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EVIDENCE LAW

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I INTRODUCTION

THE SURVEY for the year 2015 on the subject of 'law of evidence' primarily seeks to crystallise the developments in 'legal principles' through judicial decisions and legislative amendments. As there was no 'legislative amendment' in the year 2015 in the Evidence Act, 1872 (IE Act, 1872) the survey primarily focus on analysing the key judicial decisions of Supreme Court in year 2015. It is settled proposition that legislative function consists in 'making' law and not in 'declaring' as what the law shall be.[1] This survey is essentially 'a work in progress' precisely because of its nature itself. As a caution, this year the survey refers only those decisions which depicts the progress in 'legal principles' or 'law' and does not reiterate the old settled principles, which have been followed and crystallised over several years through judicial pronouncements. The survey proceeds 'topic wise' in accordance with ascending order of various section(s) under IE Act, 1872.

II INTERPRETATION CLAUSES

Proved

In the decision of *P. Satyanaraynamurthy* v. *District Inspector of Police, State of A.P.,*[2] while dealing with the ingredients of sections 7 and 13 of the Prevention of Corruption Act, 1988 opined as under:[3]

> … [T]hat mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the

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1 *S.T. Sadiq* v. *State of Kerala* (2015) 4 SCC 400.

2 (2015) 10 SCC 152.

3 *Id.* at 159.

> use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act.

It reiterated the golden principle which runs through the web of administration of justice in criminal cases that suspicion, however grave may be, it cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true, but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture.[4]

Motive

Proof of motive only adds to the weight and value of evidence adduced by the prosecution, which is indicated to heighten the probability of the offence that the accused was impelled by a particular motive to commit the offence.[5] In *Daulat Ram @ Daulti* v. *State of Haryana*,[6] the Supreme Court has opined that the motive is not required to be proved for commission of a crime, but in a case of circumstantial evidence, it cannot be altogether ignored where the other accused with similar role have been acquitted, from the charges of murder.

It is an established principle of law that the mere fact that the prosecution has failed to translate the mental disposition of the accused into evidence, that does not mean, that no such mental condition existed in the mind of the accused. The Supreme Court in *Kiriti Pal* v. *State of West Bengal*,[7] relied upon the past precedent in *Vivek Kalra* v. *State of Rajasthan*[8] and held that 'absence of motive' in cases of circumstantial evidence, when other chain of circumstances are established, does not absolve the guilt of accused and observed as under:[9]

> It is true that motive is an important factor in cases where the conviction is based on circumstantial evidence but that does not mean in all cases of circumstantial evidence if prosecution is unable to prove the motive satisfactorily, the prosecution must fail

4 *Sujit Biswas* v. *State of Assam* (2013) 12 SCC 406.

5 *Vijay Shankar* v. *State of Haryana* (2015) 12 SCC 644.

6 (2015) 11 SCC 378.

7 (2015) 11 SCC 178.

8 (2014) 12 SCC 439, the Supreme Court of India observed as under:

> …where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Indian Evidence Act, 1872, but where the chain of other circumstances establishes beyond reasonable doubt that it is the accused and the accused alone who has committed the offence, and this is one such case, the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence.

9 *Supra* note 7 at 189.

The proof of 'motive' is merely a corroborative piece of evidence.[10] Further, in *Dasin Bai* v. *State of Chhattisgarh*,[11] the Supreme Court rejected the contention that there was no motive to kill the deceased person and termed the same as 'ill founded' which does not break the chain of circumstances. It further observed and reiterated the legal position as under: [12]

Therefore, when facts are clear it is not necessary to have proof of motive or ill-will to sustain conviction.

The absence of 'motive' will not dilute the gravity of crime in the cases where eyewitnesses are present, especially when parties are related in cases of property dispute.[13] Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution.[14]

Alibi

The 'rule of alibi' is incorporated in the section 11 of the IE Act, 1872 which deals with the 'When facts not otherwise relevant become relevant'. The word 'alibi' means 'elsewhere' and is used as a defence that when the occurrence took place the accused was so far away from the place of occurrence, and it is extremely improbable that he would have participated in the crime.[15] In *Vutukuru Lakshmaiah* v. *State of Andhra Pradesh*,[16] the Supreme Court reaffirmed the principle and burden of proof in cases where the accused raises the defence of 'alibi' in following manner:[17]

> The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally, the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding

10 *Supra* note 5.

11 *Dasin Bai* v. *State of Chhattisgarh* (2015) 4 SCC 186.

12 *Ibid*.; also see *Mulakh Raj* v. *Staish Kumar* (1992) 3 SCC 43.

13 *Jagtar Singh* v. *State of Haryana* (2015) 7 SCC 675.

14 *Supra* note 5.

15 *Binay Kumar Singh* v. *State of Bihar* (1997) 1SCC 283.

16 (2015)11 SCC 102; also see *Gurpreet Singh* v. *State of Haryana* (2002) 8 SCC 18; *S.K. Sattar* v. *State of Maharashtra* (2010) 8 SCC 430 and *Jitender Kumar* v. *State of Haryana* (2012) 6 SCC 204.

17 *Id*. at 111.

> his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.

A finding of fact concurrently recorded on the question of alibi is not disturbed by this court in an appeal by special leave.[18]

Circumstantial evidence

The year 2015 has witnessed numerous decisions by the Supreme Court on 'Circumstantial Evidence'. The jurisprudence and legal principles surrounding the 'circumstantial evidence' in the criminal matters has been richly developed and nurtured by the constitutional courts in India. These principles have been crystallised several times in the various decisions including the *Sharad Birdhichand Sarda* v. *State of Maharashtra*[19]as 'panchsheel of circumstantial evidence'.[20] Explaining the essence of principles, in a case which rests on circumstantial evidence, the Supreme Court[21] has held that a court has to be satisfied that:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
(iii) 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;
(iv) 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
(v) the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

18 *Tomaso Bruno* v. *State of U.P.* (2015) 7 SCC 178; also see *Gosu Jayarami Reddy* v. *State of Andhra Pradesh* (2011) 11 SCC 766.

19 (1984) 4 SCC 116.

20 See K.S. Chauhan, "Law of Evidence" XLIX *ASIL* 630 (2013). Kindly refer it for exhaustive enumeration of proposition of law as culled out from ratio of various decisions.

21 *Raja @ Rajinder* v. *State of Haryana* (2015) 11 SCC 43; also see *Vijay Shankar* v. *State of Haryana* (2015) 12 SCC 644; *Padala Veera Reddy* v. *State of A.P.*(1989) Supp. (2) SCC 706 and Balwinder *Singh* v. *State of Punjab* (1995) Supp (4) SCC 259.

