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# LAW OF EVIDENCE

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## I INTRODUCTION

THIS SURVEY for the year 2020 on the subject of 'Law of Evidence' is to minutely analyses the development taken place in the principles and the law as laid down by the Supreme Court. Since there is no legislative amendment in the year 2020 in the Indian Evidence Act, 1872, (hereinafter Evidence Act) this survey is primarily focused on the judicial pronouncements which have led to the development in the area of law of evidence. Certain legal principles as laid down by the Supreme Court have now been altered or overruled, which have been widely elaborated in this survey for the year 2020. This survey is a progressive work and analysis of development of law on the various facets of 'law of evidence' as contained under the Evidence Act. It refers important precedents on various issues relating to the law of evidence at appropriate places besides analysing the decisions rendered by the Supreme Court of India in the survey year, 2020. This survey describes extensively only on those decisions which depicts the progress in the legal principles in the area of evidence which have taken place in the year 2020.

## II INTERPRETATION CLAUSES

**Admission**

The term, "admission" is defined in section 17 of the Evidence Act that an admission is a statement, oral or documentary or contained in electronic form, which suggested any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Admissibility is substantive evidence of the fact admitted and admission is best evidence against the maker, and it can be inferred from the conduct of the party. An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted.[1]

An admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. Thus, the court has to examine the admission made by the parties and it must be remembered that an admission is not conclusive as to the

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1 *JoshnaGouda* v. *Brundaban Gouda* (2012) 5 SCC 634.

truth of the matter stated therein. It is only a piece of evidence, and the weight that has to be attached to such admission, and it must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made, has not acted upon it to his determinant, and it might become conclusive by way of estoppel.[2]

**Admissibility and proof of evidence**

Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that the documents must be proved by primary evidence except in the circumstances mentioned hereinafter. Section 65 of the Evidence Act is important in the cases of documents which may be given in secondary evidence. It states that secondary evidence may begiven of the existence, condition or contents of a document. Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved after a document becomes admissible in evidence. Section 65A speaks of "contents" of electronic records being proved in accordance with the provisions of section 65B of the Evidence Act. section 65B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence.[3] In terms of section 62 of the Evidence Act, primary evidence means a document itself produced for inspection by the court. Section 64 of the Evidence Act stipulates that document must be proved by primary evidence except in certain cases when secondary evidence can be led. In the absence of primary or secondary evidence available in the suit for possession, the reference to such notice as the starting point of limitation is clearly erroneous and is not sustainable.[4]

The Supreme Court in *Rajesh Dhiman* v. *State of H.P.,*[5] has considered a case wherein a team led by *PW8 (ASI Purushottam Dutt)*and other police officers*, PW2 (Constable Bhup Singh) and PW7 (Constable Bhopal Singh)* were checking traffic, when a motorcycle without a number plate was spotted. The appellant-Gulshan Ranawas driving the vehicle and appellant (Rajesh Dhiman), was seated on the pillion.The appellants were given option to be searched in the presence of a magistrate or a gazetted officer for compliance of section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS, Act) but they consented to be searched by the police on the spot itself. The polythene bags were recovered from them which weighed 3kg 100gms. After separating some samples, the charas was duly sealed and

2 *Bhagwat Sharan* v. *Purushottam*, (2020) 6 SCC 387; also see *Nagubai Ammal* v. *B. Shama Rao*, 1956 SCR 541: AIR 1956 SC 593.

3 *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal* (2020) 7 SCC 1 at 27.

4 *Nand Ram* v. *Jagdish Prasad* (2020) 9 SCC 393, 415.

5 *Rajesh Dhiman* v. *State of H.P*., (2020) 10 SCC 740.

handed over to PW3 (Karam Chand) who deposited it at the police station. After completion of personal search, the appellants were formally arrested. There were eight police witnesses and PW3 (Karam Chand) was only an independent witness, who turned hostile.The onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. If the investigation is unfair and the accused is required to demonstrate prejudice and it will be fraught with danger vesting arbitrary powers in the police which may lead to false implication.In the case of *Menaka Gandhi* v. *Union of India,*[6] it is now well settled that under article 21 of the Constitution, the procedure established by law cannot be "any procedure" but it must be a just and a reasonable procedure. Hence, the accused has right to have a fair and independent investigation and trial.The "fair and independent investigation" is a right of an accused flowing from article 21 of the Constitution.[7] The presumption that a person has acted honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor.[8] The presumption, in cases of reverse burden, can operate only after the initial burden which exists on the prosecution is satisfied, and even thereafter, the standard of proof on the accused is only that of preponderance of probability and itis essential to establish the foundational facts, for invoking provisions raising presumptions against the accused cannot operate.[9]

**Hearsay evidence**

There are legal standards of evidence to rely on to presume a particular fact and the legal standards are set forth in governmental laws.The statutes and laws that lawyers point to are legal standards of proving a fact and as per the legal standard, hearsay evidence is inadmissible in evidence. Section 60 of the Evidence Act provides that the oral evidence must be direct. Hearsay evidence is not accepted by the law of evidence because the person giving the evidence is not narrating his own experience or story, rather he is presenting whatever he could gather from the statement of another person. That other person may not be available for cross-examination and, therefore, hearsay evidence is not accepted.[10] The Supreme Court in *Rajesh Dhiman* v. *State of H.P.*[11] has held that hearsay statement is inadmissible in view of the provisions of section 60 of the Evidence Act.

**Evidence of informant as investigator**

A standard of proof refers to the duty of the person responsible for proving the case. There are different standards of proof in different circumstances. Three primary

6 *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248.

7 *Romila Thapar* v. *Union of India* (2018) 10 SCC 753; *Manu Sharma* v. *State* (NCT of Delhi) (2010) 6 SCC 1; *Hema* v. *State* (2013) 10 SCC 192 and *Babubhai* v. *State of Gujarat* (2010) 12 SCC 254.

8 *Devender Pal Singh* v. *State (NCT of Delhi*) (2002) 5 SCC 234.

9 *State of Punjab* v. *Noor Aga* (2008) 16 SCC 417.

10 *Anjanappa* v. *State of Karnataka* (2014) 2 SCC 776; also see *Prempal* v. *State of Haryana* (2014) 10 SCC 336.

11 *Rajesh Dhiman* v. *State of H.P* (2020) 10 SCC 740.

standards of proof are proof beyond a reasonable doubt, preponderance of the evidence and clear and convincing evidence. It is well settled that the standard of proof for establishing the grounds or invoking concepts, such as: bias, *mala fides*, conflict of interest, malice, direct interference, motive etc. The Supreme Court in the case of *E.P. Royappa* v. *State of Tamil Nadu*[12] has observed that the burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. The Supreme Court cautioned the courts to be slow to draw inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and made against the holder of an office that has a high responsibility in the administration. It was clarified that the care must be taken not because of any special status, that the high officials enjoy but because, otherwise, functioning effectively would become difficult in a democracy.The Supreme Court in *Rajesh Dhiman* v. *State of H.P.,*[13] where a team led by IO PW8 (ASI Purushottam Dutt) and other police officers, PW2 (Constable Bhup Singh) and PW7 (Constable Bhopal Singh) were on traffic checking when a motorcycle without a number plate was spotted. Gulshan Rana (appellant) was driving the vehicle and Rajesh Dhiman (appellant) was seated on the pillion.The appellants were given option to be searched in the presence of a Magistrate or gazetted officer, but they consented to be searched by the police on the spot itself. Polythene bags were recovered from them which weighed 3kg 100gms. After separating some samples, the charas was duly sealed and handed over to PW3 (Karam Chand) who deposited it at the police station. After completion of personal search, the appellants were formally arrested. It has beenheld that hearsay statement is inadmissible in view of the provisions of section 60 of the Evidence Act. The Constitution Bench of the Supreme Court in *Mukesh Singh* v. *State (Narcotic Branch of Delhi)*[14] has reconsidered *Mohan Lal* v. *State of Punjab*[15] where the informant himself is the investigator and has set aside the principle and it has been held that in cases where the informant is the investigator himself, that itself cannot be said that the investigation is vitiated on the ground of bias or the like factors. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore, the ground that informant is the investigator, that the accused is not entitled to acquittal on this sole ground.The matter must be decided on a case-to-case basis.In the case of *Mohan Lal* v. *State of Punjab*[16] and any other decision taking a contrary view that the informant cannot be the investigator and in such a case, the accused is entitled to acquittal, are not good law and they have been specifically overruled by the Constitution Bench.

12 *E.P. Royappa* v. *State of Tamil Nadu* (1974) 4 SCC 3.

13 *Rajesh Dhiman* v. *State of H.P.,* (2020) 10 SCC 740.

14 *Mukesh Singh* v. *State (Narcotic Branch of Delhi*) (2020) 10 SCC 120.

15 (2018) 17 SCC 627.

16 *Ibid.*

**Dying declaration**

The principle on which a dying declaration is admissible in evidence is indicated in the maxim "*nemo morituruspraesumiturmentire*", which means that a man will not meet his maker with a lie in his mouth. Thus, a dying declaration may be related to:[17]

(a) the cause of death of the deceasedperson.

(b) any of the circumstances of the transaction which resulted into the death of the deceased person.

Section 32(1) of the Evidence Act deals with *"Dying Declaration"* and it lays down that when a statement is made by a person as to the cause of his death, or as to any of the circumstancesof the transaction which resulted in his death, such a statement is relevant in every case or proceeding in which the cause of the person's death comes into question. Further, such statements are relevant whether the person who made such statement, was or was not at the time when they were made under the expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.[18]

The Supreme Court in *Purshottam Chopra* v. *State (NCT of Delhi),*[19] has held that merely because of 100% burn injuries, it cannot be said that the victim will always be incapable to make a statement which could be acted upon as dying declaration. The condition or fines of the maker of the dying declaration and the admissibility and reliability of such dying declaration, are such which have to be determined in the facts and circumstances in each case. The principle relating to the admissibility and acceptability of the statement made by a victim representing the cause of death, usually referred to as a dying declaration. There are certain pre-requisites for acceptability of a dying declaration, which is well settled by the Constitution Bench of the Supreme Court in the case of *Laxman* v. *State of Maharashtra*[20] wherein the conviction of the appellant was based on a dying declaration of the deceased person which was recorded by the judicial magistrate. The sessions judge as well as the high court has found such dying declaration to be truthful, voluntary and trustworthy, and has recorded conviction on that basis. In appeal to the Supreme Court, it was urged with reference to the decision in *Paparmbaka Rosamma* v. *State of A.P.*[21] that the dying declaration could not have been accepted by the court to form the sole basis of conviction since certification of the doctor was not to the effect that the patient was in a fit state of mind to make such statement. On the other hand, it was contended on behalf of the State with reference to the decision in *Koli Chunilal Savji* v. *State of Gujarat*[22] that the material on record indicated that the deceased was fully conscious and was capable of making a statement. Thus, the matter was referred to

17 *Darshan Pal* v. *State of U.P.*, (2008) 17 SCC 337.

18 *Id.* at 345.

19 (2020) 11 SCC 489.

20 (2002) 6 SCC 710; also see *Purshottam Chopra* v. *State (NCT of Delhi)* (2020) 11 SCC 489 at 517.

21 (1999) 7 SCC 695.

22 (1999) 9 SCC 562.

the larger Bench in the case of *Laxman* v. *State of Maharashtra.*[23] The Constitution Bench in the case of *Laxman* v. *State of Maharashtra*[24] has summed up the principles applicable as regard to the acceptability of dying declaration, which are as under: [25]

> The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation, in which a man is on the deathbed, is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross–examination, are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court must also further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provide the indication, is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of

23 (2019) 11 SCC 512.

