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EVIDENCE LAW

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I INTRODUCTION

THE PRESENT survey analyses the decisions of the Supreme Court of in the year 2014. The principle of law or 'law declared by Supreme Court of India'[1] as enshrined in article 141 of the Constitution of India through the process of interpretation occupies an important place in the constitutional governance. The survey is a kind of progressive work and analysis of development of law on the various facets of 'law of evidence' as contained under Indian Evidence Act, 1872 (Hereinafter may be referred as, IE Act). It refers the important precedents on various issues relating to law of evidence at appropriate places besides analysing the decisions rendered by the apex court.

This survey assumes importance because of its seminal decisions on the evidentiary value of 'electronic evidence', evidentiary value and legality of DNA profiling, theory of memory and relativity vis-à-vis evidentiary value, dying declaration, appreciation of evidences by appellate courts etc. The apex court in its decisions has stressed on the appropriate sentencing policy, public abhorrence of crime, rule of law, and has appreciated the timely justice by trial court within a year etc. The survey follows in ascending order of sections under IE Act, 1872.

Motive

In the matter of *Subhasish Mondal @ Bijoy* v. *State of West Bengal*,[2] the apex court highlighted the importance of 'motive' in cases of circumstantial evidences, held that once the motive of vengeance is established, it assumes a great importance in cases of circumstantial evidence. In this case, the apex court upheld the finding of trial court that it was crystal clear that there was a family feud between the accused and the deceased over the service in the railway workshop on the death of their father.

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1 Art. 141 of the constitution of India reads: Law declared by Supreme Court to be binding on all courts.—The law declared by the Supreme Court shall be binding on all courts within the territory of India.

2 (2014) 4 SCC 180.

Further, in *State of Haryana* v. *Satender*,[3] the apex court held that the evidence of eye witness is corroborated by the medical evidence available on the record. The court further opined that the prosecution established, beyond reasonable doubt, the involvement of accused in commission of crime with cogent, direct and relevant evidence. The court further noted that the statement of accused recorded under section 313 of the Criminal Procedure Code, 1973 (Cr PC) where the defence of the accused was that there was revenue litigation between his father and the deceased. The court opined as under: [4]

> Once the actus reus is established, motive has been provided by accused himself in his statement under Sec. 313 of the Criminal Procedure Code, 1973.

In *Chandra Prakash* v. *State of Rajasthan*,[5] the apex court emphasized on the difference between 'conduct of a person' which is an admissible piece of evidence under section 8 of the IE Act and any conduct as influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by section 162 of the Cr PC. The division bench in *Prakash Chand* v. *State* (*Delhi Admn.*),[6] after referring to the decision in *H.P. Admn.* v. *Om Prakash*,[7] opined as under: [8]

> What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence, relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act.

Further, the apex court in the matter of *Vivek Kalra* v. *State of Rajasthan*[9] taking note of purport and intent of section 8 of the IE Act, 1872, held that 'any

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3 (2014) 7 SCC 291.

4 *Id*. at 299.

5 (2014) 8 SCC 340.

6 (1979) 3 SCC 90.

7 (1972) 1 SCC 249.

8 *Prakash Chand* v. *State (Delhi Admn.)* (1979) 3 SCC 90; also see *H.P. Administration* v. *Om Prakash* (1972) 1 SCC 249; *Chandra Prakash* v. *State of Rajasthan* (2014) 8 SCC 340, 362; *A.N. Venkatesh* v. *State of Karnataka* (2005) 7 SCC 714.

9 (2014) 12 SCC 439.

behaviour or conduct of the appellant would be relevant if it had nexus with the offence under section 302 alleged to have been committed by him'[10]. However, in the present case, the court opined as: [11]

> The general good behaviour of the appellant and the fact that he had no bad habit, have no nexus with the offence alleged against the appellant and are not relevant when other circumstances have established beyond reasonable doubt that it is the appellant and the appellant alone who has committed the murder of the deceased.

The issue before Supreme Court in *Vivek Kalra* case was the circumstantial evidence leading to one irresistible conclusion and the prosecution also fails to prove the motive for the commission of crime. The apex court held as under: [12]

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

The apex court opined that where 'motive' is clearly established, the conviction and sentence imposed on the appellants does not call for interference.[13]

Test identification parade

Test identification parade (TIP) is a well known step/ stage of the criminal investigation and there is no provision in the Cr PC which obliges the investigating agency to hold it mandatorily. [14] Further, it cannot be claimed as a matter of right by the suspect[15] or accused.[16] The basic purpose of such pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in the court at the trial.[17]

The apex court in the matter of *Prakash* v. *State of Karnataka*[18] discussed the decision of the Supreme Court of Canada in *Marcoulx* v. *The Queen*,[19] in

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10 *Id*. at 443.

11 *Ibid*.

12 *Id*. at 442.

13 *Bahadur Singh* v. *State of Madhya Pradesh* (2014) 6 SCC 639.

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

15 *Prakash* v. *State of Karnataka* (2014) 12 SCC 133.

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

17 *Rameshwar Singh* v. *State of J&K* (1971) 2 SCC 715; also see *Prakash* v. *State of Karnataka* (2014) 12 SCC 133, 143.

18 (2014) 12 SCC 133.

19 (1976) 1 SCR 763 (Canada).

which the two types of identification parade namely (i) the show up–of a single suspect; (ii) the line–up presentation of the suspect as part of a group. It quoted Professor Glanville Williams as under: [20]

> Since identification in the dock is patently unsatisfactory, the police have developed the practice of holding identification parades before the trial as a means of fortifying a positive identification….. The main purpose of such a parade from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution. The advantage of identification parades from the point of view of the trial is that, by giving the witness a number of persons from among whom to choose, the prosecution seems to dispose once and for all the question whether the defendant in the dock is in fact the man seen and referred to by the witness.

In *Chandra Prakash* v. *State of Rajasthan*,[21] the issue of holding a delayed TIP was involved. One of the contentions on behalf of accused was that there has been substantial delay of three weeks from the date of arrest of accused in holding the TIP. The court referring the decision of *Ramanand* Ramnath v. *State of* M.P.,[22] observed that there was no unusual delay in holding the test identification parade.[23] The court further noted that the witnesses had identified the accused person in court and nothing has been elicited in the cross- examination even to create a doubt.[24] The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature.[25] Highlighting the objectives of TIP in criminal investigation, the apex court relied the decision of *State of Maharashtra* v. *Suresh*,[26] as under: [27]

> We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom

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20 1963 Cri. L R 479, 480; also see *Mezzo* v. *The Queen* (1986) 1 SCR 802.

21 (2014) 8 SCC 340.

22 (1996) 8 SCC 514; the TIP was held within a period of one month from the date of arrest.

23 Also see as to legal position when there is delay in holding the Test Identification Parade— *Anil Kumar* v. *State of U.P.* (1996) 8 SCC 514; *Munna Kumar Upadhyay* v. *State of A.P.* (2012) 6 SCC 174; *State of Maharashtra* v. *Suresh* (2000) 1 SCC 471.

24 (2014) 8 SCC 340, 354.

25 *Anil Kumar* v. *State of U.P.* (2003) 3 SCC 569; also see *Munna Kumar Upadhyay* v. *State of A.P.* (2012) 6 SCC 174.

26 (2000) 1 SCC 471.

27 *Id*. at 478; also see *Chandra Prakash* v. *State of Rajasthan* (2014) 8 SCC 340, 354.

they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

Plea of Alibi

Merely raising of plea of alibi[28] would not entitle anyone to take the benefit of alibi, but, in the case of *Sri Chand* v. *State of Punjab*[29] emphasised that when concerned appellant did not adduce any evidence to prove that he was at his place of job at the relevant time, in such a case, the plea of alibi won't be accepted. It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the plaint and in case the pleadings are not complete, the court is under no obligation to entertain the pleas.[30]

Finger print evidence

In the case of *Prakash* v. *State of Karnataka*,[31] the issue as to whether the finger prints available on record could be relied when there is serious doubt as to how it came into existence. The apex court rejected the piece of evidence as it is a settled principle of admissibility of evidence that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used as a whole or not at all.[32]

Section 27

A question of seminal importance arose in the case of *Chandra Prakash* v. *State of Rajasthan*[33] that when the accused led to the discovery of article seized, he was not arrested. The court analysing all the relevant precedent held that for the purpose of section 27 of the IE Act, it is not essential that the accused must be under formal arrest.[34] The court noted the various requirements of section 27 as follows:

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28 S. 11 of the Indian Evidence Act,1872 reads as under:-

When facts not otherwise relevant become relevant.—Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

29 (2014) 10 SCC 293.

30 *Rajasthan State Road Transportation Corporation* v. *Bajrang Lal* (2014) 4 SCC 693.

31 (2014) 12 SCC 133.

32 See *Hanumant Govind Nargundkar* v. *State of M.P.*, AIR 1952 SC 343.

33 (2014) 8 SCC.

