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EVIDENCE LAW

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I INTRODUCTION

IN A SIGNIFICANT legislative development, the Indian Evidence Act, 1872[1] (hereinafter IEA) has been replaced with the Bharatiya Sakshya Adhiniyam, 2023[2] (hereinafter BSA) with effect from July 1, 2024. Two other major legislations in the realm of criminal law, the Code of Criminal Procedure, 1973[3] (hereinafter Cr PC) and the Indian Penal Code, 1860[4] (hereinafter IPC), were also replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023[5] (hereinafter BNSS) and Bharatiya Nyaya Sanhita, 2023[6] (hereinafter BNS) respectively with effect from the same date. The BSA is—both structurally and content-wise—substantially similar to the IEA and retains almost all the basic rules of evidence that applied to judicial proceedings in India over the last one and a half decades when the IEA was on the statute book. The Annual Survey of Evidence Law for 2024 briefly takes stock of this crucial legislative development. It discusses all the critical Supreme Court decisions on various aspects of the law of evidence, without any order. As the BSA, BNS and BNSS are now the law of the land and the judicial decisions of the survey year 2024 refer to the IEA, IPC and CrPC provisions, I have provided references to the corresponding provisions under the BSA, BNS and BNSS as and when required for ease of understanding the changes and a better clarity.

II BSA: KEY HIGHLIGHTS

Like the IEA, the BSA is also the primary legislation governing the law of evidence in both civil and criminal cases in India. While the core principles of evidence law—rooted in English common law—remain intact, the BSA brings a refreshed structure without significantly altering its fundamental philosophy. The BSA has introduced structural changes by including the definitions in a single

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1 Act 1 of 1872.

2 Act 47 of 2023.

3 Act 2 of 1974.

4 Act 45 of 1860.

5 Act 46 of 2023.

6 Act 45 of 2023.

section and arranging them in alphabetical order.[7] It has also cut out the dead wood by making it crystal clear which proceedings shall be governed by the BSA.[8] Although recording evidence by electronic means was permissible when the Supreme Court allowed it more than 20 years ago, the BSA explicitly provides that oral evidence may be given electronically.[9] This enables witnesses, accused persons, and victims to testify through electronic means. The BSA clearly establishes that electronic and digital records carry the same legal validity as traditional paper documents.[10] It expands the scope of electronic records to include data stored in semiconductor memory and in various communication devices, including smart phones and laptops. This definition encompasses materials such as emails, server logs, location-based evidence, and voice messages.[11] Whereas the IEA recognises two types of evidence – documentary and oral evidence, the BSA extends secondary evidence to encompass oral and written admissions and the testimony of a person skilled in examining documents.[12]

Confessions made to a police officer are generally inadmissible, and those made in police custody are also inadmissible unless recorded by a Magistrate. However, information obtained from an accused in custody that distinctly relates to the discovered fact may be admissible. The BSA consolidates all these rules in section 23. The confession of a co-accused being tried jointly is dealt with in section 24 of the BSA (corresponding to section 30 of the IEA), which clarifies that a trial involving multiple persons, in which one of the accused is tried in absentia, will be treated as a joint trial. The admissibility of electronic evidence remains unchanged, meaning a certificate from the person controlling the computer or electronic device at the relevant time is mandatory. Still, such a certificate must also be signed by an 'expert'.[13] The Schedule attached to BSA provides a format for submitting the required certificate along with the secondary electronic evidence. This is a significant improvement, and its effect on the admissibility of secondary electronic evidence will be seen in the years to come.

III PRESUMPTION OF DOWRY DEATH AND ABETMENT OF SUICIDE OF A WOMAN

Section 113A of the IEA (corresponding with section 117, BSA) raises a presumption of abetment of suicide of a married woman if the conditions prescribed

7 S. 2, BSA is the definition clause.

8 S. 1 (2), BSA is like Section 1, para 2, IEA minus obsolete references to certain proceedings to which it shall apply.

9 S.2 (1) (e), BSA says that "evidence" means and includes "(i) all statements including statements given electronically.…"

10 S. 61, BSA. This provision is unique to the BSA having no corresponding provision in the IEA.

11 S. 57, BSA explains when evidence, including electronic evidence, shall be considered primary evidence. It corresponds with Section 62, IEA which had no such indication *vis-à-vis* electronic evidence.

12 S. 58, BSA (with Section 63, IEA) deals with secondary evidence.

13 S. 63, BSA. Section 65B, IEA which corresponds with Section 63, BSA had no requirement to get the certificate signed by an 'expert'.

in this section are met. Similarly, section 113B of the IEA (corresponding to section 118 of the BSA) raises a presumption of the commission of the offence of dowry death if the conditions stipulated therein are satisfied. However, while the presumption under section 113A, IEA, is discretionary, it is mandatory under section 113B, IEA. The use of the word marks this distinction: "may presume" in the former and "shall presume" in the latter.[14] In *Chabi Karmakar* v. *State of West Bengal*,[15] the Supreme Court has said that for invoking the presumption under section 113B, IEA, the foundational facts as provided in the definition of the offence of dowry death (section 304B, IPC, corresponding with section 80, BNS) must cumulatively exist. In this case, the Supreme Court found that the prosecution proved specific facts beyond a reasonable doubt, viz. (i) That the deceased died within seven years of marriage; (ii) The death was by suicide in her matrimonial house; (iii) There was harassment at the hands of her in-laws, particularly by the husband; and (iv) There was marital discord between husband and wife. The Supreme Court also found that the prosecution witnesses did not state that such harassment or cruelty was in connection with the demand for dowry. As the prosecution failed to prove that, soon before her death, the deceased was subjected to cruelty in connection with the demand for dowry, the Supreme Court held that the offence is not dowry death and section 113B, IEA cannot be invoked. The Supreme Court, however, maintained the convictions under Sections 306, IPC (corresponding to section 108, BNS), and section 498A, IPC (corresponding to section 85, BNS). In *Shoor Singh* v. *State of Uttarakhand*,[16] it has been reiterated that all the ingredients of the offence of dowry death must be proved for raising the presumption under section 113B, IEA. The Supreme Court explained:[17]

> What is essential is that the presumption under section 113-B is not in respect of the commission of an act of cruelty, or harassment, in connection with any demand for dowry, which is one of the essential ingredients of the offence of 'dowry death'. The presumption, however, is in respect of the commission of the offence of 'dowry death' by the accused when all the essential ingredients of 'dowry death' are proved beyond a reasonable doubt by the ordinary rule of evidence, which means that to prove the crucial ingredients of an offence of 'dowry death', the burden is on the prosecution.

In *Naresh Kumar* v. *State of Haryana*,[18] the Supreme Court refused to apply the presumption of abetment of suicide of a married woman as provided in Section 113A, IEA, where the prosecution failed to prove that the deceased was subjected to cruelty. This presumption being discretionary, from the mere fact of suicide within seven years of marriage, one should not jump to the conclusion of abetment unless cruelty was proved. The court has the discretion to raise or not to raise the

14 This position remains the same under the corresponding provisions in the BSA.
15 [2024] 8 SCR 796.
16 [2024] 9 SCR 818.
17 *Id*., at 827.
18 [2024] 2 SCR 830.

presumption, because of the words 'may presume', and in deciding so, it must take into account all the circumstances of the case.

IV CIRCUMSTANTIAL EVIDENCE

The law relating to conviction based on circumstantial evidence is settled and consistently followed by the courts in India. The decision in *Sharad Birdhichand Sarda* v. *State of Maharashtra*[19] has become the cornerstone of the law on circumstantial evidence in criminal trials, wherein the Supreme Court laid down what it called the five golden principles or *Panchsheel* of circumstantial evidence:

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

(ii) The facts so established should be consistent only with the hypothesis of the accused's guilt; that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a 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 it must show that, in all human probability, the act must have been done by the accused.

These principles, though apparently objective, must be applied cumulatively to the evidence on record to ascertain that the chain of circumstantial evidence is complete and that there is no missing link. Where the circumstances presented in evidence meet the above-stated requirements, the court can recorda conviction.[20]

In *Ballu @ Balram @ Balmukund* v. *State of M.P.*,[21] the Supreme Court reiterated these principles in the following words:

It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused must be and not merely may be proved guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved'. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that there must be a chain of evidence so complete as not to leave any reasonable

19 (1984) 4 SCC 116.

20 *Navas @ Mulanav* v. *State of Kerala*, [2024] 3 SCR 913.

2 [2024] 4 SCR 48.

ground for the conclusion consistent with the innocence of the accused.It must show that, in all human probabilities, the act must have been done by the accused.

In *Darshan Singh* v. *State of Punjab,*[22] the Supreme Court held that where the prosecution's case is based on circumstantial evidence, every link in the chain of circumstances is of equal value, and the chain is as strong as its weakest link. Any missing link in the chain of circumstances will be fatal. Conviction cannot be based on circumstantial evidence unless there is a complete chain of circumstances leading to the accused's guilt without any alternative theory. When the sentence is to be based solely on circumstantial evidence, there should be no snap in the chain of circumstances. In this case, the Supreme Court did not find the testimony of the prosecution witnesses credible, who had deposed that they had seen the accused person entering the house of the deceased in the evening, where she was found murdered the next morning. The Supreme Court found several omissions that amounted to contradictions and noted very significant improvements in their testimony before the court. The Supreme Court observed:[23]

> If the PWs had failed to mention in their statements u/s 161 of the Cr PC about the involvement of an accused, their subsequent statement before the court during the trial regarding the participation of that particular accused cannot be relied upon. The prosecution cannot seek to prove a fact at trial through a witness who did not state it to the police during the investigation. The evidence of that witness regarding the said improved fact is of no significance.[24]

The Supreme Court reiterated that for a conviction based on circumstantial evidence, the facts must be so complete and compelling that they rule out any other possible explanation except the guilt of the accused. The circumstances should not support any alternative hypothesis of innocence. In this case, however, even if the presence of the appellant and co-accused was proven, the available evidence does not conclusively establish that they were responsible for the murder of his wife. A strong possibility remains that the deceased took her own life, a theory the appellant presented in his statement under section 313, Cr PC (corresponding with section 351, BNSS). This alternative explanation is significant enough to create doubt regarding their guilt.

