16

EVIDENCE LAW

*Kumar Askand Pandey**

I INTRODUCTION

THE YEAR 2023 which marks the completion of 151 years of existence of the Indian Evidence Act, 1872[1] (hereinafter IEA), also saw this *magnum opus* of F.J. Stephen replaced with the Bharatiya Sakshya Adhiniyam, 2023[2] (hereinafter BSA). The BSA is part of the trilogy of legislations enacted by the Indian Parliament to overhaul the substantive and procedural criminal laws with the object of Indianization and modernization of the colonial ear legislations.[3] The BSA has made some significant changes in the law of evidence as contained in the IEA and also some cosmetic changes necessitated by the contemporary geo-political realities which were long due after India became Independent.

The survey of law of evidence for the year 2023 critically encapsulates the development of law in this arena both through the BSA and judicial pronouncements. Though the IEA is set to be replaced with the BSA from July 1, 2024, the case law shall remain relevant and the *ratio* of the cases will remain binding for the reason that "[I]t is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the Legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind."[4] However, for the provisions repealed and not reenacted with exactly the same words, we need to wait for the judicial delineation for better clarity on those

* Associate Professor, RML National Law University, Lucknow, Uttar Pradesh (INDIA). I acknowledge with gratitude the research assistance rendered by Ms. Anjali Dixit and Ms. Shalini Shukla, Research Scholars at RML National Law University, Lucknow.

1 Act 1 of 1872. It came into force on Sep. 1, 1872.

2 Act 47 of 2023. Published in the Official Gazette on Dec. 25, 2023.

3 The Indian Penal Code, 1860 (Act 45 of 1860), abbreviated as IPC and the Code of Criminal Procedure, 1973 (Act 2 of 1974), abbreviated as CrPC, have also been replaced with the Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023) and the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023, abbreviated as BNS and BNSS, respectively.

4 *Bengal Immunity Co. Ltd.* v. *State of Bihar*, AIR 1955 SC 661, para 100.

provisions. The survey on law of evidence has been divided into parts- the first part discusses the key highlights of the BSA and the remaining parts discuss the development of law though the decisions of the Supreme Court of India. I have included the corresponding BSA provisions in the parentheses wherever the provisions of the IEA have been mentioned in the judicial decisions.

II THE BSA: A NEW DAWN

The BSA marks a watershed moment in Indian legal history as the law seeks to "consolidate and to provide for general rules and principles of evidence for fair trial."[5] The BSA, *inter alia*, provides as follows:[6]

(i) Any information given electronically *i.e.,* while the witness including accused, expert and victim appear before the court through electronic means shall be "evidence".

(ii) Electronic or digital records shall have the same legal effect, validity and enforceability on a par with any other document in physical form.

(iii) Secondary evidence shall not only include copies made from original by mechanical process, copies made from or compared with the original, counterparts of documents as against parties who did not execute them and oral accounts of the contents of a document given by some person who has himself seen it but also testimony of a person who gives matching hash value of the original record shall be admissible as secondary evidence.

(d) The BSA seeks to put limits on the facts which are admissible and its certification as such in the courts.

The BSA, while maintaining the flare and flavor of the law of evidence as contained in the IEA, has made some structural changes in the latter, for example, all the definitions have been included in one singe provision[7] and arranged alphabetically. Recognizing the ever-increasing use and dependability on Information and Communication Technology, the BSA accords the same legal effect, validity and enforceability to an electronic record as physical documents.[8] In a notable change, the definition of 'primary evidence' as provided in section 57 of the BSA adds four new explanations to clarify as to when can an electronic record be treated as a 'primary evidence.' The IEA doesn't contain any such explanation.

III EVIDENCE, FACT, FACT IN ISSUE AND RELEVANT FACT

Fact is at the core of law of evidence. Evidence may be given of facts in issue and relevant facts is the rule which means that the court would not allow a party to a suit or a judicial proceeding to adduce evidence except of a fact including a fact in issue. In *Neeraj Dutta* v. *State (NCT of Delhi)*[9] a five-judge Constitution Bench

5 *See*, the Preamble of BSA.

6 *See*, the Statement of Objects and Reasons, BSA.

7 BSA, s.2.

8 BSA, s. 61.

9 (2023) 4 SCC 731.

of the Supreme Court has revisited the important basic considerations in the law of evidence in a case where it had to appreciate the quality of evidence for proof of demand and acceptance of illegal gratification before a public servant could be held guilty for an offence under Section 7 and /or Section 13 (1) (d) of Prevention of Corruption Act, 1988. The Supreme Court observed that a fact includes a state of things or events as much as the mental state *i.e.,* intention or animus. A fact in law of evidence includes *factum probandu i.e.,* the principal fact to be proved and the *factum probans i.e.,* evidentiary fact from which the principal fact follows immediately or by inference. On the other hand, the expression "fact in issue" means the matters which are in dispute or which form the subject of investigation. A fairly settled position has been that evidence is upon facts pleaded in a case and hence, the principal facts are sometimes the facts in issue. Facts relevant to the issue are evidentiary facts which render probable the existence or non-existence of a fact in issue or some relevant fact. Further explaining the phrase "fact in issue", the Supreme Court said that in criminal cases, the fact in issue are constituted in the charge. The proof of fact in issue could be made by oral or documentary evidence as evidence is the medium, through which the court is convinced of the truth or otherwise of the matter under enquiry, *i.e.,* the actual words of the witness or documents produced and not the facts which have to be proved by oral and documentary evidence. The term evidence is not restricted to only oral or documentary evidence but includes other things as well such as material objects, the demeanour of the witnesses, facts of which judicial notice could be taken, admission of parties, local inspection made and answers given by the accused to questions put forth by the Magistrate or judge during trial. The Supreme Court went on to add that oral evidence can be classified as original and hearsay evidence and the former is that a witness herself has perceived whereas the hearsay evidence, also called derivative evidence is transmitted or second-heard evidence where a witness is merely reporting what the witness did not personally perceive. The Supreme Court reiterated that normally hearsay evidence is inadmissible but when corroborated by substantive evidence of other witnesses, it would be admissible.[10] Explaining that circumstantial evidence, also called inferential or presumptive evidence, means facts from which another fact is inferred, the Supreme Court observed that though circumstantial evidence don't prove directly a fact in issue, they are equally direct in the sense they are also to be proved by direct evidence of the circumstances. The forensic procedure as circumstantial evidence or inferential evidence or presumptive evidence is indirect evidence which means proof of other facts from which the existence of the fact in issue may be logically inferred and contextually, the phrase "circumstantial evidence" is used in a loose sense, as often, such evidence may also be direct.[11]

Referring to Section 60 of the IEA (corresponding with Section 55 of BSA), the Supreme Court said that oral evidence must be direct or positive and it is so

10 *Id*. at 755. The observation was made relying on *Mukhtiyar Singh* v. *State of Punjab*, (2017) 8 SCC 136.