In *Kiriti Pal* case,[22] the Supreme Court speaking through *R. Banumathi* J referred the treatise on "Wills' Circumstantial Evidence" and relied on the rules specially to be observed in the cases of circumstantial evidence; which are as under:[23]

(i) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*;
(ii) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;
(iii) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced with respect to the nature of the case, or for admissions;
(iv) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and
(v) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

R. Banumathi J in the decision of *Kiriti Pal* v. *State of West Bengal* [24] notes a word of caution for the cases of circumstantial evidence as under:[25]

> In a case based on circumstantial evidence, the court must adopt a very conscious approach and should record conviction only if all the links in the chain are complete pointing to the guilt of the accused. All the links forming complete chain must be firmly established by the prosecution. Each link taken separately may just suggest suspicion but such suspicion itself may not take the place of proof and not sufficient to convict the accused. All the circumstances must be firmly established and must be consistent only with the hypothesis of the guilt. But that is not to say that the prosecution must meet each and every hypothesis put forward by the accused however farfetched it may be.

When a case is solely based on circumstantial evidence and the circumstances relied upon by the prosecution are not established by convincing evidence and they do not form a complete chain pointing to the guilt, then ordinarily in exercise of its jurisdiction under article 136 of the Constitution of India, the Supreme Court does not enter into re-appreciation of evidence.[26]

Confession and its veracity

The Supreme Court of India had another opportunity in the matter of *Indra Dalal* v. *State of Haryana*,[27] to examine the evidentiary value of '*statements given by accused*

22 *Supra* note 7; also see *Geejaganda Somaiah* v. *State of Karnataka* (2007) 9 SCC 315.
23 Kirti Pal, *supra* note 7 at 185.
24 *Ibid*.
25 *Supra* note 7. 192.
26 *Supra* note 5.
27 (2015) 11 SCC 31.

in Police Custody' and its evidentiary value. These rules are inscribed in the provisions of section 25[28]and section 26[29] of the IE Act, 1872. Explaining the philosophy behind such rule the Supreme Court put it succinctly as under:[30]

> The philosophy behind the aforesaid provision is the acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused, a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

Besides above, the Supreme Court also held that when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible.[31] The only exception to this rule is that such a confession is made in the immediate presence of a Magistrate. Although, section 27 of the IE Act, 1872 deals with the issue that 'how much of information received from accused may be proved.'[32] The Supreme Court in *Indra Dalal* case[33] further held that any recovery made pursuant to the disclosure, would not made the so called-confessional statements as admissible and the same cannot be held as proved against accused.[34] The court stated as under: [35]

28 Indian Evidence Act, 1872, s. 25 reads: Confession to police officer not to be proved.—No confession made to a police officer shall be proved as against a person accused of any offence.

29 *Id*., s. 26 reads: Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation. – In this section "Magistrate" does not include the head of a village discharging magisterial functions (in the Presidency of Fort St. George or elsewhere), unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.

30 *Supra* note 27 at 38.

31 *Supra* note 27.

32 *Supra* note 28, s. 27 reads: How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

33 *Supra* note 27.

34 *Bullu Das* v. *State of Bihar* (1998) 8 SCC 130.

35 *Supra* note 27 at 31, 39.

> It is clear that Section 27 is in the form of proviso to Sections 25 and 26 of the Evidence Act. It makes it clear that so much of such information which is received from a person accused of any offence, in the custody of a police officer, which has led to discovery of any fact, may be used against the accused. Such information as given must relate distinctly to the fact discovered.

The basic idea embedded under section 27 of the is the doctrine of confirmation by subsequent events.[36] The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.[37] The expression "fact discovered" as envisaged under section 27 of the IE Act, 1872 embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. An accused cannot take the shelter under section 25 of the IE Act, 1872, when the confession given by the accused is not the basis for the courts below to convict the accused, but it is only a source of information to put the criminal law into motion.[38]

Section 27

In *Anil alias Raju Namdev Patil* v. *Administration of Daman and Diu*,[39] the Supreme Court held:

> The information disclosed by the evidences leading to the discovery of a fact which is based on mental state of affair of the accused is, thus, admissible in evidence.

In *State of Himachal Pradesh* v. *Jeet Singh*,[40] the Supreme Court has opined that when an object is discovered from an isolated place pointed out by the accused, the same would be admissible in evidence.

Extra judicial confession

It is an established principle of law that extra- judicial confession is a weak piece of evidence and the courts are to view it with greater care and caution.[41] For an extra-judicial confession to form the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities. The principle of law as summarised in the *Sahadevan* v. *State of Tamil Nadu*[42] as under:[43]

36 *Pawan Kumar @ Monu Mittal* v. *State of U.P.* (2015) 7 SCC 148.
37 *State of Maharashtra* v. *Damu* (2000) 6 SCC 269.
38 *Supra* note 36.
39 (2006) 13 SCC 36.
40 (1999) 4 SCC 370.
41 *Supra* note 5.
42 (2012) 6 SCC 403.
43 *Id*. at 412.

i. The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution;
ii. It should be made voluntarily and should be truthful;
iii. It should inspire confidence;
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;
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.

Circumstantial evidence and last seen theory

The 'last seen theory' in criminal cases which primarily hinges upon the 'circumstantial evidence' comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.[44] This is further emboldened by the provisions of section 106 of the IE Act, 1872 which lays down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him.[45] Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution.

In *State of U.P.* v. *Satveer,*[46] the Supreme Court explained the two facets of 'Last Seen Theory' as (i) in terms of proximity of time and (ii) as regards the place itself and explained as under: [47]

> The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

If the prosecution establishes the last seen theory, an inference can be drawn against the accused which may lead to the finding of his guilt.[48] In cases of sole witness

44 *Supra* note 7 ; also see *State of U.P.* v. *Satish* (2005) 3 SCC 114.
45 *State of Rajasthan* v. *Kashi Ram* (2006) 12 SCC 254.
46 (2015) 9 SCC 44.
47 *State of U.P.* v. *Satish* (2005) 3 SCC 114, 123.
48 *Supra* note 5.

Dying declaration

The evidence in the form of dying declaration forms a class in itself and is subjected to only few limitations and exceptions. For a comprehensive list of salutary principles relating to 'Dying declaration' kindly refer to the Annual Survey for year 2014.[49] It is a salutary principle of law that the dying declaration is true and reliable,[50]when it has been recorded by a person at a time when the deceased was physically and mentally fit to make such dying declaration and it has not been made under any tutoring/duress/prompting; and it can be the sole basis for recording conviction.[51]

(i) There is no reason to doubt the veracity of the dying declaration especially, since there is consistency between them.[52]

(ii) If the truthfulness or otherwise of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever in law.[53]

(iii) If the dying declarations are recorded by independent witnesses and the same give a true version of the occurrence as stated by the deceased. The dying declarations are themselves sufficient to hold the accused guilty.[54]

In *Dasin Bai* v. *State of Chhattisgarh*,[55] the Supreme Court held that merely because the deceased suffered 70 per cent burns, this does not raise an assumption that he could not have given the oral dying declaration. It further rejected the contention that the deceased could not give a dying declaration and termed the same as 'devoid of merit'. In the absence of any kind of infirmity or inherent contradictions or inconsistency or any facet that would create a serious doubt on the dying declaration, the court is not inclined to discard it.[56]

Multiple dying declarations

In case there are multiple dying declarations and there are inconsistencies between them, the dying declaration recorded by the higher officer like a magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness.[57]

49 See K.S. Chauhan, "*Evidence Law*" XLX *ASIL* 603, 617.

50 In such an eventuality, no corroboration is required.

51 *Sandeep* v. *State of Haryana* (2015) 11 SCC 154.

