20
LAW OF EVIDENCE

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I INTRODUCTION

THE PRESENT survey on Law of Evidence for the year 2013 takes into accounts the cases/ decisions/ judgments given by the Supreme Court of India. The survey on 'law relating to Evidence' focuses much on the decisions rendered by the Supreme Court of India in relation to issues arising out of various provisions of the Indian Evidence Act, 1872- a colonial legislation. The survey assumes importance in the light of government policy to have clarity on aspects of law, to repeal the obsolete provisions of statutes and to make the Indian laws in tune with the contemporary needs and standards. The Indian Evidence Act, 1872 (hereinafter referred to as (IE Act, 1972) has been amended suitably to incorporate the changes and to cater to the needs of very changing societal structure and its form. In the survey year 2013, the Parliament has enacted the Criminal Law (Amendment) Act, 2013 for specifically dealing the 'sexual offences', in this process, the Parliament has amended Indian Penal Code, 1860 (IPC), Criminal Procedure Code, 1973 (Cr PC) along with the IE Act, 1872 to update the legal principles relating to law of evidence with the changes in the legal principles relating to sexual offences and other allied issues. Section 53-A has been inserted to deal with the evidence relating to character and previous sexual experience and its relevance. Section 114-A has also been substituted which provides for presumption against the accused and the existing principle of presumption in favour of accused has been modified accordingly. Section 119 has been substituted for evidence of a witness who is unable to speak or to communicate verbally to permit the admissibility of written evidence or the signs. At the same time, the *proviso* in section 146 of the IE Act, 1872 has been substituted thereby disallowing questions of general nature to the prosecutrix in cross-examination.

An attempt has been made to analyse and crystallise the proposition of law under various sub- heads in the ascending order of the sections under IE Act, 1872. The survey takes into account those cases which have been reported in Supreme Court Cases and other journals. The Supreme Court in several of its

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decision has stressed on the appreciation of evidence, the social purpose which is sought to be achieved by the criminal justice system. The Supreme Court also stressed on the public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. The court while upholding the dictum that the mechanical rejection of the evidence on the sole ground that it is interested would invariably lead to the failure of justice and also emphasized on the cardinal principle of presumptions that a person is not guilty till he is so proved and if two views are possible on the evidence adduced then the view which is favourable to the accused should be adopted. However, the Supreme Court also sounded the note of caution for the paramount consideration of the court is to ensure that miscarriage of justice is prevented by the courts.

II INTERPRETATION CLAUSES

Motive

The definition of 'motive' in the statute book is either illustrative or definitive, which causes a trouble for the judicial authority/ judges who always entangle with the question of 'motive' in deciding a criminal case. As 'motive' constitute an essential hallmark of criminal jurisprudence in India–it always needs to be proved[1] or disproved[2] in a criminal case. In *Birendra Das* v. *State of Assam*,[3] the Supreme Court held that where there is clear proof of motive for the crime, that leads additional support to the finding of the court that the accused was guilty, but absence of clear proof of motive does not necessarily lead to the contrary conclusion. The consistent judicial approach on the issue of 'motive' is further strengthened of the dictum that the acceptation of the direct evidence on record on proper scrutiny and analysis of proof of existence of motive or strength of motive does not affect the prosecution case. [4] The court further noted succinctly as well as realistically about the subjective aspect of 'motive'; frailty and uncertainty of determination of 'motive' by human minds while deciding a particular case in following words:

> That apart, it is always to be borne in mind that different motives may come into operation in the minds of different persons, for human nature

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1 S. 3, Interpretation Clause : "Proved" – A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

2 S. 3, Interpretation Clause : "Disproved" - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non- existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

3 (2013) 12 SCC 236; also see *Atley* v. *State of U.P.* AIR 1955 SC 807.

4 *State of Uttar Pradesh* v. *Kishanpal* (2008) 16 SCC 73.

> has the potentiality to hide many things and that is the realistic diversity of human nature and it would be well nigh impossible for the prosecution to prove the motive behind every criminal act.[5]

However, the fragile and inconsistent approach of courts in determination of motive is reflective of dynamism and importance attached to the facts and circumstances of a particular case in criminal matters. Sometimes, courts give priority and weight to the 'motive' in a particular set of facts and circumstances whereas invariably in cases of presence of credible eye-witnesses and other direct evidences, the court has opined that 'motive' loses its significance.[6] The following pointer sums up the law on point: [7]

(i) The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one.