11 *Id.* at 766.

when it goes straight to establish the main fact in issue whereas a derivative or hearsay evidence is when a witness says that the fact was not personally perceived by her/him. It is hearsay evidence and therefore inadmissible if the person testifying doesn't say that the fact was personally perceived by her/him. Though hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, it does not necessarily exclude evidence regarding statement made upon which certain action was taken or certain results followed such as evidence of a person who informs police about commission of an offence, even if the informant didn't see the offence being committed.[12]

Explaining the oral and documentary evidence under the IEA, the Supreme Court said that oral evidence means the testimony of a human being examined in the court or by Commissioners appointed by the court and even deaf and dumb persons may also adduce evidence by signs or though interpretation or by writing, if they are literate[13] and all facts, except the contents of documents or electronic records, may be proved by oral evidence. As regards to oral evidence, there are the sub-categories of primary and secondary evidence. The former is an oral account of the fact *i.e.,* of a person who saw what happened and gives an account of it in the court or the original document itself, or the original material object when produced in the court and the latter is a report or an oral account of the original evidence or a copy of the document or a prototype of the original object. On the other hand, a document may be proved only by production of the document itself or in its absence, by adducing secondary evidence under Section 65 of the IEA (corresponding with Section 60 of the BSA).

IV PRESUMPTIONS AND CONCLUSIVE PROOF

In the law of evidence, the word "presumption" implies an inference, affirmative or otherwise, drawn by a court of the existence of a fact, called the "presumed fact", by employing the process of a plausible reasoning from some matter of fact either judicially noticed or established by legal evidence to the satisfaction of the court.[14] Presumptions are generally of two kinds, namely, presumptions of fact and presumptions of law. A presumption of fact is an inference of a fact not certainly known, that the court draws from a known fact. A presumption of law derives its force from law. Whereas all presumptions of fact are rebuttable, presumptions of law may be both rebuttable and irrebuttable.

Though it is true that as per Section 113A of the IEA (corresponding with Section 117 of the BSA), when the question arises as to whether commission of suicide by a woman had been abetted by her husband or any relative of her husband, and when it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of

12 *Ibid*.

13 S. 119 of the IEA (corresponding with S. 125 of the BSA) declares a deaf and dumb person to be a competent witness who may testify by writing or by signs.

14 W.M. Best, *Principles of the Law of Evidence* 313 (Sweet and Maxwell, London, 12th edn., 1922).

her husband had subjected her to cruelty, the court can presume, having regard to the other circumstances, that such suicide has been abetted by her husband or such relative of her husband. However, mere fact of commission of suicide by itself would not be sufficient for the court to raise the presumption under Section 113A of the IEA, and to hold the accused guilty of Section 306 of the IPC (corresponding with Section of the BSA).[15] The term "the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband" indicates that the presumption is discretionary.[16]

A presumption of fact under Section 114(a) of the IEA (corresponding with Section 119 (1) (a) of the BSA), that a person who is in possession of stolen goods soon after theft is either thief or receiver of stolen goods knowing them to be stolen, must be drawn considering other evidence on record and without corroboration from other cogent evidence, it must not be drawn in isolation.[17]

The rule regarding the conclusive proof of legitimacy of a child born during the subsistence of a lawful marriage or within 280 days of its dissolution is, arguably the most contentious rule in the whole of law of evidence. Based on the well known maxim *pate rest quem nuptiae demonstrant*, Section 112 of the IEA (corresponding with Section 116 of the BSA) postulates that if a child is born during the subsistence of a valid marriage or within 280 days of its dissolution, this fact shall be the conclusive proof that the child is a legitimate child of the man who is or was married to the mother.[18] The presumption of legitimacy of a child is a rebuttable presumption, however, it can be displaced only by showing "non access" during the period when the child could have been conceived. Whether a DNA test can be resorted to or a DNA report can be relied on in order to rebut the presumption of legitimacy has come up for consideration in a catena of cases before the Supreme Court.[19] In *Aparna Ajinkya Firodiya* v. *Ajinkya Arun Firodiya,*[20] the controversy had its origin in an application filed by the respondent-husband before the Principal Judge Family Court, Pune, praying for a direction to subject Master "X", the second child born to the appellant-wife, during the subsistence of her marriage with the respondent, to DNA test with a view to ascertain his paternity. The said application was filed by the respondent-husband in a petition for divorce filed by him under Sections 13(1)(i) and (ia) of the Hindu Marriage Act, 1955. The same was allowed by the Family Court, Pune and confirmed by the High Court of Bombay. Aggrieved by the order of the Family Court and the judgment of the high court, an appeal was made to the Supreme Court. Allowing the appeal, the Supreme Court has laid down following principles as to the

15 *Kashibai* v. *State of Karnataka* (2023) 15 SCC 751.

16 *Mangat Ram* v. *State of Haryana* (2014) 12 SCC 595.

17 [2023] 11 SCR 246, 260-261.

18 *Goutam Kundu* v. *State of W.B.* (1993) 3 SCC 418.

19 See, *Ramkanya Bai* v. *Bharatram* (2010) 1 SCC 85; *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*, (2014) 2 SCC 576.

20 2023 SCC OnLine SC 161.

circumstances under which a DNA test of a child may be directed to be conducted for displacing the presumption of legitimacy:

i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.

ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the IEA (corresponding with Section 116 of the BSA) by showing non-access to the spouse.. Further, if no plea has been raised as to non-access, in order to rebut the presumption under Section 112 of the IEA, a DNA test may not be directed.

iii. A court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.

iv. Merely because either of the parties have disputed a factum of paternity, it does not mean that the court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the court finds it impossible to draw an inference based on such evidence, or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the court can direct such test.

v. While directing DNA tests as a means to prove adultery, the court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social stigma, etc.

V CIRCUMSTANTIAL EVIDENCE

A fact may be proved either by direct evidence or circumstantial evidence. Over a period of years, the principles relating to proof of a fact by circumstantial evidence has been concretized by the Supreme Court.[21] In *Pritinder Singh* v. *State of Punjab,*[22] the Supreme Court has reiterated the five golden principles, also referred to as *panchsheel* of proof in a case based on circumstantial evidence, holding that before a case against the accused can be said to be fully established, the following conditions must be fulfilled:

(i) the circumstances from which the inference of guilt is drawn should be fully established,

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, i.e. they should not be explainable on any other hypothesis except that the accused is guilty,

21 See, *Sharad Birdhichand Sarda* v. *State of Maharashtra*, (1984) 4 SCC 116; *Shatrughna Baban Meshram* v. *State of Maharashtra*, (2021) 1 SCC 596; *Ravinder Singh* v. *State of Punjab*, (2022) 7 SCC 581.

22 (2023) 7 SCC 727, 732-733.

(iii) the circumstances should be of conclusive nature and tendency,

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

In *State of Punjab* v. *Kewal Krishan,*[23] acquitting the accused the Supreme Court has said that it is trite law that in case based on circumstantial evidence, the prosecution must prove beyond reasonable doubt each of the incriminating circumstances on which it proposes to rely; the circumstances relied upon must be of definitive tendency unerringly pointing to the guilt of the accused and must form a chain so far complete that there is no escape from the conclusion that within all human probability it is the accused and no one else who had committed the crime and they must exclude all other hypothesis inconsistent with his guilt and consistent with his innocence. In *Jabir* v. *State of Uttarakhand*[24] reiterating the five golden principles regarding proof by circumstantial evidence, the Supreme Court said that these principles which are now fundamental rules require adherence not only for their precedential weight, but also as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest. Acknowledging that there can be no straight jacket formula for appreciation of circumstantial evidence yet to convict the accused on basis of circumstantial evidence, the court must follow the tests as laid down by the Supreme Court from time to time. An accused can be punished if he is found guilty even in cases of circumstantial evidence provided that the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely point towards the involvement and guilt of the accused. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. However, strict adherence to the principles of circumstantial evidence is mandatory for conviction in such cases.[25]

In *Subramanya* v. *State of Karnataka,*[26] the Supreme Court made the following observations:

> 47. In an Essay on the Principles of Circumstantial Evidence by William Wills by T. and J.W. Johnson and Co. (1872), it has been explained as under:
>
> "In matters of direct testimony, if credence be given to the relaters, the act of hearing and the act of belief, though really not so, seem to

23 (2023) 13 SCC 695.