52 *Dasin Bai* v. *State of Chhattisgarh* (2015) 4 SCC 186.

53 *Ravi* v *State of T.N.*(2004) 10 SCC 776.

54 *Mafatbhai NagarbhaiRaval* v. *State of Gujarat* (1992) 4 SCC 69.

55 (2015) 4 SCC 186.

56 *Vutukuru Lakshmaiah* v. *State of Andhra Pradesh* (2015) 11 SCC 102.

57 *Supra* note 51; also see, *Lakhan* v. *State of Haryana* (2015) 11 SCC 154.

Expert witness

Section 45 of the IE Act, 1872 deals with the 'opinion of expert' and it defines as to who could be an 'expert' and when opinion of such 'expert' could be a relevant fact. In *State of M.P.* v. *Keshar Singh*,[58] the issue related to the offence punishable under section 376 of the Indian Penal Code, 1860, wherein the courts below have acquitted the accused. The Supreme Court disbelieving the 'expert evidence' as deposed by the doctor and held that the case of the prosecution suffers from inherent inconsistencies and flaws. However, it is not every report of the experts which guides the court absolutely,[59] rather the court opined and cautioned before the acceptance and reliance on expert witnesses in the following words:[60]

> The courts, normally would look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. We agree that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion but such report is not a conclusive one. This Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.

Discrepancies and improvement of witnesses

In *Dilawar Singh* v. *State of Haryana*,[61] the Supreme Court laid down and explained as no uniform rule can be laid down with regard to the behaviour of witnesses reacting to a crime, in the following terms: [62]

> Behaviour of the witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic and no hard and fast rule can be laid down as to the uniformity of the human reaction.

The principles regarding the acceptance of evidence where discrepancies are pointed out by the parties concerned, the Supreme Court has emphasised the principles in the following terms: [63]

58 (2015) 9 SCC 91.

59 *Supra* note 18.

60 *Id.* at 197.

61 (2015) 1 SCC 737; also see *Rana Pratap* v. *State of Haryana* (1983) 3 SCC 327; *State of H.P.* v. *Mast Ram*, (2004) 8 SCC 660; *Lahu KamalkarPatil* v. *State of Maharashtra* (2013) 6 SCC 417.

62 *Dilawar Singh* at 745.

63 *Vinod Kumar* v. *State of Haryana* (2015) 3 SCC 138, 149; also see, *State of U.P.* v. *M.K. Anthony* (1985) 1 SCC 505; *Rammi* v. *State of M.P.* (1999) 8 SCC 649; *Appabhai* v. *State of Gujarat* 1988 Supp SCC 241.

> It is well settled in law that minor discrepancies on trivial matters not touching the core of the case or not going to the root of the matter could not result in rejection of the evidence as a whole. It is also well accepted principle that no true witness can possibly escape from making some discrepant details, but the Court should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that it would be justified in jettisoning his evidence. It is expected of the Courts to ignore the discrepancies which do not shed the basic version of the prosecution, for the Court has to call into aid its vast experience of men and matters in different cases to evaluate the entire material on record.

The minor discrepancies of inconsequential import not having much relevance with the facts and circumstances in which crime has been committed must be ignored so as to uphold the cause of justice.

When discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.[64] There is no doubt that when two views are possible, the one which favours the accused should be taken and the accused should be acquitted by giving the benefit of doubt, however, minor discrepancies by the witnesses would not weaken the case of prosecution where circumstantial evidence, cumulatively taken together, forms a complete chain of events, pointing towards the guilt of the accused in the commission of the crime.[65] In cases where the direct evidence is scarce, the burden of proving the case of prosecution is bestowed upon motive and circumstantial evidence.[66] If the basic substratum of the matter does not get affected by such improvements, then such inconsistencies must be discarded.[67] The test as to when non-examination of a material witness could draw an adverse inference against the prosecution and in which circumstances, such non-examination would have no impact on the prosecution case, in the decision of *Jodhan* v. *State of Madhya Pradesh*,[68] the Supreme Court has considered this aspect and has observed as under: [69]

> …that if a material witness, who unfolds the genesis of the incident or an essential part of the prosecution case, not convincingly brought to the fore otherwise, or where there is a gap or infirmity in the prosecution case where could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such

64 *Pawan Kumar @ Monu Mittal* v. *State of U.P.* (2015) 7 SCC 148; also see *Rammi* v. *State of M.P.* (1999) 8 SCC 649.

65 *Ibid*.

66 *Ibid*.

67 *Kamal Kant Dubey* v. *State of U.P.* (2015) 11 SCC 145.

68 (2015) 11 SCC 52.

69 *Id*. at 67; also see *Takhaji Hiraji* v. *Thakore Kubersing Chamansing* (2001) 6 SCC 145.

a material witness would oblige the court to draw an adverse inference against the prosecution, but if there is an overwhelming evidence available, and which can be placed reliance upon, non- examination of such other witnesses, may not be material.

Secondary evidence (section 65)

Section 65 of the IE Act, 1872 deals with the 'cases in which secondary evidence relating to documents may be given'. It permits the parties to adduce secondary evidence subject to a large number of limitations.[70] Mere admission of a document in evidence does not amount to its 'proof' and such documentary evidence is required to be proved in accordance with law. The limitations can be broadly listed as under:

i. The 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.[71]

ii. 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.

iii. The court has an obligation to decide the question of admissibility of a document inm secondary evidence before making endorsement thereon.

Merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. Admissibility of a document is independent of its probative value and these two aspects cannot be combined.[72] A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.[73]

70 *Supra* note 28, s. 65.

71 *H. Siddiqui (Dead) By LRs.*v. *A. Ramalingam* (2011) 4 SCC 240.

72 *State of Bihar* v. *Radha Krishna Singh* (1983) 3 SCC 118.

73 *NandkishoreLalbhai Mehta* v. *New Era Fabrics Pvt. Ltd.* (2015) 9 SCC 755.

Electronic evidence

The Supreme Court in the *Tamso* case[74] examined the importance of 'Electronic evidence and procedure laid down therein in section 65A and 65B of the IE Act, 1872. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in section 65B is complied with. The computer generated electronic records are admissible in evidence, at a trial if it is proved in the manner specified by section 65B of the IE Act. Sub-section (1) of section 65B makes a document as admissible, or a paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of section 65B. Secondary evidence of contents of a document can also be led under section 65 of the IE Act, 1872.