In *Pradeep Kumar* v. *State of Haryana*,[25] the Supreme Court noticed gaping holes in the prosecution theory: (i) The weapons recovered by the investigating officer and the ones seen by the witnesses were only sticks but the deceased had suffered an incise wound which according to the doctor, who conducted the post-mortem, was caused by a sharp-edged weapon, (ii) prosecution did not recover

22 [2024] 1 SCR 248. 256-257.

23 *Id.*at 261-262.

24 The Supreme Court approvingly referred to its previous judgments in *Rohtash* v. *State of Haryana*, (2012) 6 SCC 589; *Sunil Kumar Shambhu Dayal Gupta* v. *State of Maharashtra*, 2011 (72) ACC 699 (SC); *Rudrappa Ramappa Jainpur* v. *State of Karnataka*, (2004) 7 SCC 422; *Vimal Suresh Kamble* v. *Chaluverapinake,* (2003) 3 SCC 175.

25 [2024] 1 SCR 306, 316-317.

any sharp-edged weapon, (iii) there was no mention about a sharp-edged weapon at all, (iv) the Forensic Science Laboratory (FSL) report stated that the "pant" sent to them for examination was one dirty blue "tricot pant", however, as per the recovery memo a "jeans pant" was recovered from the appellant. The only incriminating circumstance was the FSL report, which stated that the blood on the sticks, blood-stained pants and the blood group of the deceased are the same "O+". The Supreme Court said that the FSL report is not an indication of guilt, especially when an independent witness did not witness the recoveries. The Supreme Court held that in a case based on circumstantial evidence, the facts must be consistent with the hypothesis of the accused's guilt. As in the present case, the evidence adduced raises doubts, improbabilities, and inconsistencies; the prosecution's case must fail. In *Allarakha Habib Memon* v. *State of Gujarat*,[26] a piece of circumstantial evidence, the FSL report, was to the effect that the blood group on the murder weapons sent for forensic examination matched the blood group of the deceased. However, the Supreme Court declined to rely on the FSL report, finding that the seizure *Panchnama* did not bear the attestation of the police constable who had seized the weapons and deposited them at the police station. Thus, even an incriminating FSL report cannot be read in evidence unless the prosecution proves that the article subjected to forensic examination was seized, sealed, and stored in a manner that leaves no room for tampering or manipulation. *Mohammed Khalid* v. *State of Telangana*[27] is another case where, though the FSL report confirmed that the substance sent by the police was *ganja* (a contraband), the Supreme Court noted that.

In contrast, three bundles/packets of *ganja* were allegedly seized from the accused's possession, but when investigating officer PW-5 appeared in the witness box, he produced seven packets containing the contraband. These packets did not have any seals or identifying marks, i.e., the accused's signature and the *Panchas' signatures*. In view of this, the Supreme Court concluded that the original *ganja* seized at the spot was never produced or exhibited in court, and that the prosecution would therefore fail.

Acknowledging that there may not be any case where the evidence on behalf of the prosecution is entirely free from error, the Supreme Court has held that the margin of error in a case based on circumstantial evidence must be minimal, as the chain of circumstantial evidence is essentially meant to enable the court in drawing an inference. The task of fixing criminal liability upon a person on the strength of an inference must be approached with abundant caution, and no inference of guilt can be drawn if any link is missing in the chain of circumstances.[28] In a case where the prosecution produces direct evidence of the commission of an offence (say, testimony of an injured witness) which does not inspire confidence, the trial can still prove its case based on circumstantial evidence, provided that the principles

26 [2024] 8 SCR 345.

27 [2024] 3 SCR 23.

28 *Kalinga @ Kushal* v. *State of Karnataka*, [2024] 2 SCR 391, 406.

relating to circumstantial evidence, as enunciated and reiterated by the Supreme Court from time to time, are fully complied with.[29]

V THEORY OF "LAST SEEN TOGETHER"

One of the ordinary rules applicable to criminal trials is that the prosecution must prove the accused's guilt by leading positive, relevant, and admissible evidence. This rule is embodied in section 104 of the BSA, and it was so under section 101 of the IEA, which position has not changed. However, there may be circumstances in which it is tough for the prosecution to prove a fact that is "especially within the knowledge of the accused," and the truth is one that the accused can easily account for. Section 106, IEA is one such provision (corresponding with section 109, BSA) which is an exception to section 101, IEA, (corresponding with section 104, BSA), designed to apply to some instances in which it would be impossible, or disproportionately difficult, for the prosecution to establish the facts which are, "especially within the knowledge of the accused". It is also sometimes referred to as the "last seen together" theory in murder trials. In *Anees* v. *State (NCT of Delhi),*[30] the Supreme Court once again stated the correct position of law on the question of shifting of onus of proof from prosecution to the defence as an exception to the ordinary rule of burden of proof, as follows:

(i) The court should apply section 106 of the IEA (corresponding to section 109 of the BSA) in criminal cases with care and caution.

(ii) Section 106, IEA (corresponding with section 109, BSA) cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.

(iii) It cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence.

(iv) It does not absolve the prosecution of the duty to prove that a crime was committed, even though it is a matter within the accused's special knowledge, nor does it shift the burden on the accused to show that no crime was committed.

(v) The word "especially" means facts that are essentially, preeminently or exceptionally within the knowledge of the accused person.

(vi) It refers to cases where the guilt of the accused is established on the evidence produced by the prosecution, unless the accused proves other facts, especially within his knowledge, which render the prosecution's evidence nugatory.

(vii) If in such a situation, the accused offers an explanation which may be reasonably accurate in the proved circumstances, the accused gets the benefit of doubt; however, if the accused in such a case does not give

29*Mallappa* v. *State of Karnataka*, [2024] 2 SCR 288.
30 [2024] 6 SCR 164.

any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may go against him.

(viii) To infer the guilt of the accused from the absence of a reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden.

(ix) Until a "prima facie case" is established by such evidence, the onus does not shift to the accused.

(x) "prima facie case" means a case established by "prima facie evidence", which in turn implies evidence sufficient in law to raise a presumption of fact or establish the point in question unless rebutted.[31]

In *Navas @ Mulanavas* v. *State of Kerala*,[32] the prosecution's case was that the accused-appellant had an illicit relationship with one of the deceased, L. After some period, L had tried to distance herself from him. On the date of occurrence, the accused Navas stealthily entered the house of L and murdered L and three other persons present in the house. Even the accused's version established his presence at the scene of the occurrence. The Supreme Court found that the accused-appellant was the only person inside the house and that he failed to offer any plausible explanation for the sequence of events at the crime scene. In these circumstances, it was held that when an offence of such a magnitude is committed in a house in secrecy, the initial burden must be discharged by the prosecution. The prosecution duly discharged it by adducing forensic evidence and proving that the accused was present on the scene of the occurrence. Therefore, the burden did shift upon the appellant to offer a cogent and plausible explanation of the circumstances of the death of the deceased persons, which he failed to do.

Sukhpal Singh v. *State (NCT of Delhi)*[33] also fortifies the proposition that the onus to prove a fact, especially within the knowledge of the accused, lies on him. In this case, the accused was prosecuted for murdering his wife inside their house, where no one else was present. The trial court convicted him of murder, and the high court confirmed the conviction. Upon appeal, the Supreme Court held that the circumstances leading to the homicidal death of appellant's wife were exclusively in his knowledge. He failed to offer any satisfactory explanation as to the way the deceased was strangulated to death, though only the appellant and his wife were present in the room where she died after having been last seen with the appellant.

There are two significant consequences at play in a case where the offence is committed within the four walls of a house, with both the accused and the victim

31 *Seealso*, *Balvir Singh* v. *State of Uttarakhand,* 2023 SCC OnLine 1261; *NagendraSah* v. *State of Bihar*, (2021) 10 SCC 725; *Trimukh Maroti Kirkan* v. *State of Maharashtra*, (2006) 10 SCC 681; *State of W.B.* v. *Mir Mohammad Omar* (2000) 8 SCC 382; *Shambhu Nath Mehra* v. *State of Ajmer,* AIR 1956 SC 404.

32 [2024] 3 SCR 913.

33 [2024] 6 SCR 315.

present. Firstly, the standard of proof required to prove such a case based on circumstantial evidence is lower than in other cases. Secondly, the accused would be under an obligation to explain the circumstances leading to the deceased's death, thereby shifting the onus of proof from the prosecution to the defence. Therefore, if the accused remains silent or offers a false explanation, then such a response would become an additional link in the chain of circumstances.[34] However, it has to be borne in mind that before placing the accused person under an obligation to explain the circumstances leading to the death of the victim, the prosecution must prove the foundational fact by leading cogent evidence establishing that the accused was present in the house where the murder took place. Failure of the trial to prove this foundational fact shall negate the theory of last seen together.[35] In *Rantu Yadav* v. *State of Chhattisgarh*,[36] one of the prosecution witnesses deposed that he had seen the accused holding the hair of his mother, the victim, and dragging her to a pond where she was subsequently found dead. However, there were no injury marks on the body of the deceased. This led the Supreme Court to hold that the prosecution's theory of last seen together cannot be accepted.