24 2023 SCC OnLine SC 32, para 25-26.

25 *Ramanand alias Nandlal Bharti* v. *State of Uttar Pradesh*, 2022 SCC OnLine SC 1396, para 46-47. See also, *Mohd. Firoz* v. *State of Madhya Pradesh*, (2022) 7 SCC 443, emphasizing on the observance of the five golden principles of circumstantial evidence.

26 (2023) 11 SCC 255, 286.

> be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.
>
> The term Presumptive is frequently used as synonymous with Circumstantial Evidence; but it is not so used with strict accuracy, The word "presumption", ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.
>
> The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum."
>
> 48. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. *In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the Accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the Accused.*
>
> [Emphasis supplied]

VI THEORY OF "LAST SEEN TOGETHER"

In murder trial, often it is alleged by the prosecution that the deceased was last seen with the accused and the accused must account for the circumstances of his death. This is known as the theory of "last seen together". This theory, if proved, shifts the burden of proof on the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last

seen with him.[27] The theory of last seen together has been judicially crafted from Section 106 of the IEA (corresponding with Section 109 of the BSA) which states that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." In *Balvir Singh* v. *State of Uttarakhand,*[28] the Supreme Court said that Section 106 of the IEA provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused.[29] The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the IEA. Section 106 of the IEA is an exception to Section 101 of the IEA (corresponding with Section 104 of the BSA). Section 101of the IEA, together with its illustration (a), lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are, especially within the knowledge of the accused and which, he can prove with ease and convenience. Though, the theory of last seen together in itself is not sufficient to lead to an inference of guilt of the accused, the evidence of last seen becomes extremely crucial piece of evidence in a case of circumstantial evidence, particularly when there is close proximity of time between when the accused was last seen with the deceased and the discovery of the body of the deceased. This does not mean that in cases where there is a long gap between the time of last seen and the death of the deceased, the last seen evidence loses its value but a very heavy burden is placed on the prosecution to prove that during this period of last seen and discovery of the body of the deceased or the time of the death of the deceased, no other person but the accused could have had access to the deceased.[30] Where the time gap between the last seen together and the time of death is long enough, it would be dangerous to come to the conclusion that the accused is responsible for the murder. In such a case, it is unsafe to base conviction on the theory of last seen together and it would be safe to look for corroboration from other circumstances and evidence which have been adduced by the prosecution.[31]

27 K. A. Pandey, *Vepa P. Sarathi's Law of Evidence* 313 (Eastern Book Company, Lucknow, 8th edn., 2021).

28 2023 SCC OnLine SC 1261, para 34

29 In order to explain the meaning of the word "especially" the Supreme Court relied on its earlier judgment in *Shambhu Nath Mehra* v. *State of Ajmer*, 1956 SCC OnLine SC 27.

30 *Dinesh Kumar* v. *State of Haryana*, [2023] 4 SCR 220, 233. The observation was made by the Supreme Court relying on its earlier judgment in *Anjan Kumar Sharma* v. *State of Assam*, (2017) 14 SCC 359, para 19.

31 *Nizam* v. *State of Rajasthan*, (2016) 1 SCC 550, quoted with approval in *Dinesh Kumar* v. *State of Haryana*, 2023 SCC OnLine SC 564, para 27. See also, *Jabir* v. *State of Uttarakhand*, 2023 SCC OnLine SC 32.

In *Ram Gopal* v. *State of Madhya Pradesh,*[32] the brief facts were that the deceased was taken by the accused and next day he was found lying dead on road. Dismissing the appeal against the order of the High Court that had confirmed conviction recorded by the trial court, the Supreme Court made the following observations:

> It may be noted that once the theory of "last seen together" was established by the prosecution, the accused was expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution, however in view of Section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon him. Of course, Section 106 is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within his special knowledge, in view of Section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non- furnishing of the explanation by the accused would be a very crucial fact, when the theory of "last seen together" as propounded by the prosecution was proved against him.[33]

Quoting from *Satpal* v. *State of Haryana*[34] the Supreme Court further held that criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the IEA with regard to the circumstances under which death may have taken place. In *Prem Singh* v. *State of NCT of Delhi,*[35] the accused was prosecuted for murdering his two young sons, aged 6 and 9 by strangulating them near a canal and threw their dead bodies in the canal. Upon trial, he offered a false narrative of death by drowning. Dismissing his appeal against the order of the high court confirming his conviction, the Supreme Court held that when the facts established by the evidence on record and the surrounding factors are put together, the chain of circumstances had unfailingly

32 [2023] 2 SCR 402.
33 *Id*. at 407.
34 (2018) 6 SCC 610.
35 [2023] 5 SCR 800.

been that the deceased children were lastly seen alive in the company of the appellant; they died because of manual strangulation and obviously, their death was homicidal in nature; their dead bodies were recovered from the canal; and the appellant attempted to project that they had accidentally fallen into the canal. In the given set of circumstances, when the deceased children were in the company of the appellant, who was none else but their father and when their death was caused by manual strangulation, the burden, perforce, was heavy upon the appellant to clarify the facts leading to the demise of his sons, which would be presumed to be specially within his knowledge.[36]

Thus, on its own, the theory of last seen together is considered to be a weak basis for conviction. However, when the same is coupled with other factors such as when the deceased was last seen with the accused, proximity of time to the recovery of the body of deceased etc. the accused is bound to give an explanation under Section 106 of the IEA. If he does not do so, or furnishes what may be termed as wrong explanation or if a motive is established – pleading securely to the conviction of the accused closing out the possibility of any other hypothesis, then a conviction can be based thereon.[37] Relying on its earlier judgment in *Sabitri Samanaray* v. *State of Odisha,*[38] the Supreme Court has held that in a case based on circumstantial evidence, with reference to Section 106 of the IEA, if accused had a different intention, the facts are specially within his knowledge which he must prove; and if, in a case based on circumstantial evidence, the accused evades response to an incriminating question or offers a response which is not true, such a response, in itself, would become an additional link in the chain of events.[39] However, undoubtedly, the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt. If the prosecution fails to discharge its initial burden beyond reasonable doubt, the accused has to be acquitted. It is settled law that the prosecution cannot take recourse of Section 106 of the IEA without laying any foundational facts.[40]

VII DYING DECLARATION

When a statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statement, referred to as dying declaration, is admissible by virtue of Section 32 (1) of the IEA (corresponding with section. 26 (a) of the BSA). It has been held that the statement of the complainant-victim which, after having been injured, he gave as *bayan tahriri* (loosely translated as statement in the nature of complaint) and recorded as the First Information Report (FIR) by the police is relevant as a dying declaration. In a case where the deceased narrated the entire incident and circumstances of the transaction which resulted in his death and he died subsequent to making of his statement on account of injuries suffered by him in the incident in question, it was

36 *Id.,* at 850.

held that the FIR lodged on the basis of his statement is liable to be treated as a dying declaration which itself is a substantive piece of evidence and is admissible under Section 32(1) of the IEA.[41]