34 *Bharama Parsram Kudachkar* v. *State of Karnataka* (2014) 14 SCC 431; also see *Vikram Singh* v. *State of Punjab* (2010) 3 SCC 56.

(i) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(ii) The fact must have been discovered.

(iii) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(iv) The person giving the information must be accused of any offence.

(v) He must be in the custody of a police officer.

(vi) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(vii) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

In *Mahavir Singh* v. *State of Haryana*,[35] the apex court has observed that absence of material contradictions do not impact the case of prosecution. It also observed that the minor discrepancies are bound to occur in every case. It held that the mere marginal variations in the statements of witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier.[36] But, when such discrepancies make the foundation of prosecution case shaky, the court has to take strict note thereof.[37]

Expanding meaning of 'Custody'

The expression "custody" which appears in section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police.[38] It has been further held that if the accused is within the ken of surveillance of the police during which his movements are restricted, then it can be regarded as custodial surveillance.[39] Consequently, so much of information

35 (2014) 6 SCC 716.

36 *A. Shankar* v. *State of Karnataka* (2011) 6 SCC 279, 287; also see *Mahavir Singh* v. *State of Haryana* (2014) 6 SCC 716.

37 *Nallabothu Ramulu @ Seetharamaiah* v. *State of A.P.* (2014) 12 SCC 261.

38 *Dharam Dev Yadav* v. *State of Uttar Pradesh* (2014) 5 SCC 509.

39 *State of Andhra Pradesh* v. *Gangula Satya Murthy* (1997) 1 SCC 272.

given by the accused in "custody", in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. It is quite common that based on admissible portion of the statement of the accused, whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the court as to nature of recoveries and as to how they came into the possession or for planting the same at the place from where they were recovered.[40]

Circumstantial evidence

In *N.S. Nagendra* v. *State of Karnataka*[41] the apex court held that where there is a complete chain of events, proving the guilt of the accused and he could be the only person who has committed the crime, in absence of any substantial question of law, the special leave petition(SLP) should be dismissed. Further, in the case of *Donthula Ravindranath @ Ravinder Rao* v. *State of Andhra Pradesh*,[42]reiterating the general rule of prudence adopted by courts of law in criminal justice system, it observed that: [43]

> … [T]he requirement of criminal law is that the prosecution must establish the guilt of accused beyond all reasonable doubt and in a case of circumstantial evidence the chain of circumstances is so complete that they collectively point only to the guilt of the accused without leaving any scope for doubt.

In *Madhu @ Madhuranatha* v. *State of Karnataka*,[44]the court held that the prosecution resting its case on circumstantial evidence cannot derive any strength from the weakness of the defence. It held as under: [45]

> "… [T]he prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or point to any other

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40 *A.N. Venkatesh* v. *State of Karnataka* (2005) 7 SCC 714; also see *Sandeep* v. *State of Uttar Pradesh* (2012) 6 SCC 107; *State of Maharashtra* v. *Suresh* (2000) 1 SCC 471.

41 (2014) 3 SCC 193.

42 (2014) 3 SCC 196.

43 *Id*. at 198.

44 (2014) 12 SCC 419.

45 *Id*. at 428; also see *Sharad Birdhichand Sarda* v. *State of Maharashtra* (1984) 4 SCC 116; *State of U.P.* v. *Satish* (2005) 3 SCC 114; *Paramjeet Singh* v. *State of Uttarakhand* (2010) 10 SCC 439.

> hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable.

Further, in *Shyamal Saha* v. *State of West Bengal*[46] the apex court reiterating the principle as laid down in *Sharad Birdhi Chand* Sarda v. *State of Maharashtra*,[47] held as under:

> "The facts of this case demonstrate that the first link in the chain of circumstances is missing. It is only if this first link is established that the subsequent links may be formed on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the last seen theory. In our opinion, this was a rather unsatisfactory way of dealing with the appeal."[48]

In the cases of circumstantial evidence, the relevant circumstances should not be looked at in a disaggregated manner but collectively. However, in *Prakash* v. *State of Karnataka*[49] the court has held that in such cases the prosecution has to prove each relevant fact. The court held as under: [50]

> In a case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence and the circumstances so proved, must form a complete chain without giving room to any other hypotheses and should be consistent with only the guilt of the accused.

Further, the Supreme Court after reiterating the golden principles of 'circumstantial evidence' as laid down in the *Sharad Birdhi Chand Sarda* v. *State of Maharashtra*[51] held that in cases where the chain of circumstances is not so complete so as to leave any ground for the conclusion consistent with the innocence of the respondent.[52] It further held that in such cases 'motive' plays an important part in order to tilt the scale against the accused.[53] The chain of events leading to the commission of crime should unerringly point towards the guilt of the accused but if the available evidence on record leads to uncertainty in the manner of the commission of crime then it requires circumspection while deciding the maximum penalty for murder.[54]

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46 (2014) 12 SCC 321.

47 (1984) 4 SCC 116.

48 *Shyamal Saha* v. *State of West Bengal* (2014) 12 SCC 321, 331.

49 (2014) 12 SCC 133.

50 *Id*. at 153; also see *Lakhjit Singh* v. *State of Punjab*, 1994 Supp (1) SCC 173, 176.

51 (1984) 4 SCC 116.

52 *State of Himachal Pradesh* v. *Raj Kumar* (2014) 14 SCC 39.

53 *Mahamadkhan Nathekhan* v. *State of Gujarat* (2014) 14 SCC 589.

54 *Mohammad Bin Beerankutti* v. *State of Karnataka* (2014) 14 SCC 493.

In the cases of circumstantial evidence, the recovery has to be corroborated by any proper independent evidence[55] as the recovery of an object is not a discovery of fact[56]. In *Dhan Raj @ Dhand* v. *State of Haryana*,[57] the Supreme Court further held as under: [58]

> Recovery must be of a fact which was relevant to connect it with the commission of crime. Therefore, even if the recovery of goods is reliable then it does not indicate that the accused appellants committed the murder and the only admissible fact which can be inferred is that they are in possession of stolen goods.

In a case, where there is no eye witness / direct evidence to the actual occurrence of the crime, the Supreme Court in *Tara Singh* v. *State* through Home *Secretary, Uttarakhand*[59] held that after reading the testimony of all other witnesses, we agree with the conclusion of the courts below that there is a complete chain of circumstances proving the charges. The suspicion however strong cannot be a substitute for proof.[60] In a case resting completely on the circumstantial evidence the chain of circumstances must be so complete that they lead only to one conclusion, that is, the guilt of the accused. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum.[61]

Considering the nature of improvement by witnesses, the Supreme Court in *Vijay Kumar* v. *State of Rajasthan*,[62] held as under: [63]

> The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. When a witness has been examined by Investigation officer during investigation and in that statement he has not stated the facts which he now for the first time stated before the trial court.[64] In other words, when a witness has made material improvement while deposing in the Court then, in all such cases such evidences cannot be safely relied upon as they fail to pass the test of credibility and is liable for rejection.

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55 *Dhan Raj @ Dhand* v. *State of Haryana* (2014) 6 SCC 745.

56 *Mano* v. *State of Tamil Nadu* (2007) 13 SCC 795.

57 (2014) 6 SCC 745.

58 *Id*. 754; also see *Mano* v. *State of Tamil Nadu* (2007) 13 SCC 795.

59 (2014) 12 SCC 383; also see *Kusha Laxman Waghmare* v. *State of Maharashtra* (2014) 10 SCC 298.

60 *Sangili @ Sanganathan* v. *State of Tamil Nadu* (2014) 10 SCC 264.

61 *Dharam Dev Yadav* v. *State of Uttar Pradesh* (2014) 5 SCC 509.

62 (2014) 3 SCC 412.

63 *Vijay Kumar* v. *State of Rajasthan* (2014) 3 SCC 412.

64 *Khalil Khan* v. *State of M.P.* (2003) 11 SCC 19.

In *Vijay Kumar* v. *State of Rajasthan*[65], the apex court has held that: [66]

> Nobody has witnessed the occurrence and the case rests on circumstantial evidence. In a case based on circumstantial evidence the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

It has been consistently laid down by the Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.[67]

Affirming the view that the suspicion, however strong, cannot take the character of the proof, the apex court emphasised that with regard to section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.[68]

Extra judicial confession

In the case of *Dhan Raj @ Dhand* v. *State of Haryana*,[69] the Supreme Court reiterated the legal principle that the extra–judicial confession is a weak evidence in the absence of a chain of cogent circumstances for recording a conviction.[70] It reiterated the golden principle laid down in the decision of *Shahadevan* v. *State of Tamil Nadu*[71] that an extra- judicial confession suffers from material discrepancies or inherent probabilities then the courts cannot base a conviction on the same. It

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65 (2014) 3 SCC 412.

66 *Id*. at 417.

67 *Kanhaiya Lal* v. *State of Rajasthan* (2014) 4 SCC 715.