Documentary evidence and appreciation of evidence by appellate court

In *Laxmidevamma* v. *Ranganath,*[75] the Supreme Court deprecated the practice of interference by high court in those cases where on the basis of sound oral and documentary evidences, the courts below have recorded concurrent findings. The Supreme Court succinctly observed that in exercise of appellate jurisdiction under section 100 of the Code of Civil Procedure,1908, (CPC), the high court cannot upset concurrent findings of fact, unless the findings so recorded, are shown to be perverse.[76]

Hostile witness

The evidentiary value of 'hostile witnesses' are not merely to be disbelieved or washed off the record altogether.[77] The Supreme Court of India after referring the celebrated decision of *Bhagwan Singh* v. *State of Haryana,*[78] opined that the evidence of hostile witnesses can be accepted to the extent it is found to be dependable on a careful scrutiny thereof.[79] Highlighting the importance of 'hostile witness *vis-à-vis* right to cross-examination' the Supreme Court has observed as under: [80]

> …[T]he prosecution has such a right in the process of re-examination, as a natural corollary, the testimony of a hostile witness cannot be brushed aside. On the contrary, both the prosecution and the defence can rely for their stand and stance. Emphasis on re-examination by the prosecution is not limited to any answer given in the cross-examination, but the Public Prosecutor has the freedom and right to put such questions as it deems necessary to elucidate certain answers from the witness. It is not confined to clarification of ambiguities, which have been brought down in the cross-examination.

74 *Supra* note 18.
75 (2015) 4 SCC 264.
76 *Id*. at 269.
77 *Vinod Kumar* v. *State of Punjab* (2015) 3 SCC 220.
78 (1976) 1 SCC 389.
79 *Supra* note 77.
80 *Id*. at 238.

Will as a proof

Proof of a Will stands in a higher degree in comparison to other documents.[81] It recorded the procedure through which such deed needs to be put into effect in following words: [82]

> There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant.

Quality of evidence

In *Vinod Kumar* v. *State of Punjab*,[83] the Supreme Court after examining the facts and circumstances of the case under the Prevention of Corruption Act, 1988 has laid down as under:[84]

> It is the settled principle of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as bribe. In the absence of any evidence of demand and acceptance of the amount as illegal gratification, recovery would not alone be a ground to convict the accused.

Non-examination of material witness

It is an established principle of law that non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, if the same is natural, trustworthy and convincing.[85] In *Raja @ Rajinder* v. *State of Haryana*,[86] where a material witness was not examined, the court held that merely non-examination would not destroy the version of prosecution and recorded as under: [87]

> That apart, he was not such a witness who alone was the competent witness to depose about a fact and his non-examination would really destroy the version of the prosecution.

81 *Dhannulal* v. *Ganeshram* (2015) 12 SCC 301.

82 *Id*. at 307.

83 (2015) 3 SCC 220

84 *Id*. at 243; also see *T. Subramanian* v. *State of T.N.* (2006) 1 SCC 401;*MadhukarBhaskarrao Joshi* v. *State of Maharashtra*, (2000) 8 SCC 571;*Satvir Singh* v. *State of Delhi* (2014) 13 SCC 143.

85 *State of H.P.* v. *Gian Chand* (2001) 6 SCC 71.

86 (2015) 11 SCC 43.

87 *Id*. at 48.

Presumption under section 106 of the Act

In *Paramasivam* v. *State through Inspector of Police*,[88] the Supreme Court held that when deceased is shown to be abducted, it is for the abductors to explain how they dealt with the abducted victim. In the absence of explanation, Court is to draw inference that abductors are the murderers. The Supreme Court reiterated the principle laid down in the *State of W.B.* v. *Mir Mohammad Omar,*[89] *Sucha Singh* v. *State of Punjab*[90] and upheld as under: [91]

> The abductors alone could tell the court as to what happened to the deceased after they were abducted. When the abductors withheld that information from the court there is every justification for drawing the inference, in the light of all the preceding and succeeding circumstances adverted to above, that the abductors are the murderers of the deceased.

It further observed that section 106 of the IE Act, 1872 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

The importance of section 106 of the IE Act, 1872, was explained succinctly in the cases of 'circumstantial evidence' coupled with 'last seen theory' in the decision of *Dasin Bai* v. *State of Chhattisgarh,*[92] in the following terms: [93]

> …in a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him by Section 106, that itself provides an additional link in the chain of circumstances proved against him.

As a rule of prudence and pre-requisite of doing justice, Section 106 of the Indian Evidence Act, 1872 assumes importance because of certain facts of which exclusive knowledge is with the accused and hence the 'burden of proof' lies on him. The rule has been explained in *State of Rajasthan* v. *Kashi Ram*[94] in the following terms: [95]

> …Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased.

88 (2015) 13 SCC 300.
89 (2000) 8 SCC 382.
90 (2001) 4 SCC 375.
91 *Id*. at 380; also see *Paramasivam* v. *State through Inspector of Police* (2015) 13 SCC 300.
92 (2015) 4 SCC 186.
93 *Id*. at 190; also see *State of Rajasthan* v. *Kashi Ram* (2006) 12 SCC 254, 265.
94 (2006) 12 SCC 254.
95 *Id*. at 265.

> He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of the facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act.

The Supreme Court in *Tamso* case[96] held that when crime is committed in the hotel room which had installed CCTV camera at vital points in its precincts, then the prosecution cannot rely upon the presumptions enshrined in section 106 of the IE Act, 1872.The Supreme Court has held in the following terms: [97]

> CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case.

The Supreme Court made a categoric distinction between 'faulty investigation' and absence/non-production of best evidence by the prosecution in the facts and circumstances of the case as under: [98]

> Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence.

Presumption under section 113-A

In *Dhannulal* v. *Ganeshram*,[99] the question relating to presumption of a valid marriage arose. The Supreme Court referred the classic decision of *A.Dinohamy* v. *W.L. Balahamy*,[100] it was held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin.[101]

Burden of proof under section 113-B

Section 113-B of the IE Act, 1872 was inserted through an Amendment to curb and deal with the increasing menace of 'dowry death'. It raises certain presumptions,

96 *Supra* note 18.
97 *Id*. at 191.
98 *Id*. at 192.
99 (2015) 12 SCC 301.
100 AIR 1927 PC 185.
101 *Dhannulal* v. *Ganeshram* (2015) 12 SCC 301, 306.

and places the burden of proof on the accused person upon fulfilment of certain conditions.[102]

In *Major Singh* v. *State of Punjab*,[103]the Supreme Court reiterated the common point of reference for establishing guilt of the accused person under section 304-Bof the IPC, that the woman must havebeen subjected to cruelty or harassment for or in connection with the demand of dowry 'soon before her death'.

Explaining the import of expression "soon before" in section 113-B of the IE Act, 1872 and section 304-B IPC, the court opined that the prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates.[104] It developed the twin test i.e. 'proximity test' as well as 'nexus test' and elaborated that "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of 'soon before' the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive section 304-B IPC and Section 113-B of the IE Act, 1872 is present with the idea of proximity test.[105]

The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. The expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned.[106] If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.[107]

102 *Supra* note 28, s. 113B reads, Presumption as to dowry death: When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation. - For the purposes of this Section, 'dowry death' shall have the same meaning as in Section 304-B, of the Indian Penal Code, 1860.