However, dying declaration, although undoubtedly a substantive piece of evidence upon which reliance can be placed, shall be rendered nugatory where the person who took down such declaration was not examined, nor did the police officer endorse the said document with details of who took down the declaration. Examination of the person who reduced the dying declaration into writing is essential. Given the nature of a dying declaration, it is required that such statement be free from tutoring, prompting, or not be a product of imagination and where it emanated from the statement of the doctor who attended to the deceased, that at the time of the dying declaration being made, there were numerous people present near him and it was also not clear as to in front of which of the relatives of deceased was the same taken down, the dying declaration loses its evidentiary value.[42]

In those cases where the deceased made multiple dying declarations, it has been held in *Abhishek* v. *Govt. of NCT of Delhi*[43] as follows:

> 1. The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind; 2. All dying declarations should be consistent – In other words, inconsistencies between such statements should be 'material' for its credibility to be shaken; 3. When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purposes of corroboration of the contents of dying declarations; 4. The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances; 5. Each declaration must be scrutinized on its own merits – The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further; 6. When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion; 7. In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant

37 *Ravasaheb @ Ravasahebgouda* v. *State of Karnataka*, [2023] 2 SCR 965, 975. See also, *Siju Kurian* v. *State of Karnataka*, [2023] 4 SCR 397, 416.

38 2022 SCC OnLine SC 673.

39 *Vahita* v. *State of Tamil Nadu*, [2023] 3 SCR 942, 979.

40 *Wazir Khan* v. *State of Uttarakhand*, [2023] 11 SCR 39, 44.

41 *Harendra Rai* v. *State of Bihar*, [2023] 11 SCR 403, 456.

42 *Manjunath* v. *State of Karnataka*, [2023] 14 SCR 727.

43 [2023] 11 SCR 890.

> time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.[44]

In *Anil Kumar* v. *State of Kerala,*[45] where the accused was tried for murdering his wife by setting her on fire, there were multiple dying declarations on record. The first dying declaration was in the form of statement which the deceased had made before a First Class Judicial Magistrate. The said statement clearly revealed the cause and circumstances of the death of the deceased. Before her death, the deceased had also made a statement about the cause and circumstances of her burn injuries to a police constable at the hospital where she was admitted after the incident. The Magistrate before whom one of the two statements was made proved the correctness and also that he found the deceased to be in a fit mental condition to make rational statements. The doctor who had treated her after being admitted to the hospital also corroborated the testimony of the Magistrate. In view of these facts, it was held that the dying declarations are reliable and rightly read in evidence.

If there are more than one dying declarations, the dying declarations may entirely agree with one another. There may be dying declarations wherein inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable. In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable. Yet another category of cases is that where there are more than one dying declarations and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two dying declarations. In this scenario, it is the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon. Thus, in case of multiple dying declarations, adduced in the course of a criminal trial, especially where the deceased had been a victim of burns and had succumbed to burn injuries and had prior to

44 *Id.* at 902-903. The Supreme Court relied on several of its earlier decisions including *Kamla* v. *State of Punjab*, (1993) 1 SCC 1; *State of Punjab* v. *Parveen Kumar*, (2005) 9 SCC 769; *Amol Singh* v. *State of M.P.,* (2008) 5 SCC 468; *Lakhan* v. *State of M.P.,* (2010) 8 SCC 514; *Makhan Singh* v. *State of Haryana*, (2022) SCC OnLine SC 1019; *Ashabai* v. *State of Maharashtra*, (2013) 2 SCC 224; *Jagbir Singh* v. *State (NCT of Delhi),* (2019) 8 SCC 779; *Uttam* v. *State of Maharashtra*, (2022) 8 SCC 576.

45 [2023] 14 SCR 173.

death made more than one dying declaration have indicated that test of credibility having regard to the overall facts on record, has to be adopted.[46] It has been consistently held that the weight and utility of a dying declaration depend upon the surrounding circumstances and the credibility which the court attaches to it, having regard to the evidence led before it. Therefore, whether it is essential to have medical certification before the statement is recorded, who records it, etc. are all fact dependent, and no stereotypical approach can be adopted by courts.[47]

Although a voluntary and truthful dying declaration devoid of any extraneous influence can form the sole basis of conviction,[48] the Supreme Court in *Irfan alias Naka* v. *State of Uttar Pradesh*[49] discussed as to when it shall not be safe to record conviction solely based on dying declaration. In this case the accused-appellant had strained relationship with his son (victim-deceased) from his first marriage and his two brothers (victims-deceased), all of whom, as per the prosecution, were opposed to his second marriage. He locked the door of the room from outside in which the victims were sleeping, poured kerosene in the room and set it on fire causing their death. The prosecution sought to prove two dying declarations of two of the deceased victims. The Supreme Court found that the two dying declarations were not consistent or rather contradictory to the oral evidence on record and although, the accused-appellant was named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances rendered such statement very doubtful. It was held that courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it. Dying declaration while carrying a presumption of being true must be wholly reliable and inspire confidence. Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the sole basis for conviction without there being other reliable evidence to sustain the same.

VIII EXTRA-JUDICIAL CONFESSON

Extra-judicial confessions are those that are made either to the police or to any person other than judges or Magistrates. However, Sections 25 and 26 of the IEA (corresponding with sub-sections (1) and (2) of Section 23 of the BSA, respectively) exclude confession to police or while the accused is in police custody from the purview of admissibility unless the confession falls under the exceptions stated in Sections 26 and 27 of the IEA (corresponding with sub-section (2) of Section 26 of BSA and its proviso, respectively).[50] Extra-judicial confession made to a person other than police is governed by Sections 24, 28 and 29 of the IEA

46 R*ajaram* v. *State of Madhya Pradesh* [2023] 16 SCR 99, quoting from *Jagbir Singh* v. *State (NCT of Delhi),* (2019) 8 SCC 779.

47 *Id.* at 107.

48 *Sampat Babso Kale* v. *State of Maharashtra* (2019) 4 SCC 739.

49 [2023] 11 SCR 789.

50 *Naresh alias Nehru* v. *State of Haryana* [2023] 13 SCR 771.

(corresponding with Section 22 of the BSA, which clubs these provisions of the IEA). In *Nikhil Chandra Mondal* v. *State of West Bengal,*[51] the Supreme Court observed that extra–judicial confession is a weak piece of evidence. Where an extra–judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra–judicial confession. There is no doubt that conviction can be based on extra–judicial confession, but in the very nature of things, it is a weak piece of evidence. Placing reliance on its earlier judgment in *Sahadevan* v. *State of Tamil Nadu,*[52] the Supreme Court reiterated[53] the following precepts for judicial minds for the purpose of appreciating and evaluating extra-judicial confessions:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

Thus we find that as far as extra-judicial confession is concerned, the law is well settled.[54] Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement.[55] The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility.[56] In a case where the prosecution was able to lead credible and convincing evidence

51 [2023] 2 SCR 20.

52 (2012) 6 SCC 403.

53 [2023] 2 SCR 20, 27.

54 *Pawan Kumar Chourasia* v. *State of Bihar*, [2023] 2 SCR 875.

55 *Id.,* at 877.