24 (2002) 6 SCC 710, at 713-714.

25 *Id*. at 714.

> each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

The Constitution Bench of the Supreme Court affirmed the view in *Koli Chunilal Savji* v. *State of Gujarat*,[26] while holding that *Paparambaka Rosamma* v. *State of A.P.,*[27] was not correctly decided. The Supreme Court has held that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Once the court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as a rule requiring corroboration is not a rule of law but only a rule of procedure.[28]However, where deceased is a mental (psychic) patient and there existed a doubt about mental condition of the deceased at the time of making the dying declaration. In those given circumstances, the benefit of doubts could be given to the accused person.[29]

**Reliability on dying declaration**

The principles relating to recording of dying declaration and its admissibility and reliability are enumerated by the Supreme Court in *Purshottam Chopra* v. *State (NCT of Delhi),*[30] which are reproduced as under:[31]

(i) A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

(ii) The court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

(iii) Where a dying declaration is suspicious, or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

26 (1999) 9 SCC 562.

27 *Paparambaka Rosamma* v. *State of A.P.,* (1999) 7 SCC 695.

28 *Uka Ram* v. *State of Rajasthan*, (2001) 5 SCC 254, at 257.

29 *Ibid.*

30 (2020) 11 SCC 489.

31 *Id.* at 522.

(iv) When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make a statement, the medical opinion cannot prevail and such statement cannot be treated as dying declaration.

(v) The law does not provide as to who could record dying declaration and neither there is any prescribed format nor procedure for the same, but the person recording dying declaration must be satisfied that the maker of such dying declaration is in a fit state of mind and is capable of making such statement.

(vi) Although the presence of a Magistrate is not absolutely necessary for recording of a dying declaration, but to ensure authenticity and credibility of a dying declaration, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording of such dying declaration.

(vii) As regards a burn case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

(viii) If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and it also finds that it is coherent and consistent, then there is no legal impediment in recording conviction on its basis even without corroboration.[32]

The Supreme Court in *Uka Ram* v. *State of Rajasthan*[33] has emphasized on the requirement that the court should be satisfied about trustworthiness of the dying declaration, its voluntary nature and fitness of the mind of the deceased. The Supreme Court in *Thanu Ram* v. *State of Madhya Pradesh*[34] has observed that the court has to consider the interplay between section 113-A of the Indian Evidence Act, 1872 and sections 498-A, 107 and 306 of the IPC, and on consideration of the interplay, it has beenheld that the appellant was liable for conviction for the offences punishable under section 498-A and section 306 of the IPC. However, it is to be noted that in the said case, the court relied on the dying declaration of the deceased wherein she had stated that she had been treated with cruelty, both- mental and physical cruelty by the accused. In the said case, there was a dying declaration of the deceased person which has been believed by the court. The said dying declaration was corroborated by the evidence of PW-13, on the basis of which the court has held that the ill treatment was such, which triggered her immediate intention to commit suicide.

**Multiple dying declaration**

There are many cases where more than one dying declaration is recorded in a case. The Supreme Court has considered the reliability of the dying declarationin

32 *Purshottam Chopra* v. *State (NCT of Delhi*) (2020) 11 SCC 489 at 523; also see *Uka Ram* v. *State of Rajasthan* (2001) 5 SCC 254 and *Laxman* v. *State of Maharashtra* (2002) 6 SCC 710.

33 (2001) 5 SCC 254.

34 *Thanu Ram* v. *State of Madhya Pradesh* (2010) 10 SCC 353.

such casesof more than one dying declaration in *Kashmira Devi* v. *State of Uttarakhand.*[35] The Supreme Court considered the multiple dying declarations in *Kashmira Devi* case, where three dying declarations were recorded. First two dying declarations are found to be non-voluntary as they were made in an atmosphere of fear andthe third dying declaration was found reliable as it has specifically implicated the appellant (mother-in-law) in the act of causing death. It was held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. The court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.[36] The Supreme Court has decided that when there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merits.[37]

In *State of Gujarat* v. *Jayarajbhai Punjabhai Varu*,[38] the Supreme Court has considered multiple dying declarations. It was observed that the courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for his or her cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. It has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

In the case of *Dayaram* v. *State of M.P.*[39] two dying declarations were recorded by the deceased, wherein it was contended that the second dying declaration recorded by the Executive Magistrate did not contain the thumb impression of the deceased. The court has considered the contention and has held that:[40]

> .....The second dying declaration, recorded by the Executive Magistrate-PW-19 did not contain thethumb impression of the deceased, and hence, couldnot be relied upon. The Executive Magistrate - PW-19has stated that the signature or thumb impression couldnot be taken since there were injuries on both his hands. PW-17 - Dr. Hari Agrawalwho conductedthe post mortem on the body of the deceased. Reliance is placed on the decision of [the SupremeCourt] in *Sukanti Moharana* v. *State of Orissa*[41] wherein the Court took the view that there is no reason why a dying declaration which is otherwise found to be true,voluntary and correct, should be rejected only because the person

35 (2020) 11 SCC 343 at 354.

36 *Nallam Veera Satyanandam* v. *Public Prosecutor* (2004) 10 SCC 769.

37 *Ashabai v. State of Maharashtra* (2013) 2 SCC 244.

38 (2016) 14 SCC 151.

39 (2020) 13 SCC 382 at 390.

40 *Dayaram* v. *State of M.P.,* (2020) 13 SCC 382 at 390.

41 (2009) 9 SCC 163.

> who recorded the dying declaration couldnot affix his signatures or thumb impressions on thedying declaration.
>
> 11. Considering the totality of the evidence including the two dying declarations made by the deceased, which are both consistent with each other and the ocular evidence is corroborated by the medical evidence, we are satisfied that the prosecution has proved the case beyond reasonable doubt. The chain of circumstances is complete. We affirm the Judgment passed by the Sessions Court and the High Court.

In *Aher Rama Gova* v. *State of Gujarat*[42] it has been observed that the"original dying declaration was not produced before the court but from the evidence, it is clear that the original was lost and was not available. The magistrate himself had deposed on oath that he had given the original dying declaration to the head constable where head constable had said that he had made a copy of the same and given it back to the magistrate". Thus, the original dying declaration was not available and the prosecution was entitled to give secondary evidence which consisted of the statement of the magistrate as also of the head constable who had made a copy from the original. Thus, the secondary evidence of dying declaration was admitted in evidence, though no application to lead secondary evidence was filed. Similarly, in *Dhanpat* v. *Sheo Ram,*[43] a close reading of the will indicated its clear language, and its unambiguous purport and effect. The mind of the testator was clearly discernible and the reasons for exclusion of the sons, was apparent from the will itself. The Will was in the possession of the beneficiary and was stated to be lost. There was no cross -examination of any of the witnesses of the defendant in respect of loss of original Will. The judicial verdict will be based on the consideration of all the unusual features and suspicious circumstances put together and not upon the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution. Thus, secondary evidence was held to be permissible in such cases.

**Proved**

Section 3 of the Evidence Act defines the word, "*Proved*" which is reproduced hereinunder: -

> "Proved"– A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The Supreme Court in *M. Siddiq (Ram Janmabhumi Temple -5 J)* v. *Suresh Das*[44] has observed that theproof of a fact depends upon the probability of its existence. The finding of thecourt must be based on:

(i) The test of a prudent person, who acts under the supposition that a fact exists; and

(ii) In the context and circumstances of a particular case.

42 (1979) 4 SCC 500.

43 (2020) 16 SCC 209.

44 (2020) 1 SCC 1 at 541.

Analysing this, Y.V. Chandrachud J (as hisLordship then was) in *N G Dastane* v. *S. Dastane* [45] has held that:

> The belief regarding the existence of a fact may thus befounded on a balance of probabilities.A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities, the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue,"[46] or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, sought the proof to be clear. [47]

But whether the issue is one of cruelty or of a loan on apronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. Normally, this is the standard of proof to apply for finding whether the burden of proof is discharged in civil cases.

The court has recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject matter involved. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proofbeyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common senseand, ultimately, on the trained intuitions of the judge.[48]

**Onus and burden of proof**

"Burden of proof" is defined under section 101 of the Evidence Act, which provides that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that

45 (1975) 2 SCC 326: also see *M. Siddiq*, (2020) 1 SCC 1 at 541-542.

46 *Wright* v. *Wright,* (1948) 77 CLR 191 at 210.

47 *Blyth* v. *Blyth*, (1966) 1 AER 524, at 536.

48 *State of U.P*. v. *Krishna Gopal* (1988) 4 SCC 302.

the burden of proof lies on that person. The burden of proof lies on that person, who could fail if no evidence at all were given on either side.[49] Section 102 of the Evidence Act, provides as the on whom the burden of proof lies and Section 103 provides for resting of the burden of proof on the person who wishes the court to believe a particular fact.Section 104 provides for the burden of proving any fact on the person who wishes to believe the court of a certain fact. Like if a person wishes to prove the content of a lost document by the secondary evidence, such person has to prove that the document has been lost. Section 105 of the Evidence Act provides that if an accused contends that his case falls within exception, onus of proving such condition or fact, is upon the accused person. The legal principle embodied in section 106 of the Evidence Act which reads as follows:

"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Thus, the production of evidence to prove certain facts and the onus to discharge the burden of proof is essential under the scheme of the Evidence Act, 1872.

In *Somasundaram* v. *State,*[50] the Supreme Court has held that though it is the duty of the prosecution to prove the case; but it may not be to an extent of holding that a matter which could be proved by the defence as something within his knowledge, the accused can sit tight.The Supreme Court in *Harish Chander* v. *Ghisa Ram*[51] has held that the entries in the Jamabandi carry presumption of truth but such presumption is rebuttable. A presumption of truth attaches to those entries in view of section 44 of the Punjab Land Revenue Act. Once that presumption is raised, still another comes to the aid of respondent no.1 by reason of the rule contained in section 109 of the Evidence Act. If two persons have been shown to stand in the relationship of landlord and tenant to each other, the burden of proving that such relationship has ceased, is on the party who so asserts. In *Vishwa Vijai Bharti* v. *Fakhrul Hasan*[52] it has been held that the entries in the revenue record ought to be generally accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent entries.[53]

The Supreme Court in the case of *State of W.B.* v. *Mir Mohd. Omar*[54] has convicted under section 302 IPC though read with section 34 of the IPC. The Supreme Court has held that section 106 of the Evidence Act 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 for which a reasonable inference can be drawn regarding the existence of certain

49 Indian Evidence Act, 1872, s. 102.

50 (2020) 7 SCC 722.

51 (1981) 1 SCC 431.

52 (1976) 3 SCC 642

53 *Guru Amarjit Singh* v. *Rattan Chand*, AIR 1994 SC 227, examining a dispute of relationship of landlord and tenant and a presumption by reason of the rule contained in s. 109 of the Evidence Act.

54 (2000) 8 SCC 382: 2000 SCC (Cri) 1516.

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.When more than one person has abducted the victim, who is later murdered, it is within the legal province of the court to justifiably draw a presumption depending on the factual situation, that all the abductors are responsible for the murder. Section 34 IPC could be invoked for the aid to that end, unless any particular abductor satisfies the court with his explanation as to what else he did with the victim subsequently, *i.e.,* whether he left his associates enroute or whether he dissuaded others from doing the extreme act etc. Thus, section 106 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 such 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 led to draw a different inference or conclusion.