(ii) The motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing.

(iii) Even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

(iv) Acceptation of the direct evidence on record on proper scrutiny and analysis of proof of existence of motive or strength of motive does not affect the prosecution case.

(v) While motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence.

The substance of section 8 of the Evidence Act which deals with 'Motive, preparation and previous and subsequent conduct' is upheld and reinforced in the decision of *Harivadan Babubhai Patel* v. *State of Gujarat*[8] wherein it was held that the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The court further relied on the precedent in *State of Maharashtra* v. *Damu S/o Gopinath Shinde*, [9] wherein it was

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5 *Birendra Das* v. *State of Assam* (2013) 12 SCC 236, 243

6 *Rishipal* v. *State of Uttarakhand* (2013) 12 SCC 551.

7 *Sukhram* v. *State of Maharashtra* (2007) 7 SCC 502; also see *Sunil Clifford Daniel (Dr.)* v. *State of Punjab* (2012) 8 SCALE 670; *Pannayar* v. *State of Tamil Nadu*,(2009) 9 SCC 152.

8 (2013) 7 SCC 45.

9 (2006) 6 SCC 269.

held that the recovery of an object is not discovery of a fact as envisaged in the section. It also reiterated the settled proposition of law that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.[10]

Presumptions

The presumptions under 'Law of Evidence' play an important role. Although, the Evidence Act, 1872 defines 'may presume' and 'shall presume' in section 4 of the Evidence Act, the Supreme Court of India, in the matter of *Rev. Mother Marykutty* v. *Reni C Kottaram*,[11] opined about presumptions as under: [12]

> Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be evidence even for the purpose of drawing presumption under another.

'May be', 'must be', 'will be proved'

The Supreme Court of India in another notable decision in the case of *Sujit Biswas* v. *State of Assam*[13] had occasion to deal with the subtle yet important difference between the expression 'may be', 'must be' and 'will be proved'. It is important to note that all these expression has been articulated and analysed by the Supreme Court in this case, and the language of the provisions under IE Act, 1872 uses it frequently. The court in this case highlighted the importance in backdrop of cases where the conviction is based on circumstantial evidence. It has observed as under: [14]

> Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be'

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10 *State of Maharashtra* v. *Suresh* (2000) 1 SCC 471; also see *State of Punjab* v. *Gurnam Kaur and others* (2009) 11 SCC 225; *Aftab Ahmad Anasari* v. *State of Uttaranchal* (2010) 2 SCC 583; Bhagwan Dass v. State (NCT) of Delhi, AIR 2011 SC 1863; *Manu Sharma* v. *State* (2010) 6 SCC 1, and *Rumi Bora Dutta* v. *State of Assam* (2013) 7 SCC 417.

11 (2013) 1 SCC 327.

12 (2013) 1 SCC 327, 334.

13 (2013) 12 SCC 406.

14 *Hanumant Govind Nargundkar* v. *State of M.P.* AIR 1952 SC 343, also see *State through CBI* v. *Mahender Singh Dahiya* AIR 2011 SC 1017; *Ramesh* v. *State of U.P.* AIR 2012 SC 1979.

> and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

The golden principle which runs through the web of administration of justice is that a person is considered not guilty until and unless the case has been proved against him.[15] Merely on suspicion and circumstances one cannot be held guilty. The court illustrating the 'standard of proof' required in cases of circumstantial evidences opined that 'graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof.'[16]

In case of *Sujit Biswas case*,[17] the Supreme Court further stated that any circumstances, in respect of which an accused has not been examined under section 313, cannot be used against him. The court further held that mere absconding from arrest does not lead to a firm conclusion of guilty mind.[18] It further opined as under: [19]

> An adverse inference can be drawn against the accused only and only if the incriminating material stands fully established, and the accused is not able to furnish any explanation for the same. However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself.

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15 The Supreme Court in the matter of *Babu* v. *State of Kerala* (2010) 9 SCC 189, has held that the presumptions of innocence is a human right.

16 *Shard Birdhichand Sarda* v. *State of Maharashtra* AIR 1984 SC 1622.

17 *Supra* note 13.