VI DYING DECLARATION

Section 32(1), IEA (corresponding with section 26(a), BSA), declares that a statement of a relevant fact by a person about the circumstances of their death may be proved. Such a statement is called a dying declaration. The law relating to dying declarations is fairly settled in India, and the rules of prudence regarding the manner of appreciation of dying declarations have crystallised into binding principles. In 2024, the Supreme Court revisited these principles in several cases, which shall be discussed in this part. It is trite that a dying declaration can form the sole basis for conviction provided that it inspires confidence. As a dying declaration is an exception to the rule against the admissibility of hearsay evidence, it requires greater scrutiny, and only those statements that pass muster can be relied on. In *Lal Mohammad Manjur Ansari* v. *State of Gujarat*,[37] the Supreme Court declined to rely on the dying declaration, finding that the prosecution's witness to whom it was made turned hostile and could not withstand cross-examination. In *Naeem* v. *State of U.P.*,[38] the conviction was based solely on the dying declaration, and the Supreme Court quoted with approval its earlier judgment in *Atbir* v. *Government of NCT of Delhi*, which had summarised the factors to be taken into consideration while basing the conviction solely on the dying declaration. Thus, if, after scrutiny, the court is satisfied that it is accurate and free from any effort to induce the deceased to make a false statement, and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. In a significant ruling in *Neeraj Sharma* v. *State of Chhattisgarh*,[39]

34 *Uma* v. *State (Rep. by Dy SP),* [2024] 10 SCR 1757.
35 *Nusrat Parween* v. *State of Jharkhand*, 2024 INSC 955.
36 [2024] 7 SCR 466.
37 [2024] 7 SCR 41.
38 [2024] 3 SCR 36.
39 [2024] 1 SCR 40.

the Supreme Court held that a statement given by the victim to the police where the cause of injuries is explained and attributed to the accused cannot be called a dying declaration and considered as such if the victim survives. Such a statement given to the investigating police officer is, at best, a statement made under section 162, CrPC (corresponding to section 181, BNSS). As a matter of rule, a statement recorded under section 162, CrPC can be used only for the purpose of contradicting the maker of the statement under section 145, IEA (corresponding with section 148, BSA).[40]

In a case where there are multiple dying declarations recorded by or made to different witnesses and their testimonies contain minor variations but converge on material aspects of the dying declaration, there is no bar in placing reliance on the dying declaration and even resting the conviction solely on it. In *Rajendra* v. *State of Maharashtra*,[41] a written dying declaration was recorded by one of the prosecution witnesses, the Sub-inspector of Police, and oral dying declarations were recorded from five other witnesses. All these witnesses were examined during the trial, and the accused was convicted based on the written dying declaration. The Supreme Court observed that where there is a substantial time gap between the dying declaration and the trial, there are bound to be some inconsistencies in the testimonies of the witnesses through whom the dying declaration is sought to be proved. Even minor discrepancies in the versions of such witnesses are not fatal, as identical statements by witnesses may create a doubt of tutoring in the court's mind. The Supreme Court quoted from its earlier judgment in *Amol Singh* v. *State of Madhya Pradesh*,[42] where it was held that "[i]t is not the plurality of the dying declarations that matter. On the contrary, the reliability of a dying declaration is significant. If there are inconsistencies between one dying declaration and the other, the court has to examine the nature of the inconsistencies, *i.e.,* whether those are material or not." The Supreme Court's consistent approach has been to carefully scrutinise each dying declaration independently to determine which is credible and worthy of reliance.[43]

In *Surjit Singh* v. *State of Punjab*,[44] the appellant was tried for having murdered his wife by poisoning. There were two dying declarations, one that was made to *M,* who had first attended to the deceased when she was admitted to a hospital. The other dying declaration was made to a police officer *S* in another hospital, where she was shifted the day after. In the first dying declaration, the deceased told doctor *M* that she had consumed poison herself as she fought with the

40 The Supreme Court approvingly referred to its earlier decisions in *Gentela Vijayavardhan Rao* v. *State of A.P.* (1996) 6 SCC 241; *Sunil Kumar* v. *State of M.P.,* (1997) 10 SCC 5704; *Shrawan Bhadaji Bhirad* v. *State of Maharashtra*, (2002) 10 SCC 565; *State of U.P.* v. *Veer Singh*, (2004) 10 SCC 1176 and S. *Arul Raja* v. *State of Tamil Nadu*, (2010) 8 SCC 2337.

41 [2024] 6 SCR 740.

42 [2008] 8 SCR 956.

43 *Lakhan* v. *State of Madhya Pradesh*, [2010] 9 SCR 705; *Ashabai*v. *State of Maharashtra*, [2013] 1 SCR 115.

44 (2024) 2 SCC 411.

appellant, her husband, the previous night. In the second dying declaration in another hospital, she stated that the appellant had administered poison to her. The Supreme Court found that the other doctor, *Su,* who had treated her in the second hospital, had declined to certify that at the time of making her statement to the police officer *S,* the deceased was in a fit state of mind. While the first doctor, *M,* was examined and found to be speaking the truth, the other doctor, *Su,* was not examined by the prosecution. As the prosecution's case was mainly based on the dying declaration recorded by the police officer *S,* the Supreme Court drew an adverse inference against the prosecution for its failure to examine Doctor *Su.* It held that the second dying declaration has to be discarded. Holding that the dying declaration recorded by doctor *M* holds the field, the Supreme Court acquitted the appellant as there was no other evidence to support the prosecution's case convincingly. As regards the assessment of the mental fitness of the person making a dying declaration, it is indubitably the responsibility of the court to ensure that the declarant was in a sound state of mind. It is so because the law does not prescribe any specific procedure or format for recording a dying declaration. Suppose an eyewitness asserts that the deceased was conscious and capable of making the declaration. In that case, the medical opinion cannot override such affirmation, nor can the dying declaration be disregarded solely for want of a doctor's fitness certification. That dying declaration should be recorded in the presence of a doctor, following certification of the declarant's mental fitness, is merely a matter of prudence and not a requirement of law.[45]

In a significant judgment in *State of Madhya Pradesh* v. *Ramjan Khan*,[46] the Supreme Court has observed that an oral dying declaration should be such that it inspires the utmost confidence of the court in its correctness. An oral dying declaration, even if made to a close relative, should be subjected to the highest degree of scrutiny. In this case, the prosecution sought to prove a dying declaration made to the mother of the deceased. The Supreme Court noted that neither in the FIR nor in her statement to the police had the mother of the deceased mentioned the dying declaration. Except for her statement in court, there was no other evidence of the existence of the dying declaration. It was held that the high court was correct in noting the serious omissions in the testimony of the mother of the deceased and discrediting it.

VII EXTRA-JUDICIAL CONFESSION

Extra-judicial confessions are dealt under sections 24, 28, 29 of the IEA and the BSA clubs; these sections are included in one provision, *i.e.,* section 22, without modifying the rule. The standard rule of human conduct is that a person would confess to the commission of a serious crime, such as murder, to another person only when he has the utmost faith in that person. Where the accused had worked in the employment of the prosecution witness only for five months, the Supreme Court held that it is unnatural that the accused would call the prosecution

45 *Dharmendra Kumar @ Dhamma* v. *State of M.P.*, [2024] 7 SCR 218, 244-245.
46 [2024] 10 SCR 1876.

witness to confess his crime of murder over the telephone as they were not previously known to each other.[47] It is now a rule of caution that the prosecution must lead evidence to show that the accused and the person to whom the extra-judicial confession was made had a close acquaintance.[48] The Supreme Court in *Kalinga @ Kaushal* v. *State of Karnataka*[49] said the following about extra-judicial confession:

> It is no longer *res integra* that an extrajudicial confession must be accepted with great care and caution. If it is not supported by other evidence on record, it fails to inspire confidence, and in such a case, it shall not be treated as a strong piece of evidence for the purpose of concluding guilt. Furthermore, the acceptability of an extrajudicial confession depends on the trustworthiness of the witness before whom it is given and the circumstances in which it is given. The prosecution must establish that a confession was indeed made by the accused, that it was voluntary in nature and that the contents of the confession were accurate. The standard required for proving an extrajudicial confession to the satisfaction of the Court is on the higher side, and these essential ingredients must be established beyond any reasonable doubt. The standard becomes even higher when the entire case of the prosecution necessarily rests on an extrajudicial confession.

In this case, the prosecution's version was that the accused had made an extra-judicial confession to his brother PW-1, his mother and his wife that he had killed PW-1's son, who was his nephew, and thrown the dead body in a well. However, the prosecution did not examine PW-1's mother and wife. The Supreme Court said that this glaring mistake was fatal as it raised serious doubt about the existence of any such confession. Finding many other serious lacunae in PW-1's testimony, the Supreme Court acquitted the accused. This decision underscores the consistent approach of the Supreme Court that, though the father of the deceased is the most interested witness who would like the murderer of his son to be convicted, his testimony cannot be taken as gospel truth, especially in a case that is based on an extrajudicial confession and other circumstantial evidence.[50]

In *Allarakha Habib Memon* v. *State of Gujarat*,[51] the trial court as well as the high court placed extensive reliance on the confessions of the accused-appellants recorded by the Medical Officer, PW-2, while preparing the injury reports of the accused. The Supreme Court held that these so-called confessions are *ex facie* inadmissible in evidence for the simple reason that the accused persons were presented at the hospital by the police officers after being arrested in the present case. As such, the note made by the PW-2 in the injury reports of the accused

47 *Lal Mohammad Manjur Ansari* v. *State of Gujarat*, [2024] 7 SCR 41, 46.

48 *Rantu Yadav* v. *State of Chhattisgarh*, [2024] 7 SCR 466.

49 [2024] 2 SCR 391, 401.

50 In *Chhote Lal* v. *Rohtash,* 2023 INSC 1072, the Supreme Court refused to act on the testimony of the appellant, father of the deceased, when it found that though he claimed to be an eyewitness of the offence of kidnapping and murderous assault on his son, it was doubtful that he was even present on the crime scene.

51 [2024] 8 SCR 345, 373.

would be clearly hit by section 26, IEA[52] (corresponding with section 23 (2), BSA).It was also held that the admissions made by the accused persons cannot be accepted as incriminating pieces of evidence relevant under section 21, IEA (corresponding with section 19, BSA) as an admission.