103 (2015) 5 SCC 201.

104 *Hira Lal* v. *State (Govt. of NCT) Delhi* (2003) 8 SCC 80.

105 *Ibid*.

106 *Harjit Singh* v. *State of Punjab* (2006) 1 SCC 463; also see *Biswajit Halder @ BabuHalder* v. *State of West Bengal* (2008) 1 SCC 202; *Narayanamurthy* v. *State of Karnataka* (2008) 16 SCC 512.

107 *State of A.P.* v. *Raj Gopal Asawa* (2004) 4 SCC 470; also see *Balwant Singh* v. *State of Punjab* (2004) 7 SCC 724; *Kaliyaperumal* v. *State of Tamil Nadu* (2004) 9 SCC 157; *Kamesh Panjiyar @ Kamlesh Panjiyar* v. *State of Bihar* (2005) 2 SCC 388.

In an offence where the ingredients of section 304-B of the IPC read with section 113-B of the IE Act, 1872 is satisfied, then the burden of proof must shift on the accused persons to explain the death of the deceased. In the facts and circumstances of the case, based on the evidence, if the entire conduct of the accused persons is very suspicious and not explained then they have not discharged their burden of proof.[108]

Busting the practice of naming every member of family in the cases of 'dowry death' and simultaneously attaching guilt to every one of them, the Supreme Court in *Basisth Narayan Yadav* v. *Kailash Rai*[109] held as under: [110]

> There is no evidence to the effect that these accused persons were in that house when the incident occurred. Therefore, we do not find it prudent to attach guilt to them in absence of any such evidence.

In the decision of *Sher Singh* v. *State of Haryana*[111] the Supreme Court discussed the aspect of 'presumption of innocence, deemed culpability and burden of proof. Referring and replying upon the decision of *Pathan Hussain Basha* v. *State of A.P.* [112] which noted that (a) that Article 20 of the Constitution of India contain a presumption of innocence in favour of a suspect, and (b) that the concept of deeming fiction is hardly applicable to criminal jurisprudence. It further opined with a caveat as under:

> The logical consequence of both these conclusion would lead to the striking down of Section 8-A of the Dowry Act, Section 113-B of the Evidence Act, and possibly Section 304-B IPC, but neither decision does so.

And the caveat is:

> Even though there may not be any constitutional protection to the concept of presumption of innocence, this is so deeply ingrained in all common law legal systems so as to render it ineradicable even in India, such that the departure of deviation from this presumption demands statutory sanction. This is what the trilogy of dowry legislation has evdeavoured to ordain.

The Supreme Court further noted the difference of statutory expressions used in section 113-A, 113-B of the I.E. Act, 1872 alongwith section 304-B of IPC *i.e.*, in case of section 113-A, Parliament has used the word "presumed" the guilt of the husband and the members of his family in case of a wife's suicide. In section 113-B

108 *Basisth Narayan Yadav* v. *Kailash Rai* (2015) 7 SCC 555.
109 *Ibid.*
110 *Id.* at 560.
111 (2015) 3 SCC 724.
112 (2012) 8 SCC 594.

which refers to dowry deaths, Parliament has again employed the word "presume", Whereas, in substantially similar circumstances, in the event of a wife's unnatural death, Parliament has in section 304-B "deemed" the guilt of the husband and the members of his family.

Section 114

Section 114 of the IE Act, 1872 deals about the situations wherein the 'Court may presume existence of certain facts'[113] As per section 114 (g) of the IE Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving, does not lie on him. The presumption under section 114 (g) of the IE Act, is only a permissible inference and not a necessary inference.[114] Explaining the purport of section 114 and presumption therein, the Supreme Court has observed as under: [115]

> Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

Credence of injured witness

The Supreme Court in *Jodhan* v. *State of Madhya Pradesh*,[116] summarised the principle relating to the special credence attached to the 'injured witness' in following words: [117]

> it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt–guarantee of his presence at the place of occurrence.

Medical evidence versus ocular evidence

When the overwhelming and impregnable testimony of the witness on the entirety of the events relatable to the incident, the decomposition of the dead bodies to nihilate

113 *Supra* note 28, s.114.
114 *Supra* note 18.
115 *Id*. at 192.
116 (2015) 11 SCC 52.
117 *Id*. at 64.

the medical opinion is not sufficient to set aside the conviction.[118] The Supreme Court highlighted the objectives of the judicial scrutiny, in the following terms: [119]

> As the eventual objective of any judicial scrutiny is to unravel the truth by separating the grain from the chaff, we are of the opinion that in the face of clinching evidence on record, establishing the culpability of the appellants, their conviction and sentence as recorded by the courts below, does not call for any interference at this end.

In *Edward* v. *Inspector of Police, Aandimadam Police Station*,[120] the Supreme Court of India held that if there is a difference between ocular and medical evidence, it is clear from the facts that the accused were present there with the common intention to attack the deceased. Thus, in such a situation, a difference between ocular and medical evidence will not stand any ground in acquitting the accused in the present case.

Promissory estoppel

Section 115 of the IE Act, 1872 deals with the rule of 'estoppel' and rule(s) thereto. In *Devi Multiplex* v. *State of Gujarat*,[121] it reiterated the well-known preconditions for the operation of the doctrine:

(i) a clear and unequivocal promise knowing and intending that it would be acted upon by the promisee;
(ii) such acting upon the promise by the promisee so that it would be inequitable to allow the promisor to go back on the promise.

The 'doctrine of promissory estoppel' being an equitable doctrine, it must yield when the equity so requires.[122] The doctrine was not limited only to cases where there was some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affect a legal relationship which would arise in future.[123] The doctrine of promissory estoppel is applicable against the government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel.[124]

120 *Daya Ram* v. *State of Haryana* (2015) 12 SCC 373.
121 *Id*. at 380.
120 (2015) 11 SCC 222.
121 (2015) 9 SCC 132.
122 *MotilalPadampat Sugar Mills Co. Ltd.* v. *State of U.P.*(1979) 2 SCC 409.
123 *Devi Multiplex* v. *State of Gujarat* (2015) 9 SCC 132.
124 *Union of India* v. *Godfrey Philips India Ltd.* (1985) 4 SCC 369.