In *Nagar Parishad, Ratnagiri* v. *Gangaram Narayan Ambekar*[55] it has been held that the first appellate court, after adverting to the oral and documentary evidence produced by the parties, proceeded to first find fault with the evidence of the defendants to answer the controversy in favour of the plaintiffs. The adequacy of the evidence adduced by the plaintiffs and to ascertain whether he had discharged their initial burden of proof at all. However, the first appellate court chose to first examine the evidence of the defendants (appellant and respondent no.20), that too selectively, and misread the same out of context to form its opinion and also took judicial notice of irrelevant facts - which is nothing short of being replete with conjectures and surmises. The high court had fallen in error in not entertaining the second appeal despite such manifest and cardinal infirmities committed by the first appellate court. The first appellate court had committed palpable error in not keeping in mind that the initial burden of proof was on the plaintiffs to substantiate their cause for actionable nuisance, which they had failed to discharge. In such a case, the weakness in the defence cannot be the basis to grant relief to the plaintiffs and to shift the burden on the defendants, as the case may be. Thus understood, the findings and conclusions reached by the first appellate court will be of no avail to the plaintiffs. Section 109 of the Evidence Act further contemplates that whether there exists a relationship of landowner and tenant and the burden of provingsuch a relationship is on the person who affirms it.[56]

**Presumption**

Section 4 of the Evidence Act provides that the court may presume a fact, it may either regard such fact as provided, unless and until it is disproved, or may call for its proof. A presumption is not in itself evidence but onlymakes a *prima facie* case for party in whose favour it exists. It is a rule concerning evidence. It indicates theperson on whom the burden of proof lies. When presumption is conclusive; it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable, it only points out the party on whom lies the

55 (2020) 7 SCC 275.

56 *Pratap Singh* v. *Shiv Ram* (2020) 11 SCC 242.

duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over.Then the evidence will determine the true nature of the facts which are to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.[57] Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.[58]

The court may presume a fact that, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.[59] The court shall presume a fact; it shall regard such fact as proved, unless and until it is disproved.[60]The court presumes to be genuine every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or state government.[61]Section 81 of the Evidence Act requires the court to presume the genuineness of every document purporting to be any official gazette or the Government Gazette of any colony, dependency or possession of the British Crown.[62] Section 81 raises a presumption of the genuineness of the document and not of its contents. When the court has to form an opinion on the existence ofa fact of a public nature, section 37 of the Evidence Act indicates that any statement from a government gazette is a relevant fact. While gazetteer shave been noticed in several decisions of the Supreme Court, it is equally important tonote that the reliance placed on them is more in the nature of corroborative material.[63] How the presumption can be inferred has come for consideration before the Supreme Court in *Harish Chander* v. *Ghisa Ram,*[64] wherein it is held that the entries in the *Jamabandi* carry presumption of truth but such presumption is rebuttable.[65]The entries in the revenue record ought to be generally accepted at their face value and courts should not embark upon anappellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent entries.[66]

There is presumption of truth attached to the revenue records, but if it is proved that the entry has been made fraudulently, then such presumption is discharged and the other party has to prove that the entry in question is genuine, to discharge such

57 *Sodhi Transport Co*. v. *State of U.P*., (1986) 2 SCC 486; also see *Partap Singh* v. *Shiv Ram* (2020) 11 SCC 242 at 251.

58 *Kumar Exports* v. *Sharma Carpets* (2009) 2 SCC 513.

59 Indian Evidence Act, 1872, s. 4.

60 *Id*., s. 3.

61 *Id*., s 79.

62 *Id*., s. 81.

63 M. Siddiq (Ram Janmabhumi Temple -5 J) v. Suresh Das, (2020) 1 SCC 1.

64 (1981) 1 SCC 431.

65 (2020) 11 SCC 242.

66 See *Vishwa Vijai Bharti* v. *Fakhrul Hasan* (1976) 3 SCC 642; also see *Partap Singh* at 251.

burden. It has been held in the case of *Partap Singh* v. *Shiv Ram*[67] that the presumption of truth attached to the revenue record, can be rebutted if such entry was made fraudulently or surreptitiously or where such entry has not been made by following the prescribed procedure. The presumption of truth attached to the record-of-rights can be rebutted only if there is a fraud in the entry or the entry was surreptitiously made or that prescribed procedure was not followed. It will not be proper to rely on the oral evidence to rebut the statutory presumption as the credibility of oral evidence vis-a-vis documentary evidence is at a much weaker level.[68] The Supreme Court in *Vaijinat* v. *Afsar Begum*[69] has held that the land tribunal being a statutory body, there shall be a presumption of correctness of the orders passed by it. In the case of *Bala Shankar Maha Shanker Bhattjee* v. *Charity Commissioner, Gujarat State,*[70] the issue was as to whether the temple of Kalikashrine on Pavagadh was a public trust within the meaning of the Bombay Public Trust Act,1950. In this context, a two judge bench of the Supreme Court has held that:

> 22…It is seen that the Gazette of the Bombay Presidency, Vol.III published in 1879 is admissible under Section 35 read with Section 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Section 45 and the court may in conjunction with other evidence and circumstance take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence.

It has been observed in *M. Siddiq (Ram Janmabhumi Temple -5 J)*[71] that the gazette has not been treated to be independent evidence of a conclusive nature in itself. The court has a caution in the above extract. The contents of the gazetteer may be read in conjunction with other evidence and circumstances. They may be taken into consideration but would not be conclusive evidence. The historical material which has been relied upon in the course of the proceedings before the high court must be weighed in the context of the salutary principles which emerge from the above decisions. The court may have due regard to appropriate books and reference material on matters, of public history. Yet, when it does so, the court must be conscious of the fact that the statements contained in travelogues as indeed in the accounts of gazetteers reflect opinions on matters which are not amenable to be tested by cross-examination at this distant point of time. Consequently, where there is a dispute pertaining to possession and title amidst a conflict of parties, historical accounts cannot be regarded as conclusive. The court must then decide the issue in dispute on the basis of credible evidentiary material.

67 (2020) 11 SCC 242.
68 (2020) 11 SCC 242, p.252.
69 (2020) 15 SCC 128.
70 1995 Supp (1) 485.
71 (2020) 1 SCC 1.

The Supreme Court in *Mohan Lal* held that in a case where, the investigation is conducted by the police officer, who himself is a complainant, the trial is vitiated and the accused is entitled to acquittal. The correctness of the said decision has been doubted and the matter was referred to the larger bench consisting of three-judges.[72] Subsequently, the three-judge bench in *Mukesh Singh* v. *State (NCTE of Delhi)*[73] has referred the matter to the larger bench of five-judges for reconsideration of the decision in *Mohan Lal* v. *State of Punjab.*[74] The Constitution Bench of the Supreme Court has decided the reference in *Mukesh Singh* v. *State (NCTE of Delhi),*[75] where it has been held that that the investigation by an investigation officer, who himself is informant/ complainant in the case, is not barred under NDPS Act or Cr PC to conduct such investigation. In a case where informant officer himself is investigator, but it cannot be said that the investigation is vitiated on the ground of bias or the like factor. The five-judges bench referred to the *illustration* (e) appended to section 114 of the Evidence Act and has held that as per the said provision, in law if an official act has been proved to have been done, it shall be presumed to be regularly done. Credit has to be given to public officers in the absence of any proof to the contrary of their not acting with honesty or within limits of their authority. Therefore, merely because the complainant conducted the investigation that would not be sufficient to cast doubt on the entire prosecution version and to hold that the same makes the prosecution version vulnerable. The matter has been left on the courts to decide on a case-to-case basis without any universal generalisation.[76] Thus, the contrary decision in *Mohan Lal*[77] has been overruled by the larger bench.

**Presumption as to abetment of suicide by married woman**

Section 113-A of the Evidence Act deals with a presumption which the court may draw in a particular fact situation, which may arise, when necessary, ingredients in order to attract that provision are established.[78] The question then arises as to whether in the facts and circumstances of the case, one can be convicted of the offence under section 306 IPC with the aid of presumption under section 113-A of the Evidence Act. Section 107 IPC lays down the ingredients of abetment which includes instigating any person to do a thing or engaging with one or more person in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that act or illegal omission to the doing of that thing. In the absence of direct evidence, the prosecution has relied upon section 113-A of the Evidence Act under which the court may presume on proof of circumstances enumerated therein and having regard to all the other circumstances of the case, that the suicide had been abetted by the accused. Under section113-A of the Evidence Act, the prosecution has to first establish that

72 *Mukesh Singh* v. State *(NCT of Delhi*) (2020) 17 SCC 573.

73 (2020) 10 SCC 164 at 165.

74 (2018) 17 SCC 627.

75 (2020) 10 SCC 120.

76 *Id*. at 144.

77 *Supra* note 74.

78 P*rinakin Mahipatray* v. *State of Gujarat* (2013) 10 SCC 48, at 58.

the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty. Even if these facts are established the court is not bound to presume that the suicide had been abetted by her husband. Section 113-Aof the Evidence Act confers discretion to the court to raise such presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty, and it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word, "cruelty" in section 498-A of the IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband. The court is required to look into all the other circumstances ofthe case. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature, as it was likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or danger tohealth of the woman.[79]

In *Ramesh Kumar* v. *State of Chhattisgarh,*[80] a three-judges bench of the Supreme Court has considered the question as to whether in a case where the prosecution establishes cruelty under explanation (b) of section 498-A of the IPC and it also establishes that the deceased committed suicide within seven years of her marriage, whether the accused could also be held guilty for the offence punishable under section 306 of the IPC ('Abetment of suicide') with the aid of section113-A of the Evidence Act. While dealing with the provisions of section 306 IPC and section 113-A of the Evidence Act, the Supreme Court has observed that:

> 12. This provision was introduced by the Criminal Law (Second)Amendment Act, 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-lawsand incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her tocruelty. On existence and availability of the abovesaid circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband.

79 *Gurjit Singh* v. *State of Punjab* (2020) 14 SCC 264 at 276; also see *Hans Raj* v. *State of Haryana*, (2004) 12 SCC 247 at 263-64.

80 *Ramesh Kumar* v. *State of Chhattisgarh* (2001) 9 SCC 618; also see *Gurjit Singh* v. *State of Punjab*, (2020)14 SCC 264 at 272-273.

> Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". Aconsideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression— "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, *the presumption is not an irrebuttable one*. In spite of a presumption having been raised the evidence adduced in defenceor the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says— "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it".
>
> 13. The present case is not one which may fall under clauses secondly and thirdly of Section 107of the Penal Code, 1860. The case has to be decided by reference to the first clause i.e.whether theaccused appellantabetted the suicide by instigating her to do so."

The Supreme Court in *Gurjit Singh* v. *State of Punjab,*[81] has observed that the applicability of section 113-A of the Evidence Act, certain conditions are prerequired to be satisfied, which are as follows: -

(i) The woman has committed suicide,

(ii) Such suicide has been committed within a period of seven years from the date of her marriage,

(iii) The husband or his relatives, who are charged had subjected her to cruelty.

