be carved out while giving full play to Rule 15 of Order XVIII of the Code which amply empowers the successor Judge to proceed with the suit from the stage at which his predecessor left it.

Circumstantial evidence

The survey year 2012 has witnessed numerous decision by the Supreme Court on 'circumstantial evidence'. Circumstantial evidence is a close companion of factual

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140 (2012) 2 SCC 196.
141 *Id. a*t 210-211.

matrix, creating a fine network through which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit to arrive at any other inference but one, indicating the guilt of the accused. The golden principles popularly referred as 'panchsheel of Circumstantial evidence' as laid down in the case of *Sharad Birdhichand Sarda* v. *State of Maharashtra*[142] was referred and discussed in each of the cases which have been decided in year 2012.[143] However, due to numerous decisions on the subject matter of 'circumstantial evidences', the rule of cautions which a court has to follow in the cases of circumstantial evidence, sometimes not only differ semantically but also in the meaning and content also. As criminal cases are basically fact- centric where each case has its own unique set of facts and circumstances, the proposition of law which has been formulated in *Sharad Birdhichand Sarda* case[144] remains intact and hold the field. These are:

a. 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".
b. 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,
c. the circumstances should be of a conclusive nature and tendency,
d. they should exclude every possible hypothesis except the one to be proved, and
e. 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.

The Supreme Court in the case of *Nagesh* v. *State of Karnataka*[145] discussed the another cardinal rule of criminal jurisprudence that if in a case of circumstantial evidence, there are two possible views, then as a matter of prudence, the view favouring the innocence/ acquittal of accused should prevail. It approved the view of Supreme Court in the case of *Kali Ram* v. *State of H.P.*[146] and held as under:

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence

142 (1984) 4 SCC 116.
143 In the survey year 2012, the cases which dealt with the circumstantial evidence were T*ulshiram Sahadu Suryawanshi* v. *State of Maharashtra* (2012) 10 SCC 373; *Nagesh* v. *State of Karnataka* (2012) 6 SCC 477; *Munish Mubar* v. *State of Haryana* (2012) 10 SCC 464; *Jagroop Singh* v. *State of Punjab* (2012) 11 SCC 768; *Munna Kumar Upadhyay* v. *State of Andhra Pradesh* (2012) 6 SCC 174; *Vadlakonda Lenin* v. *State of Andhra Pradesh* (2012) 12 SCC 260.
144 (1984) 4 SCC 116.
145 (2012) 6 SCC 477.
146 (1973) 2 SCC 808.

adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence."

Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures. The caution against wrongful acquittals so that the faith of people in criminal justice delivery system does not get eroded was also noted by the Supreme Court in the present case. Apart from the above referred 'panchsheel' principles which has been duly approved, relied by the Supreme Court in the survey year, the plethora of decisions which rules the dynamic field like 'circumstantial evidence are as under:-

(i) For appreciating circumstantial evidence, the court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused.[147]

(ii) It is well settled that if any hypothesis or possibility arises from the evidence which is incompatible with the guilt of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidence is difficult to be sustained.[148]

(iii) The Court has to examine the evidence in its entirety, particularly, in the case of circumstantial evidence, the Court cannot just take one aspect of the entire evidence led in the case like delay in lodging the FIR in isolation of the other evidence placed on record and give undue advantage to the theory of benefit of doubt in favour of the accused.[149]

(iv) Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence.[150]

(v) Prosecution is not required to meet any and every hypothesis put forward by the accused.[151]

(vi) 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. Proof beyond reasonable doubt is a guideline, not a fetish.[152]

(vii) Motive assumes great significance and importance.[153]

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147 *Birendar Poddar* v. *State of Bihar* (2011) 6 SCC 350.

148 *Hanumant Govind Nargundkar* v. *State of M.P.,* AIR 1952 SC 343; also see *Bhagat Ram* v. *State of Punjab,* AIR 1954 SC 621; *Eradu* v. *State of Hyderabad* ,AIR 1956 SC 316.

149 *Nagesh* v. *State of Karnataka* (2012) 6 SCC 477.

150 *Singh* v. *State of Punjab* (2003) 7 SCC 643.

151 *State of U.P.* v. *Ashok Kumar Srivastava,* AIR 1992 SC 840.