56 *Id.,* at 878.

against the accused in addition to a purported extra-judicial confession, the Supreme Court rejected the contention of the accuses-appellants that they were convicted solely on the basis of extra-judicial confession which was in the form of a letter written by the accused-appellant to one of the prosecution witnesses. Having noticed that the high court had not given much weightage the extra-judicial confession while confirming the conviction recorded by the trial court, the Supreme Court refused to interfere with the order of the high court.[57]

IX ADMISSIBILITY OF ELECTRONIC EVIDENCE

The rules of admissibility of electronic evidence were added to the IEA in the year 2000 itself when the Information Technology Act, 2000[58] inserted Sections 65A and 65B in the IEA (corresponding with Sections 62 and 63 of the BSA, respectively). However, it was only in *Anvar P.V.* v *P.K. Basheer*[59] wherein the Supreme Court emphasized on the mandatory nature of Section 65B of the IEA and held that secondary evidence of an electronic record can be read in evidence only when it complies with the conditions laid down in Section 65B of the IEA. The decision of the Supreme Court in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantayal*[60] which also clarified[61] the decision in *Anvar P.V.* case has left no doubt about the mandatory nature of Section 65B of the IEA whereby a secondary evidence of electronic record is admissible only when accompanied by a certificate in terms of Section 65B (4) of IEA. Following the law laid down in these cases, the Supreme Court in *Mohd. Arif* v. *State (NCT of Delhi)*,[62] eschewed the electronic record which was in the form of CDR unaccompanied by the appropriate certificates as mandated by Section 65B of the IEA. Interestingly, though the mandatory requirement of a certificate to be produced with secondary evidence of an electronic record has been retained in Section 63 the BSA (which corresponds with Section 65B of the IEA), the Schedule appended to the BSA prescribes a template which is to be used for preparing such certificate.

However, mere compliance with the admissibility conditions of secondary evidence of electronic record does not mean that the court shall rely on it. In *Naresh alias Nehru* v. *State of Haryana,*[63] PW-8 who made a video from his mobile

57 *John Anthonisamy @ John* v. *State, Rep. by the Inspector of Police*, [2023] 1 SCR 279.

58 Act 21 of 2000 which came into force on Oct. 17, 2000.

59 (2014) 10 SCC 473.

60 (2020) 7 SCC 1.

61 *Id.,* at para 73. It was clarified that the required certificate under Section 65B (4) of IEA 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 device concerned, 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 Section 65B (4) of the IEA.

62 (2023) 3 SCC 654.

63 [2023] 13 SCR 771.

phone of the CCTV footage on April 22, 2016 claimed to have handed over the recorded CD to the police on June 1, 2016. However, the video (CD) was not forwarded by the police to the Forensic Science Laboratory. The PW-8 claimed to have downloaded the video from his mobile phone and transferred to his laptop and then prepared CD (Ex.P.3). Neither the laptop nor the mobile phone was produced by prosecution or had been seized by the police during the course of investigation. The PW-8, though identified his signature on the certificate prepared in compliance with Section 65B of the IEA, it was admitted that the said certificate was prepared by the police and the PW-8 had merely put his signature on it. The CD was played in the trial court and the Sessions Judge recorded that from the video clips the faces of assailants and complainants were not decipherable. Even the PW-8 admitted that faces of the assailants were not visible and identifiable and the registration numbers of the motorcycles were also not visible. The Investigating Officer also admitted in his cross-examination that faces of the accused were not identifiable from the video. Also, the said video according to PW-8 was taken from the CCTV camera located in the house of 'D' who was never cited as a witness by the prosecution. In these circumstances, the Supreme Court disagreed with the trial court and the High Court holding that said evidence could not have been relied upon, as it was infested with serious doubts and the very manner in which it came into existence itself would raise a serious doubt not only about its source but also raises a serious doubt about the presence of the appellants at the scene of crime. Thus, an electronic record that is in the form of secondary evidence must pass the test of admissibility and reliability before it is acted on. Proof of origin, source and a proper chain of custody are crucial considerations in this regard. It has also been reiterated in *State of Karnataka* v. *T. Naseer*[64] that a certificate as required by Section 65B of the IEA can be produced at any stage of the judicial proceeding before it is read in evidence provided that it doesn't result in any irreversible prejudice to the accused in a criminal trial.

X PLEA OF ALIBI

The plea taken by the accused by leading evidence that he was at a place so far away from the crime scene that it was impossible for him to have committed the crime is known as plea of alibi.[65] Section 11 of the IEA (corresponding with Section 9 of the BSA) declares plea of alibi a relevant fact. In *Kamal Prasad* v. *State of Madhya Pradesh*[66] the Supreme Court referred to its previous judgments and summarized the principles relating to plea of *alibi* as follows:[67]

64 2023 INSC 988.

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

66 [2023] 13 SCR 810.

67 *Id*., at 817. The Supreme Court referred to *Dhananjoy Chatterjee* v. *State of W.B.,* (1994) 2 SCC 220; *Binay Kumar Singh* v. *State of Bihar*, (1997) 1 SCC 283; *Jitender Kumar* v. *State of Haryana*, (2012) 6 SCC 204; *Vijay Pal* v. *State (Govt. of NCT of Delhi),* (2015) 4 SCC 749; *Darshan Singh* v. *State of Punjab*, (2016) 3 SCC 37; *Mukesh* v. *State (NCT of Delhi)*, (2016) 6 SCC 1; *Pappu Tiwari* v. *State of Jharkhand*, 2022 SCC OnLine SC 109.

(a) It is not part of the General Exceptions under the substantive criminal law and is instead a rule of evidence under Section 11 of the IEA.

(b) This plea being taken does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein.

(c) Such plea is only to be considered subsequent to the prosecution having discharged, satisfactorily, its burden.

(d) The burden to establish the plea is on the person taking such a plea. The same must be achieved by leading cogent and satisfactory evidence.

(e) It is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of 'strict scrutiny' is required when such a plea is taken.

XI TEST IDENTIFICAN PARADE

Facts which establish the identity of any person or thing whose identity is relevant are, by virtue of Section 9 of the IEA (corresponding with Section 7 of the BSA). In *Mukesh Singh* v. *State (NCT of Delhi)*,[68] the Supreme Court has revisited the whole gamut of law and practice of TIP in the light of earlier decisions of the Supreme Court. Answering the question whether an accused can decline to participate in the Test Identification Parade (TIP) on the ground that he was already shown to the eye witnesses prior to the conduct of the TIP, it was held that the accused while subjecting himself to the TIP does not produce any evidence or perform any evidentiary act. It may be a positive act and even a volitional act, but only to a limited extent, when the accused is brought to the place where the TIP is to be held. It is certainly not his evidentiary act. The accused concerned may have a legitimate ground to resist facing the TIP saying that the witnesses had a chance to see him either at the police station or in the court, as the case may be, however, on such ground alone he cannot refuse to face the TIP. It is always open for the accused to raise any legal ground available to him relating to the legitimacy of the TIP or the evidentiary value of the same in the course of the trial. However, in view of Section 54A of the CrPC, the accused cannot decline or refuse to join the TIP. The accused concerned may have a legitimate ground to resist facing the TIP saying that the witnesses had a chance to see him either at the police station or in the court, as the case may be, however, on such ground alone he cannot refuse to face the TIP. It is always open for the accused to raise any legal ground available to him relating to the legitimacy of the TIP or the evidentiary value of the same in the course of the trial. However, the accused cannot decline or refuse to join the TIP.[69] On the issue of constitutional validity of TIP, the Supreme Court observed that the mere attendance or the exhibition of his body at a TIP even though compelled, does not result in any evidentiary act until the accused is identified by some other agency. The identification of him by a witness is not his act, even

68 [2023] 11 SCR 886.