18 Also see, *Matru alias Girish Chandra* v. *State of U.P.,* AIR 1971 SC 1050, *State of M.P. through CBI* v. *Paltan Mallah* AIR 2005 SC 733.

19 *Supra* note 13 at 416.

Test identification parade (section 9)

The '*Test Identification Parade*'—a predominant feature at the investigation stage;[20] tests and strengthens the trustworthiness of the substantive evidence of a witness in a court[21] but it is not a piece of 'substantive evidence',[22] it may be used by the court for the purpose of corroboration[23] and always subject to the rule of prudence.[24]There is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade and failure to hold a test identification parade would not make inadmissible the evidence of identification in court.[25] In the case of *State of Maharashtra* v. *Lahu alias Lahukumar Ramchandra Dhekhane,* [26] the court held that there is no reason to doubt the identification of the accused by the independent witnesses.

Circumstantial evidence

The year 2013 has witnessed numerous decisions by the Supreme Court on 'circumstantial evidence'. Circumstantial evidence is a close companion of factual matrix, creating a fine network through which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit to arrive at any other inference but one, indicating the guilt of the accused. The golden principles popularly referred as 'panchsheel of circumstantial evidence' as laid down in the case of *Sharad Birdhichand Sarda* v. *State of Maharashtra*[27] was referred and discussed in each of the cases which have been decided in year 2013.[28] The rule of caution which the supreme court of India has pronounced in numerous decision which is like *magna carta* for the law on circumstantial evidence not only differs semantically rather than the various expressions / languages used in those decisions have the potential to be used differently and may create a silence of chaos. Section 27 of the IE Act, 1872 states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the

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20 *Munna Kumar Upadhyay @ Munna Upadhyaya* v. *State of Andhra Pradesh* (2012) 6 SCC 174.

21 *Ram Babu* v. *State of Uttar Pradesh* AIR 2010 SC 2143.

22 *Sidhartha Vashisht @ Manu Sharma* v. *State (NCT of Delhi);* (2010) 6 SCC 1; *Matru* v. *State of U.P*., 1971 (2) SCC 75.

23 *Supra* note 20; also see *Santokh Singh* v. *Izhar Hussain,* (1973) 2 SCC 406.

24 Exceptions to this rule is that the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

25 *Supra* note 20.

26 (2013) 10 SCC 292.

27 (1984) 4 SCC 116.

fact thereby discovered, may be proved. However, the proposition of law which emerges out from the ratio of decisions rendered in year 2013, are as under:

(i) That in the absence of direct evidence, the slightest of a discrepancy, depicting the possibility of two views would exculpate the accused of guilt, on the basis of benefit of doubt in cases of circumstantial evidences.[29]

(ii) That the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between '*may be proved*' and '*must be* or *should be proved*.[30]

(iii) That each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible.[31]

(iv) That in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof.[32]

(v) The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of innocence of the accused.[33]

(vi) That when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts.[34]

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28 In the survey year 2013, the cases which dealt with the circumstantial evidence were. *Sananullah Khan* v. *State of Bihar* (2013) 3 SCC 52; *Sunder alias Sundarajan* v. *State by Inspector of Police* (2013) 3 SCC 215; *Harivadan Babubhai Patel* v. *State of Gujarat* (2013) 7 SCC 45; *Anuj Kumar Gupta @ Sethis Gupta* v. *State of Bihar* (2013) 12 SCC 383; *Majendran Langeswaran* v. *State of NCT Delhi* (2013) 7 SCC192; *Rumi Bora Dutta* v. *State of Assam* (2013) 7 SCC 417*; Dharminder Singh @ Vijay Singh* v. *State* (2013) 12 SCC 263; *Tenjinder Singh alias Aaka* v. *State of Punjab* (2013) 12 SCC 503; *State of Himachal Pradesh* v. *Jai Chand* (2013)10 SCC 298, *State of Maharashtra* v. *Lahu @ Lahukumar Ramchandra Dhekhane* (2013) 10 SCC 292; *Rishipal* v. *State of Uttarakhand* (2013) 12 SCC 551; *R. Kuppusamy* v. *State represented by Inspector of Police, Ambeiligai* (2013) 3 SCC 322.

29 *Sunder alias Sundarajan* v. *State by Inspector of Police* (2013) 3 SCC 215.