The Supreme Court has been observed that on the existence and availability of the aforesaid circumstances, the court may presume that such suicide had been abetted by her husband, or by such relatives of her husband. It has been held that the presumption is not mandatory; but only permissive as the words "may presume" suggests. It has been held that theexistence and availability of the aforesaid three circumstances shall not, like a formula, enable the presumption being drawn. It has been further held that before a presumption beingdrawn, the court shall have regard to all other circumstances of the case. It has been held, that the consideration of all other circumstances of the case, may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. It is, thus observed

81 (2020) 14 SCC 264.

that the expression "the other circumstances of the case" used in section 113-A of the Evidence Act suggests the need to reach a cause-and effect relationship between the cruelty and the suicide for the purpose of raising a presumption.[82] The court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. It has beenfurtherheld that section 498-A and Section 306 of the IPC are independent provisions and constitute different offences. It has been observed that depending on the facts and circumstances of an individual case of subjecting a woman to cruelty, such cruelty may amount to an offence under section 498-A of the IPC.[83]

The prosecution has to establish beyond reasonable doubt that the accused had instigated, conspired or intentionally aided so as to drive the wife to commit suicide. Even if it is established that the woman has committed suicide within a period of seven years from the date of marriage and that her husband had subjected her to cruelty, the court is not bound to presume that suicide has been abetted by her husband. It is required to take into consideration all other circumstances.[84]

In *Gurjit Singh* v. *State of Punjab*[85] the Supreme Court has held that merely because an accused is found guilty of an offence punishable under section 498-A of the IPC and the death has occurred within a period of seven years of the marriage, the accused cannot be automatically held guilty for the offence punishable under section 306 of the IPC by employing the presumption under section 113-Aof the Evidence Act,unless the prosecution establishes that some act or illegal omission by the accused has driven the deceased to commit suicide, the conviction under section 306 would not be tenable.In *Surinder Kumar* v. *State of Punjab,*[86] it has been observed that merely because prosecution did not examine any independent witness, and it would not necessarily lead to conclusion that accused was falsely implicated. The Supreme Court has relied upon the case of State, in the case of *Govt. of NCT of Delhi* v. *Sunil*[87] where it had been observed as follows:

> It is an archaic notion that actions of the Police Officer, should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Courts cannot start with the presumption that the police records are untrustworthy. As a presumption of law, the presumption would be the other way round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature.

82 *Id*. at 273-74.

83 *Gurjit Singh* v. *State of Punjab* (2020) 14 SCC 264 at 275; also see *State of W.B*. v. *Orilal Jaiswal* (1994) 1 SCC 73.

84 *Id*. at 278; also see *Hans Raj* v. *State of Haryana* (2004) 12 SCC 247.

85 *Ibid.*

86 (2020) 2 SCC 563.

87 (2001)1 SCC 652.

The Supreme Court has affirmed the findings recorded by the trial court and high court, that the evidence of official witnesses (oral and documentary evidence) placed on record cannot be distrusted and disbelieved, merely on account of their official status. Therefore, the mere fact that the case of the prosecution is based on the evidence of official witnesses, such evidence if not corroborated from the circumstances beyond reasonable doubts, it should not be believed. From the evidence on record in this case, the prosecution has proved the guilt of the appellant beyond reasonable doubt. The conviction recorded and the sentence imposed is in conformity with the provisions of law and evidence on record.

**Extra judicial confession**

The law of confession is embodied under the provisions of sections 24 to 30 of the Evidence Act, 1872. The confession is a form of admission consisting of direct acknowledgement of guilty in a criminal charge.[88]A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person.[89]The confession made by the accused while in custody of police not be proved against him, unless it is made in the immediate presence of magistrate.[90] A statement made under section 27 of the Evidence Act is not only about the thing as such which is discovered consequent upon the statement but the knowledge attributed to the person who makes the statement about the matter, discovered, based on the statement.[91]An extra-judicial confession is used against its maker but as a matter of caution, advisable for the court to look for a corroboration with the other evidence on record.[92]

The extra-judicial confession cannot be sole basis for recording the confession of the accused, if the other surrounding circumstances and the materials available on the record do not suggest this complicity. It is a very weak type of evidence and requires appreciation with very great deal of care and caution where an extra-judicial confession is surrounded by suspicious circumstance, its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing any reliance upon an extra-judicial confession.[93]The court is reluctant, in the absence of a chain of cogent circumstances, to rely on the extra-judicial confession, for the purpose of recording a conviction.[94]

It is well settled that the conviction can be based on a voluntary confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence.[95] Extra-judicial confession of the accused need not in all cases

88 *Raja alias Ayyappan* v. *State of Tamil Nadu* (2020) 5 SCC 118 at124.
89 Indian Evidence Act, 1872, s. 24.
90 Indian Evidence Act, 1872, s.26.
91 *Somasundaram* v. *State* (2020) 7 SCC 722 at 767.
92 *Devi Lal* v. *State of Rajasthan*, (2019) 19 SCC 447.
93 *Balwinder Singh* v. *State of Punjab* (1995) Supp. (4) SCC 259.
94 *Gopal Sah* v. *State of Bihar* (2008) 17 SCC 128.
95 *Ram Lal* v. *State of H.P.* (2019) 17 SCC 411.

be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.[96]

In *Bhagwat Sharan* v. *Purushottam,*[97] the Supreme Court has held that an admission made by a party is only a piece of evidence not conclusive proof of what is stated therein. It is only a piece of evidence, the weight is to be attached to it, which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.[98]

**Validity of confession**

The validity of confession in India is that the same must be made before Magistrate after compliance with certain safeguards. The cornerstone of a valid confession in India is only whether such a statement was made in compliance with the statutory provisions which mandate that the same must be before the Magistrate after compliance with the certain safeguard mean to ensure voluntariness and lack of coercion by the police.[99]Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed, a confession, if it is voluntary, true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. The Privy Council in *Palaka Narayana Swamy* v. *Emperor*[100] has stated that in India, it is rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true.[101]

96 *Darshan Singh* v. *State of Punjab* (2020) 2 SCC 78 at 86; also see *Madan Gopal* v. *State of Punjab* (1977) 4 SCC 452.

97 *Bhagwat Sharan* v. *Purushottam*, (2020) 6 SCC 387 at 396.

98 *NagubaiAmmal* v. *B. Shama Rao*, 1956 SCR 451: AIR 1956 SC 596.

99 *Manoharan* v. *State* (2020) 5 SCC 782 at 794.

100 AIR 1939 PC 47.

101 *Bara*t v. *State of U.P.,* (1971) 3 SCC 950 at 953.

In *Manoharan* v. *State,*[102] the Supreme Court has observed that on a conjoint reading of the confessional scheme comprising of sections 163, 164 Cr PC and section 24 of the Evidence Act as construed in the catena of decisions of the Supreme Court, it is obvious that even in the absence of an express provision for retracting a confessionary statement once made, the courts have preferred a rule of prudence whereby in a case of retraction, the court reduces the probative value of such confessionary statements and seeks corroborating evidence.[103]

In *Raja alias Ayyappan* v. *State of Tamil Nadu*[104] the Supreme Court decided the question whether the appellant has made the confession voluntarily and truthfully. A confession which is not free from doubt about its voluntariness, is not admissible in evidence. A confession caused by the inducement, threat or promise cannot be terms as voluntary confession.[105]The confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also, the authority recoding the confession, be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to issue whether the accused has come forward to make confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognising the stark reality of the accused being enveloped in a stage of fear and panic, anxiety and despair while the police custody, the Evidence Act has excluded the admissibility of a confession made to the police officer.[106] Finally, the Supreme Court in *Raja alias Ayyappan*[107] has held that the manner in which the accused has made the statement, is the foundation upon which it is to be found out, as to whether the statement was made voluntarily or not. If the certificate is not supported by any of the above inputs, then the certificate needs to be rejected. The police officer cannot record such a certificate out of his own imagination and the entire proceedings should reflect that the certificate was rightly given based on the materials. The court has observed that in the present case, there is nothing on record to prove the voluntariness of the statement. The other circumstances would go to show that the appellant could not have made the statement voluntarily. Therefore, the confession statement of the appellant requires to be rejected.[108]

**Confession statement of co-accused- admissibility**

In *Raja alias Ayyappan* v. *State of Tamil Nadu,*[109] Supreme Court considered the issue as to whether the statement of two other co-accused is admissible in evidence.

102 *Manoharan* v. *State* (2020) 5 SCC 782

103 *Id*. at 794.

104 *Raja alias Ayyappan* v. *State of Tamil Nadu* (2020) 5 SCC 118.

105 *Id.* at 124.

*106 State (NCT of Delhi*) v. *Navjot Sandhu* (2005) 11 SCC 600.

107 (2020) 5 SCC 118 at 128.

Section 30 of the Evidence Act mandates that to make the confession of a co-co accused admissible in evidence, there has to be a joint trial. If there is no joint trial, the confession of a co-accused is not at all admissible in evidence and, therefore, the same cannot be taken as evidence against the other co-accused.[110]In the aforementioned case, one accused was absconding and therefore joint trial could not be held. A confession statement of the accused may be admissible and used not only against him but also against a co-accused person tried jointly with him for the same offence. Section 30 applied to the case in which the confession is made by accused tried at the same time with the accused person against whom the confession is used. The confession of an accused tried previously would be rendered inadmissible, since, the trial of two accused persons was separate and hence their confession statements are not admissible in evidence and the same cannot be taken as evidence against another accused person.[111]

**Retracted confession**

It is well settled that the confession, which is not free from doubt about its voluntaries, is not admissible in evidence and whether the confession is voluntary or not is essentially a question of fact. The retractions must be made by the accused as soon as possible, otherwise there would be a strong presumption of voluntariness in the confession.[112] In *Manoharan* v. *State*[113] the confession was not challenged during stage of framing of charge or over the course of examination of forty-seven prosecution witnesses, but instead only disputed through a letter written in secret just before the petitioner's examination under Section 313 of the Code. It is thus evidence that such retraction at the fag-end of the defense strategy. Hence there remain no doubt about the voluntariness of the confession or it being unaffected by the subsequent retraction. The rule regarding use of such retracted confession was noted by the Supreme Court in *Subramanian Goundan* v. *State of Maharashtra*[114] as well as by four-judge Bench in *Pyare Lal Bhargava* v. *State of Rajasthan,*[115] wherein Supreme Court held that a retracted confession may from the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less or a retracted confession, unless the court is satisfied that the retracted

108 *Ibid*.

109 (2020) 5 SCC 118 at128.

110 *Ibid.*

111 (2020) 5 SCC 118, p.130.

112 *Shankari* v. *State of Rajasthan*, (1978) 3 SCC 435; also see Manoharan v. State, (2020) 5 SCC 782.

113 (2020) 5 SCC 782, at 796.

114 AIR 1958 SC 66.

115 AIR 1963 SC 1094.

confession is true and voluntarily made and has been corroborated in material particulars. The substantial admission made by the accused must be read together with the prosecution evidence and are sufficient to convict the accused.

**Test identification parade**

The substantive evidence is the evidence of identification in the court. As a general rule, the substantive evidence of the witness is the statement in the court. The evidence of identification merely corroborates and strengthens the oral testimony in the court which alone is the primary and substantive evidence as to identify.[116]They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court.[117]

In *Mustak @ Kanio Ahmed Shaikh v. State of Gujarat*[118] the eye witnesses to the crime being the victim and the driver of his car, the complainant confidently identified the Appellant and first accused. The witness could not be shaken in cross-examination. PW-10 testified to the recovery of weapon of offence in his presence, the test identification parade was conducted and PW-11 corroborated the evidence of PW-12 and PW-8with regard to the identification and he also could not be shaken despite extensive cross-examination and the recovery is at the instance of the appellant and also identified the appellant in court.[119] Considering the manner in which the victim was shot, there can hardly be any doubt that the attempt was to murder the victim.It had been established beyond any iota of doubt that the victim had sustained bullet injuries. It had also been proved that the incident had taken place and, in the manner, alleged.Considering the testimony of three medical experts who deposed with regard to the gravity and seriousness of the injuries.The High Court confirmed the judgment and order of conviction but enhanced sentence under Section 307 read withSection 114 of the IPC to seven years instead of six years. The Supreme Court has affirmed it and has linked to the recovery of weapon and test identification. The facts which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. Identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect, is the real person whom the witnesses had seen in connection with the said occurrence.[120]

116 *Hari Nath* v. *State of U.P.,* (1988) 1 SCC 14; also see *Rameshwar Singh* v. *State of J & K,* (1971) 2 SCC 715.