68 *Vijay Thakur* v. *State of Humachal Pradesh* (2014) 14 SCC 609.

69 (2014) 6 SCC 745.

70 *Id*. at 752, also see *Gopal Shah* v. *State of Bihar* (2008) 17 SCC 128; *Pancho* v. *State of Haryana* (2011) 10 SCC 165; *Sahadevan* v. *State of Tamil Nadu* (2012) 6 SCC 403.

71 (2012) 6 SCC 403.

also took note of the judicial precedent in *Pancho* v. *State of Haryana*,[72] wherein the Supreme Court did not convict the accused on the basis of the confession statement of the co-accused in the absence of other cogent evidence, inspite of the belated recovery of the alleged weapon of crime.

In *Mohd. Jamilludin Nasir* v. *State of West Bengal*,[73] the apex court has examined the procedure and manner in which the relevance, efficacy and reliability of the confessional statement has to be appreciated and held as under: [74]

> The relevance, efficacy and reliability of the confessional statement needs to be examined in the touchstone of Sections 10 and 30 of the Evidence Act, it will have to be stated that the confession of a co-accused cannot be treated as substantive evidence to convict other than the person who made the confession on the evidentiary value of it.

It is, however, well established and reiterated in several decisions of the apex court that based on the consideration of other evidence on record and if such evidence sufficiently supports the case of the prosecution and if it requires further support, the confession of a co-accused can be pressed into service and reliance can be placed upon it.

The court held that as per section 30 of the IE Act, when more than one person are being tried jointly for the same offence and a confession made by one of such persons is found to affect the maker as well as the co-accused and its stand sufficiently proved, the court can take into consideration such confession as against other persons and also against the person who made such confession from the above proposition.[75]

Evidentiary value of confession under section 15 of Terrorist and Disruptive (Prevention) Activities Act, 1987 TADA

Terrorist and Disruptive (Prevention) Activities Act, 1987 (TADA) is a special legislation, section 15[76] of which lays down the recording of confession before

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72 (2011) 10 SCC 165.

73 (2014) 7 SCC 443.

74 *Id*. at 519 (per F.M. Ibrahim Kalifulla J.).

75 *Id*.; also see, *Govt. of NCT of Delhi* v. *Jaspal Singh* (2003) 5 SCC 589.

76 Terrorist and Disruptive (Prevention) Activities Act, 1987, s.15 reads: Certain confessions made to police officers to be taken into consideration.—(1) Not withstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person 6[or co-accused, abettor or conspirator] for an offence under this Act or rules made there under:

[Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused].

police officials. The seminal issue of evidentiary value of such confession recorded under the Special Act *i.e.*, TADA, 1987 was considered by Supreme Court in *Periyasami* v. *State*.[77] The court laying down the law with all clarity relied on its erudite and prolific decision in the matter of *Yakub Abdul Razak Memon* v. *State of Maharashtra*[78] and laid down as under: [79]

> 180. To sum up, it can easily be inferred that the position of law on the evidentiary value of confession is as under;
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> 180.1. If the confessional statement is properly recorded satisfying the mandatory provision of Section 15 of TADA and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthfully then the said confession is sufficient to base conviction on the maker of the confession.
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> 180.2. Whether such confession requires corroboration or not, is a matter for the court to consider on the basis of the facts of each case.
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> 180.3. With regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base conviction on the basis of such confession of the co- accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.
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> 180.4 The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.

> (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

77 (2014) 6 SCC 59.

78 (2013) 13 SCC 1.

79 *Id*. at 197-198.

Thus the apex court in *Periyasamy* case[80] has held that a confessional statement recorded under section 15 of the TADA, if found to be voluntarily made and is truthful and properly recorded, can form the basis of conviction.[81]

Retraction of confession

The law relating to 'retraction of confession' and its evidentiary value was crystallised by the Supreme Court in *Periyasami* v. *State* has held that: [82]

(i) Retraction does not always dilute or reduce or wipe out the evidentiary value of a confessional statement.

(ii) Quite often retraction is an afterthought. It could be the result of legal advice or pressure exerted by those whose involvement may be likely to be disclosed or confirmed by the confessional statement of the accused. Therefore, in each case, the court will have to examine whether the confession was voluntary and true and whether the retraction was an afterthought.

(iii) the amount of credibility to be attached to a retracted confession would depend upon the facts and circumstances of each case.[83]

(iv) a retracted confession may form legal basis for conviction if the court is satisfied that the confession was true and was voluntarily made.[84]

(v) where the original confession was truthful and voluntary, the court can rely upon such confession to convict the accused in spite of a subsequent retraction and its denial in statement under Section 313 of the Code.[85]

(vi) A retracted confessional statement is therefore not always worthless.

Last seen together theory

In *Krishnan @ Ramasamy* v. *State of Tamil Nadu*,[86] the Supreme Court held that the conviction cannot be based only on circumstance of last seen together with the deceased.[87] The circumstance of last seen together does not by itself and

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80 *Supra* note 78.

81 *Id*. at 71.

82 *Supra* note 78.

83 *Kalawati* v. *State of Himachal,* AIR 1953 SC 131.

84 *State of Tamil Nadu* v. *Kutty* (2001) 6 SCC 550.

85 *Supra* note 79.

86 (2014) 12 SCC 279.

87 *Kanhaiya Lal* v. *State of Rajasthan* (2014) 4 SCC 715; aslo see *Arjun Marik* v. *State of Bihar* (1994) Supp. (2) SCC 372; *Jaswant Gir* v. *State of Punjab* (2005) 12 SCC 438; the appellant cannot be convicted solely on the basis of 'last seen together' even if version of the prosecution witness in this regard is believed.

necessarily leads to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.[88]

The apex court in *Mahavir Singh* v. *State of Haryana*[89] explained the purpose of 'last seen theory' in following words:[90]

> Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime.

Appreciating the judicial principle of 'last seen together theory' and conviction solely based thereon, the Supreme Court in Dharam *Dev Yadav* v. *State of Uttar Pradesh*[91] opined as under:[92]

> ...a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company.

Dying declaration

In *Anjanappa* v. *State of Karnataka*,[93] the issue of acceptability and conviction based on dying declaration was considered by the apex court. It opined that 'minor discrepancy in the time of recording of dying declaration creates no dent in the

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88 *Ibid*.

89 (2014) 6 SCC 716; also see *Bodhraj* v. *State of Jammu & Kashmir* (2002) 8 SCC 45.

90 *Id*. at 721.

91 (2014) 5 SCC 509.

92 *Id*. at 521.

93 (2014) 2 SCC 776.

prosecution story which is, otherwise, substantiated by reliable evidence.[94] The requirement that a dying declaration recorded properly when the declarant is in a fit mental condition to make it, being truthful and voluntary.

In *Babubhai Bhimabhai* Bokhiria v. *State of Gujarat*,[95] the Supreme Court has determined the question of law as to whether the note in question is admissible in evidence or in other words, can be treated as a dying declaration under section 32 of the Act. While delving on the meaning and content of "circumstances of transaction" in section 32 of the IE Act, referring the decision of Privy Council *Pakala Narayanswami* v. *Emperor*[96], the Supreme Court held as under: [97]

> [T]he statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible.

In the *Babubhai Bhimabhai* case,[98] the court held that except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under section 319 of the Code.

It is well settled that a conviction can be based on a dying declaration which is based on legal maxim "Nemo moriturus praesumitur mentire" *i.e.*, a man will not meet his maker with a lie in his mouth, must be recorded properly when the declarant is in a fit mental condition to make it. It should be truthful and voluntary.[99]

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.[100]

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.[101]

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94 *Id.* at 786.

95 (2014) 5 SCC 568.

96 AIR 1939 PC 47.

97 *Id*. at 50; also see *Babubhai Bhimabhai Bokhiria* v. *State of Gujarat* (2014) 5 SCC 568, 575.

98 *Babubhai Bhimabhai Bokhiria* v. *State of Gujarat* (2014) 5 SCC 568.

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

100 *Munnu Raja* v. *State of M.P*. (1976) 3 SCC 104.

101 *State of U.P.* v. *Ram Sagar Yadav* (1985) 1 SCC 552; also see *Ramawati Devi* v. *State of Bihar* (1983) 1 SCC 211.

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.[102]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.[103]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it, is to be rejected.[104]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.[105]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.[106]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.[107]

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.[108]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.[109]

(xi) Where there are more than one statement in the nature of dying declaration, one, first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.[110]

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102 *K. Ramachandra Reddy* v. *Public Prosecutor* (1976) 3 SCC 618.

103 *Rasheed Beg* v. *State of M.P.* (1974) 4 SCC 264.

104 *Kake Singh* v. *State of M.P.* (1981) Supp. SCC 25.

105 *Ram Manorath* v. *State of U.P.* (1981) 2 SCC 654.

106 *State of Maharashtra* v. *Krishnamurti Laxmipati Naidu* (1980) Supp. SCC 455.