VIII CONFESSION RECORDED UNDER SPECIAL LEGISLATIONS

Section 25 of the IEA (corresponding to section 23(1) of the BSA) stipulates that a confession made to a police officer cannot be proved. However, the question whether a confession recorded by an officer under a special legislation where the officer is conferred with only some of the powers of police, is also hit by the bar of section 25, IEA (corresponding with section 23 (1), BSA) has been answered in affirmative by a majority decision of a three-Judge Bench in *Tofan Singh* v. *State of T.N*.[53] in the context of confessional statement recorded by empowered officer under section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The majority judgment in this case is to the effect that officers who are invested with the powers under Section 53 of the NDPS Act are police officers for Section 25, IEA, as a result of which any confessional statement made to them cannot be proved. The majority held that a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act. In *Najmunisha* v. *State of Gujarat*,[54] the Supreme Court relied on the *Tofan Singh* case holding that section 67 of the NDPS Act is at an antecedent stage to the investigation, which occurs after the empowered officer under Section 42 of the NDPS Act has the reason to believe upon information gathered in an enquiry made in that behalf that an offence under NDPS Act has been committed and is thus not even like a confessional statement. Hence, the question of its admissibility in the trial as a confessional statement against the accused does not arise. The same, therefore, cannot be considered to convict an accused person under the NDPS Act. Earlier, in *Vijay Madanlal Choudhary* v. *Union of India*,[55] the Supreme Court had held that the expression "police officer" in Section 25, IEA (corresponding with Section 23 (1), BSA)is not confined to persons who are members of the regularly constituted police force. This decision had approvingly quoted from the decision in *Rajaram Jaiswal* v. *State of Bihar*,[56] where it was held as follows:

In our judgment, what is pertinent to bear in mind for the purpose of determining who can be regarded as a 'police officer' for this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a "police officer" for S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable

52 S. 26, IEA says that a confession made by a person in police custody cannot be proved unless made in immediate presence of a Magistrate.

53 2020 SCC OnLine SC 882.

54 [2024] 4 SCR 442.

55 [2022] 6 SCR 382.

56 AIR 1964 SC 828.

by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate his obtaining a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may be relevant for consideration where the powers of the police officer conferred upon him are minimal and, by themselves, insufficient to secure a confession.

In *Prem Prakash* v. *Union of India*,[57] the Supreme Court, relying on the judgments in *Vijay Madanlal Chaudhary case* and *Rajaram Jaiswal* case, has held that a confessional statement made by an accused under section 50 of the Prevention of Money Laundering Act, 2002 (PMLA) is hit by Section 25, IEA and not admissible in evidence. The Supreme Court further held that if a person is in judicial custody/custody in another case investigated by the same investigating agency, the statements recorded for a new case in which his arrest is not yet shown, and which are claimed to contain incriminating material against the maker, would also not be admissible under Section 50 of the PMLA. This judgment takes a pragmatic approach and correctly explains the position.

IX ADMISSIBILITY OF ELECTRONIC EVIDENCE

In almost every criminal trial, an electronic or digital record, especially in the form of Call Data Record (CDR) or CCTV footage, is a vital piece of evidence. The law on the admissibility of electronic or digital records is dealt with in sections 65A and 65B of the IEA (corresponding to sections 62 and 63 of the BSA, respectively). In *Anvar P.V.* v. *P.K. Basheer*,[58] it was held that secondary evidence of an electronic or digital record, e.g., its printout, is admissible and may be read in evidence only when a certificate accompanies it under section 65B of the IEA (corresponding to section 63 of the BSA). This rule was reiterated by another three-Judge Bench in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantayal, and courts have consistently refused to read in, as evidence, an electronic or digital record that is secondary in nature,* unaccompanied by the said certificate. In *Gaurav Mani* v. *State of Haryana*,[59] the prosecution claimed that ransom calls were made from specific mobile numbers belonging to some of the accused and produced CDRs for the suspected numbers. The trial court and the High Court relied on the same, despite the prosecution not adducing convincing evidence to link the alleged mobile numbers to the accused. The trial also did not establish the CDR under section 65B of the IEA (corresponding to section 63 of the BSA). The Supreme Court categorically said that the CDR cannot be read in evidence as the rule regarding its admissibility has not been complied with. It has to be remembered

57 [2024] 8 SCR 955.

58 (2014) 10 SCC 473.

59 [2024] 7 SCR 333, 361-362. See also, *Neeraj Sharma* v. *State of Chhattisgarh,* (2024) 3 SCC 125, at para 29.

that even if CDR is read in evidence, upon its appreciation, it may not be acted on as proof of a fact or a fact in issue.[60] In *Randeep Singh @ Rana* v. *State of Haryana*,[61] the prosecution produced CCTV footage downloaded from a CD recorded by the CCTV installed at the premises of a Bank, where PW-1 was the manager. PW-24, a CCTV engineer, admitted in his cross-examination that the CCTV footage on the CD could be edited and that the CD could be tampered with. He also did not depose that he had seen the CCTV footage before downloading it on the CD. Thus, neither PW-1 nor PW-24 had seen the CCTV footage downloaded on the CD. Moreover, the CD did not bear any markings or signs from either witness. Most importantly, the prosecution failed to produce the certificateundersection65B of the IEA (corresponding tosection63 of the BSA) concerning the CD. The Supreme Court held that the evidence in the form of the CD must be excluded, as it is not admissible.

X ABSCONDENCE AS A RELEVANT FACT

'Flight is evidence of guilt' is a well-known proposition in the law of evidence. Section 8, IEA (corresponding with Section 6, BSA) declares as relevant, *inter alia*, previous or subsequent conduct of an accused person. However, the fact that the accused absconded after commission of the offence is not, in itself, sufficient to conclude guilt, and abscondence is only a circumstance which may be considered by the court along with other circumstances forming a complete chain of circumstances for sustaining a conviction. In *Sekaran* v. *State of Tamil Nadu*,[62] one of the prosecution witnesses, the Inspector of Police, in his oral testimony, revealed that the accused-appellant fled after the offence was reported to the police and could be apprehended after three years. The Supreme Court said it is natural for the accused against whom an FIR has been registered to abscond. The mere fact of absconding after the commission of a crime and the registration of an FIR and remaining untraceable for such a long period of time is by itself not sufficient to prove his guilt or his guilty conscience. The fact that the accused absconded cannot, in the absence of other cogent evidence of guilt, help the prosecution prove its case.

On the other hand, in *Sukhpal Singh* v. *State (NCT of Delhi)*,[63] the accused-appellant could be apprehended and tried ten years after the date of the offence and was found guilty of the murder of his wife by the trial court. The high court confirmed the conviction. Dismissing the appeal against the order of the high court, the Supreme Court held that abscondence for nearly ten years is a relevant circumstance in the chain of circumstances which form a complete chain sans any missing link. The other incriminating circumstances were (i) motive, as the accused had a strained relationship with his wife due to suspected infidelity, (ii) the accused was last seen together with his wife, (iii) medical evidence establishing the cause

60 *Rama Devi* v. *State of Bihar*, (2024) 10 SCC 462, at para 50.

61 2024 INSC 887.

62 (2024) 2 SCC 176.

63 [2024] 6 SCR 315.

of death to be homicidal, (iv) a confessional note written by the accused and left on the crime scene, (v) wrong explanation given by the accused in his statement under section 313, CrPC (corresponding with section351, BNSS), (vi) failure of the accused to explain the circumstances of death of his wife when only the accused and the deceased were present in the house. While the circumstances pointed out by the Supreme Court definitely form a chain of circumstances, adding the so-called confessional note as a vital circumstance is questionable, as the Supreme Court has not discussed any principle governing the admissibility of a confessional note. The only reason the Supreme Court considered and relied on the so-called confessional note was that the prosecution proved, by leading the evidence of a handwriting expert, that the accused wrote it.

XI TEST IDENTIFICATION PARADE

Section 7, BSA (corresponding with Section 9, IEA), inter alia, declares any fact that establishes the identity of a person, thing, or object as relevant.[64] When the accused is not previously known to the victim or an eyewitness, a Test Identification Parade (TIP) is often conducted during the investigation to establish the accused's identity. TIP evidence is not a substantive piece of evidence, but it helps corroborate a witness's testimony identifying the accused in the courtroom during trial. It is also settled that TIP is not mandatory for the investigation, and that its absence is not always fatal to the prosecution. However, there may be circumstances in which failing to conduct a TIP may undermine the prosecution's case. In *P. Sasikumar* v. *State (Rep. by Inspector of Police)*,[65] the facts were that the two accused persons, A1 and A2, were prosecuted for the murder of a teenage girl inside her house and though there was no eyewitness to the murder, the prosecution placed both forensic and ocular evidence in support of its case. The trial court convicted both A1 and A2; however, only A2 preferred an appeal against conviction to the High Court, which was dismissed. A2, therefore, preferred an appeal to the Supreme Court. Two prosecution witnesses, PW1 and PW5, stated in the trial court that they had seen A2 wearing a green coloured monkey-cap at all relevant times, *i.e.,* when A2 entered the premises, when he knocked on the door of the victim's house and when he was coming downstairs with A1. Neither witness had ever seen A2. P1 and P5 were said to have been taken to the hospital by the police, where A1 and A2 were admitted upon their arrest and identified the accused persons. The Supreme Court said that such so-called identification, at best, is a statement to the police and can be used only for limited purposes as specified under section 162, Cr PC (corresponding to section 181, BNSS). Noting the admitted position that TIP was not conducted and that the witnesses had never seen the accused persons earlier, the Supreme Court rejected the testimony of dock identification, *i.e.,* identification of the accused for the first time during trial. The rejection of testimony of P1 and P5 was based on following grounds: (i) A2 was wearing a monkey-cap which covers the entire face, chin and cheek of a person,

64 *Karakkattu Mohammed Bashir* v. *State of Kerala*, (2024) 10 SCC 813.
65 [2024] 7 SCR 87.

leaving only his eyes and nose and part of forehead exposed, (ii) P1 and P5 had seen A2 from a distance, (iii) P1 and P5 were not acquainted with A2 and had never seen him before, (iv) Though the accused persons were arrested within two days of the offence, TIP was not conducted and the prosecution also did not offer any explanation for not conducting TIP. Elucidating on the TIP, the Supreme Court made the following observations:[66]

> The relevance of a TIP is well-settled. It depends on the facts of the case. In some instances, TIP may not be necessary. The non-conduct of a TIP may not prejudice the prosecution's case or affect the identification of the accused. It would all depend upon the facts of the case. The evidence of a prosecution witness who has identified the accused in court may be of sterling quality, as held by this Court in Rajesh v. State of Haryana (2021) 1 SCC 118; therefore, TIP may not be necessary. It is the task of the investigation team to see the relevance of a TIP in a given case. Not conducting TIP in a given case may prove fatal to the prosecution, as we fear it will be in the present case.