117 *Matru* v. *State of U.P*., (1971) 2 SCC 75; also see *Santokh Singh* v. *Izhar Hussain*, (1973) 2 SCC 406.

118 *Mustak @ Kanio Ahmed Shaikh* v. *State of Gujarat* (2020) 7 SCC 237.

119 *Salim Akhtar @ Mota* v. *State of U.P*,AIR 2003 SC 1374: AIR 2003 SC 4076.

120 *State of Maharashtra* v. *Suresh* (2000) 1 SCC 471 at 478.

The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Cr PC which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Cr PC. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.[121]

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.[122]

In *Raja* v. *State,*[123] the Supreme Court observed that what is substantive piece of evidence of identification of an accused, is the evidence given during the trial. However, by the time the witnesses normally step into the box to depose, there would be substantial time gap between the date of the incident and the actual examination of the witnesses. If the accused or the suspects were known to the witnesses from before and their identity was never in doubt, the lapse of time may not qualitatively affect the evidence about identification of such accused, but the difficulty may arise if the accused were unknown. In such cases, the question may arise about the correctness of

121 *Malkhan Singh* v. *State of M.P.*, (2003) 5 SCC 746.

122 *Munshi Singh Gautam* v. *State of M.P.,* (2005) 9 SCC 631, p.642.

123 *Raja* v. *State* (2020) 15 SCC 562.

the identification by the witnesses. The lapse of time between the stage when the witnesses had seen the accused during occurrence and the actual examination of the witnesses may be such that the identification by the witnesses for the first time in the box may be difficult for the court to place complete reliance on. In order to lend assurance that the witnesses had, in fact, identified the accused or suspects at the first available opportunity, the TIP which is part of the investigation affords a platform to lend corroboration to the ultimate statements made by the witnesses before the court. However, what weightage must be given to such TIP is a matter to be considered in the facts and circumstances of each case.

There is no hard and fast rule about the period within which the TIP must be held from the arrest of accused. The court has considered the said period on the facts and circumstances of each case. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case.

In *Sk. Hasib* v. *State of Bihar*[124] it was observed that the identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. And early opportunity to identify tends to minimize the chances of the memory the identifying witnesses fading away due to long lapse of time. In *Anil Kumar* v. *State of U.P.*[125] wherein the test identification parade was held 47days after the arrest of the appellants. The Supreme Court after considering several decisions including the decisions in *Brij Mohan* v. *State of Rajasthan,*[126] *Daya Singh* v. *State of Haryana*[127] and *State of Maharashtra* v. *Suresh*[128] concluded that since the identifying witness was attacked by the assailants including the appellant and another, he had a clear look at the assailants. Thesewere circumstances which would have imprinted in the memory of the witness the facial expressions of the assailants and this impression would not diminish or disappear within a period of 47 days.[129]

In *Daya Singh* v. *State of Haryana*[130] the Supreme Court delt with the grounds regarding lapses of time between the occurrence and the actual identification in the court as under: -

> 11.At this stage we would first refer to the decisions upon which reliance is placed. In the case of *Soni*[131] the [Supreme] Court observed that a delay of 42 days in holding the identification parade throws a doubt on genuineness thereof, apart from the fact that it is difficult that after a

124 (1972) 4 SCC 773.
125 (2003) 3 SCC 569.
126 (1994) 1 SCC 413.
127 (2001) 3 SCC 468.
128 (2000) 1 SCC 471.
129 (2020) 15 SCC 562.
130 (2001) 3 SCC 468.
131 (1982) 3 SCC 368.

lapse of such a long time the witnesses would be remembering facial expression of the appellant. In the case of *Mohd. Abdul Hafeez* v. *State of A.P.*[132] the court while dealing with a robbery case observed that as no identification parade was held, no reliance can be placed on the identification of the accused after a lapse of four months in the court. In the case of *Hari Nath*[133] the court observed that evidence of test identification is admissible under section 9 of the Evidence Act. But the value of test identification, apart from the other safeguards appropriate to a fair test of identification depends upon the promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The court further referred to Professor Edwin Borchard[134] who has stressed upon establishing rational criteria for the imposition of capital punishment and he has examined the conviction ofthe Innocent on the basis of error in identification of the accused. The learned author has observed:

"The emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally—the desire to require a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused."

The identification parades belong to the stage of investigation, and 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. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.[135]

132 (1983) 1 SCC 143.

133 *Hari Nath* v. *State of U.P.,* (1988) 1 SCC 14.

134 Edwin Borchard& E. Russell Lutz, 'Convicting the innocent: sixty-five actual errors of criminal justice', in 'History of capital punishment; Criminal justice & criminology' Garden City, N.Y.: Garden City Publishing Company, Inc. (1932).

135 See *Kanta Prashad* v. *Delhi Admn*, AIR (1958) SC 350; *Vaikuntam Chandrappa* v. *State of A.P., AIR* (1960) SC 1340; *Budhsen* v. *State of U.P*., (1970) 2 SCC 128 and *Rameshwar Singh* v. *State of J&K*, (1971) 2 SCC 715.

The Supreme Court in *Raja* v. *State*[136] held that:

> It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. The [Supreme] Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of them had sufficient opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance.

**Photo identification**

In *Kartar Singh* v. *State of Punjab*[137] the Supreme Court, while dealing with the section 22 of the TADA had observed that the photo TIP is bad in law, however the said judgment has been distinguished in *Umar Abdul Sakoor Sorathia* v. *Narcotics Control Bureau,*[138] where a photo identification has been held to be valid. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation.[139] The photo identification and TIP are only aides in the investigation and does not form substantive evidence.

In *Basavaraj* v. *State of Karnataka,*[140] the Supreme Court held that: -

> 16. This will bring us to a consideration of the evidence as against accused appellant No.2. The identification of the said accused appellant No.2 in the hospital from the photographs shown to Suryakanthamma (P.W.7); the further identification in the course of T.I.P. and subsequently in Court, in our considered view, sufficiently establishes the case of the prosecution that the accused appellantNo.2 was involved in the commission of the crime.[141]

136 *Raja* v. *State*, (2020) 15 SCC 562, at 578.

137 (1994) 3 SCC 569.

138 (2000) 1 SCC 138.

139 *Manu Sharma* v. *State (NCTE of Delhi*) (2010) 6 SCC 1.

140 *Basavaraj* v. *State of Karnataka* (2020) 15 SCC 310.

141 *Id.* at 314.

**Statement made to court by counsel**

In *Om Prakash* v. *Suresh Kumar*[142] during the course of hearing counsel for the tenant had urged before the high court that the tenant was ready and willing to handover possession of the suit premises subject to the landlord (present appellant) agreeing to re-induct him as tenant in equivalent area occupied by him in the suit building. In response to the said submission, the learned counsel appearing for the present appellant, unequivocally, stated before the high court that the appellant was not averse to the offer so made by the tenant. The appellant changed his Advocate and then filed review petition asserting that he had never instructed his counsel to make such statement before the Court. The question arose as to whether the party should be bound by the statement made by his counsel. The court has been held that: -

> 13. Considering the above, the appellant cannot now be allowed to resile from the statement made before the High Court, which the High Court justly declined to undo in the review petition filed by theappellant for that purpose. In the peculiar facts of this case, the decision of the [Supreme] Court in *Himalayan Coop. Group Housing Society*[143] will be of no avail to the appellant. Inasmuch as, it is not a case where the counsel, who made the statement was not engaged by the appellant before the High Court. The engagement was in respect of eviction proceedings and the statement was in relation to the commitment of the appellant qua the subject matter thereof and being an unequivocal statement, it will be binding on the appellant. In any case, even the [Supreme] Court showed indulgence to the appellant on the basis of impression given to the [Supreme] Court about the possibility of atleast sparing a small room for the respondent, which was the basis for issuing notice to the respondent, as is evident from the orders dated 9.1.2017 and 15.2.2017.[144]

The attention of the court was also invited to exposition of law in paragraph 22 of *Himalayan Coop. Group Housing society* v. *Balwan Singh*[145] which reads as under:

> Ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If"22. Apart from the above, in our view lawyersare perceived to be their client's agents. The law of agency may not strictly apply to the client lawyer's relationship as lawyers or agents, lawyers have certain authority and certainduties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. Theauthority agencystatus affords the lawyers to act for the client on

142 (2020) 13 SCC 188.

143 (2015) 7 SCC 373.

144 *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188.

145 (2015) 7 SCC 373 at 383; *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188 at 195.

> the subject matter of the retainer. One of the most basic principles of the lawyer client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specificallyauthorised to settle and compromise a claim, that merelyon the basis of his employment he has no implied or ostensible the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel."[146]

The attention of the court was also invited to paragraph 31 of *Himalayan Coop. Group Housing society* v. *Balwan Singh*,[147] which reads as under: -

> Therefore, it is the solemn duty of an advocate not to transgress the authority conferred on him by the client. Itis always better to seek appropriate instructions from the client or his authorised agent before making any concession which may, directly or remotely, affect the rightful legal right of the client. The advocate represents the client before the court and conducts proceedings on behalf of the client. He is the only link between the court and the client. Therefore, his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment.[148]

In addition, the attention was invited to paragraph 32 of *Himalayan Coop. Group Housing society* v. *Balwan Singh*,[149] which reads as under:

> Generally, admissions of fact made by a counselarebinding upon their principals as long as they areunequivocal; where, however, doubt exists as to apurported admission, the court should be wary toaccept such admissions until and unless the counsel or the advocate is authorised by his principal tomake such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorized to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purposefor which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or

146 *Id*. at 383; *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188 at 195.

147 *Id*. at 385; *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188 at 196.

148 (2015) 7 SCC 373 at 385; *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188 at 196.

149 *Id*. at 386; *Om Prakash* v. *Suresh Kumar* (2020) 13 SCC 188 at 196.

> admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights."[150]

As aforesaid, in the present case, the counsel who was engaged by the appellant and had appeared for him before the high court did not, *strictosensu*, transgress the authority conferred on him by the appellant. Notably, the appellant filed review petition before the High Court by engaging another Advocate for reasons best known to him. The [Supreme] Court has deprecated the conduct of such petitioners and has opined that such review petitions should not be encouraged and need to be dismissed, as expounded in *Tamil Nadu Electricity Board*v. *Raju Reddiar*[151]. Not only that, even before the [Supreme] Court,the appellant, has advisedly showed his willingness to explore possibility of settlement as is evident from different orders recorded above. It is obvious that the delivery of possession of the suit premises, then in possession of the respondent, was expedited and made over to the appellant only after intervention of the [Supreme] Court, which indulgence was shown because the appellant had expressed inclination to spare portion of premises for the respondent. Thus, the [Supreme] Court has discouraged the change of stand by the party in such cases.

**Expert Evidence**

Expert testimony is made relevant by section 45 of the Evidence Act, which states that where the court has to form an opinion upon a point as to identity of handwriting, the opinion of a person especially "skilled" "in questions as to identity of handwriting" is expressly made a relevant fact. So, corroboration may not invariably be insisted upon before acting on the opinion of a handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it.[152]

The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering "conclusive" proof and therefore safe to reply upon the same without seeking independent and reliable corroboration.[153] In *Magan*

150 *Ibid.*

151 *Tamil Nadu Electricity Board* v. *Raju Reddiar* (1997) 9 SCC 736.