107 *Surajdeo Ojha* v. *State of Bihar* (1980) Supp. SCC 769.

108 *Nanhau Ram* v. *State of M.P.* (1988) Supp. SCC 152.

109 *State of U.P.* v. *Madan Mohan* (1989) 3 SCC 390.

110 *Mohanlal Gangaram Gehani* v. *State of Maharashtra* (1982) 1 SCC 700.

(xii) A truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated. The reliability of declaration should be subjected to close scrutiny and the court must be satisfied that the declaration is truthful.

(xiii) If a part of dying declaration has not been proved to be correct, it must necessarily result in the rejection of the whole of the dying declaration.

(xiv) While great solemnity and sanctity is attached to the words of a dying man, the courts must apply the strictest scrutiny and the closest circumspection to the statement before acting upon it.[111]

(xv) Dying declaration is an exception to the hearsay rule when it is made by the declarant at the time when it is believed that the declarant's death was near or certain.[112]

(xvi) Hearsay evidence is not accepted by the law of evidence because the person giving the evidence is not narrating his own experience or story, but rather he is presenting whatever he could gather from the statement of another person. That other person may not be available for cross-examination and, therefore, hearsay evidence is not accepted.

(xvii)Dying declaration is an exception to hearsay because, in many cases, it may be sole evidence and hence it becomes necessary to accept the same to meet the ends of justice.

(xviii) Simply because the statement is not recorded in the form of questions and answers, is no reason to discard it once.[113]

(xix) The Supreme Court has emphasised that the recording of such a statement in the form of question and answer is more appropriate method which should generally be resorted to. However, that would not mean that if such a statement otherwise meets all the requirements of Section 32 and is found to be worthy of credence, it is to be rejected only on the ground that it was not recorded in the form of questions and answers.[114]

(xx) If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our

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111 *Bhagwan Tukaram Dange* v. *State of Maharashtra* (2014) 4 SCC 270.

112 *Prem Kumar Gulati* v. *State of Haryana* (2014) 14 SCC 646; *Shaileshbhai @ Pappu Balubhai Chunara* v. *State of Gujarat* (2014) 14 SCC 33.

113 *Satish Chandra* v. *State of Madhya Pradesh* (2014) 6 SCC 723, 735.

114 *Ibid*.

> opinion, this by itself creates a lot of suspicion about credibility of such statement and the prosecution has to clear the same to the satisfaction of the court.[115]

In another decision of *Umakant* v. *State of Chhattisgarh*, [116] the Supreme Court listed out the following set of guidelines while considering a dying declaration, which is an under:[117]

> (i) Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.
>
> (ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
>
> (iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
>
> (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.
>
> (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
>
> (vi) A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
>
> (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
>
> (viii) Even if it is a brief statement, it is not to be discarded.
>
> (ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
>
> (x) If after careful scrutiny the Court is satisfied that it is 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 basis of conviction, even if there is no corroboration.

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115 *Muralidhar @ Gidda* v. *State of Karnataka* (2014) 5 SCC 730, 737.

116 (2014) 7 SCC 405; *Atbir* v. *Government of NCT of Delhi* (2010) 9 SCC 1; *Paniben* v. *State of Gujarat* (1992) 2 SCC 474; *Panneerselvam* v. *State of Tamil Nadu* (2008) 17 SCC 190.

117 *Umakant* at 413.

In burn injury cases, two possible hypothesis arise in the judicial mind – was it suicide or was it homicide. In cases where the dying declaration projected by the prosecution gets credence, the alternative hypothesis of suicide has to be justifiably eliminated.[118]

Expert opinion

In *Munni @ Syed Akbar* v. *State, Inspector of Police, All Women Police Station, Gobichettipalyam,Erode*,[119]the Supreme Court relying on the scientific evidence and expert opinion, held that the case of homicidal death by strangulation of victim instead of suicide as painted by appellant is proved beyond reasonable doubt. The court further held that the guilt of appellant has been established through expert and scientific evidence as he could not come forward with an appropriate explanation.

In the case of *B. Raghuvir Acharya* v. *CBI*,[120] a seminal question relating to expert opinion as contemplated under section 47 of IE Act, 1872[121] *i.e*., what should be the process of evaluation of evidence, when there is an absence of expert opinion was considered by the Supreme Court. Referring to the precedent on the issue, the court laid down that a second screening in the form of the court's assessment is essential to ascertain the authorship of document. It held that: [122]

> In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence.

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118 *Prempal* v. *State of Haryana* (2014) 10 SCC 336.

119 (2014) 10 SCC 623.

120 (2014) 14 SCC 693.

121 S. 47 reads as under:-

> Opinion as to handwriting, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.
>
> *Explanation*.-A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

122 *Murari Lal* v. *State of Madhya Pradesh* (1980) 1 SCC 704, 712; also see *B. Raghuvir Acharya* v. *CBI* (2014) 14 SCC 693, 706.

Documentary evidence versus medical board opinion

An important question of law arose in the matter of *Union of India* v. *Jai Kishun Singh*[123] wherein the issue for consideration of age of freedom fighters and extending the benefit to such person. The Supreme Court opined that in such cases, which needs to be decided on preponderance of probabilities and standard of proof beyond reasonable doubt is not to be applied.[124] The court opined on the alleged two set of evidences as under: [125]

> We are unable to rely upon determination of age by the Medical Board as it is based upon physical appearance only and not based upon any scientific medical test like ossification test and radiological examination. When it is based on such scientific tests as laid down in Om Prakash v. State of Rajasthan,[126] it is of strong corroborative value.

Ocular testimony versus medical evidence

Commenting on the direct conflict and inconsistency between the 'ocular evidence and medical evidence', the Supreme Court in the matter of *Ganesh Dutt* v. *State of Uttarakhand,*[127] held as under: [128]

> The eye–witnesses who deny the presence of injuries on the person of the accused are lying on most material point, and therefore, their evidence is unreliable. It assumes much greater importance where the evidence consists of interested or inimical witnesses.

There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence.[129] The expression 'medical evidence' compendiously refers to the facts stated by the doctor either in the injury report or in the post mortem report or during his oral testimony plus the opinion expressed by the doctor on the basis of the facts stated. As the two doctors may have a different opinion, the opinion of a particular doctor is not final or sacrosanct.[130] An opinion given by a doctor, based on the facts recorded on an examination of a victim of a crime, could be rejected by relying on cogent and trustworthy eye witness testimony.[131]

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123 (2014) 10 SCC 352.

124 *Gurdial Singh* v. *Union of India* (2001) 8 SCC 8; also see *Kamlabai Sinkar* v. *State of Maharashtra* (2012) 11 SCC 754.

125 *Union of India* v. *Jai Kishun Singh* (2014) 10 SCC 352, 356.

126 (2012) 5 SCC 201.

127 (2014) 12 SCC 389.

128 *Id*. at 397.

129 *Bastiram* v. *State of Rajasthan* (2014) 5 SCC 398, 407.

130 *Ibid*.

131 *Id*. at 408.

Medical evidence coupled with sole evidence of prosecutrix

The Supreme Court of India in *Mukesh* v. *State of Chhattisgarh,*[132] the issue, whether the benefit of doubt should be given to the appellant based on contradictions regarding the date of the incident, the FIR, charge-sheet and the statement of prosecutrix or prosecution witness. Repelling all the arguments, the court upholds the dictum of law that the sole testimony of the witness (prosecutrix) is sufficient to establish the commission of rape in the absence of corroborative evidence.[133] A woman, who was a victim of sexual violence, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of a culprit.[134] It further elaborated and discussed that the delay in the lodging of FIR could not be a relevant factor in cases where the prosecutrix has been a married woman and cannot be considered as a ground for acquittal of the accused. The court noted the varied reasons for delay in lodging FIR in such sexual violence including the question of morality and chastity of a married woman[135], reputation of the prosecutrix,[136] honour of family,[137] and it also observed that if the delay is satisfactorily explained then it cannot be counted against the prosecution.[138]

In *Sultan Singh* v. *State of Haryana,*[139] the Supreme Court held that the statement of an expert witness (medical opinion) without being based on any specialised knowledge cannot be accepted. It observed as under: [140]

> The opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialised knowledge and the data on which it is based has to be found acceptable by the Court.

Section 65B—electronic evidence

In the landmark decision of *Anvar P.V*. v. *P.K. Basheer,*[141] the apex court corrected and overruled its earlier decision in *State (NCT of Delhi)* v. *Navjot Sandhu*[142] on the admissibility and procedure laid down for the electronic evidences under section 65-B of the IE Act, 1872.[143] The Supreme Court in *Anwar P.V.* case

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132 (2014) 10 SCC 327.

133 See *Mohd. Iqbal* v. *State of Jharkhand* (2013) 14 SCC 481; also see *Narender Kumar* v. *State (NCT of Delhi)* (2012) 7 SCC 171.

134 *Karnel Singh* v. *State of M.P.* (1995) 5 SCC 518.