XII CUSTODIAL CONFESSION LEADING TO DISCOVERY OF NEW FACT

Section 27, IEA (corresponding with the proviso to section 23(2), BSA) provides that if a new fact is discovered pursuant to a statement made by the accused person while in police custody, the part of the statement—referred to as the disclosure statement—that *distinctly* relates to the discovery of a fact not known to the police can be proved against the accused, even if the statement is confessional in nature. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible.[67] The courts have consistently followed the Supreme Court's judgment in *State of U.P*. v. *Deoman Upadhyaya*, holding that formal arrest is not necessary for the operation of Section 27 of the IEA.[68] It has been held that the expression "custody" in Section 27 of the IEA does not mean formal custody, but includes any surveillance, restriction, or restraint by the police. Even if the accused was not formally arrested at the time the information was provided, the accused is, for all practical purposes, in the custody of the police, and section 27 of the IEA would apply.[69] These issues were once again considered by the Supreme Court in *Perumal Raja @ Perumal* v. *State, Rep. by Inspector of Police*,[70] and the decision in the *Deoman Upadhyaya* case was followed.

The law on the admissibility of disclosure statements under section 27 of the IEA is well settled, as evidenced by the classic decision of the Privy Council in

66 *Id*. at 95.

67 *Perumal Raja @Perumal* v. *State, Rep. by Inspector of Police*, [2024] 1 SCR 87.

68 *Vikram Singh* v. *State of Punjab*, (2010) 3 SCC 56; *Dharam DeoYadav* v. *State of U.P.,* (2014) 5 SCC 509

69 *State of A.P.* v. *Gangula Satya Murthy*, (1997) 1 SCC 272; *A.N. Vekatesh* v. *State of Karnataka*, (2005) 7 SCC 714.

70 [2024] 1 SCR 87.

Pulukuri Kotayya v. *King Emperor.*[71] Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion.[72] It has been held that the rationale behind this provision is that, if a fact is discovered in consequence of the information supplied, it affords some guarantee that the information is accurate. It can therefore be admitted in evidence as an incriminating factor against the accused.[73] Where the prosecution relied on the disclosure statement of the appellant that led to the recovery of the dead body of the victim, the prosecution must establish that, before the information given by the accused persons, based on which the dead body was recovered, nobody knew of the existence of the dead body at the place from where it was recovered. As the prosecution failed to establish this elementary fact, the disclosure statement loses its evidentiary value and cannot be admitted.[74] In *Vishwajeet Kerba Masalkar* v. *State of Maharashtra*,[75] the trial court found the appellant guilty of murdering his mother, wife and daughter. The High Court confirmed the conviction. The prosecution's case was primarily based on the ocular evidence of the prosecution witness, a neighbour of the appellant, who was also injured. However, given its contradictions, the ocular evidence was discarded, and the prosecution's case was based on circumstantial evidence, including the appellant's disclosure statement and CCTV footage. The said disclosure statement, the prosecution claimed, led to the recovery of the hammer allegedly used in the crime and the appellant's blood-stained clothes. However, the Supreme Court noted that, (i) recovery of the hammer was from a canal which was open and accessible to all and sundry, (ii) the place where the appellant had taken the police to show the incriminating articles was already known to the police,[76] (iii) recovery of appellant's clothes and jewellery (*mangalsutra*) was also from an open public place, and (iv) it was also improbable that the hammer soaked in water for three days would still have bloodstains. In view of these findings, the Supreme Court rejected the prosecution's theory and acquitted the accused. In *Raja Naykar* v. *State of Chhattisgarh,* the Supreme Court also dismissed the disclosure statement, where it found that the recovery of the murder weapon was a delayed recovery from a place that was accessible to all, and the human blood on the gun did not match the blood group of the deceased.

It has been held that the act of the accused guiding the police to a place where the murder weapon or any other incriminating object was subsequently discovered constitutes a relevant fact under Section 8, IEA (corresponding with Section 6, BSA). In other words, the mere circumstance that the accused indicated the location where he discarded the weapon of offence or some other incriminating

71 1946 SCC OnLine PC 47.

72 *State (NCT of Delhi)* v. *Navjot Sandhi @ Afsan Guru*, (2005) 11 SCC 600.

73 *Ravishankar Tandon* v. *State of Chhattisgarh*, [2024] 4 SCR 558, 570.

74 *Id*. at 573.

75 [2024] 10 SCR 753.

76 In *Suresh Chandra Tiwari* v. *State of Uttarakhand*, 2024 INSC 907 also, the Supreme Court said that disclosure statement loses its evidentiary value when the court finds that the incriminating articles were not found at the instance of the accused but were already known to the police.

object is admissible as evidence of his conduct regardless of whether any statement made by him at that time or before this act falls within the scope of Section 27, IEA (corresponding with the proviso to Section 23 (2), BSA).[77]

In *Randeep Singh @ Rana* v. *State of Haryana*,[78] the Supreme Court held that section 27 of the IEA is an exception to sections 25 and 26 of the IEA (corresponding to Section 23(1) and 23 (2) of the BSA, respectively). It permits certain parts of the statement made by the accused to a police officer while in custody to be proved. Under Section 27, IEA, only that part of the statement made to the police is admissible which distinctly relates to the discovery of a new fact. No other part is admissible.[79] The Supreme Court noted that by Exhibits 'P55' and 'P56', the prosecution alleged that the accused showed the place where the deceased was abducted, where he was murdered and where his body was thrown. Still, even an inadmissible part of the disclosure statement was incorporated in the examination-in-chief of PW-27. Adverting that the trial judge should not have recorded the inadmissible part of the disclosure statement, which was like a confession in the deposition, the Supreme Court added that if such inadmissible confessions are made part of the depositions of the prosecution witnesses, there is every possibility that the trial courts may be influenced by it.

The manner in which the disclosure statement has to be recorded has been discussed by the Supreme Court in *Babu Sahebagouda Rudragoudar* v. *State of Karnataka,*[80] which quoted an earlier decision of the Supreme Court in *Subramanya* v. *State of Karnataka*[81] as follows:

> … 84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station, the accused should be asked, in their presence, to make an appropriate statement as he may desire regarding the place where he is said to have hidden the weapon of offence, etc. When the accused, while in custody, makes such a statement before the two independent witnesses (panch-witnesses), the exact statement, or rather the exact words uttered by the accused, should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for section 27

77 *Anees* v. *The State Govt. of NCT*, [2024] 6 SCR 164, 200-201.

78 2024 INSC 887.

79 Quoting *State of U.P.* v. *Deoman Upadhyaya*, [1961] 1 SCR 14, the Supreme Court said the same in *Babu Sahebagouda Rudragoudar* v. *State of Karnataka*, [2024] 5 SCR 174, 198.

80 [2024] 5 SCR 174.

81 2022 SCC OnLine SC 1400.

> of the Evidence Act is always drawn at the police station in the presence of the independent witnesses to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed, the police party, along with the accused and the two independent witnesses (panch-witnesses), would proceed to the particular place. If anything like the weapon of offence, blood-tainted clothes, or any other article is discovered, that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer, then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.
>
> [Emphasis supplied in original]

Therefore, mere exhibition of the memorandum prepared by the Investigating Officer during the investigation cannot be tantamount to proof of its contents. While testifying on oath, the investigating officer would be required to narrate the sequence of events that transpired leading to the recording of the disclosure statement.[82]

It is to be remembered that the discovery of a new fact pursuant to a disclosure statement, however incriminating, is only a circumstance in the chain of circumstances, and a conviction cannot be based only on the disclosure statement, even if the disclosure statement inspires confidence. The police frequently use Section 27of the IEA, and the courts must be vigilant in its application to ensure the credibility of evidence, as the provision is vulnerable to abuse. However, this does not mean that, in every case, the invocation of Section 27, IEA, must be seen with suspicion and discarded as perfunctory and unworthy of credence.[83] Though Section 27 of the IEA applies to joint disclosures, once information is given by an accused, it cannot be used, even if voluntarily provided by a co-accused who is in custody.[84] The legal position under the BSA shall remain unchanged.

XIII CONFESSION OF CO-ACCUSED

Section 30, IEA (corresponding with section 24, BSA), deals with the relevance of the confession of the co-accused. The Supreme Court has reiterated in *Prem Prakash* v. *Union of India* that a co-accused's confessional statement is not a substantive piece of evidence, and the prosecution cannot start its case on such a statement. The Supreme Court further added that, on the question of the use of

82 *Ramanand @ Nandlal Bharti* v. *State of Uttar Pradesh*, 2022 SCC OnLine SC 1396.
83 *Perumal Raja @ Perumal* v. *State, Rep. by Inspector of Police*, [2024] 1 SCR 87, 103.
84 *Id*. at 113.

a confession of a co-accused, the law laid down under section 30, IEA (corresponding to Section 24, BSA), by the Supreme Court in *Kashmira Singh* v. *State of M.P.*, while dealing with the confession of the co-accused, will continue to apply. In the *Kashmira Singh* case, it has been held:

> The proper way to approach a case of this kind is, first, to marshal the evidence against the accused, excluding the confession altogether from consideration, and then to see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what, without the help of the confession, he would not be prepared to accept.

XIV APPRECIATION OF OCULAR EVIDENCE

It is trite that the principal task of the court is to appreciate the evidence on record to draw its conclusion. The mere fact that evidence is admissible does not mean that the court must act on it. Admissibility and reliability of evidence are distinct, and the former does not guarantee the latter. Over the course of decades, the Supreme Court has laid down principles governing the appreciation of evidence that have been consistently followed, with hardly any scope for new tenets to emerge. In the Survey Year 2024, the Supreme Court also followed these principles in relying on or rejecting evidence, especially ocular evidence, on record.