152 *Murari Lal* v. *State of Punjab* (1980) 1 SCC 704; also see *Padum Kumar* v. *State of U.P.*, (2020) 3 SCC 35, at 43.

153 *S. Gopal Reddy* v. *State of A.P.,* (1996) 4 SCC 596; also see *Padum Kumar* v. *State of U.P.*, (2020) 3 SCC 35 at 41.

*Bihar Lal* v. *State of Punjab,*[154] the Supreme Court has opined while dealing with the evidence of a handwriting expert that:

> …We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by the [Supreme] Court in *Ram Chandra* v. *State of U.P.*[155] that it is unsafe to treat expert handwriting opinion as sufficient basis for conviction, but it may be relied upon when supported by other items of internal and external evidence. The [Supreme] Court is again pointed out in *Ishwari Prasad Misra*v. *Mohd. Isa*[156] that expert evidence of handwriting can never be conclusive because it is, afterall, opinion evidence, and this view was reiterated in *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*[157] where it was pointed out by the [Supreme] Court that expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. The [Supreme] Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in *Fakhruddin* v. *State of M.P.*[158] and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial."[159]

In *Padum Kumar* case,[160] the Supreme Court has observed that it is not safe to base the conviction solely on the evidence of a handwriting expert. It is fairly well settled that before action upon the opinion of the handwriting expert, prudence requires that the court must see that such evidence is corroborated by other evidence either direct or circumstantial evidence.[161]It has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting

154 *Magan Bihar Lal* v. *State of Punjab* (1977) 2 SCC 210 at 213-14.

155 *Ram Chandra* v. *State of U.P*, AIR 1957 SC 381.

156 *Ishwari Prasad Misra* v. *Mohd. Isa*, AIR 1963 SC 1728.

157 *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529.

158 *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326.

159 *S. Gopal Reddy* v. *State of A.P.*, (1996) 4 SCC 596 at 614-615; also see *Padum Kumar* v. *State of U.P.*, (2020) 3 SCC 35 at 41-42.

160 *Padum Kumar* v. *State of U.P.*, (2020) 3 SCC 35.

161 *Id.* at 42.

expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses. The quality of credibility or incredibility being one which an expert share with all other witnesses, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science over identification of fingerprints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty "is to furnish the Judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the Judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.[162]

Similarly, in *Basheera Begam* v. *Mohd. Ibrahim*[163] held that the evidence of experts is not always conclusive and there is hazard in accepting the opinion of an expert, not because the expert is not reliable as a witness, but because human judgment is fallible. While the science of identification of fingerprints has attained perfection, with practically not risk of an incorrect opinion, the science of identification of handwriting is not so perfect.

In *Rajeshbhai Muljibhai Patel* v. *State of Gujarat,*[164] while deciding the issue "whether the defendant proved that the plaintiff has fabricated the forged signature illegally and created forged receipt" the Supreme Court observed that in terms of section 45 of the Evidence Act, the opinion of handwriting expert is a relevant piece of evidence; but it is not conclusive evidence. It is always open to the parties to adduce appropriate evidence to disprove the opinion of the handwriting expert. That apart, section 73 of the Evidence Act empowers the court to compare the admitted and disputed writings for the purpose of forming its own opinion. Based on the sole opinion of the handwriting expert, the FIR ought not to have been registered.

In *Maharaja Agrasen Hospital* v. *Rishabh Sharma*[165] the court held that it is well-settled that a court is not bound by the evidence of an expert, which is advisory

162 *Murari Lal* v. *State of Punjab* (1980) 1 SCC 704 at 708-09; also see Lord President Cooper in *Davie* v. *Edinburgh Magistrate*, 1953 SC 34; 1953 S.L.T. 54encapsulates the Scots law position regarding the role of expert witnesses in providing their opinion to the court in criminal and civil proceedings. It was quoted by Professor Cross in his evidence. The *Financial Conduct Authority* v. *Arch Insurance (UK) Limited* [2020] EWHC 2448 (Comm).

163 *Basheera Begam* v. *Mohd. Ibrahim* (2020) 11 SCC 174 at 218.

164 *Rajeshbhai Muljibhai Patel* v. *State of Gujarat* (2020) 3 SCC 794 at 801-02.

165 *Maharaja Agrasen Hospital* v. *Rishabh Sharma* (2020) 6 SCC 501.

in nature. The court must derive its own conclusions after carefully sifting through the medical records, and whether the standard protocol was followed in the treatment of the patient. The duty of an expert witness is to furnish the court with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the court to form an independent opinion by the application of this criteria to the facts proved by the evidence of the case. Whether such evidence could be accepted or how much weight should be attached to it is for the court to decide.[166]

**Secondary evidence**

The facts have to be established by primary evidence under the Evidence Act, 1872 and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of primary evidence.[167] Section 65 of the Evidence Act, 1872 provides that the secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in section 66 such person does not produce it. It is settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reason as to why the original has not been furnished.[168] The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed, or is being deliberately withheld by the party in respect of that document sought to be used secondary evidence in respect of that document cannot be accepted.[169]

In *Dhanpat* v. *Sheor Ram,*[170] the Supreme Court held that there is no requirement that an application is required to be filed in terms of section 65(c) of the Evidence Act before the secondary evidence is led. A party to the *lis* may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed. The Supreme Court is *Fair Communication and Consultants* v. *Surendra Kerdile*[171] has held that once the document is admitted during the course of cross examination, despite that it was a

166 *Id.* at 503;also see *Malay Kumar Ganguly* v. *Sukumar Mukherjee* (2009) 9 SCC 221: (2010)2 SCC (Cri) 299:(2009) 3 SCC (Civ) 663; *V. Kishan Rao* v. *Nikhil Super Speciality Hospital* (2010) 5 SCC 513: (2010) 2 SCC (Civ) 460.

167 *Jagmal Singh* v. *Karamjit Singh* (2020) 5 SCC 178 at 183

168 *Ibid.*; also see *Ashok Dulichand* v. *Madahav Lal Dube* (1975) 4 SCC 644 at 666-667.

169 *Rakesh Mohindra* v. *Anita Beri*, (2016) 16 SCC 483 at 488.

170 *Dhanpat* v. *Sheor Ram* (2020) 16 SCC 209.

171 *Fair Communication and Consultants* v. *Surendra Kerdile* (2020) 16 SCC 411.

photocopy and that the statement of plaintiff that the original document was with a third person, was not denied. The court held that the photocopy could be relied upon.

The Supreme Court in *H. Siddiqui* v. *A. Ramalingam*[172] has reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence is not established, it is not permissible for the court to allow a party to adduce secondary evidence.The certified copy of the Will is not admissible per se in evidence. It cannot be presumed to be primary document which could be adduced in evidence and could be proved only by leading secondary evidence.[173] Onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.[174]

In *Jagmail Singh* v. *Karmajit Singh,*[175] it has been held that it is imperative to appreciate the evidence of the witnesses as it is only after scrutinizing the same opinion,it can be found as to the existence, loss or destruction of the original will. While both the revenue officials failed to produce the original will, upon perusal of the cross-examination it is clear that either of the officials has unequivocally denied the existence of will. Observing the factual situation prevailing in the case, the court held that it is clear that the factual foundation to established the right to give secondary evidence was laid down by the appellants and thus the high court ought to have given them an opportunity to lead secondary evidence. It is held that the high court committed grave error of law without properly evaluating the evidence and holding that the prerequisite condition *i.e.,* existence of will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence. The Supreme Court further observed that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with law. However, it is also clarified that such admission of secondary evidence automatically does not attest to its authenticity, truthfulness or genuineness which will have to be established during the course of trial in accordance with law.[176]In *Anwar P.V.* v. *P.K. Basheer,*[177] the Supreme Court has held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65-B are satisfied. Thus, in the case of CD, VCD, chip *etc.*, the same shall be accompanied by the certificate in terms of section 65-B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record, is inadmissible.

**Document**

As per the section 3 of Indian Evidence Act, "Document" means any matter expressed or described upon any substance my means of letters, figures or marks, or

172 *H. Siddiqui* v. A. *Ramalingam* (2011) 4 SCC 240.

173 *Sampat Singh* v. *Bhagwanti,* AIR 2010 (NOC) (P&H).

174 *Beni Chand* v. *Kamla Kunwar*, (1976) 4 SCC 554, p.559.

175 (2020) 5 SCC 178.

176 *Id.* at 184.

177 *Anwar P.V.* v. P.K. *Basheer* (2014) 10 SCC 473.

by more than one of those means, intended to be used, or which may be used, for the purpose of recording the matter.[178] The meaning of word "document" has been discussed in varying circumstances. The word 'document' is derived from the Latin "*documentum*": it is something which instructs or provides information. Something written, inscribed *etc*., which furnishes evidence or information upon any subject, as manuscript, title-deed, coin *etc*.[179] The *Illustrations* contained for the definition of "Document" includes -writing, words printed, lithographed or photographed, a map or plan an inscription on the metal plate or stone and caricature are documents.

The word "Document" is also denied under section 29 of the Penal Code, 1860, which denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter. Even the definition of "document" given in the General Clauses Act would reinforce the position that electronic recordsought to be treated as "document".

The definition of "document" in Section 3(18) of the General Clauses Act, 1897 which readsas under:

"[3. Definitions. — In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,

Section 3(18) Document. — "Document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter;

There are two types of evidence—(i) oral evidence and (ii) documentary evidence. As per Section 3, oral evidence means and includes all the statements, which the court permits or requires to be made before it by witnesses, in relation to the matter of facts under inquiry and 'documentary evidence' means all the documents including electronic records produced for the inspection of the court.

**Documentary evidence**

The purpose for which it is produced determines whether a document is to be regarded as documentary evidence.When adduced to prove its physical condition, for example, an alteration, presence of a signature, bloodstain or fingerprint, it is real evidence. So too, if its relevance lies in the simple fact that it exists or did once exist or its disposition or nature. In all these cases the content of the document, if relevant at all, is only indirectly relevant, for example to establish that the document in question is a lease. When the relevance of a document depends on the meaning of its contents, it is considered documentary evidence.[180]

178 Indian Evidence Act, 1872, s. 3

179 *Grant* v. *Southwestern & Country Properties* Ltd.,1975 Ch 185: (1974) 3 WLR 221.

180 Hodge M. Malek, Phipson on Evidence, 19th edn., 2018 at 1450; also see *P. Gopalkrishnan* v. *State of Kerala* (2020) 9 SCC 161 at 187.