69 *Id*., at 912.

though his body is exhibited for the purpose. If the coercion is sought to be imposed in getting from an accused evidence which cannot be procured save through positive volitional act on his part, the constitutional guarantee as enshrined under Article 20(3) of the Constitution will step in to protect him. However, if that evidence can be procured without any positive volitional evidentiary act on the part of the accused, Article 20(3) of the Constitution will have no application.[70]

XII CUSTODIAL CONFESSION LEADING TO DISCOVERY OF NEW FACT

The rule embodied in Section 27 of the IEA (which corresponds with the proviso to sub-clause (2) of Section 23 of BSA) states that if in a confessional statement made by the accused while in police custody a certain part of the statement distinctly relates to a new fact discovered by the police which the police was unaware of, that certain part of the statement may be proved against the accused.[71] The first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.[72] In *Manjunath* v. *State Karnataka*[73], it has been held that the new fact discovered should be in the exclusive knowledge of the accused. Where discoveries are made from a public place or from an area where other persons also resided, no reliance can be placed on the evidence of discovery. Similarly, in *Nikhil Chandra Mondal* v. *State of West Bengal*[74] the Supreme Court refused to place reliance on the discoveries made pursuant to the disclosure statement of the accused person as the discoveries were made from a place accessible to one and all. Where the independent witnesses to the seizure of stolen goods pursuant to the disclosure statement of the accused turned hostile and did not support the prosecution case, the recoveries made by the police under Section 27 of IEA must be rejected.[75] However, even where the court has to discard the evidence of discovery on the ground that no independent witnesses were present at the time of discovery, still the fact that the accused led the police party to his house and handed over the murder weapon or anything that was used in the offence, would be reflective of his conduct. By virtue of Section 8 of the IEA (corresponding with Section 6 of the BSA), the conduct of an accused is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance,

70 *Id*. at 913.

71 For a detailed discussion on S. 27, IEA, see, *Pulukuri Kottayya* v. *King Emperor*, AIR 1947 PC 67.

72 *Mohd. Inayatullah* v. *State of Maharashtra*, (1976) 1 SCC 828.

73 [2023] 14 SCR 727.

74 (2023) 6 SCC 605.

75 *Manoj Kumar Soni* v. *State of Madhya Pradesh*, [2023] 11 SCR 246.

simpliciter, that the accused pointed out to the police officer, the place where he had concealed the weapon of offence would be admissible as conduct under section 8 irrespective of the fact whether the statement made by the appellant convict contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the IEA or not. Even if the discovery statement is inadmissible under Section 27, IEA, the same is still relevant under Section 8 of the IEA.[76]

XIII APPRECIATION OF OCULAR EVIDENCE

The courts are enjoined with the duty of appreciating evidence with an object to decide what weight ought to attached to the evidence in question and whether it is reliable. Most of the rules regarding appreciation of evidence have evolved though judicial pronouncements and supplement the statutory law of evidence. It has become clichéd that evidence is to be weighed and not counted. Though no particular number of witnesses is required for proving a fact the question whether the testimony of a sole eyewitness is sufficient to record conviction, has been considered by the courts time and again. Eye witness' account, referred to as ocular evidence in the realm of law of evidence, undoubtedly fares better than other kinds of evidence and is considered evidence of a strong nature. The principle is that if the eyewitness testimony is "wholly reliable", then the court can base conviction thereupon. This applies even in cases where there is a sole eyewitness.[77] Relying on its earlier judgment in *Rai Sandeep alias Deepu* v. *State (NCT of Delhi*[78], the Supreme Court observed that for an eye-witness to be believed, his evidence should be of sterling quality. It should be capable of being taken at face value. The "sterling witness" should be of very high quality and caliber, whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The

76 *Mukesh Singh* v. *State (NCT of Delhi),* [2023] 11 SCR 886, 935.

77 *Manjunath* v. *State of Karnataka*, [2023] 14 SCR, 746.

78 (2012) 8 SCC 21.

said version should consistently match with the version of every other witness.[79] Material contradictions and inconsistencies in the statements render such witnesses to be unreliable and undependable so as to place reliance on the same to hold the accused persons guilty of having committed an offence. However, discrepancy has to be distinguished from contradiction. Whereas, contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement.[80]In *Ravasaheb @ Ravasahebgouda* v. *State of Karnataka*[81] for the offence of murder, the trial court and the High Court, despite most of the prosecution witnesses turning hostile, found the prosecution case to be established beyond reasonable doubt through the unrefuted testimony of a sole eyewitness and convicted the accused persons. The only point for consideration before the Supreme Court was whether on the basis of testimony of a solitary witness, eight men can be convicted and made to suffer life imprisonment for murder. Having noticed that the presence of the accused on the spot was not disputed by anyone and the sole eyewitness, despite being cross examined extensively, was consistent in his testimony to the effect that the accused caught hold of the deceased and inflicted serious injuries upon his person. Though the sole eyewitness could not attribute the injuries caused to the victim after he fell down to any particular accused but he was very categorical as to the role played by each one of them, it was held that the testimony of the sole eyewitness is trustworthy, truthful, credible and reliable establishing the prosecution case beyond reasonable doubt. Relying on *Vedivelu Thevar* v. *State of Madras,*[82] the Supreme Court has said[83] that if the witness is wholly reliable, there is no difficulty inasmuch as relying on even the solitary testimony of such a witness conviction could be based. Again, there is no difficulty in the case of wholly unreliable witnesses inasmuch as his/her testimony is to be totally discarded. It is only in the case of the third category of witnesses which is partly reliable and partly unreliable that the court faces the difficulty. The court is required to separate the chaff from the grain to find out the true genesis of the incident.

In a case where a witness was not originally listed as a prosecution witness and he gave his statement to the police on an affidavit for the first time on the date

79 *Ibid*.

80 *Rameshji Amarsing Thakor* v. *State of Gujarat,* 2023 SCC OnLine SC 1321, para 8, quoting from *State of H.P.* v. *Lekh Raj*, (2000) 1 SCC 247.

81 [2023] 2 SCR 965.

82 AIR 1957 SC 614.

83 *Balaram* v. *State of M.P*, 2023 SCC OnLine 1468, para 11-12.

when the police report was prepared, implying that he remained silent for as long as three and a half months, the Supreme Court in *Ravi Mandal* v. *State of Uttarakhand*[84] quoted with approval the observation made in an earlier case[85] to the effect: "If a witness professes to know about a gravely incriminating circumstance against a person accused of the offence of murder and the witness keeps silent for over two months regarding the said incriminating circumstance against the accused, his statement relating to the incriminating circumstance, in the absence of any cogent reason, is bound to lose most of its value." Terming the witness as a "chance witness" whose presence on the scene of occurrence was not satisfactorily explained and did not inspire confidence, the Supreme Court added that even if the reasons for the delay in giving statement to the police is accepted, the witness whose presence at the spot, at that hour, was not satisfactorily and additionally, bearing in mind that he kept silent for unusually long i.e. for more than three and a half months, his testimony was not worthy of any credit.

Acknowledging that appreciation of ocular evidence is a hard task and no straightjacket formula can be prescribed for the same, the Supreme Court has enumerated the judicially evolved principles of appreciation of ocular evidence as follows:[86]

> "I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
>
> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.
>
> III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

84 [2023] 7 SCR 1.

85 *Kali Ram* v. *State of Himachal Pradesh*, (1973) 2 SCC 808.