There can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition.[125]

That promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make.[126]

Another aspect 'Estoppel by conduct' and its governing principles were extensively discussed by the Supreme Court of India in *Bhagwati Vanaspati Traders* v. *Senior Suptd. of Post Office*[127] wherein it was held thatthe issue of an estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status. It further held that such a principle is not available in a case where two people with the same source of information assert the same truth or agree to assert the same falsehood at the same time, neither can be estopped against the other.[128]

Evidence of an accomplice/approver (section 133)

The rule regarding evidence of accomplice/approver has been dealt in section 133[129] of the IE Act, 1872. Accomplice's evidence is addressed by section 133 and 114(b) of the IE Act, 1872, which does not make explicit use of the word 'accomplice'.[130] It is popularly known as section 133 is 'rule of law' and section 114(b) is the 'rule of prudence'.[131] It has been laid down succinctly that a trap witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeds.[132] The Supreme Court in *Vinod Kumar* v. *State of Punjab,*[133] held that a trap witness is an interested witness and for acceptance or reliance of his testimony of such witness requires corroboration and the corroboration would depend upon the facts and circumstances, nature of the crime

125 *MotilalPadampat Sugar Mills Co. Ltd.* v. *State of U.P.*(1979) 2 SCC 409.

126 *Ibid*.

127 (2015) 1 SCC 617.

128 *Bhagwati Vanaspati Traders* v. *Senior Suptd.of Post Office*, AIR 2015 SC 901; also see *Moorgate Mercantile Co. Ltd.* v. *Twitchings*, 1977 (AC) 890; *Square* v. *Square* 1935 P 120: 104 LJP 46.

129 *Supra* note 28, s. 133 Accomplice: An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

130 *D. Velayuthan* v. *State represented by Inspector of Police, Salem Town* (2015) 12 SCC 348.

131 *Ibid*.

132 *Major E.C. Barsay* v. *State of Bombay*, AIR 1961 SC 1762.

133 (2015) 3 SCC 220.

and the character of the trap witnesses. Explaining the requirement of corroboration of testimony of accomplice in the case of *D. Velayuthan* v. *State represented by Inspector of Police, Salem Town,*[134] the court has opined in the following terms: [135]

> The reasons for requiring corroboration of the testimony of an accomplice are that an accomplice is likely to swear falsely in order to shift the guilt from himself and that he is an immoral person being a participator in the crime who may not have any regard to any sanction of the oath and in the case of an approver, on his own admission, he is a criminal who gives evidence under a promise of pardon and supports the prosecution with the hope of getting his freedom.

However, whether corroboration is necessary or not, will be within the discretion of the court, depending upon the facts and circumstances of the case.[136]

Sole witness (section 134)

Section 134 of the IE Act, 1872 states that 'no particular number of witnesses shall in any case, be required for the proof of any fact'. However, over the years through a series of pronouncement, the Supreme Court of India has developed a series of caution while relying on the evidence of 'sole witness,' in the following terms:

(i) where there is a sole witness, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of other material on record.[137]
(ii) the testimony of a sole witness must inspire confidence and it should be beyond suspicion, thus, leaving no doubt in the mind of the Court.[138]
(iii) the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime.[139]
(iv) The evidence of the sole witness thus needs to be considered with caution and after testing it against other material and further, such evidence must inspire confidence and ought to be beyond suspicion.[140]
(v) A conviction can be founded on the testimony of a single witness, if the court finds his version to be trustworthy and corroborated by record on material particulars.

134 (2015) 12 SCC 348.
135 *Id*. at 355; also see *M.O. Shamsudhin* v. *State of Kerala* (1995) 3 SCC 351, 358.
136 *Ibid*.
137 *Joseph* v. *State of Kerala* (2003) 1 SCC 465.
138 *State of Haryana* v. *Inder Singh* (2002) 9 SCC 537.
139 *Ramnaresh* v. *State of Chhattisgarh* (2012) 4 SCC 257.
140 *State of U.P.* v. *Satveer* (2015) 9 SCC 44; also see *Kamal Kant Dubey* v. *State of U.P.* (2015) 11 SCC 145.

It is also trite and true that when feelings run high and there is a personal cause for enmity, there is a tendency to drag in an innocent person against whom the witness has a grudge but foundation must be laid for such a criticism and each case must be judged and governed on its own facts.[141]

Credibility of witness

In *Deepa @ Deep Chand* v. *State of Haryana,*[142] the Supreme Court declined to interfere and affirmed the findings and upheld the conviction on the ground that the eye-witness account in the present case is truthful and has been accepted by both the courts below.

Official witness

In the present survey year, the Supreme Court in *Makhan Singh* v. *State of Haryana,*[143]opined that when the manner in which recovery has been made and independent witnesses do not support the prosecution version, then the conviction secured on undue credence to the testimony of official witnesses, who are generally interested in securing the conviction has to be set aside. However, it recognised the limitations in securing evidence, in the following terms: [144]

> In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence.

Interested witness

The seminal question as whether a trap witness would fall under the ambit of 'interested witness' was considered before the Supreme Court in the matter of *D. Velayuthan* v. *State represented by Inspector of Police, Salem Town*[145] Affirming the principle that a trap witness is not an 'interested witness', the court held as under: [146]

> It would therefore be a derogation and perversion of the purpose and object of anti-corruption law to invariably presuppose that a trap/decoy

141 *Edward* v. *Inspector of Police, Aandimadam Police Station* (2015) 11 SCC 222; also see *Dalip Singh* v. *State of Punjab*, 1954 (1) SCR 145.

142 (2015) 12 SCC 240.

143 (2015) 12 SCC 247.

144 *Id*. at 251.

145 (2015) 12 SCC 348.

146 *Id*. at 356.

> witness is an "interested witness", with an ulterior or other than ordinary motive for ensuring the inculpation and punishment of the accused. The burden unquestionably is on the defence to rattle the credibility and trustworthiness of the trap witness' testimony, thereby bringing him under the doubtful glare of the Court as an interested witness.

The evidence of 'interested witness' per se cannot be said to be unreliable evidence,[147] unless it is found to be not worthy of 'trust' and not credible. A minor and trivial discrepancies in the evidence of 'interested witness' do not create a dent in their evidence warranting to treat the same as improbable or untrustworthy.[148] There is no rule of evidence that the testimony of the interested witnesses is to be rejected solely because other independent witnesses who have been cited by the prosecution have turned hostile.[149] The evidences of 'injured interested witnesses' stands on a higher pedestal than other witnesses.[150]

Related witness

The rule regarding the evidentiary value of 'related witness' was discussed in the decision of *Golbar Husain* v. *State of Assam*[151] wherein it was held that there is no bar on the admissibility of a statement by related witnesses supporting the prosecution case, but it should stand the test of being credible, reliable, trustworthy, admissible in accordance with law and corroborated by other witnesses or documentary evidence of the prosecution. It further flows from the proposition of law that it is the quality of witness that matters and not the quantity, when the related witness was examined and found credible.[152] However, in a case where the only independent witness turned hostile, the appellate courts should affirm the acquittal and grant benefit of doubt considering the factual background and circumstances in the case.[153]

Chance witness

In *Vutukuru Lakshmaiah* v. *State of Andhra Pradesh*,[154] the Supreme Court had occasion to examine the evolving and emerging concept of 'chance witness' in the evidentiary jurisprudence. The expression 'Chance witness' are harped by the advocates to whittle down the gravity of eye-witnesses in a crime. Explaining this, the Supreme

147 *Jodhan* v. *State of Madhya Pradesh* (2015) 11 SCC 52.