From the decision of the Supreme Court in *Joy Devaraj* v. *State of Kerala*,[85] the following points can be culled out:

i. When several witnesses were under a violent attack by an unlawful assembly of which the accused was a part, there are bound to be some minor inconsistencies in the testimonies of the witnesses unless the defencecan show that the incongruities in the testimonies of the eyewitnesses strike at the very root of their credibility.

ii. It is not the law that a conviction cannot be recorded unless there is oral testimony of at least two witnesses who match each other.

iii. If the evidence of a solitary eyewitness appeals to the court to be wholly reliable and inspires confidence, a conviction can be recorded based on such evidence.

iv. A witness may not be disbelieved on the mere ground of their turning hostile. There would be no dent in the prosecution's theory when, despite turning hostile, the witness does not offer an alternative theory that might cast doubt on the credibility of other witnesses.

85 (2024) 8 SCC 102.

In *Periyasamy* v. *State, represented by the Inspector of Police,* the Supreme Court held that the failure to examine an independent witness is not fatal to the prosecution's case. The Supreme Court quoted earlier authorities[86] in discussing the distinction between an "interested witness" and a "related witness". It has been held that being "related" to the victim does not mean a witness is "interested" in the outcome of the case. A witness is considered "interested" only if they stand to gain or benefit from the result of the litigation, whether it is through the civil decree or the punishment of the accused. However, a witness who is naturally connected to the situation even if related to the victim and is the sole eyewitness due to the circumstances cannot be classified as "interested." Moreover, there is no law requiring corroboration of testimony of an interested witness, however, as a rule of prudence the courts should scrutinize the evidence of an interested witness with extra care. Even if there is a sole eye witness who is too related to or otherwise interested in the victim, their testimony should not be disbelieved solely for this reason. But it has been held that in the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence, and the case proven beyond a reasonable doubt. Unnatural conduct and unexplained circumstances may be grounds for disbelieving the witness.[87]

In *Vinod Jaswantray Vyas (Dead) Through Lrs.* v. *State of Gujarat*,[88] the Supreme Court found that the key prosecution witness knew the victim, claimed that he saw the assault, yet kept quiet and did not report the same when he had the opportunity. The so-called eyewitness cannot be believed. Even the sisters of the deceased were disbelieved by the Supreme Court, as they also did not report the assault on their victim brother at the earliest occasion.

XV HEARSAY EVIDENCE AND RES GESTAE

Testimony of only a witness of fact is allowed as a matter of rule. In other words, if the question is whether a particular person was present at a specific place, and there is no scientific evidence, such as fingerprints or video footage, the testimony of a single eyewitness who saw that person is admissible as direct evidence. In *Rama Devi* v. *State of Bihar*,[89] the Supreme Court rejected as hearsay that part of the testimony of eyewitness Rama Devi, wife of the murdered victim, which related to the arrival of several persons in two vehicles on the crime scene and also the detailed version of the occurrence which she had heard from the people present on the crime scene. However, her testimony establishing the presence of three other eye witnesses at the crime scene was held admissible to corroborate and affirm the testimonies of those three eyewitnesses. In this case, Rama Devi had arrived at the crime scene after hearing about the murder of her husband, who was a member of the Bihar Legislative Assembly and upon arrival, found her husband and his bodyguard lying in a pool of blood where several other

86 *State of Rajasthan* v. *Kalki* (1981) 2 SCC 752; *Sarwan Singh* v. *State of Punjab* (1976) 4 SCC 369.

87 *Narendrasinh Keshubhai Zala* v. *State of Gujarat*, [2023] 2 SCR 746.

88 [2024] 7 SCR 365.

89 (2024) 10 SCC 462.

persons had also gathered. The doctrine of *res gestae,* enshrined in Section 6, IEA (corresponding with Section 4, BSA), forms an exception to the rule against admissibility of hearsay evidence. The test for application of the principle of *res gestae, i.e.,* "things forming part of the same transaction", has been laid down in a catena of cases, including *Gentela Vijyvardhan Rao* v. *State of A.P.*[90] and *Dhal Singh Devangan* v. *State of Chhattisgarh,*[91] where it has been held that it is based on spontaneity and immediacy of such statement or fact in relation to the point in issue. However, if there was an interval which ought to have been sufficient for fabrication, then the said statement, having been recorded, with however slight a delay, is not part of *res gestae*, in *Najmunisha* v. *State of Gujarat*,[92] a case related to trial and conviction under the Narcotic Drugs and Psychotropic Substances Act, 1986, the Supreme Court perused the material on record and found that the attempt towards raiding/searching the residence of the co-accused (accused no. 4) was not explicitly in pursuance of detaining the said accused. Still, the testimonies of the raiding party members show that the search of the house was an afterthought, with an admitted time gap of 40-45 minutes between raiding the auto rickshaw, which was alleged to have been abandoned by the driver. The said co-accused and the subsequent search of his house, during whichthe Appellant-accused (Accused No. 01) was present. The Supreme Court also noted that, from the records, it is evident that the idea of searching the house was to recover more contraband, not to apprehend the said absconded Appellant-accused at the first instance. The Supreme Court concluded that the search conducted at the residence of the said co-accused was not a continuance of action of the raiding party towards the search of the auto rickshaw based on the secret information received by the Intelligence Officer and it did not appropriately fulfill the requirements of the test laid down in a multitude of cases regarding admissibility of facts "forming part of the same transaction", and therefore, inadmissible.

XVI COMPARISON OF SIGNATURE BY THE COURT

In *Ajitsinh Sehuji Rathod* v. *State of Gujarat*,[93] the Supreme Court held that a certified copy of a document issued by a Bank is itself admissible under the Bankers' Books Evidence Act, 1891, without the need for formal proof. Hence, in an appropriate case, the certified copy of the specimen signature maintained by the Bank can be procured by a request to the court to compare it with the signature appearing on the cheque, by exercising powers under section 73 of the IEA (corresponding to section 72 of the BSA). In this case, the appellant was prosecuted and convicted for the offence punishable under section 138 of the Negotiable Instruments Act, 1881, as the cheque to the tune of Rs. 10 lakhs issued by the appellant in favour of the complainant was dishonoured upon presentation "for insufficient funds and account dormant". While his appeal against conviction

90 (1996) 6 SCC 241.
91 2016 SCC OnLine SC 983.
92 [2024] 4 SCR 442.
93 [2024] 1 SCR 1083.

before the Principal Sessions Judge was pending, the appellant applied section 391, CrPC (corresponding with section 432, BNSS) for taking additional evidence at the appellate stage and seeking a direction to obtain the opinion of the handwriting expert after comparing his admitted signature and the signature as appearing on the disputed cheque. The SessionsCourt rejected the application, and the High Court dismissed the appeal against the rejectionorder. Agreeing with the order of rejection, the Supreme Court said the following:[94]

> Thus, the appellant was desirous of proving that the signatures as appearing on the cheque issued from his account were not genuine. He could have procured a certified copy of his specimen signatures from the Bank, and a request could have been made to summon the concerned Bank official in defence to give evidence regarding the genuineness or otherwise of the signature on the cheque.

However, despite the opportunity, the accused-appellant did not put any question to the bank official examined in defence to establish his plea of a purported mismatch of signature on the cheque in question. Hence, we are of the firm opinion that the appellate Court was not required to come to the aid and assistance of the appellant for collecting defence evidence at his behest. The presumptions under the NI Act, albeit rebuttable, operate in favour of the complainant. Hence, it is for the accused to rebut such presumptions by leading appropriate defence evidence, and the Court cannot be expected to assist the accused in collecting evidence on his behalf.

XVII BURDEN OF PROOF AND ONUS OF PROOF

The first and foremost rule regarding burden of proof is that the party desirous of a judgment as to a legal right or liability on the existence of facts that the party asserts lie on that party. In every criminal trial, the burden of proof of guilt lies on the prosecution, as it is the prosecution that seeks to make the accused liable by asserting the existence of incriminating facts. This burden never shifts, except where a statute places it on the accused to prove innocence after the prosecution has proved specific foundational facts. In *Bhupatbhai Bachubhai Chavda* v. *State of Gujarat*,[95] the Supreme Court curtly said:

> [T]he High Court has gone to the extent of recording a finding that the appellants have failed to adduce evidence in their support, were unable to examine the defence witness and failed to establish the falsity of the prosecution's version. This concept of the burden of proof is entirely wrong. Unless, under the relevant penal statute, a negative burden is placed on the accused or a reverse onus clause is in place, the accused is not required to discharge any burden. In a case involving a statutory presumption, after the prosecution discharges the initial burden, the burden of rebuttal may shift to the accused. In the absence of the statutory provisions as above, in

94 *Id*. at 1089.

95 [2024] 4 SCR 322.

> this case, the burden was on the prosecution to prove the guilt of the accused beyond a reasonable doubt. Therefore, the High Court's finding on the burden of proof is entirely erroneous. It is contrary to the law of the land.

However, once an incriminating fact is proved against the accused, the onus shifts to the accused to explain; if no explanation is forthcoming from the defence, or if the explanation offered is improbable or untrue, it constitutes a circumstance against the accused. In *Dharmendra @ Dhamma* v. *State of M.P.*,[96] the Supreme Court quoted from its earlier judgments in *Raja @ Rajinder* v. *State of Haryana*[97] and *John Pandian* v. *State*,[98] to hold that when an FSL report confirmed human blood on the murder weapon, the non-explanation of human blood on the murder weapon constitutes a circumstance against the accused. It is incumbent upon the accused to explain the presence of human blood on the gun.