The Halsbury's Laws of England dealing with Chapter – "Documentary and Real Evidence" containing the meaning of documentary evidence and therelevancy and admissibility thereof including about the audio and video recordings. Meaning of documentary evidence. The term 'document' bears different meanings in different contexts. At common law, it has been held that any written thing capable of being evidence is properly described as a document[181], and this clearly includes printed text, diagrams, maps and plans. Photographs are also regarded as documents at common law. A document maybe relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue), or as documentary evidence. Documentary evidence denotes reliance on a document as proof of its terms or content.[182]

In *C. Doddanarayana Reddy* v. *C. Jayarama Reddy,*[183] it is observed that the public document in terms of section 74 of the Evidence Act, 1872 includes the documents forming records of official bodies or tribunals. Section 76 of the said Act gives a right to any person to demand a copy of a public document on payment of a fee together with the certificate written at the foot of such copy that it is a true copy of such document. Certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. The school leaving certificate has been produced by the plaintiff and said to be signed by his father. The person who has recorded the date of birth in the school register or the person who proves the signature of his father in the school transfer certificate has not been examined. No official from the school nor any person has proved the signatures of his father on such certificate. Apart from the self-serving statement, there is no evidence to show that the entry of the date of birth was made by the official in-charge, which alone would make it admissible as evidence under section 35 of the Evidence Act, 1872.[184] The entry in the school register may not be a public document and thus, must be proved in accordance with law. The condition laid down in section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. But in this case, the said condition must be held to have been satisfied.[185]

In *Madam Mohan Singh* v. *Rajni Kant,*[186] the court has held that the entries contained in the school's register are relevant and admissible but have no evidentiary value for the purpose of proof of date of birth of the candidates. The entries made in the official record maybe admissible under section 35 of the Evidence Act, 1872 but the court has a right to examine their probative value. The authenticity of the entries

181 R v *Daye*, [*1908*] 2 KB 333, p.340.

182 Halsbury's laws of England, Fourth Edn., 2006 reissue, Vol. 11(3), Criminal Law, Evidence and Procedure; also see *P. Gopalkrishnan* v. *State of Kerala,* (2020) 9 SCC 161, pp.192-193.

183 *C. Doddanarayana Reddy* v. *C. Jayarama Reddy*, (2020) 4 SCC 659.

184 *C. Doddanarayana Reddy* v. *C. Jayarama Reddy,* (2020) 4 SCC 659, p.664.

185 *Ram Suresh Singh* v. *Prabhat Singh*, (2009) 6 SCC 681; also see *Birad Mal Singhvi* v. *Anand Purohit,* 1988 Supp SCC 604.

186 *Madam Mohan Singh* v. *Rajni Kant*, (2010) 9 SCC 209.

would depend on whose information such entries stood recorded.[187] The court has observed that:

> "So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/ school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
>
> 21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded.[188]
>
> 22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein.[189]

**Electronic document**

A bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the court. However, the question of admissibilityof the contents of the memory card/pen drive, the same will have to be on the basis of Section 65B of the 1872 Act.[190] Section 29A defines the word "electronic record" and it has meaning assigned to them in clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000. The definition of "communication devises" is given under Section 2(1) (ha) of the 2000 Act, which reads as under:-

''2(1) (ha)''Communication device'' means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image''

Section (1)(v) of the 2000 Act, also defines "information', which reads as under:

187 *C. Doddanarayana Reddy* v. *C. Jayarama Reddy*, (2020) 4 SCC 659, p.665.

188 *Brij Mohan Singh* v. *Priya Brat Narain Sinha*, AIR 1965 SC 282; also see *Birad Mal Singhvi* v. *Anand Purohit*, 1988 Supp SCC 604; *Vishnu* v. *State of Maharashtra*, (2006) 1 SCC 283; *Satpal Singh* v. *State of Haryana*, (2010) 8 SCC 714.

189 *Updesh Kumar* v. *Prithvi Singh* (2001) 2 SCC 524; also see *State of Punjab* v. *Mohinder Singh* (2005) 3 SCC 702.

190 *P. Gopalkrishnan* v. *State of Kerala* (2020) 9 SCC 161.

"2(1)(v) "information" includes data, message, text, images sound, voice, codes, computer programmes, software and data bases or micro film or computer-generated micro fiche"

The Supreme Court has considered the issues with reference to the electronic record such as memory card or pen-drive in *P. Gopalkrishnan* v. *State of Kerala,*[191] wherein following questions has arisen:[192]

(i) Whether the contents of a memory card/pen drive being electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 would, thereby qualify as a "document" within the meaning of Section 3 of the Indian Evidence Act, 1872(for short, 'the 1872 Act') and Section 29 of the Indian Penal Code, 1860?

(ii) If so, whether it is obligatory to furnish a cloned copy of the contents of such memory card/pen drive to the accused facing prosecution for an alleged offence of rape and related offences since the same is appended to the police report submitted to the Magistrate and the prosecution proposes to rely upon it against the accused, in terms of Section 207 of the Code of Criminal Procedure, 1973?

(iii) Whether it is open to the Court to decline the request of the accused to furnish a cloned copy of the contents of the subject memory card/pen-drive in the form of video footage/clipping concerning the alleged incident/ occurrence of rape on the ground that it would impinge upon the privacy, dignity and identity of the victim involved in the stated offence(s) and more so because of the possibility of misuse of such cloned copy by the accused (which may attract other independent offences under the 2000 Act and the 1860 Code)?

The basis of classifying article as a "document" depends upon the information which is inscribed and not on where it is inscribed.It may be useful to advert to the exposition of [the Supreme Court] holding that tape records of speeches[193] and audio/ video cassettes[194]including compact disc[195] were "documents" under section 3 of the Indian Evidence Act, 1872, which stand on no different footing than photographs and are held admissible in evidence. It is by now well established that the electronic record produced for the inspection of the court is documentary evidence under Section 3of the 1872 Act.[196]

In *P. Gopalkrishnan,* [197] court held that the video footage/clipping contained in such memory card/pen drive being an electronic record as envisaged by section

191 *Id*. at 189.

192 *Id*. at171.

193 *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate* (2010) 4 SCC 329.

194 *Ziyauddin* Burhanuddin Bukhari v. BrijmohanRamdass Mehra, (1976) 2 SCC 17.

195 *Shamsher Singh Verma* v. *State of Haryana* (2016) 15 SCC 485.

196 *Anvar P.V.* v. P.K. Basheer (2014) 10 SCC 473; also see P. Gopalkrishnan v. State of Kerala, (2020) 9 SCC 161.

197 P. G*opalkrishnan* v. *State of Kerala* (2020) 9 SCC 161.

2(1)(t) of the 2000 Act, is a "document" and cannot be regarded as a material object. Section 2(1)(t) of the2000 Act reads thus:-

"2(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated microfiche;"

The above definition refers to data or data generated, image or sound stored, received or sent in an electronic form, it would be apposite to advert to definition of "data" as predicated in Section 2(1)(o) of the same Act. It reads as under:

> 2(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;
>
> Thus, the court held that an electronic record is not confined to "data" alone, but it also means the record or data generated, received or sent in electronicform. The expression "data" includes a representation of information, knowledge and facts, which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored internally in the memory of the computer.[198]

The term "matter" as mentioned in section 3 of the Evidence Act, section 29 Cr PC and section 3(18) of the General Clauses Act, and to ascertain whether the contents of the memory card can be regarded as "document", the Supreme Court in *P. Gopalkrishnan* v. *State of Kerala*[199] referred 42nd and 156th Law Commission Report Reports. The Law Commission while dealing with the section 29 of the IPC, the Commission opined in its 42nd Report[200] as under:-

2.56. The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of "document" for its own purpose, and that section 29 should be retained."

The aforesaid observation is restated in the 156th Report,[201] wherein the Commission opined thus:

11.08 Therefore, the term 'document' as defined in Section 29IPC may be enlarged so as to specifically include therein any disc, tape, sound track or other device nor in which any matteris recorded or stored by mechanical, electronic or

198 *Id*. at 188.

199 *Id.* at 195-96.

200 42nd Report on Indian Penal Code, Law Commission of India, June 1971, at 32-35.

201 156th Report on Indian Penal Code (Vol. I), Law Commission of India, Aug. 1997, (see Chapter XI).

other means …… The aforesaidproposed amendmentin section29would also necessitate consequential amendment of the term "document" under section 3 of the Indian Evidence Act, 1872 on the lines indicated above.

Considering the aforementioned Reports, the Supreme Court in *P. Gopalkrishnan*[202] concluded that the contents of the memory card would be a "matter" and the memory card itself would be a "substance" and hence, the contents of the memory card would be a "document". It is further clarified that all documents including "electronic record" produced for the inspection of the court along withthe police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in article 21 of the Constitution of India.

The next crucial question as to whether parting of the cloned copy of the contents of the memory card/pen drive and handing it over to the accused may be safe or is likely to be misused by the accused or any other person with or without the permission of the accused concerned. In a peculiar case of intra-conflict of fundamental rights flowing from article 21, that is right to a fairtrial of the accused and right to privacy of the victim, the court adopted the approach which would balance both the rights. This principle has been enunciated in the case of *Asha Ranjan* v. *State of Bihar*[203] wherein the [Supreme] Court held thus:

The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognize and accept the right of one which has to be protected.[204]

> 86.1. The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s)and the society at large. These factors would collectivelyallude andconstitute the Rule of Lawi.e. Free and fair trial.[205]
>
> 86.2. The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or

202 *P. Gopalkrishnan* v. *State of Kerala* (2020) 9 SCC 161 at 195-196.

203 (2017) 4 SCC 397.

204 *Id*. at 432.

205 *Id*. at 447.

> the collective/interest of the society. When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote andinstill Rule of Law. A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings."[206]

The nine-judges' Bench of the Supreme Court in *Justice K.S. Puttaswamy* v. *Union of India,*[207] has held that the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under article 19 does not denude article 21 of its expansive ambit. It was held that, validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action, but on the basis of its effect on the guarantees of freedom.The 'rule of law', which is a fine sonorous phrase, is dynamic and ever expanding and can be put alongside the brotherhood of man, human rights and human dignity. About the modern rule of law, Professor Garner observed:[208]

> The concept in its modern dress meets a need that has been felt throughout the history of civilization, law is not sufficient in itself and it must serve some purpose. Man is a social animal, but to live in society he has had to fashion for himself and in his own interest the law and other instruments of government and as a consequence those must to some extent limit his personal liberties. The problem is how to control those instruments of government in accordance with the Rule of Law and in the interest of the governed.[209]

Finally, the Supreme Court in *P. Gopalkrishnan* v. *State of Kerala,*[210] has concluded the issue and has held that the contents of the memory card/pen drive being electronic record must be regarded as a document.If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides.

**Admissibility of electronic record**

The subject matter of sections 65Aand 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to section 65A indicates that "special provisions" as to evidence relating to electronic records are laid down in

206 *Ibid.*

207 (2017) 10 SCC 1.

208 Black's Law Dictionary (Bryan Garner, Ed.) at 3783; Also See Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' 4 (5) *Harvard Law Review* 193 (2004).

209 (2017) 10 SCC 1.

210 (2020) 9 SCC 161 at 201.

this provision. The marginal note to Section 65B then refers to "admissibility of electronic records". Section 65B (1)opens with a 'non-obstante clause', and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by section 3 of the Evidence Act does not include electronic records. Section 65B (2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B (2(a)) to 65 2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections 2(a) to 2(d) must be satisfied cumulatively. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" – whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing any of the following things…" must be read as doing all of the following things, it being well settled that the expression "any" can mean "all" given the context. This being the case, the conditions mentioned in sub-section (4) must also be interpreted as being cumulative.[211]

Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of section 65-Aof the Evidence Act, read with sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shallbe governed by the procedure prescribed under section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under sections 63 and 65 has to yield. The electronic record by way of secondary evidence is not admissible in evidence, unless the requirements under section 65-B are satisfied.[212]

A three judges bench of the Supreme Court in *Anwar P.V.*[213] held that the requirements of section 65-B are to be satisfied. In the case of CD, VCD, chip, *etc.*, the same shall be accompanied by the certificate in terms of section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. In *Anvar P.V.* case[214] it is clarified that:

211 *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal* (2020) 7 SCC 1 at 27-28; also see *Bansilal Agarwalla* v. *State of Bihar* (1962) 1 SCR 331; *Om Parkash* v. *Union of India* (2010) 4 SCC 172.

212 *Anwar P.V.* v. *P.K. Basheer* (2014) 10 SCC 473.