135 *State of Rajasthan* v. *Narayan* (1992) 3 SCC 615.

136 *State of Punjab* v. *Gurmit Singh* (1996) 2 SCC 384.

137 *Ibid*.

138 *Karnel Singh* v. *State of M.P.* (1995) 5 SCC 518.

139 (2014) 14 SCC 664; also see *Madan Gopal Kakkad* v. *Naval Dubey* (1992) 3 SCC 204.

140 *Id*. at 670.

141 (2014) 10 SCC 473.

142 (2005) 11 SCC 600

143 Added by Act 21 of 2000, s. 92 and sch. II (w.e.f. 17-10.2000).

held that the law relating to admissibility of electronic evidence as introduced by an amendment in year 2000 is a complete code in itself. It opined as under:[144]

> The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself.

Any documentary evidence by way of an electronic record under the IE Act, in view of sections 59 and 65A can be proved only in accordance with the procedure prescribed under section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non-obstante clause. Thus, notwithstanding anything contained in the IE Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under section 65B(2).

In the categorical statement of law, the apex court held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65B are satisfied. The court laid down the conditions as stipulated under section 65B (2) of the IE Act as under:[145]

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

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144 *Anvar P.V.* v. *P.K. Basheer* (2014) 10 SCC 473, 485.

145 *Id*. at 486.

Under section 65B(4) of IE Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:[146]

(i) There must be a certificate which identifies the electronic record containing the statement;

(ii) The certificate must describe the manner in which the electronic record was produced;

(iii) The certificate must furnish the particulars of the device involved in the production of that record;

(iv) The certificate must deal with the applicable conditions mentioned under Section 65B (2) of the Evidence Act; and

(v) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. It further clarified as under: [147]

> It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

The question of genuineness of electronic evidence would be considered only if the admissibility of same is determined as per procedure laid down in section 65 B of the IE Act. The court opined as under: [148]

> Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.
>
> The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

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146 *Id*. at 484.

147 *Id*. at 486.

148 *Supra* note 146.

Sting operation

The Supreme Court of India delivered a landmark decision on the aspect of legality, ethical and moral questions surrounding 'sting operation' which has become so popular in the context of Indian criminal investigation system to expose the crimes being committed. The Supreme Court of India in the matter of *Rajat Prasad* v. *CBI*[149], recorded the legal position as applicable in India that unlike other jurisdiction like USA where a sting operation is recognised as a legal method of law enforcement, in a limited manner, the same is not the position in India.[150] However, the court noted that a sting operation carried out in public interest has had the approval in the matter of *R.K. Anand* v. *Registrar, Delhi High Court*,[151] though it will be difficult to understand the ratio of the said case as an approval of such a method as an acceptable principle of law enforcement valid in all cases.[152]

Citing the relevant case laws, decisions of the Supreme Court of Canada, USA, and UK relating to 'sting operation' *vis-a-vis* 'entrapment, the Supreme Court discussed the subtle aspect and appreciated the difference between 'the trap for the unwary innocent and the trap for the unwary criminal'[153] as approved by the US Supreme Court. Similarly, the jurisprudence developed by the Supreme Court of Canada on the issue as explained in the decision of *R* v. *Mack*[154] on entrapment was noted as follows: [155]

That entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence. The following factors determine whether the police have done more than to provide an opportunity to commit a crime:

(1) The type of crime being investigated and the availability of other techniques for the police detection of its commission.

(2) whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;

(3) the persistence and number of attempts made by the police before the accused agreed for committing the offence;

(4) the type of inducement used by the police including: deceit, fraud, trickery or reward;

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149 (2014) 6 SCC 495.

150 *Id*. at 504.

151 (2009) 8 SCC 106.

152 *Rajat Prasad* v. *CBI* (2014) 6 SCC 495, 504.

153 *Sherman* v. *United States*, 2 L. Ed. 2d 848: 356 US 369 (1958), (Warren, C.J.).

154 (1988) 2 SCR 903 (Can SC).

155 *Id*.; also see *Rajat Prasad* v. *CBI* (2014) 6 SCC 495, 504-505.

(5) the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;

(6) whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;

(7) whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;

(8) the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;

(9) the existence of any threats, implied or express, made to the accused by the police or their agents;

(10) whether the police conduct is directed at undermining other constitutional values.

In the matter of *Rajat Prasad* v. *CBI*,[156] the court considered and expressed its opinion in following words: [157]

> ...[W]hat would be the position of such operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender honey trapped into committing the crime, but that of the sting operator who had stained his own hands while entrapping what he considers to be the main crime and the main offender. Should such an individual i.e. the sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is sought to be established? Should the commission of the first offence be understood to be obliterated and extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to public interest? Can the commission of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the "main culprit" and its exposure before the public?

The court without answering and laying down the law on above questions as pointed, opined that it would depend on the facts and circumstances thereof,[158]

156 (2014) 6 SCC 495.

157 *Id*. at 506.

158 *Ibid*.

whether the sting operation was a journalistic exercise or a well thought criminal design would be answered by the evidences of the parties. The court also noted that the long gap between the operation and the circulation thereof to the public is another relevant facet of the case that would require examination by the competent court.

Section 91 & 92

Chapter VI of the IE Act, 1872 deals with the admissibility of documents and the extent to which oral evidences are excluded. The law on this point has been further crystallised in the survey year so as to avoid the confusion regarding admissibility of documents. In the matter of *Omprakash* v. *Laxminarayan*,[159] the Supreme Court decided the admissibility of a document/instrument which is not sufficiently stamped. The Supreme Court of India while referring the mandate of section 35 of the Indian Stamp Act, 1899 held:[160]

> ....an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was in admissible in evidence.

The court further upheld the finding and conclusion of the high court that if in a document certain recitals are made then the court would decide the admissibility of the document on the strength of such recitals and not otherwise[161]. It further held and observed that in cases of unregistered sale deed where parties say that the same is not required to be registered then the courts are not required to admit the document because simply the parties say so. In all such cases, the jurisdiction of the court flows from sections 33, 35 and 38 of the Stamp Act,1899 read with section 91 of the IE Act and court has to decide the question of admissibility of such documents.

In another landmark decision in *Central Bureau of Investigation* v. *Ashok Kumar Aggarwal*,[162] emphasising the importance and purpose of section 91 and 92 of IE Act, 1872, the court observed as under: [163]

> The provisions of Sections 91 and 92 of the Evidence Act provide that evidence may be led to invalidate a document itself. The best evidence as to the contents of a document is the document itself and it is the production of the document that is required by this section

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159 (2014) 1 SCC 618.

160 *Id*. at 624.

161 *Id*. at 625.

162 (2014) 14 SCC 295.

163 *Id*. at 312 (B.S. Chauhan, J).

> in proof of its contents. Section 91 describes the "best evidence rule", while Section 92 comes into operation for the purpose of excluding evidence of any oral agreement, statement etc., for the purpose of contracting or adding or subtracting from its terms. However, these sections differ in some material particulars. (emphasis added)

Burden of proof

While analysing the plea of right of private defence and burden of proof under section 105 of the IE Act, 1872, the apex court in the case of *State of Rajasthan* v. *Manoj Kumar*, [164] it held as under: [165]

> ...[T]he plea of right of private defence arises on the base of materials on record. As far as onus is concerned, we find that there is ocular and documentary evidence to sustain the concept of preponderance of probability. It cannot be said that there is no material on record or scanty material to discard the plea. Thus, the aforesaid submission being unacceptable, are hereby repelled.

However, in *Mohd. Ramzani* v. *State of Delhi*,[166] the court has that: [167]

> ….[I]t is trite that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the un-shifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt.

It is one of the cardinal principle of criminal jurisprudence that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under section 106[168] of the IE Act to establish that he was not guilty. The Supreme Court in *Joydeb Patra* v. *State of West Bengal*[169] held

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164 (2014) 5 SCC 744.

165 *Id*. at 750.

166 1980 Supp SCC 215.

167 *Id*. at 221; also see *State of Rajasthan* v. *Manoj Kumar* (2014) 5 SCC 744, 750.

168 Indian Evidence Act, 1872, s.106 reads:

> Burden of proving fact especially within knowledge.—when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

169 (2014) 12 SCC 444.

that the prosecution has not been able to discharge its burden of establishing beyond reasonable doubt to the effect that the deceased died due to poisoning, the trial court and the high court could not have held the appellants guilty just because the appellants have not been able to explain under what circumstances the deceased died.

The court reiterated the time tested and valued principle of 'burden of proof' vis- a-vis the prosecution to prove the guilt of the accused beyond reasonable doubt and if two views are possible on the evidence adduced in the case, the view which is favourable to the accused should be adopted. In *Umakant* case[170] the court held that the evidence available on record and the dying declaration does not inspire confidence in the mind of this court to make it the basis for the conviction of the appellants.