86 *Balu Sudam Khalde* v. *State of Maharashtra*, [2023] 6 SCR 851, 865-867.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

> XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

XIV EFFECT OF NON-EXAMINATION OF MATERIAL WITNESSES

In a criminal trial, although the prosecution is not bound to examine all the witnesses whose name appear in the chargesheet, non-examination of a material witness is often hammered on by the defence as an issue to be considered by the appellate courts in its favour. The Supreme Court in *Harvinder Singh @ Bachhu* v. *State of Himachal Pradesh*[87] has clarified that failure on the part of the prosecution in not examining a witness, though material, by itself would not vitiate the trial. However, when facts are so glaring and with the witnesses available, particularly when they are likely to give a different story, the court shall take adequate note of it. When a circumstance has been brought to the notice of the court by the defence and the court is convinced that a prosecution witness has been deliberately withheld, as it in all probability would destroy its version, it has to take adverse notice. Anything contrary to such an approach would be an affront to the concept of fair play. Non-examination of the investigating officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.[88]

XV RES GESTAE

Section 6 of the IEA (corresponding with Section 4 of the BSA) is an exception to the general rule under which the hearsay evidence becomes admissible. For making hearsay evidence admissible what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of the same transaction, called *res gestae*, must have been made contemporaneously with the acts or immediately thereafter. Under the rule of *res gestae* a fact which, though not in issue, if so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To make a particular statement as part of the same transaction, utterances must be simultaneous with the incident or substantially contemporaneous, *i.e.,* is made either during or immediately before or after its occurrence.[89] In *Arvind Kumar* v. *State (NCT of Delhi)*,[90] the Supreme Court was considering two statements, one made by the accused-appellant and another by a prosecution witness, immediately after death of the victim, and held that the alleged statements were certainly connected with the fact in issue, namely, the alleged act of the appellant of killing the deceased.

87 [2023] 13 SCR 1157.

88 *Munna Lal* v. *State of Uttar Pradesh*, [2023] 3 SCR 224, 237.

89 *Sukhar* v. *State of U.P.,* (1999) 9 SCC 507.

90 [2023] 10 SCR 713.

Therefore, assuming that the statements attributed to the appellant and the prosecution witness were in fact made, the conduct of the appellant of making the said statement is relevant in view of Section 6 of IEA.[91]

XVI ADMISSION BY A LAWYER: WHETHER IT BINDS THE CLIENT?

In *Balu Sudam Khade* v. *State of Maharashtra*[92], discussed earlier in the context of appreciation of ocular evidence, the Supreme Court also discussed the question that in a criminal trial whether and to what extent admission by a lawyer shall bind the client. It was held that a suggestion made by the defence counsel to a witness in the cross-examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestions in the nature of admissions against his client. Any concession or admission of a fact by a defence counsel would definitely be binding on his client, except the concession on the point of law. To put it in other words, suggestions by itself are not sufficient to hold the accused guilty if they are incriminating in any manner or are in the form of admission in the absence of any other reliable evidence on record.

It is true that a suggestion has no evidentiary value but this proposition of law would not hold good at all times and in a given case during the course of cross-examination the defence counsel may put such a suggestion the answer to which may directly go against the accused.[93] The Supreme Court further held that the principle of law that in a criminal case, a lawyer has no implied authority to make admissions against his client during the progress of the trial would hold good only in cases where dispensation of proof by the prosecution is not permissible in law. For example, it is obligatory on the part of the prosecution to prove the post mortem report by examining the doctor. The accused cannot admit the contents of the post mortem report thereby absolving the prosecution from its duty to prove the contents of the same in accordance with law by examining the doctor. This is so because if the evidence *per se* is inadmissible in law then a defence counsel has no authority to make it admissible with his consent. Therefore, suggestions made to the witness by the defence counsel and the reply to such suggestions shall form part of the evidence and can be relied upon by the court along with other evidence on record to determine the guilt of the accused.[94]

XVII EVIDENTIARY VALUE OF REPUTATION

In *Harvinder Singh Bachhu* v. *State Himachal Pradesh*[95] holding that reputation is a fact within the meaning of the term 'fact' under Section 3 the IEA (corresponding with Section 2 (f) of the BSA) and while reputation has to be seen from the point of view of an identifiable group of persons, character is what a

91 In its ultimate analysis, the Supreme Court did not agree that the statement sought to be proved as *res gestae* was in fact made.

92 [2023] 6 SCR 851.

93 *Id*. at 872-873.

94 *Id.* at 874.

95 [2023] 13 SCR 1157.

person really is, it was added that character is to be formed and reputation is to be acquired. Character may lead to formation of one's reputation. Both have an element of interconnectivity but both are distinct and different. Reputation thus forms part of internal facts which arise through thoughts and feelings such as love, anger, fear, hatred and intention etc and thus, it is required to be proved in the form of opinion of persons who form it accordingly. When reputation is to be taken as a relevant fact, its evidentiary value becomes restrictive and limited. It is a weak piece of evidence when becomes relatable to a fact in issue. Court cannot declare the reputation of a person based upon its own opinion merely because a person is educated and said to be God-fearing, that by itself will not create a positive reputation. Conduct of a witness under Section 8 of the IEA (corresponding with Section 6 of the BSA), is a relevant fact to decide, determine and prove the reputation of a witness. When the conduct indicates that it is unnatural from the perspective of normal human behaviour, the so-called reputation takes a back seat.[96] Interestingly, while Illustration (e) to the definition of 'fact' under Section 3 of IEA, specifically declares "that a man has a certain reputation, is a fact", its corresponding definition in Section 2 (1) (f) of the BSA, omits this illustration. However, in spite of this omission, it remains true that reputation is indeed a fact and may be proved as such.

XVIII TRIAL JUDGE IS NOT A MUTE SPECTATOR OF PROCEEDINGS

A trial court judge is not a mere mute spectator or a disinterested referee in the adversarial system. It is the duty of the court to seek the truth and the court should be alive and alert during criminal trial seeking every bit of vital information even if the information is not strictly relevant.[97] In a criminal trial, even if the defence counsel failed to contradict the prosecution witnesses in terms of Section 145 of the IEA (corresponding with Section 148 of the BSA), or the public prosecutor did not confront prosecution witnesses by drawing their attention to their previous statement to police, it is the duty of the trial judge to put relevant questions to the witnesses in exercise of his powers under Section 165 of the IEA (corresponding with Section 168 of the BSA). In *Munna Pandey* v. *State of Bihar,*[98] a case of rape and murder and where the evidence was not free from doubt, it has been held that the trial judge ought to have acquainted himself, in the interest of justice, with the important material and also with what the only important witnesses of the prosecution had said during the police investigation. Had he done so, he could without any impropriety have caught the discrepancies between the statements made by these witnesses to the investigating officer and their evidence at the trial, to be brought on the record by himself putting questions to the witnesses under section 165 of the IEA. The Supreme Court emphasised that in many sessions cases when an advocate appointed by the court appears and particularly when a junior advocate, who has not much experience of the procedure of the court, has

96 *Id.* at 1164-1165.

97 *Supra* note 27 at 411.