213 *Ibid.*

214 *Id.* at 484.

> 16. It is further clarified that the person needsonly to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), videocompact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. Without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Thereafter, a two-Judge Bench in *Shafhi Mohammad* v. *State of H.P.*[215] referred the decision of *Anvar*[216] and observed that the view taken in *State (NCT of Delhi)* v. *Navjot Sandhu*[217] that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.Relying on three Judge Bench judgments in *Tomaso Bruno* v. *State of U.P.*[218] and *Ram Singh* v. *Ram Singh,*[219] it has been held in *Shafhi Mohammad case* that: -

> An apprehension was expressed on the question of applicability of conditions under Section 65-B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relationtooperationofthe relevantdevice orthe management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65-B ofthe EvidenceAct wasa procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that anyinformationin anelectronicrecord, covered by the said provision, was tobe deemed to be a document and admissible in any proceedingswithout further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.[220] xxxxx

215 *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801.

216 *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.

217 *State (NCT of Delhi)* v. *Navjot Sandhu*, (2015) 1 SCC 600.

218 *Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178.

219 *Ram Singh* v. *Ram Singh*, 1985 Supp. SCC 611.

220 *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801, p.808.

24. We may, however, also refer to the judgment of the [Supreme] Court in *Anvar P.V.* v. *P.K. Basheer*[221], delivered by a three Judge Bench. In the said judgment inpara 24 it was observed that electronic evidence byway of primary evidence was covered by Section 62of the Evidence Act to which procedure of Section65-B of the Evidence Act was notadmissible. However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in *Navjot Sandhu*[222] that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.[223]

25. Though in view of the three Judge Bench judgments in Tomaso Bruno and Ram Singh, it can be safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B of the Evidence Act are by wayof clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65-B (4).[224]

26. Sections 65-A and 65-B of the Evidence Act,1872 cannot be held to be a complete code on the subject. In *Anvar P.V.*[225], the [Supreme] Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and theexpression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks,or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.[226]xxxxx

29. The applicability of procedural requirement under Section 65-B (4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability

221 *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.

222 *State (N.C.T. Of Delhi)* v. *Navjot Sandhu@ Afsan Guru*, (2015) 1 SCC 600.

223 *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801, at 809.

224 *Id.* at 809-810.

225 (2014) 10 SCC 473.

226 *Shafhi Mohammad* v. *State of H.P.,* (2018) 2 SCC 801 at 810.

> of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness buton account of manner of proving,such documentis keptoutof consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producingcannotpossibly secure.Thus, requirement of certificate under Section 65-B (4) is not always mandatory."[227]

Thus, the two-judgment bench in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal,*[228] dealing with the interpretation of section 65-B of the Indian Evidence Act, 1872 considered the opinion of a three-Judge Bench in *Anvar P.V. case,*[229] and referred the decision in *Shafhi Mohammad*[230] to larger bench.

The larger bench (three-judge bench) has answered the aforementioned reference in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*[231]and held that: -

73. The reference is thus answered by stating that:

> 73.1 *Anvar P.V.,*[232] as clarified by us hereinabove, is the law declared by the [Supreme] Court on section 65B of the Evidence Act. The judgment in *Tomaso Bruno,*[233] being per incuriam, does not laydown the law correctly. Also, the judgment in *Shafhi Mohammad*[234] and the judgment dated 03.04.2018 reported as *Shafhi Mohd.* v. *State of H.P.,*[235] do not lay down the law correctly and are therefore overruled.
>
> 73.2The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section65B(4). The last sentence in *Anvar P.V.*[236] (supra) which reads as "…if an electronic record as such is used as primary evidence under Section

227 *Id* at 810.
228 (2020) 3 SCC 216.
229 (2014) 10 SCC 473.
230 *Shafhi Mohammad* v. *State of H.P*. (2018) 2 SCC 801.
231 (2020) 7 SCC 1 at 62.
232 (2014) 10 SCC 473.
233 *Tomaso Bruno* v. *State of U.P*. (2015) 7 SCC 178.
234 *Shafhi Mohammad* v. *State of H.P.,* (2018) 2 SCC 801.
235 (2018) 5 SCC 311.
236 *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.

62of the Evidence Act…" is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act…" With this clarification, the law stated in paragraph 24 of *Anvar P.V.*[237] does not need to be revisited.

73.3 The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

73.4 Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67-C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016."[238]

**Accomplice evidence**

The Supreme Court in *Somasundaram* v. *State*[239] has observed the contradiction between sections 133 and 114of the Evidence Act, 1872. Section 133 of the Evidence Act declares that an accomplice is competent witness and further stipulates that a conviction based on the uncorroborated testimony of an accomplice is not illegal only on account of it being so. Section 133 of the of the Evidence Act reads as under:

"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."

In *Somasundaram* case[240] court further noticed that the section 114 of the Evidence Act, Illustration (b), the court may presume—

"(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

After observing the contradiction between these provisions, the court has referred the early judgment of the Supreme Court in *Sarwan Singh* v. *State of Punjab,*[241] wherein it is held that: -

237 *Ibid.*

238 *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal* (2020) 7 SCC 1 at 62.

239 *Somasundaram* v. *State* (2020) 7 SCC 722.

240 *Somasundaram* v. *State,* (2020) 7 SCC 722, p.764.

241 *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637, pp. 640-641; *Somasundaram* v. *State*, (2020) 7 SCC 722, p.764.

7. It is hardly necessary to deal at length with the true legal position in this matter. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence.

It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.

But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver, then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.

In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is attest which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver."[242]

In *Haroom Haji Abdulla* v. *State of Maharashtra,*[243] the court has observed that:

> 8. The law as to accomplice evidence is well settled. The Evidence Act in Section 133 provides that an accomplice isa competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in Illustration (b) to Section114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may

242 *Somasundaram* v. *State*, (2020) 7 SCC 722, p.764; also see *Sarwan Singh* v. *State of Punjab*, AIR 1957 SC 637, at 640-641.

243 *Haroom Haji Abdulla* v. *State of Maharashtra*, AIR 1968 SC 832.

> beno means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law."[244]

In *Sheshanna Bhumanna Yadav* v. *State of Maharashtra,*[245] the dichotomy between the mandate of section 133 and illustration (b) to section 114 of the Evidence Act has been explained as under: -

> 12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and114, illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he putthe skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft."[246]

In the case of *K. Hashim* v. *State of Tamil Nadu,*[247] it is held that:

244 *Haroom Haji Abdulla* v. *State of Maharashtra*, AIR 1968 SC 832 at 835-836; also see *Somasundaram* v. *State*, (2020) 7 SCC 722, at 765.

245 *Sheshanna Bhumanna Yadav* v. *State of Maharashtra*, (1970) 2 SCC 122 at 125-126; also see *Somasundaram* v. *State* (2020) 7 SCC 722 at 765-766.

246 *Somasundaram* v. *State* (2020) 7 SCC 722, at 765-766; also see *Sheshanna Bhumanna Yadav* v. *State of Maharashtra* (1970) 2 SCC 122 at 125-126.

247 K. H*ashim* v. *State of Tamil Nadu* (2005) 1 SCC 237 at 250-251.

> 38. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says:
>
> "Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony."[248]
>
> 39. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.[249]
>
> 40. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identification must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that:

"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all…. It would not at all tend to show that the party accused participated in it."[250]

41. Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course,the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.

42. Fourthly, the corroboration needsnot be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences), "could never be brought to justice?"[251]

248 *Ibid*, also see, *R.* v. *Baskerville*, (1916) 2 KB 658: (1916-17) All ER38 at 42 (B-C).

249 *Ibid*, also see *Somasundaram* v. *State* (2020) 7 SCC 722 at 766.

250 *Id.* at 251; also see *Somasundaram* v. *State* (2020) 7 SCC 722 at 766.

251 *M.O. Shamsudhin* v. State *of Kerala* (1995) 3 SCC 351.

Thus, in *Somasundaram* case[252] the Supreme Court, after analyzing the provisions of section 133 read with Illustration (b) to section 114 of the Evidence Act, held that as a rule of prudence, the requirement that it would be unsafe to convict an accused solely based on uncorroborated testimony of an accomplice. The corroboration must be in relation to the material particulars of the testimony of an accomplice. Itis clear that an accomplice would be familiar with the general outline of the crime as he would be one who has participated in the same and therefore, indeed, be familiar with the matter in general terms. The connecting link between a particular accused and the crime, is where corroboration of the testimony of an accomplice would assume crucial significance. The evidence of an accomplice must point to the involvement of a particular accused. It would, no doubt, be sufficient, if his testimony in conjunction with other relevant evidence unmistakably makes out the case for convicting an accused. Every material circumstance against the accused need not be independently confirmed. Corroboration must be such that it renders the testimony of the approver believable in the facts and circumstances of each case. The testimony of one accomplice cannot ordinarily, be supported by the testimony of another approver. The court has used the word 'ordinarily' inspired by the statement of the law in paragraph-4 in *K. Hashim* v. *State of T.N.*,[253] wherein Supreme Court contemplatedspecial and extraordinary cases where the principle embedded in section 133 would literally apply. In the common run of cases, the rule of prudence which has evolved into a principle of law is that an accomplice, to be believed, he must be corroborated in material particulars of his testimony. The evidence which issued to corroborate an accomplice need not be direct evidence and can be in the form of circumstantial evidence.[254]

**Medical evidence versus ocular evidence**

When the medical evidence was not in entire conflict with the ocular version of witness, it would not be fatal to the prosecution. It was a case where there were discrepancies regarding the number of blows inflicted and which side of the weapon was used in the first instance.[255]The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor form a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.[256]

252 *Somasundaram* v. *State* (2020) 7 SCC 722 at 767.

253 *K. Hashim* v. *State of T.N.*, (2005) 1 SCC 237.

254 *Somasundaram* v. *State*, (2020) 7 SCC 722, at 767.

255 *State of Uttarakhand* v. *Darshan Singh* (2020) 12 SCC 605; *Mangoo* v. *State of M.P.*, AIR 1995 SC 959.

256 *State of Haryana* v. Bhagirath, (1999) 5 SCC 96, at 101.

In *State of Haryana* vs. *Bhagirath,*[257] court held that where 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 eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant.'

Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.[258]

In *Solanki Chimanbhai Ukabhai* v. *State of Gujarat*[259] the Supreme Court has observed that the value of medical evidence is only corroborative:

Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.

## III Conclusion

The Survey for the Year 2020 has seen various development in the Law of Evidence through judicial decisions specially admissibility of electronic evidence, dying declaration, extra judicial confession etc. Today in the digital world, technologies are developing very rapidly and electronic devices have become more advanced, as such, the electronic records have been heavily relied in evidence. At the same time, such developments have turned the wrong path and have made it easier to tamper with the electronic record, therefore, it is very difficult to rely on any such electronic records. Reliability of the electronic records, always bring new challenges for the courts of law. The Supreme Court has given certain guidelines before relying on such electronic evidence.The law of Evidence is developing as per the prevailing circumstances and the views of the court, on the reliability of evidence, is also changing. The author anticipates more development in the Law of Evidence, as long as the courts face new challenges. The author signs off with a word of appreciation for the Supreme Court of India, for meticulous and impressive decisions rendered by it.

257 *Ibid.*

258 *Thaman Kumar* v. *State (UT of Chandigarh*), (2003) 6 SCC 380; also see *Krishnan* v. *State*, (2003) 7 SCC 56 at 62-63.

259 *Solanki ChimanbhaiUkabhai* v. *State of Gujarat*, (1983)2 SCC 174, p. 180.