Explaining as to how section 101 and section 106 of the IE Act operate, the Supreme Court of India in *Joshinder Yadav* v. *State of Bihar*[171] held that section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof. It is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

Further, in *State of Rajasthan* v. *Thakur Singh*[172], the Supreme Court emphasised on the real purpose of section 106 of the IE Act as follows: [173]

> ... it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.
>
> The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

The court further opined that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

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170 (2014) 7 SCC 405.

171 (2014) 4 SCC 42; also see *Shambhu Nath Mehra* v. *State of Ajmer*, AIR 1956 SC 404.

172 (2014) 12 SCC 211; also see *Raj Kumar* v. *State of Madhya Pradesh* (2014) 5 SCC 313.

173 *Id*. at 216; also see *Shambhu Nath Mehra* v. *State of Ajmer*, AIR 1956 SC 404, 406.

Appreciation of evidence of the hostile witness

The survey year has witnessed numerous case laws on the evidence of 'hostile witness' and conviction based on it. It is settled legal position that the evidence of a hostile witness cannot be discarded as a whole and the relevant parts thereof, which are admissible in law, can be used, either by the prosecution or the defence.[174]

In *Periyasami* v. *State*,[175] the issue relating to the evidentiary value of evidence deposed by witnesses who have turned to be 'hostile' at later stage of trial, the Supreme Court opined as under: [176]

> It is trite that evidence of a hostile witness need not be completely discarded. The prosecution can use that part of his evidence which is corroborated by other evidence on record.

Section 112

In the matter of *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*,[177] the issue as to conflict between the DNA test which suggest contrary to the conclusive presumption as under section 112 of the IE Act, 1872 got resolved. In the case, the DNA test concluded that the appellant is not the biological father of the girl child, whereas the child has been born during the continuance of a valid marriage. Therefore, the provisions of section 112 of the IE Act conclusively prove otherwise about parenthood. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggested about the biological father. The apex court held that when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. The court in its decision opined that: [178]

> … Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank

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174 *Birju* v. *State of Madhya Pradesh* (2014) 3 SCC 471.

175 *Supra* note 78.

176 *Id*. at 73; also see *Bhajju @ Karan Singh* v. *State of Madhya Pradesh* (2012) 4 SCC 327.

177 (2014) 2 SCC 576.

178 *Id*. at 586.

> upon presumptions, unless science has no answer to the facts in issue.

The court opined that the section 112 of the IE Act, 1872 does not create a legal fiction but provides for presumption and distinction between the two as under: [179]

> …[T]he distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed.

Distinguishing the present case from the earlier decision of *Kamti Devi* v. *Poshi Ram*,[180] the Supreme Court held that, the husband has no opportunity whatsoever to have liaison with the wife and there was no DNA test held in the case. So, in the said background i.e. non- access of the husband with the wife, this court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act".[181]

In another decision, the Supreme Court emphasizing the use of scientific investigation like DNA profiling to determine the involvement/ commission of crime, in State of Gujarat v. *Kishanbhai*,[182] it held as under: [183]

> ...The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture.....[T]his scientific investigation would have unquestionably determined whether or not the accused-respondent was linked with the crime.

The survey year witnessed another decision by the Supreme Court wherein it emphasised the importance of DNA profiling as means of scientific investigation. In *Anil @ Anthonony Arikswamy Joseph* v. *State of Maharashtra*,[184] the apex court while rejecting the argument of tacit consent in the offences defined under section 377 of the IPC, the court laid down as under: [185]

> Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.

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179 *Ibid*.

180 (2001) 5 SCC 311.

181 *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik* (2014) 2 SCCC 576, 586.

182 (2014) 5 SCC 108.

183 *Id*. at 124.

184 (2014) 4 SCC 69.

185 *Id*. at 81.

It rejected the plea of consent of a passive agent, as it is not at all a defence, but, in the instant case, though a suggestion was made that the boy had not resisted, being in the company of the accused for few days, is of no consequence, he being a minor. When reliable evidence to prove the guilt of an accused is available, lapses in investigation would not result in grant of the benefit of doubt to an accused.[186]

Presumption under section 113 B

Added by an amendment in year 1986, section 113B of the IE Act by which the provision relating to presumption as to dowry death has been subject matter of much interpretation in recent years with an increased violence and particular form of crime against the woman. In the matter of *Tummala Venkateswar Rao* v. *State of Andhra Pradesh*,[187] the court while interpreting the expression 'soon before' held that the expression is a relative term which is required to be considered under specific circumstances of each case and no straightjacket formula can be laid down by fixing any time-limit. The apex court further clarified that the expression 'soon before' is not synonymous with 'immediately before' and it would imply that the interval should not be much between the cruelty or harassment concerned and the death in question; showing an existence of proximate and live link.[188] It is equally important to note that the Supreme Court further held that no presumption would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment, the dispute stood resolved and there was no evidence of cruelty or harassment thereafter.

In *Bhupendra* v. *State of Madhya Pradesh*,[189] the Supreme Court held that for the purposes of section 304B IPC the mere fact of an unnatural death is sufficient to invite a presumption under section113-B of the IE Act.

In another landmark decision of *Sultan Singh* v. *State of Haryana*[190] the Supreme Court taking note of the purpose and essence of legislative amendment, it held that the expression "dowry" should be given an interpretation to correct the mischief. It held that the provision of section 304 B makes 'demand of dowry' itself punishable.[191] It further held that the presumption under section 113B of the IE Act is attracted only in case of suicidal or homicidal and not in case of an accidental death.[192]

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186 *Amar Singh* v. *Balwinder Singh* (2003) 2 SCC 518; also see *Takhaji Hiraji* v. *Thakore Kubersing Camansing* (2001) 6 SCC 145; *Ram Prasad* v. *State of UP* (1974) 1 SCR 650; *State of Gujarat* v. *Kishanbhai* (2014) 5 SCC 108.

187 (2014) 2 SCC 240

188 *Hira Lal* v. *State (Govt. of NCT Delhi)* (2003) 8 SCC 80; also see *Kailash* v. *State of Madhya Pradesh* (2006) 12 SCC 667.

189 (2014) 2 SCC 106, 112; also see *Taiyab Khan* v. *State of Bihar (Now Jharkhand)* (2005) 13 SCC 455.

190 (2014) 14 SCC 664.

191 *Id*. at 672.

192 *Chotan Sao* v. *State of Bihar* (2014) 4 SCC 54.

Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry-related deaths, and recording the need to bring such amendment by the legislature in relation to presumption of dowry death on proof of certain essentials, the Supreme Court in *Pradeep Kumar* v. *State of Haryana*[193] laid down that the presumption shall be raised only on proof of the following essentials:

(i) The question before the court must be whether the accused has committed the dowry death of the woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC).

(ii) The woman was subjected to cruelty or harassment by her husband or his relatives.

(iii) Such cruelty or harassment was for or in connection with any demand for dowry.

(iv) Such cruelty or harassment was soon before her death.

Presumption under section 114 A

Section 114A of the IE Act, 1872 was introduced by Parliament in year 2013 which laid down the rule as to presumption as to absence of consent in certain prosecution for rape. The Supreme Court in *Puran Chand* v. *State of Himachal Pradesh*[194] while negating the medical opinion in the case of rape; emphasized on the purpose of amendment and presumptions which it seeks to create as under: [195]

> .... [e]ven if there had been a doubt about the medical evidence regarding non-rupture of hymen the same would be of no consequence as it is well settled by now that the offence of rape would be held to have been proved even if there is an attempt of rape on the woman and not the actual commission of rape. Thus, if the version of the victim girl is fit to be believed due to the attending circumstances that she was subjected to sexual assault of rape and the trauma of this offence on her mind was so acute which led her to the extent of committing suicide which she miraculously escaped, it would be a travesty of justice if we were to disbelieve her version which would render the amendment and incorporation of Section 114A into the Indian Evidence Act as a futile exercise on the part of the Legislature which in its wisdom has incorporated the amendment in the Indian Evidence Act clearly implying and expecting the Court to give utmost weightage to the version of the victim of the offence of rape which definition includes also the attempt to rape.

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193 (2014) 7 SCC 395.

194 (2014) 5 SCC 689; also see *State of Gujarat* v. *Ratansingh @ Chinubhai Anopsingh Chauhan* (2014) 5 SCC 16.

195 *Id*. at 696.

Estoppel

Section 115 of the IE Act provides that when one person has by his declaration act or commission, intentionally causes or permits another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in the suit or proceeding between herself and such person or his representative shall be allowed in the suit or proceeding between herself and such person or his representation, to deny the truth of that thing. In *Pratima Chodhary* v. *Kalpana Mukherjee*[196] the apex court held that it is a fit case to invoke the doctrine of estoppels in the facts and circumstances of the case.