98 [2023] 11 SCR 1005.

been appointed to conduct the defence of an accused person, it is the duty of the presiding judge to draw his attention to the statutory provisions of Section 145 of the IEA and this provision must be followed in order to contradict a witness by referring to the previous statement.[99]

XIX TESTIMONY OF CHILD WITNESS

A child witness is competent to testify under Section 118 of the IEA (corresponding with Section of the BSA) and when a child goes into the witness box, the practice is for the judge to ask a few preliminary questions of a general nature to see if the child is capable of understanding the questions, give rational answers, and has a rough idea of the difference between truth and falsehood.[100] A credible testimony of a child witness can be acted on and there is no legal bar against relying of the testimony of a child witness to whom oath is not administered due to the child's incapacity to understand the meaning of oath.[101] In *Pradeep* v. *State of Haryana*[102] the Supreme Court considered the question whether a conviction can be recorded on the sole testimony of a child witness. It was observed that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The court should scrutinize the evidence of a child witness with caution and in order to determine the child's competence, ask questions which are not sketchy and where the prosecution case suffers from deficiencies, it will be unsafe to record conviction on uncorroborated testimony of a child witness.

XX EFFECT OF FAILURE TO EXAMINE FORENSIC EXPERT

Any inconsistency between ocular evidence and forensic evidence which is usually in the form of opinion of an expert has to be resolved in favour of ocular evidence. However, in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent. In a case based on circumstantial evidence and where there is serious doubt about the credibility of the witnesses on the issue of extra-judicial confession and last seen theory, the failure to examine a forensic expert would be a glaring defect in the prosecution case.[103]

XXI OPINION OF HANDWRITING EXPERT

Opinion of a handwriting expert is a valuable and relevant piece of evidence for coming to the conclusion of similarity or dissimilarity in those cases where the

99 *Id* at 1046.
100 *Supra* note 27 at 357.
101 *Paras Ram* v. *State of H.P.,* (2001) 1 JIC 282 (SC).
102 [2023] 10 SCR 1021.
103 *Pritinder Singh @ Lovely* v. *State of Punjab*, [2023] 10 SCR 1033, 1047.

authorship of anything written is a fact in issue. However, opinion of a handwriting expert, by itself, shall not be the sole basis of determination of the fact in issue. It has been held that the science of identification of handwriting by comparison not being infallible, prudence demands that before acting on such opinion, the court fully satisfies itself with the authorship of the writing in question which is made the sole basis of comparison and should also be fully satisfied with the competence and credibility of the handwriting expert.[104] Though there is no rule of law that the evidence of a handwriting expert needs corroboration before it is acted on, in view of the imperfect nature of the science of identification handwriting and it fallibility, the courts follow a rule of prudence insisting on corroboration of the expert opinion before acting on it.[105] Reiterating the rule of prudence in this regard, the Supreme Court said in *Santosh @ Bhure* v. *State (GNCT) of Delhi*[106] that such opinion has to be relied with caution and may be accepted if, on its own assessment, the court is satisfied that the internal and external evidence relating to the document in question supports the opinion of the expert and it is safe to accept his opinion.

XXII RELIANCE ON TESTIMONY OF A HOSTILE WITNESS

There is no rule of law which says that no weight can be attached to the testimony of a hostile witness. The court should subject the testimony of a hostile witness to greater scrutiny and that portion of the testimony which inspires confidence and is credible can be acted on. In *Sajeev* v. *State of Kerala,*[107] a case related to alcohol poisoning, which resulted in the death of 7 innocent people, blindness in 11 people, and more than 40 people sustaining injuries, the prosecution witness who was neighbour of the accused A1, turned hostile as he did not recall having seen the other accused persons A10 and A11 but identified the car which was used to carry methyl alcohol to the residence of A1 by the appellants. Placing reliance on the testimony of the hostile witness whereby he identified the vehicle, the Supreme Court held that it is the settled law that the testimony of a hostile witness can be accepted to the extent that the version is found to be dependable on careful scrutiny thereof. Testimony of a hostile witness can be relied upon and cannot be treated as being washed off the record.

104 *State of Maharashtra* v. *Sukhdev Singh* (1992) 3 SCC 700.
105 *Ibid.*
106 [2023] 7 SCR 719.
107 [2023] 15 SCR 241.

XXIII MANNER OF PROOF OF A WILL

It has been consistently held by the Supreme Court that the presumption under Section 90 of the IEA[108] (corresponding with Section 92 of the BSA) in favour of a document that is thirty years old does not apply to wills.[109] In *Ashutosh Samanta (D) by Lrs.* v. *SM. Ranjan Bala Dasi*[110] it has been reiterated that wills cannot be proved only on the basis of their age and the presumption under Section 90 of the IEA as to the regularity of documents more than 30 years of age is inapplicable when it comes to proof of wills, which have to be proved in terms of Sections 63(c) of the Succession Act, 1925, and Section 68 of the IEA (corresponding with Section 67 of the BSA). The IEA has been accommodating of even those situations when wills which may have satisfied the requirements of being attested, as provided by law, cannot be proved in terms of the above stated two provisions, for the reason that the attesting witnesses are not available, or if one of the witnesses denies having attested the will, Sections 69 and 71 of the IEA (corresponding with Sections 68 and 70 of the BSA, respectively) then come to the aid of the propounder.

XXIV DOCTRINE OF ESTOPPLE AND ACQUIESCENCE

The object of the doctrine of estopple as provided in Section 115 of the IEA (corresponding with Section 121 of the BSA) is to prevent fraud and secure justice between the parties to a suit or litigation by promotion of honesty and good faith. Therefore, when a party makes a representation to the other about a fact, he would not be shut out by the rule of estopple if that other person knew the true state of facts and must consequently not have been misled by the representation.[111] On the other hand, doctrine of acquiescence, a doctrine of equity, applies when a party having a right doesn't object to the other party doing an act inconsistent with that right reflecting his assent and accord. The party whose rights were violated cannot complain afterwards.[112] In *Baini Prasad (dead) through LRs* v. *Durga Devi,*[113] it has been held that where the appellant was not having title over

108 S. 90. *Presumption as to documents thirty years old*.- Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting,

and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation-Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

109 *M.B. Ramesh (D) by L.Rs*. v. *K.M. Veeraje Urs (D) by LRs*, (2013) 4 SCC 490.

110 2023 SCC OnLine 255.

111 *R.S. Maddanappa* v. *Chandramma*, AIR 1965 SC 1812.

112 *S.B.I.* v. *M.J. James*, (2022) 2 SCC 301.

113 (2023) 6 SCC 708.

the property and the respondent was owner of the land, and objection was raised by the respondent against the construction made by the appellant, neither the doctrine of estopple nor the doctrine of acquiescence would help the appellant as mere delay in instituting the suit, especially when the suit was still within period of limitation, would not amount to acquiescence.

XXV CONCLUSION

The survey of Indian law of evidence for the year 2023 has highlighted the development and application of the rules of evidence contained in the IEA though the decisions of the Supreme Court of India. It can be seen that more than whether a fact is relevant or not, most of the judicial decisions hinge on the issue of appreciation of evidence i.e. the reliability of the evidence. The two more important highlights of the survey year 2023 are, *firstly*, the crystallization of the rule of admissibility of electronic record and *secondly*, the principles laid down by the Supreme Court pertaining to rebuttal of the presumption of legitimacy of a child. In almost all the decisions included and discussed in the survey, the doctrine of precedent has been religiously adhered to bringing better clarity and consistency in the rules of evidence. As noted above, by the end of the survey year 2023, a new law, the BSA replaced the IEA bringing some vital changes in the rules of evidence necessitated by the technological advances made in the field of information technology. However, as the basic statutory principles of the law of evidence remain unaltered, decisions of the Supreme Court shall remain relevant and binding as precedent for the purpose of interpretation of the rules in the BSA corresponding with the rules in the IEA.