Disposing of an appeal against the order of the National Consumer Dispute Redressal Commission (NCDRA) allowing the insurer to repudiate the claim of the legal heirs of the insured, the Supreme Court in *Mahakali Sujatha* v. *The Branch Manager, Future Generali India Life Insurance Company Limited*,[99] has observed that though the proceedings before the Consumer Fora are like a summary proceeding, yet the elementary principles of burden of proof and onus of proof would apply.[100] The Supreme Court then extensively discussed the rules regarding the burden and onus of proof in the IEA. The primary legal propositions reiterated by the Supreme Court include:

i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.[101]

ii. The burden of proof lies on the party who would fail if no evidence is adduced at all from either side.[102]

iii. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless any law provides that the evidence of that fact shall lie on any particular person.[103]

iv. The burden of proving any fact necessary to be proved to enable any person to give evidence of any other fact is on the person who wishes to provide such proof.[104]

96 [2024] 7 SCR 218, 242.

97 (2015) 11 SCC 43.

98 (2010) 14 SCC 129.

99 [2024] 4 SCR 724.

100 *Shriram Chits (India) Private Limited Earlier Known as Shriram Chits (K) Pvt. Ltd* v. *Raghachand Associates*, [2024] 6 SCR 214, also says that general principles regarding burden of proof apply to proceedings before the Consumer Fora.

101 S.101, IEA (corresponding with S. 104, BSA).

102 S.102, IEA (corresponding with S. 105, BSA).

103 S. 103, IEA (corresponding with Section 106, BSA).

104 S. 104, IEA (corresponding with Section 107, BSA).

v. It is incumbent on each party to discharge the burden of proof, which rests upon them. In the context of insurance contracts, the burden is on the insurer to prove the allegation of non-disclosure of a material fact and that the non-disclosure was fraudulent.

vi. The burden of proving the fact, which excludes the liability of the insurer to pay compensation, lies on the insurer alone and no one else.

vii. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. This section applies only to parties to the suit or proceeding. It cannot apply when the truth is such as to be capable of being known also by persons other than the parties.[105]

The burden of proof is not the same as the standard of proof, and this distinction is well known in both civil and criminal jurisprudence. In a title dispute, where the defendant's counsel pointed out that no single document relied on by the plaintiff establishes the existence of the title, the Supreme Court held that it is not an issue of burden of proof, but a matter relating to the sufficiency of evidence. While inquiring into whether a fact is "proved",[106] the sufficiency of evidence is to be seen in the context of the standard of proof, which in civil cases is by preponderance of probability.[107]

XVIII TRIAL JUDGE IS NOT A MUTE SPECTATOR OF PROCEEDINGS

Although in an adversarial system of trial, the judge's principal task is to evaluate and appreciate evidence led by the parties to a suit or proceeding, the judge's role is not that of a mute spectator and section 165, IEA BSA (corresponding with section 168, BSA)confers ample power on a trial judge to put questions to the witness either during the chief-examination or cross-examination or even during re-examination for eliciting the truth. If a judge feels that a witness has committed an error or slip, it is the judge's duty to ascertain whether it was so, for to err is human. The chances of erring may increase under the stress of nervousness during cross-examination.[108] It has been the consistent approach of the Supreme Court that unprofessionalism or incompetence of the public prosecutor or the indifference or aloofness of the prosecuting agency should not affect the trial, as the trial judge must exercise the vast powers conferred on her or him under Section 165, IEA (corresponding with Section 168, BSA).[109] In *Shailesh Kumar* v. *State of U.P. (now Uttarakhand)*,[110] the Supreme Court made the following observation

105 S. 106, IEA (corresponding with Section 109, BSA).

106 S. 3 of the IEA defines the term as: "Proved".— A fact is said to be proved when, after considering the matter 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.

S. 2 (1) (j) of the BSA has the same definition of the term "proved".

107 *Government of Goa* v. *Maria Julieta D'Souza (D)* (2024) 3 SCC 523, 525.

108 *Anees* v. *The State Govt. of NCT*, [2024] 6 SCR 164, 208.

109 *Zahira Habibulla H. Sheikh* v. *State of Gujarat*, (2004) 4 SCC 158. See also, *State of Rajasthan* v. *Ani alias Hanif*, AIR 1997 SC 1023.

110 [2024] 2 SCR 776, 805.

regarding a judge's power under Section 165, IEA (corresponding with Section 168, BSA):

> Section 165 of the Evidence Act provides for the court's power to put questions and order the production of documents in the course of a trial. This is a general and omnibus power given to the court when seeking the truth. Such a power is to be exercised against any witness before it, both in a civil and a criminal case. The object is to discover adequate proof of a relevant fact, and, therefore, for that purpose, the Judge is authorised and empowered to ask any question of his choice. When the court exercises such a power, there is no corresponding right that can be extended to a party to cross-examine any witness on an answer given in reply to a question put forth by it, except with its leave. Emphasising the importance of section 165 of the Evidence Act, Sir James Stephen, while presenting the report of the Select Committee, at the time of passing of the Evidence Act, observed,

"It is necessary that the judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. To do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matters in issue, but may lead to something that is, and it is to arm judges with express authority to do this that section 165, which has been so much objected to, has been framed".

In *Gaurav Maini* v. *State of Haryana*,[111] the Supreme Court found that the grandfather of the victim of the offence of kidnapping, who had first informed the police about the commission of the offence, was not produced and examined by the prosecution during trial. Terming the victim's grandfather the most crucial witness, the Supreme Court observed that the trial court should have remained vigilant. It was essential for the court to have exercised powers under Section 311, Cr PC[112] (corresponding with Section 348, BNSS), read with Section 165, IEA (corresponding with section 168, BSA),to summon and examine the grandfather of the victim because his evidence was essential for a just decision of the case. Section 165, IEA (corresponding with Section 168, BSA) permits the judge to ask any question as he pleases in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant or may order production of any document or thing. The trial court is enjoined with a duty to ensure that all essential evidence is brought on record for a judicious decision, even though the party concerned has omitted to do so. Relying on the decision in *Puja Pal* v. *Union of India*,[113] which has extensively quoted from *Zahira Habibulla H. Sheikh* v. *State of Gujarat*,[114] the Supreme Court said that "a court must cease to be a mute spectator

111 [2024] 7 SCR 333.

112 S. 311, CrPC deals with power of the court, *inter alia*, to summon material witness or examine a person present in the court even if not summoned as a witness.

113 (2016) 3 SCC 135.

114 (2004) 4 SCC 158.

and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community".[115] In *Surender Singh* v. *State (NCT of Delhi),* the Supreme Court found that the defence did not cross-examine the prosecution witness immediately after her examination-in-chief; it sought that the cross-examination be deferred, which was granted, and the cross-examination took place more than two months after the examination-in-chief. Sounding a note of caution and referring to earlier authorities[116], the Supreme Court said:

> [S]uch long adjournment as was given in this case after examination-in-chief should never have been given. Reasons for this are many, but, to our mind, the main reason is that it may affect the fairness of the trial and, in a given case, even endanger the safety of the witness. As far as possible, the defence should be asked to cross-examine the witness the same day or the following day. Only in very exceptional cases, and for reasons to be recorded, the cross-examination should be deferred, and a short adjournment can be given after taking precautions and care for the witness, if it is required. We are constrained to make this observation, as we have noticed, in case after case, that cross-examinations are routinely adjourned, which can seriously prejudice a fair trial.

Referring to *State of Kerala* v. *Rasheed*,[117] it was observed that the guidelines laid down in that case must be followed to determine when such an adjournment can be granted, emphasising that a request for deferral must be premised on sufficient reasons that justify the deferral.

XIX TESTIMONY OF CHILD WITNESS AND DUTY OF THE PROSECUTION

A child witness is competent to testify, and a conviction can be based on the testimony of a sole child witness without requiring an oath if the child witness has the intellectual capacity to understand questions and give rational answers.[118] However, a child witness must be treated differently from an adult witness, as the unfamiliar and intimidating environment of the court, coupled with the tender age and inexperience, adds to the trauma of a child witness. In *Anees* v. *The State Govt. of NCT*,[119] the accused was tried for the offence of murder of his wife in their home. His five-year-old daughter, Shaheena, PW-3, was the only direct witness to the offence of murder. However, during the trial, the child witness turned hostile, and in the absence of any other cogent and convincing circumstantial evidence, the

115 *Supra* note 119, at 360.

116 *State of U.P* v. *Shambhu Nath Singh*, (2001) 4 SCC 667; *Ambika Prasad* v. *State (Delhi Admn.),* (2000) 2 SCC 646; *Mohd. Khalid* v. *State of W.B*., (2002) 7 SCC 334.

117 (2019) 13 SCC 297.

118 *Ratan Singh* v. *State of Gujarat*, (2004) 1 SCC 64; *K. Venkateshwarlu* v. *State of A.P*., AIR 2012 SC 2955.

119 [2024] 6 SCR 164.

Supreme Court acquitted the appellant. However, the Supreme Court said the following regarding the duty of the court to a child witness:[120]

> The impact of a court appearance on a child and the duty of the court towards a child witness have been very succinctly explained by the Constitutional Court of South Africa in the case of *Director of Public Prosecutions, Transwal* v. *Minister of Justice and Constitutional Development*, reported in (2009) 4 SA 222 (CC). We quote the relevant observations as under:
>
> 101. A court operates in an atmosphere that is intended to be imposing. It is an atmosphere that is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers, including the presiding judicial officer, the accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before - at least one assumes that the prosecutor would have interviewed the child in preparing for trial - the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the courtroom atmosphere may reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown."

So far as the conduct of the competency assessment of the child is concerned, it was held as follows:

> "102. *The judicialofficerwould question the child to satisfy themself that the child understands that theyare under a duty to speak the truth or understands the import of the oath. Regrettably, this questioning, although well-meaning, is often theoretical and may increase the child's confusion and terror. The child may wonder why theyare being subjected to this questioning. That is not all.*
>
> xxx xxxxxx
>
> 104. If the child decides to speak, the prosecutor will take them through the evidence. The questioning of a child requires special skills, similar to those needed to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the courtroom environment…"

120 *Id*. at 207-208.