152 *Inder Singh and another* v. *State (Delhi Admn.)*, AIR 1978 SC 1091.

153 *Munish Mubar* v. *State of Haryana* (2012) 10 SCC 464.

(viii) The evidence indicating the guilt of the accused becomes untrustworthy and unreliable, because most often it is only the perpetrator of the crime alone, who has knowledge of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime.[154]

(ix) If the evidence on record suggest sufficient/necessary motive to commit a crime, it may be conceived that the accused has committed the same.[155]

(x) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;[156]

(xi) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;[157]

(xii) 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[158]; and

(xiii) 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.[159]

(xiv) The circumstances relied upon must be established and the cumulative effect of the established facts must lead to a singular hypothesis that the accused is guilty.[160]

(xv) When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts.[161]

(xvi) Whether a 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.[162]

The proposition of law which emerges from the decisions rendered by the Supreme Court on the circumstantial evidence apart from the panchsheel principles; the decisions of *Munish Mubar* v. *State of Haryana,*[163] J*agroop Singh* v. *State of Punjab,*[164]*Munna Kumar Upadhyay* v. *State of Andhra Pradesh*[165] and *Vadlakonda*

154 *Supra* note 40.

155 *Subedar Tewari* v. *State of U.P.* , AIR 1989 SC 733; also see *Suresh Chandra Bahri* v. *State of Bihar*, AIR 1994 SC 2420; *Dr. Sunil Clifford Daniel* v. *State of Punjab*, JT 2012(8) SC 639.

156 *Padala Veera Reddy* v. *State of Andhra Pradesh* 1989 Supp. (2) SCC 706.

157 *Ibid.*

158 *Ibid.*

159 *Ibid.*

160 *State of U.P.* v. *Ashok Kumar Srivastava,* AIR 1992 SC 840.

161 *Ram Singh* v. *Sonia* (2007) 3 SCC 1.

162 *Ujagar Singh* v. *State of Punjab* (2007) 13 SCC 90.

163 (2012) 10 SCC 464.

164 (2012) 11 SCC 768.

165 (2012) 6 SCC 174.

Lenin v. *State of Andhra Pradesh*[166] lays down the essential canon of legal principle governing the field. However, an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard.

Evidentiary value of last seen theory

The theory of 'last seen' has become one of the permanent feature of judicial decisions and the important tool in the hands of prosecution to establish the guilt of the accused in absence of any direct (oral, documentary) evidence. The complexity of cases and manner in which crimes are being committed has necessitated the evolution of this theory through the judicial interpretations wherein the entire conviction is based on the circumstantial evidence. The last seen theory as propounded by Supreme Court has been considered as a 'weak evidence' and so far the court has maintained the view that 'the last seen theory' may raise suspicion but it is not independently sufficient to lead to a finding of guilt.[167] The court in the matter of *Arjun Marik* v. *State of Bihar*[168] has observed as under:

> … that it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.

In the survey year 2012, the Supreme Court in *Sahadevan* v. *State of Tamilnadu*[169] after analyzing the judicial precedent holding the field hold as under:[170]

> But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

The change and development of law on this issue is reflected from the fact that a conviction may be based upon the 'last seen theory' if the entirety of the case, facts and timing of the crime leads us to an inevitable conclusion that the possibility of accused being the author of crime becomes impossible. Hence, the engrafting of 'the theory of last seen', coupled with the prohibitions/ limitations/ cautions as outlined in this decision makes the case of prosecution much easier in cases of circumstantial evidence where the guilt of accused could be ascertained and proved beyond doubt.

Variations in evidence

The key question as on which all evidences, the court should put reliance in the process of adjudication remains a turbulent area to tread upon. Each case having peculiar and typical set of facts, circumstances and having its own set of evidences

166 (2012) 12 SCC 260.
167 *State of Karnataka* v. *M.V. Mahesh* (2003) 3 SCC 353; also see *State of U.P.* v. *Satish* (2005) 3SCC 114.
168 1994 Supp. (2) SCC 372.
169 (2012) 6 SCC 403.
170 *Id.* at 416.