Competent witness

Child Witness

Section 118[197] of the IE Act lays down as 'who may testify' essentially outlining the 'competent witness'. The reliance placed on and evidentiary value of 'child witness' is always questioned because of their tender age, their capacity to understand and speak truth about incident and their susceptibility to be tutored etc.[198] It further held that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence.[199]

The Supreme Court further stressed the manner and precaution to be adopted in the cases of evaluation of child witness in following words: [200]

> The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

The Supreme Court has examined the issue of competency of witness vis-à-vis child witness in *Raj Kumar* v. *State of Madhya Pradesh*[201] and reiterated the settled legal position as follows: [202]

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196 (2014) 4 SCC 196.

197 S.118. Who may testify

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation—A lunatic is not incompetent to testify, unless he is prevented by his Lunacy from understanding the questions put to him and giving rational answers to them.

198 *State of Rajasthan* v. *Chandgi Ram* (2014) 14 SCC 596.

199 *Ibid*.

200 *Id*. at 602; also see *State of M.P.* v. *Ramesh* (2011) 4 SCC 789, 792.

201 (2014) 5 SCC 353.

202 *Id*. at 359-360.

> It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him.

However, the legal principles on the issues of competency as child witnesses can be summarised herein as below:

(i) The deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. [203]

(ii) A court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored.[204]

(iii) The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. [205]

(iv) Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.[206]

(v) The child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.[207]

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203 *State of Madhya Pradesh* v. *Ramesh* (2011) 4 SCC 786.

204 (2014) 5 SCC 353.

205 *Supra* note 204.

206 *Suryanarayana* v. *State of Karnataka,* AIR 2001 SC 482.

207 *Radhey Shyam* v. *State of Rajasthan* (2014) 5 SCC 389.

Sole Witness

In *Veer Singh* v. *State of Uttar Pradesh*[208], the issue relating to evidentiary value of sole witness was considered by the Supreme Court. The court while reiterating the settled legal position and upholding the intent of section 134[209] of the IE Act, 1872 held that in the present case the evidence of sole witness is cogent, credible and trustworthy and has a ring of truth, cogent, credible, trustworthy and deserves acceptance.[210] It is further noted that the law has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witness. It is a time-honoured principle that evidence must be weighed and not counted.[211] In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. The Supreme Court observed as under: [212]

> It is not the number of witnesses but-quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/ disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable.

In *Gulam Sarbar* v. *State of Bihar* (now Jharkhand),[213] the Supreme Court laid down as under: [214]

> Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more

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208 (2014) 2 SCC 455.

209 S. 134 of IE Act read as under:-

Number of witnesses.—No particular number of witnesses shall in any case be required for the proof of any fact.

210 *Veer Singh* v. *State of Uttar Pradesh* (2014) 2 SCC 455, 464; also see *Gulam Sarbar* v. *State of Bihar (now Jharkhand)* (2014) 3 SCC 401.

211 *Gulam Sarbar* v. *State of Bihar* (now Jharkhand) (2014) 3 SCC 401.

212 *Supra* note 210; also see *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614; *Kunju @ Balachandran* v. *State of Tamil Nadu*, AIR 2008 SC 1381; *Bipin Kumar Mondal* v. *State of West Bengal*, AIR 2010 SC 3638; *Mahesh*. v. *State of Pradesh* (2011) 9 SCC 626; *Prithipal Singh* v. *State of Punjab* (2012) 1 SCC 10 and *Gulam Sarbar* v. *State of Jharkhand* (2014) 3 SCC 401.

213 (2014) 3 SCC 401.

214 *Id*. at 411; also see *Vadivelu Thevar* v. *State of Madras*, AIR 1957 SC 614; *Kunju @ Balachandran* v. *State of Tamil Nadu*, AIR 2008 SC 1381; *Bipin Kumar Mondal* v. *State of West Bengal*, AIR 2010 SC 3638; *Mahesh*. v. *State of Madhya Pradesh Pradesh* (2011) 9 SCC 626; *Prithipal Singh* v. *State of Punjab* (2012) 1 SCC 10 and *Kishan Chand* v. *State of Haryana*, JT 2013 (1) SC 222.

> witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence.

Related witness

It is one of the cardinal principle of evidence law that the credibility of a witness needs to be tested, irrespective of the status or relation of the witness to the deceased or victim of crime. The Supreme Court in *State of Rajasthan* v. *Chandgi Ram*[215] laid down succinctly and upheld the legal principle governing the evidences given by 'related witness' as under:[216]

> ...[W]e fail to understand as to why the evidence of the witnesses should be discarded solely on the ground that the said witnesses are related to the deceased. It is well settled that the credibility of a witness and his/her version should be tested based on his/her testimony vis-à-vis the occurrence with reference to which the testimonies are deposed before the Court. As the evidence is tendered invariably before the Court, the Court will be in the position to assess the truthfulness or otherwise of the witness while deposing about the evidence and the persons on whom any such evidence is tendered. As every witness is bound to face the cross-examination by the defence side, the falsity, if any, deposed by the witness can be easily exposed in that process. The trial Court will be able to assess the quality of witnesses irrespective of the fact whether the witness is related or not. Pithily stated, if the version of the witness is credible, reliable, trustworthy, admissible and the veracity of the statement does not give scope to any doubt, there is no reason to reject the testimony of the said witness, simply because the witness is related to the deceased or any of the parties (emphasis added).

Accomplice

In *Chandra Prakash* v. *State of Rajasthan*,[217] the interrelationship of section133[218] and section 114[219] dealing with the evidence of 'approver' or

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215 (2014) 14 SCC 596; also see *Mano Dutt* v. *State of Uttar Pradesh* (2012) 4 SCC 79; *Dinesh Kumar* v. *State of Rajasthn* (2008) 8 SCC 270.

216 *Id*. at 603-604.

217 (2014) 8 SCC 340.

218 S.133. Accomplice.—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

219 S.114. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume—

'accomplice' was examined. The Supreme Court after analysing the relevant decisions held that the former, which is a rule of law, an accomplice is competent to give the evidence, and according to the later which is a rule of practice it is almost always unsafe to convict upon his testimony alone.[220] Though a conviction based upon accomplice evidence is legal the court will not accept such evidence unless it is corroborated in material particular.[221]

Cross examination

Right to cross examination is an essential constitutional as well legal right. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised.[222] The Supreme Court in *Mahavir Singh* v. *State of Haryana*[223] held that defence had never put any question for discrepancies in deposition to the material witness who could furnish the explanation for the same. Therefore, once the chain of all the circumstantial evidence is complete, the material discrepancies pointed out could not be an impediment in determining the guilt of accused.

Improvements of evidences

The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.[224]

Evidentiary value of inquest report

The inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither

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(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

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

220 *Bhiva Doulu Patil* v. *State of Maharashtra,* AIR 1963 SC 599.

221 *Mohd. Husain Umar Kochra* v. *K.S. Dalipsinghji* (1969) 3 SCC 429.

222 *Atluri Brahmanandam (D), Thr. LRs.* v. *Anne Sai Bapuji,* AIR 2011 SC 545; also see *Laxmibai (dead) Thr. L.Rs.* v. *Bhagwantbuva (dead) Thr. L.R.,* AIR 2013 SC 1204.

223 (2014) 6 SCC 716.

224 *Mahavir Singh* v. *State of Haryana* (2014) 6 SCC 716; also see *State of Rajasthan* v. *Rajendra Singh,* AIR 1998 SC 2554; *State Represented by Inspector of Police* v. *Saravanan,* AIR 2009 SC 152; *Arumugam* v. *State,* AIR 2009 SC 331; *Mahendra Pratap Singh* v. *State of Uttar Pradesh* (2009) 11 SCC 334; *Vijay alias Chinee* v. *State of M.P.* (2010) 8 SCC 191; *State of U.P.* v. *Naresh* (2011) 4 SCC 324; *Brahm Swaroop* v. *State of U.P.,* AIR 2011 SC 280 and *Dr. Sunil Kumar Sambhudayal Gupta* v. *State of Maharashtra* (2010) 13 SCC 657).

the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warrant benefit of doubt to the accused.[225]

Evidence collected by improper means

In *Madhu @ Madhurantha* v. *State of Karnataka*,[226] reiterating the evidence collected by any means if their genuineness has been proved, the Supreme Court held as under: [227]

> It is a settled legal proposition that evidence collected even by improper or illegal means is admissible if it is relevant and its genuineness stands proved. However, the court may be cautious while scrutinizing such evidence. In such a fact–situation, it may be considered a case of procedural lapse on the part of the Investigating Officer and it should not be discarded unless the appellant satisfies the court that any prejudice has been caused to him.

Independent witness

The Supreme Court in *Madhu @ Madhurantha* v. *State of Karnataka*[228] held that there is no reason as why a policeman cannot be an independent witness as under: [229]

> Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.