148 *Id.* at 63; also see *Hari Obula Reddy* v. *State of A.P.* (1981) 3 SCC 675, 683.

149 *Ibid*.

150 *Id*.; also see *Abdul Sayeed* v. *State of M.P.* (2010) 10 SCC 259.

151 (2015) 11 SCC 242. Also see, Chandrappa v. *State of Karnataka* (2007) 4 SCC 415.

152 *Man Singh* v. *State of Uttarakhand* (2013) 7 SCC 629.

153 *Supra* note 151; also see *Shyamlal Saha* v. *State of West Bengal* (2014) 12 SCC 321.

154 *Supra* note 56; also see *Gurpreet Singh* v. *State of Haryana* (2002) 8 SCC 18; *S.K. Sattar* v. *State of Maharashtra* (2010) 8 SCC 430; *Jitender Kumar* v. *State of Haryana* (2012) 6 SCC 204.

Court relied on the decision of another two-judge bench decision in *Rana Pratap* v. *State of Haryana*[155] in the following terms: [156]

> We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.

However, the Supreme Court has also expressed a word of caution as when the evidence of the so called chance witness, must be discarded in a given facts and circumstances of the case that the evidence of a chance witness requires a very cautious and close scrutiny and as such a witness must adequately explain his presence at the place of occurrence and if his presence at the place of incident remains doubtful, then his version should be discarded.[157]

Cross examination

In *V.K. Misra* v. *State of Uttarakhand*,[158] the Supreme Court held that the court cannot *suo motu* make use of statements to police not proved and ask question with reference to them which are inconsistent with the testimony of the witness in the court. As the words used in section 162 Cr PC, 'if duly proved' indicates the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer.[159] The right to cross- examination is one of

155 (1983) 3 SCC 327.

156 *Id*. at 329; also see *Supra* note 56, 109.

157 *Jarnail Singh* v. *State of Punjab* (2009) 9 SCC 719; also see *Vutukuru Lakshmaiah* v. *State of Andhra Pradesh* (2015) 11 SCC 102, 109.

158 (2015) 9 SCC 588.

159 *Ibid*.

the vital step in the criminal justice system which has been enshrined in the section 138 of the IE Act, 1872 and emboldened by section 146 of the IE Act, 1872. In *Vinod Kumar* v. *State of Haryana*,[160] the Supreme Court laid down in the following terms:[161]

> The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned (1) to test his veracity, (2) to discover who he is and what is his position in life, or (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

The Supreme Court mandating the completion of examination of witnesses and their cross- examination as per the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons in the following terms:[162]

> The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in- chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time.

The Supreme Court recorded its anguish of not following the procedure of trial as mandated and directed the high courts to circulate the copy of decision in the matter of *Vinod Kumar* v. *State of Punjab*[163] as under:[164]

> Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross- examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.

160 (2015) 3 SCC 138.

161 *Id*. at 152; also see *State of U.P.* v. *Nahar Singh* (1998) 3 SCC 561, 566-567.

162 V*inod Kumar* v. *State of Punjab* (2015) 3 SCC 220, 246.

163 *Ibid*.

164 *Id*. at 246.

It is not a rule of universal application that the testimony of a witness becomes unreliable merely because there is delay in examination of a particular witness[165] unless such delayed examination is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing core of witness to falsely support the prosecution case.[166]

The Statementsrecorded during the investigation under section 161 Code of Criminal Procedure, are not substantive piece of evidence but can be used primarily for the limited purpose:[167]

(i) of contradicting such witness by an accused under Section 145 of Evidence Act;

(ii) the contradiction of such witness also by the prosecution but with the leave of the Court and

(iii) the re-examination of the witness if necessary.

The Supreme Court reiterated the procedure involved in the cross- examination and steps involved in the decision of *State of Kerala* v. *S. Unnikrishnan Nair*[168] and *V.K. Misra* v. *State of Uttarakhand*,[169] where it has been laid down that when it is intended to contradict a witness by his previous statement which is reduced into writing, under section 145 of the IE Act,1872 the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness, is brought to the notice of the witness in his cross-examination.

In *Mayank Pathak* v. *State (GNCTD)*,[170] the court below tried to reconcile the parties for an amicable settlement of dispute which met with failure mainly due to denial and refusal of the petitioner in a connected matrimonial dispute. In the present proceedings, the petitioner sought to rely on the concessions and statements made in the court while seeking anticipatory bail, which was rejected by the Supreme Court with an observation, which is as under: [171]

> We are conscious that the statements made in the court in the attempt for conciliation are not evidence before the court and will not be used as such. In any case, we are of the view that the allegations of cruelty

165 *V.K. Misra* v. *State of Uttarakhand* (2015) 9 SCC 588.

166 *Sunil Kumar* v. *State of Rajasthan* (2005) 9 SCC 283.

167 *State of Kerala* v. *S. Unnikrishan Nair* (2015) 9 SCC 639.

168 (2015) 9 SCC 639.

169 (2015) 9 SCC 588.

170 (2015) 11 SCC 798.

171 *Id*. at 799.

> and torture at the hands of the petitioner and the alleged desertion of the complainant as a result of beating, completely disentitle the petitioner to any consideration for anticipatory bail.

In *Golbar Husain*[172]and *Vinod Kumar* v. *State of Haryana*[173] reiterated the legal principles regarding powers of the appellate court,[174] while dealing with an appeal against an order of acquittal, which are as under:

(i) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(ii) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(iv) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." (Emphasis supplied)

(vi) An order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible.

(vii) The appellate Court will not reverse the decision of the trial court merely because a different view is possible.

172 *Supra* note 151; also see *Chandrappa* v. *State of Karnataka* (2007) 4 SCC 415.

173 (2015) 3 SCC 138; also see *Pawan Kumar @ Monu Mittal* v. *State of U.P.* (2015) 7 SCC 148.

174 For a list general principles regarding powers of the appellate court, K.S. Chauhan, *"Evidence Law"* XLX *ASIL* 603, 617.

(viii) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of facts, save in exceptional circumstances.[175]

(ix) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.[176]

(x) When the evidence adduced by the prosecution fell short of the test reliability and acceptability and as such, it is highly unsafe to act upon it.

(xi) Where the appreciation of evidence and finding is vitiated by any error of law or procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

(xii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.[177]

Again further, the Supreme Court had an occasion in *Selvaraj* v. *State of Karanataka*[178] to examine the correctness of high court decision which sought to reverse the judgement of acquittal by the trial court. It opined that the appreciation of evidence is made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal.[179] It noted the words of caution as under: [180]

> We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds.

The Supreme Court reiterated the well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the high court. It referred the *locus classicus* precedent as laid down in *Sanwant Singh* v. *State of Rajasthan*[181] on this point as under:

175 *Supra* note 61; also see, *Ganga Kumar Srivastava* v. *State of Bihar* (2005) 6 SCC 211.

176 *Ibid*.