[Emphasis supplied in original]

The Supreme Court lamented that the trial judge also failed to play an active role in the present case, who should have been conscious of the fact that the child witness,Shaheena, was asked to depose in the open court in a charged atmosphere and that too in the presence of the accused, who was none other than her own father. A child witness is a vulnerable witness, and special measures must be adopted to record theirtestimony in a child-friendly environment.[121]

XX EFFECT OF FAILURE TO EXAMINE A FORENSIC EXPERTOR NOT CONSIDERING FORENSIC EVIDENCE

While forensic evidence is often an invaluable piece of evidence in cases built on circumstantial evidence, it has been a consistent approach of the Supreme Court that where direct evidence in the form of testimony of an eyewitness is available, non-availability of forensic evidence, such as a report of a ballistic expert, *etc.*, is not a material omission.[122] In *Ram Singh* v. *State of U.P.*,[123] the murder weapon, a firearm, was not recovered by the police and the pellets and cartridges were not sent for ballistic examination. It was held that non-recovery of the murder weapon is not by itself fatal to the prosecution's case. When the murder weapon is not recovered, linking the empty cartridges and pellets seized during the investigation with the alleged murder weapon is out of question. Where there is credible direct evidence in the form of an eyewitness account, omission to obtain a ballistic report and non-examination of a ballistic expert may not be fatal to the prosecution's case. There is no rigid rule requiring forensic evidence to be brought on record, nor is there a requirement that a forensic expert be examined in every case. Even the non-availability or inability to ascertain the blood group or bloodstains, etc., cannot be a basis for discarding the testimony of an eyewitness who inspires confidence.[124] But in a case based solely on circumstantial evidence, failure to obtain a forensic examination report, e.g., a serological test report to ascertain the blood group on the weapon of crime or any other incriminating object, renders the recoveries meaningless and an exercise in futility.[125]

But when there is cogent forensic evidence available as to the extent of disability for quantifying the amount of compensation in a motor accident case, the Supreme Court has said that where the medical opinion as to the extent of disability was not accepted by the forum/court, without there being a contra opinion, rejection of the expert opinion is an illegality.[126]

121 See, *Sakshi* v. *Union of India* (2004) 5SCC 518; *Nipun Saxena* v. *Union of India* (2019) 2 SCC 703.

122 *Dhanaj Singh* v. *State of Punjab*, (2004) 3 SCC 654; *State of Punjab* v. *Hakam Singh* (2005) 7 SCC 408; *Maqbool* v. *State of A.P.*, AIR 2011 SC 184.

123 [2024] 2 SCR 668.

124 *Keshavlal*v. *State of M.P.* (2002) 3 SCC 254.

125 *Babu Sahebagouda Rudragoudar* v. *State of Karnataka*, [2024] 5 SCR 174, 201.

126 *Aabid Khan* v. *Dinesh*, (2024) 6 SCC 149.

XXI WITNESS MUST ANSWER EVEN AN INCRIMINATING QUESTION

Section 132, IEA (corresponding with section 137, BSA) provides that a witness shall not be excused from answering any question in any suit or any civil or criminal proceeding, even if the answer is incriminating. It, however, adds a proviso to the effect that "…no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer". In *Raghuveer Sharan* v. *Distract Sahakari Krishi Gramin Vikas Bank*,[127] the Supreme Court considered a question of whether the qualified privilege under the proviso to section 132, IEA (corresponding with the proviso to section 137, BSA), grants complete immunity to a witness who has deposed and made statements incriminating himself, notwithstanding the availability of other material to the prosecution? The Supreme Court revisited the principle and policy underlying the provision and its interpretation in an earlier decision, *R. Dinesh Kumar alias Deena* v. *State represented by Inspector of Police*,[128] observing that, on that occasion, it did not answer this question. Answering the question, the Supreme Court held:

> …[t]he qualified privilege under the proviso to section 132 of the Act is intended to ensure that all the evidence is placed before the Court to reach a just conclusion. In our view, it is not fathomable that a provision in the Evidence Act, the primary purpose of which was to ensure that all the material is before the Court and ensure that the ends of justice are met, could itself grant a blanket immunity to a witness (albeit complicit). Such an interpretation, in our opinion, would be unsustainable. Needless to say, his statement cannot be used for any purpose whatsoever for the purposes of bringing such a witness to trial. As such, we hold that the qualified privilege under the proviso to section 132 of the Act does not grant complete immunity from prosecution to a person who has deposed as a witness (and made statements incriminating himself).

In view of the above, the Supreme Court said that there cannot be an absolute embargo on the trial court to initiate process under Section 319 Cr PC (corresponding with section 358, BNSS), provided that there is additional, cogent material before the trial court apart from the statement of the witness.

XXII HOSTILE WITNESS AND DUTY OF PROSECUTION

Witnesses are expected to speak the truth, and a witness called by a party to a judicial proceeding may not support that party's case. Such a witness is called a hostile witness.[129] In a criminal trial, when a prosecution witness becomes belligerent, and the public prosecutor seeks the trial court's permission to cross-

127 [2024] 9 SCR. 361.

128 [2015] 5 SCR 605.

129 K. A. Pandey, *Vepa P. Sarathi's Law of Evidence* 400 (Eastern Book Company, Lucknow, 8th edn., 2021).

examine that witness, the witness is treated like any other witness. The witness no longer remains the prosecution witness. Effective and diligent cross-examination shall be instrumental in eliciting the truth and in helping the court arrive at a just decision. In *Anees* v.*The State Govt. of NCT,*[130] the Supreme Court made the following observations:[131]

> Under section 145 of the Evidence Act, when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of the witness is drawn to that part, and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved, and there is no need for further proof of contradiction; it will be read with the evidence in mind. If he denies having made that part of the statement, his attention must be drawn to that statement, and it must be mentioned in the deposition. By this process, the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when the Investigating Officer is examined in the court, his attention should be drawn to the passage marked for contradiction; it will then be proved in the deposition of the Investigating Officer, who, again, by referring to the police statement, will depose about the witness having made that statement. The process again involves referring to the police statement and culling out the part intended to be contradicted by the maker of the statement. Suppose the witness was not confronted with that part of the statement with which the defence wanted to contradict him. In that case, the court cannot *suo motu* make use of statements to police not proved in compliance with section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction." [See: *V.K. Mishra* v. *State of Uttarakhand*: (2015) 9 SCC 588]
>
> Over time, we have noticed that, in criminal appeals, there is practically no effective or meaningful cross-examination by the Public Prosecutor of a hostile witness. All that the Public Prosecutor would do is to confront the hostile witness with his/her police statement recorded under section 161 of the Cr.P.C. and contradict him/her with the same. The only thing the Public Prosecutor would do is to bring the contradictions on record and thereafter prove them through

130 [2024] 6 SCR 164.

131 *Id.,* at 204-206.

> the evidence of the Investigating Officer. This is not sufficient. The object of the cross-examination is to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness; to detect and expose the discrepancy or to elicit the suppressed facts which will support the case of the cross-examining party. What we are trying to convey is that it is the duty of the Public Prosecutor to cross-examine a hostile witness in detail, to try to elucidate the truth & also establish that the witness is speaking a lie and has deliberately recanted from his police statement recorded under section 161 of the Cr PC. A good, seasoned and experienced Public Prosecutor will not only bring the contradictions on record, but will also cross-examine the hostile witness at length to establish that he or she had actually witnessed the incident as narrated in his/her police statement.

In the case at hand, we have observed that after Shaheena (PW-3) was declared hostile, the public prosecutor made only a few suggestions to her for cross-examination. Surprisingly, even proper contradictions were not brought on record. In other words, the PW-3 was not even appropriately confronted with her police statement. It is not sufficient for the public prosecutor while cross-examining a hostile witness to merely hurl suggestions, as mere suggestions have no evidentiary value.

XXIII PARTIES TO A SUIT OR PROCEEDING AS WITNESS

That parties to a suit or proceeding are competent witnesses was clarified by the Supreme Court in *Mohammed Abdul Wahid* v. *Nilofer.*[132] In this case, the Supreme Court held that the term 'witness' does not exclude parties to the suit, *i.e.,* the plaintiff and the defendant, from appearing before the court to enter evidence, and that there is no difference between a party to a suit as a witness and a witness *simpliciter*. The conclusion was premised on the Supreme Court's perusal of sections 137-139 of the IEA (corresponding to sections 142-144 of the BSA), which deal with examination-in-chief, the order of examination, and the cross-examination of a person called to produce a document. The Supreme Court added that examination-in-chief, cross-examination, and re-examination are facets of a trial that can be availed of by a party or its adversary, for both the party to a suit as a witness, as also for other witnesses called by the party.[133] The judgment assumes great significance in view of conflicting judgments of high courts[134] on this issue and states the correct proposition of law.

132 (2024) 2 SCC 144.

133 *Id*., at para 25.

134 In *T.M. Mohana* v. *V. Kannan,* 1983 SCC OnLine Mad 145, it was held that the production of documents for the purpose of cross-examination can be availed only for a witness of a party and not the party themselves, is not a tenable argument. But in the judgment under appeal, M*ohd. Abdul Wahid* v. *Nilofer*, 2021 SCC OnLine Bom 170, an opposite view was expressed.

XXIV CONCLUSION

The survey year 2024 marks a legislative milestone with the enactment of the BSA, which reflects modern India's aspiration to integrate technological advancements in the administration of justice while eliminating colonial overtones from the law of evidence.

The survey of case law for 2024 points to instances in which the Supreme Court found that inadmissible evidence, especially confessions to police, was admitted by the trial courts, and that this could not be rectified even by the concerned High Courts. The decisions in *Mohammed Khalid* v. *State of Telangana*[135] and *Allarakha Habib Memon* v. *State of Gujarat*,[136] discussed under different heads in this Survey, can be considered illustrative cases in this regard. Most of the judgments in the survey year 2024 address multiple critical issues in the law of evidence, and almost all the judgments discussed in the survey copiously quote and rely on earlier Supreme Court decisions on those issues. As always, the Supreme Court has emphasised that, notwithstanding the relevancy and admissibility of a fact, only its proper and principled appreciation shall determine its reliability.

135 [2024] 3 SCR 23.
136 [2024] 8 SCR 345.