Non –examination of material witness

The Supreme Court in *Deny Bora* v. *State of Assam*[230] held that it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution's case.[231] In this case, considering all relevant evidence on the

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225 Madhu @ Madhurantha v. State of Karnataka (2014) 12 SCC 419; also see *Pooda Narayan* v. *State of A.P*., AIR 1975 SC 1252; *Rameshwar Dayal* v. *State of U.P*., AIR 1978 SC 1558; *Kuldeep Singh* v. *State of Punjab*, AIR 1992 SC 1944; *George* v. *State of Kerala*, AIR 1998 SC 1376; *Suresh Rai* v. *State of Bihar*, AIR 2000 SC 2207 and *Munshi Prasad* v. *State of Bihar*, AIR 2001 SC 3031.

226 (2014) 12 SCC 419.

227 *Id*. at 431; also see *Umesh Kumar* v. *State of Andhra Pradesh*, JT 2013 (12) SC 213; *Pooran Mal* v. *Director of Inspection, Income-Tax, New Delhi*, AIR 1974 SC 348.

228 *Ibid*.

229 *Id*. at 429.

230 (2014) 14 SCC 42.

231 *Id*. at 46.

record and the facts and circumstances of the case, the court held that the prosecution has otherwise not been able to establish the case and non-examination of material witness cannot be regarded as inconsequential.[232]

However, for the sake of brevity, the important legal principle governing the law relating to non-examination of material witnesses could be culled out as under:

(i) That a failure on the part of the prosecution in non-examining the two children, aged about six and four years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution.[233]

(ii) Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be.[234]

(iii) The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution.[235]

(iv) The court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.[236]

(v) That if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case.[237]

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232 *Id*. at 47.

233 *Surinder Kumar* v. *State of Haryana* (2011) 10 SCC 173.

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

235 *Ibid*.

236 *Ibid*.

237 *Takhaji Hiraji* v. *Thakore Kubersing Chamansing* (2001) 6 SCC 145.

(vi) That if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. [238]

(vii) That the Court should pose the question whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examine and yet was being withheld from the court. If the answer is positive then only a question of drawing an adverse inference may arise.[239]

(viii) That when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution.[240]

Duty of court to appreciate evidence

Examining the hurriedly considered criminal case, the court took the view that the hurried disposal of a case may bury the principle of criminal justice. In *Patel Rameshbhai Ranchodbhai* v. *State of Gujarat,*[241] the Supreme Court emphasised that the prime duty of the trial court to appreciate the evidence for search of truth is abandoned and in a hurry to dispose of the case or for some other reason, the sessions judge had disposed of the trial and acquitted the accused.

Appreciation of evidence by appellate court

The Supreme Court listed the general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal in *Nallabothu Ramulu @ Seetharamaiah* v. *State of A.P*.[242] as follows:[243]

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

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

(iii) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail

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238 *Deny Bora* v. *State of Assam* (2014) 14 SCC 42.

239 *Ibid*.

240 *Dahari* v. *State of U.P.* (2012) 10 SCC 256.

241 (2014) 4 SCC 657.

242 (2014) 12 SCC 261.

243 *Id*. at 266-267.

extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

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

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.[244]

(vi) While re-appreciating the evidence, the rule of prudence requires that the High Court should give proper weight and consideration to the views of the trail judge.[245]

(vii) The Appellate Court may re-appreciate the evidence when it is satisfied that the Trial Court has committed an error and has failed to consider the credibility and trustworthiness of the account given by the eye-witnesses.[246]

In another landmark decision of *Muralidhar @ Gidda* v. *State of Karnataka*,[247] the Supreme Court listed out the following guidelines for appellate courts while appreciating evidences:[248]

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court,

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal,

(iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers

244 *Pundappa Yankappa Pujari* v. *State of Karnataka* (2014) 12 SCC 372.

245 *Dwarka Dass* v. *State of Haryana* (2003) 1 SCC 204.

246 *Supra* note 244..

247 (2014) 5 SCC 730.

248 *Id*. at 736.

> in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and
>
> (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

It is an established principle of law that the maxim of 'falsus in uno, falsus in omnibus' i.e., false in one thing, false in everything has no application in India and rejected with all clarity by the Supreme Court in its entirety in numerous decision.[249] It is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment.[250]

Appreciation of investigating agency & judicial proceedings below

The Supreme Court appreciated the investigating agency and the manner in which judicial proceedings were conducted in the case of *Raj Kumar* v. *State of Madhya Pradesh*[251] as under: [252]

> that in the instant case investigation and all judicial proceedings upto this Court stood concluded in less than 8 months from the date of incidence. Thus, it is an exemplar of expeditious justice in country of chronic delay by smooth functioning of investigating agency,

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249 *Nisar Ali* v. *State of U.P.,* AIR 1957 SC 366; also see *Gurcharan Singh* v. *State of Punjab,* AIR 1956 SC 460; *Ugar Ahir* v. *State of Bihar* AIR 1965 SC 277.

250 *Bijender Singh* v. *State of Haryana* (2014) 12 SCC 412; also see *Krishna Mochi* v. *State of Bihar* (2002) 6 SCC 81; *Sucha Singh* v. *State of Punjab* (2006) 10 SCC 601; *Jakki @ Selvaraj* v. *State Represented by the IP, Coimbatore* (2007) 9 SCC 589 and *Dalbir Singh* v. *State of Haryana* (2008) 11 SCC 425.

251 (2014) 5 SCC 353.

252 *Id*. at 363.

> courts and the members of legal fraternity. We expect such prompt disposal of cases specifically in cases of such grave nature.

Social background and criminal justice system

In *Badal Murmu* v. *State of West Bengal*,[253] the Supreme Court considered the social background as relevant factor while deciding and determining the criminality in the facts and circumstances of the case. It pithily observed while distinguishing the case at hand from rest of the case as under:[254]

> Before parting we must note certain special features of this case, which distinguish it from other cases. It is an unusual case where a trivial incident led to a murder. The appellants as well as the material witnesses belong to Santhal community. They are tribals. They come from a very poor strata of the society and appear to be untouched by the effect of urbanization. They live in their own world. They are economically so weak that possession of a hen is very important to them. The deceased-Jhore Soren stole a hen, killed it and made a feast out of it. This angered the community and the village panchayat penalized deceased- Jhore Soren. He was ordered to give a hen to appellant Bhagbat and, in addition, he had to give two handies of liquor. Though, there can be no justification for the appellants' actions, their anger and reaction to the theft of hen must be viewed against the background of their economic and social status. Moreover, we are informed that the appellants are in jail for almost 14 years. Apart from the legal angle, this, in our view, is a case where justice must be tempered with mercy.

In the present set of circumstances of the case, the Supreme Court in its opinion, convicted the appellants for culpable homicide not amounting to murder and sentenced them for the period already undergone by them by resorting to section 304 Part II of the IPC to meet the ends of justice.

In another decision of *Ashok Rai* v. *State of Uttar Pradesh*,[255] the Supreme Court rejected the unnecessary weightage and due given to the social status of accused by the trial court. It observed as under:[256]

> …[C]areer or a position of a man in life is irrelevant. Crimes are also committed by men holding high positions and having bright future. Trial court grossly erred in relying on such extraneous circumstance and rightly the High Court dismissed this circumstance as irrelevant.

Considering the magnitude of crime committed and barbaric yet heinous crimes committed by such perpetrators of crime, and popular sentiments build

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253 (2014) 3 SCC 366.

254 *Id.* at 372

255 (2014) 5 SCC 713.

256 *Id*. at 722.

through various means in favour of accused, the Supreme Court lamented and observed a note of caution in following words: [257]

> ...[T]he general feeling of the society has no relevance to a criminal case. A court deciding a criminal case must go by the legal evidence adduced before it. The trial court's order thus suffered from a gross error of law warranting the High Court's interference.

General principle of criminal jurisprudence

The Supreme Court recorded its anguish and pain about the wrongful acquittals in criminal cases by the lapse of both investigating agency and prosecuting agency as well as judicial side in the decision of *Prem Kumar Gulati* v. *State of Haryana*[258] in the following words:[259]

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Alien: [260]

> I dare say some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.

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257 *Id*. at 722.

258 (2014) 14 SCC 646.

259 *Id*.at 655.

260 Glanville Williams, *The Proof of Guilt* (Stevens & Sons, London, 2nd edn., p. 157.

II CONCLUSION

This survey has witnessed a number of remarkable and path- breaking decisions on 'law of evidence' specially on the admissibility of electronic evidence, evidentiary value of sting operations, appreciation of evidences by the appellate courts, competency of child witnesses and dying declaration. The principle of law has been settled by the authoritative pronouncement of decisions by the Supreme Court on some of the emerging issues which is being faced by investigating agency as well as judicial branch more frequently than ever. As the society is getting guided and influenced by technology driven development, the progressive interpretations by the Supreme Court seeks to balance the competing interest of criminal justice system vis –a-vis inviolable rights, which are fundamental to the human civilization being governed by rule of law under the aegis of the constitutional governance. The author signs off with a word of appreciation of the Supreme Court for the meticulous and impressive decisions rendered by it. The 'law declared by it' would certainly contribute positively towards the administration of justice.