177 *Jodhan* v. *State of Madhya Pradesh* (2015) 11 SCC 52.

178 (2015)10 SCC 230.

179 *Jagan M. Seshadri* v. *State of Tamil Nadu* (2002) 9 SCC 639.

180 *Selvaraj* v. *State of Karanataka* (2015)10 SCC 230, 237; also see *Jagan M. Seshadri* v. *State of T.N.* (2002) 9 SCC 639, 642-643.

181 1961 (3) SCR 120.

The foregoing discussion yields the following results:

(i) an appellate court has full power to review the evidence upon which the order of acquittal is founded;
(ii) the principles laid down in *Sheo Swarup* case[182] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and
(iii) the different phraseology used in the judgments of this court, such as—
(i) "substantial and compelling reasons",
(ii) "good and sufficiently cogent reasons", and
(iii) "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 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.

In *State of Rajasthan* v. *Sampat Ram*,[183] one of the key witnesses turned hostile and in the facts and circumstances of the case, it completely hinges on the testimony of another witness which was found to be extremely unnatural. The Supreme Court held that the view that has weighed with the high court in reversing the order of conviction and acquitting the respondents-accused is definitely a possible view. In *Sobaran Singh* v. *State of Madhya Pradesh*,[184] the Supreme Court re-appreciating the entire evidence and findings by the trail Court as well as High Court, it opined that the High Court even after noticing the infirmities, in our opinion, fell in error in confirming the conviction of the appellants. It further stated that the case against the appellant has not been proved beyond a reasonable doubt and they are entitled to benefit of doubt.

In *State of M.P.* v. *Madanlal*,[185] the Supreme Court referred a number of duty attached to the appellate court as held in *K. Anbazhagan* v. *State of Karnataka*,[186] which are as under:

182 *Sheo Swarup* v. *King Emperor* (1933-34) 61 IA 398: AIR 1934 PC 227 (2).
183 (2015) 13 SCC 115.
184 (2015) 13 SCC 537.
185 (2015) 7 SCC 681.
186 (2016) 6 SCC 158.

(i) duty to make a complete and comprehensive appreciation of all vital features of the case.
(ii) duty to scrutinize the evidence brought on record in entirety with care and caution.
(iii) duty to see that justice is appropriately administered, which is the paramount consideration of a Judge.[187]
(iv) duty to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record.
(v) duty of the Judge is to consider the evidence objectively and dispassionately.
(vi) duty to lay down the reasoning in appeal with deliberation which should be resolutely expressed.
(vii) duty to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not.[188]

The litmus test and onerous task which the appellate court has been expressed in the following words: [189]

An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.

Reflecting upon the need to strictly adhere to the principles enumerated above with regard to the appreciation of evidence by the Appellate Court in the criminal matters, the Supreme Court in *Pawan Kumar @ Monu Mittal* v. *State of U.P.*[190] has observed as under:[191]

> …Thus in a criminal appeal by special leave, this Court at the hearing examines the evidence and the judgment of the High Court with the limited purpose of determining whether or not the High Court has followed the principles enunciated above. Where the Court finds that the High Court has committed no violation of the various principles laid down by this Court and has made a correct approach and has not

187 The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties.

188 *Jodhan* v. *State of Madhya Pradesh* (2015) 11 SCC 52;also see *State of Punjab* v. *Karnail Singh* (2003) 11 SCC 271.

189 *State of M.P.* v. *Madanlal* (2015) 7 SCC 681, 687; also see *K. Anbazhagan*v. *State of Karnataka* (2016) 6 SCC 158, 183.

190 (2015) 7 SCC 148.

191 *Id*. at 161; also see *Dalbir Kaur* v. *State of Punjab* (1976) 4 SCC 158, 165-166.

> ignored or overlooked striking features in the evidence which demolish the prosecution case, the findings of fact arrived at by the High Court on an appreciation of the evidence in the circumstances of the case, would not be disturbed.
>
> Much time, energy and expense could be saved if the principles enunciated above are strictly adhered to by counsel for the parties and they confine their arguments within the four corners of those principles and they cooperate in this sound and subtle judicial method without transgressing the limits imposed by the decisions of this Court on its power to interfere with the concurrent findings of fact

Evidentiary value of findings by the competent court

The question as whether the findings or decision given under section 15 of the Cr PC is admissible as evidence or not has been dealt by the Supreme Court in the decision of *Surinder Pal Kaur* v. *Satpal.*[192] It held that a decision given under section 15 Cr PC has relevance in evidence to show one or more of the following facts: [193]

(i) That there was a dispute relating to a particular property;

(ii) That the dispute was between the parties;

(c) That such dispute led to the passing of a preliminary order under section 145(1) Cr PC or an order of attachment issued under Section 146(1) Cr PC ; and

(d) That the Magistrate found particular party or parties in possession or fictional possession of the disputed property

In *Surinder Pal Kaur* v. *Satpal*,[194] it was further held that that the observations made in the proceedings drawn under section 145 Cr P C do not bind the 'competent court'[195] in a legal proceeding initiated before it.

Adjournment in criminal trial

Lamenting the practice of seeking unwarranted adjournments by the counsels in the criminal matter, the Supreme Court expressed the apathy and malignant disease which the criminal justice system is facing in the country in following words: [196]

192 (2015) 13 SCC 25.

193 See *Shanti Kumar Panda* v. *Shakuntala Devi* (2004) 1 SCC 438.

194 (2015) 13 SCC 25.

195 The words 'competent court' as used in sub-s.(1) of s. 146 of the Code do not necessarily mean a civil court only. A competent court is one which has the jurisdictional competence to determine the question of title or the rights of the parties with regard to the entitlement as to possession over the property forming the subject- matter of proceedings before the executive magistrate.

196 *Vinod Kumar* v. *State of Punjab* (2015) 3 SCC 220 (*Per Dipak Misra*, J.)

> If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present.

Falsus in uno, falsus in omninbus

The Latin expression '*Falsus in uno, falsus in omninbus*'meaning thereby 'false in one thing, false in everything'has no application under Indian law. It is one of the principle which essentially entails that witnesses cannot be termed as liars which only remains a 'rule of caution'.[197] It essentially deals with the rule of exception enshrined into 'may' and 'shall' wherein the first prevail in discarding of testimonies of witnesses in cases of doubt/suspicion etc.[198]

III CONCLUSION

As the nature of crime is changing in numerous ways due to emerging complex social structure and changing societal norm(s) coupled with technological advancements – the evolving legal principles relating to 'electronic evidence', 'chance witness', 'material discrepancies in appreciation of evidence', 'burden of proof' assumes significance in bringing justice to the victims and establishing a just order in the society. This survey signs off with a note of appreciation for discharging its constitutional task in utmost satisfactory manner by rendering the authoritative decisions and crystallising the legal principles relating to 'law of evidence'.

197 *Krishna Mochi* v. *State of Bihar* (2002) 6 SCC 81.

198 *Raja @ Rajinder* v. *State of Haryana* (2015) 11 SCC 43.