(documentary or oral) with varied characteristics. The Supreme Court in *Kuria* v. *State of Rajasthan*[171] has held that when the two set of evidence is presented before the court by the rival parties and there are variations, then in the face of unimpeachable evidence, ocular or documentary, the question of corroboration by unreliable evidence does not arise.

Documentary evidence: pre & post-independence document

The Supreme Court has given higher probative value to the pre-independence documents in certain cases, which is produced before it, as in *Anand* v. *Committee for Scrutiny & Verification of Tribe Claims*[172] the Supreme Court opined that the documentary evidence of pre-independence era furnishes a higher degree of probative value to the declaration of status of a caste, as compared to the post-independence documents. However, why the documents of pre- independence period will have higher probative value or why such documents should be credible evidence, has not been dealt upon by the Supreme Court. However, the court further cautioned that where the credibility of document is itself questioned, then in all such cases the veracity has to be tested on the basis of oral evidence, for which an opportunity has to be afforded to the applicant.

Affinity test is not sole criteria to determine the status of Scheduled Tribes

The judicially approved 'affinity test'[173] to determine the status of tribes has been diluted or watered down to the extent by the Supreme Court in *Anand* v. *Committee for Scrutiny & Verification of Tribe Claims.*[174]The Supreme Court held that 'the affinity test' should not be regarded as the 'litmus test' to determine the status. Taking stalk of the developments, globalization, modernization, migration, increased interconnectedness and interactions with other communities, the Supreme Court held that the tribal communities tend to develop and adopt new traits which they may not match with their traditional traits. So, a claim of scheduled tribes should not be declined on the ground that his present traits do not match his tribes' peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc.It further held that the affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim.

Use of personal knowledge by arbitration tribunal as evidence

In the matter of *P.R. Shah, Shares & Stock Brokers Pvt. Ltd.* v. *B.H.H. Securities Pvt. Ltd.,*[175] the issue relating to the use of personal knowledge by the Arbitrator to decide the dispute. The issue as to whether the tribunal can make use of their personal knowledge as evidence to decide the dispute or not was decided in negative. However, the Supreme Court making a clear cut distinction between the 'personal knowledge of the facts of the dispute which is not on record' to the 'expert & technical knowledge' of the subject matter observed:

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171 (2012) 10 SCC 433.
172 2012 (1) SCC 113.
173 *Marrie Chandrashekhar Rao* v. *G.S. Medical College* (1990) 3 SCC 130.
174 (2012) 1 SCC 113.
175 (2012) 1 SCC 594.

> 23. An arbitral tribunal cannot of course make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. But an arbitral tribunal can certainly use their expert or technical knowledge or the general knowledge about the particular trade, in deciding a matter. In fact, that is why in many arbitrations, persons with technical knowledge, are appointed as they will be well-versed with the practices and customs in the respective fields.

In this case, the court concluded that the arbitrators have used/ referred the market practice of particular trade/ industry, which falls in the domain of expert or special knowledge and not of personal knowledge.

III CONCLUSION

The decisions of the Supreme Court in the survey year 2012,on the subject matter of law of evidence, has consolidated the legal position on various grey areas including in consistency between medical and ocular evidence, sterling worth witnesses, classification of witnesses, confession and its admissibility etc. The year has witnessed an important landmark judgment in criminal jurisprudence title as *Mohd. Azmal Amir Kasab* v. *State of Maharashtra*[176] which has considered the fact that the petitioner was a member of Lashkar-e-Toiba and was responsible for 166 deaths and 238 injured persons, but the judgment has not seized the opportunity of examining the legal principles in relation to the law of evidence, particularly intercepted telephones/mobile phone calls from a foreign jurisdictions and its evidentiary value and the use of proxy locations, fake names, domain names in another country, admissibility of electronic records generated, used and collected during and after the Mumbai terrorist attack. The survey year has also reiterated the principle of cross-examination of a witness in criminal jurisprudence, which is a statutory right, but the Supreme Court has enhanced the right by conferring it as part of natural right in *Mohd. Hussain* v. *State.*[177] This evolution of legal principle would confer the right of principles of natural justice in favour of the accused persons. The survey signs off with a note of cheer for the decisions rendered by the Supreme Court of India in the year 2012 for consolidating the various legal principles developed on law of evidence.

176 (2012) 9 SCC 1.
177 (2012) 2 SCC 584.