30 Also see *Shivaji Sahebrao Bobade* v. *State of Maharashtra* 1973 Cri LJ 1783.

31 *Ibid*.

32 *Ibid*.

33 *Ibid*.

34 *Harivadan Babubhai Patel* v. *State of Gujarat* (2013) 7 SCC 45.

(vii) That the court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof.[35]

(viii) That there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from conclusions.[36]

(ix) That more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences.[37]

(x) When the other evidence on record are cogent, credible and meet the test of circumstantial evidence laid down in various decisions, then there is no justification to come to hold that the prosecution has deliberately withheld a witness that creates a concavity in the concept of fair trial.[38]

(xi) The circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind.[39]

(xii) The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused.[40]

Confession & its veracity (section 24-31)

Section 27 of the IE Act, 1872 deals with the issue that '*how much of information received from accused may be proved*'.[41] This provision of the IE Act, 1872 has been one of the most turbulent paths/ area and has received varied

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35 *Anuj Kumar Gupta @ Sethis Gupta* v. *State of Bihar* (2013) 12 SCC 383.

36 *Jaharlal Das* v. *State of Orissa* (1991) 3 SCC 27

37 *Supra,* note 29.

38 *Supra*, note 31.

39 *Majendran Langeswaran* v. *State of NCT Delhi* (2013) 7 SCC 192

40 *Ibid.*

41 S. 27, Indian Evidence Act, 1872.

interpretations by the judiciary depending upon the facts and circumstances of the each case. The year 2013 has also witnessed numerous decisions on the core issue of '*extra- judicial confession-its nature, its reliability & its applicability*' in upholding the conviction based on such piece of evidence. Section 27 of the Act states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.[42] Hence, the information received from the appellant pursuant to which the aforesaid incriminating materials were recovered is not only admissible but also has been proved. The following principles emerge out from the decision of *Sahadevan* v. *State of Tamil Nadu:*[43]

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

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

(iii) It should inspire confidence.

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

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

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

The Supreme Court of India in *Anuj Kumar Gupta @ Sethi Gupta* v. *State of Bihar*[44] while distinguishing the extra-judicial confession, stated as under:[45]

> 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 the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered. Similarly, this part of the statement which does not in any way implicate the accused but is mere

42 *Sananullah Khan* v. *State of Bihar,* (2013) 3 SCC 52. This presumption is based on the view that if a fact is actually discovered in consequence of information given and accordingly can be safely allowed to be given in evidence. But, the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to be related. Also see, *Ram Kishan Lal Sharma* v. *State of Bombay,* 1955 SCR 903.

43 (2012) 6 SCC 403.

44 (2013) 12 SCC 383.

45 *Id*. at 388-389.

> statement of facts would only amount to mere admissions which can be relied upon for ascertaining the other facts which are intrinsically connected with the occurrence, while at the same time, the same would not in any way result in implicating the accused in the offence directly.

In the case of *R. Kuppusamy* v. *State represented by Inspector of Police, Ambeiligai*,[46] the Supreme Court of India has laid down as under: [47]

> The legal position is fairly well-settled that an extra judicial confession is capable of sustaining a conviction provided the same is not made under any inducement, is voluntary and truthful. Whether or not these attributes of an extra judicial confession are satisfied in a given case will, however, depend upon the facts and circumstances of each case. It is eventually the satisfaction of the Court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if any, available as to the truth of such a confession that will determine whether the extrajudicial confession ought to be made a basis for holding the accused guilty.

In *Kumar* v. *State of Tamil Nadu*,[48] it was held that the extrajudicial confession could be relied alongwith other materials when it is made voluntary and in a fit state of mind. In the case of *Nana Keshav Lagad* v. *State of Maharashtra*,[49] the Supreme Court of India held that evidence tendered in another case, cannot be rejected on that ground alone.

Circumstantial evidence and last seen theory

The theory of 'last seen' has become one of the permanent feature of judicial decisions and the important tool in the hands of prosecution to establish the guilt of the accused in absence of any direct (oral, documentary) evidence. The complexity of cases and manner in which crimes are being committed, has necessitated the evolution of this theory through the judicial interpretations wherein the entire conviction is based on the circumstantial evidence. The 'Last Seen Theory' as propounded by the Supreme Court of India has been considered as a 'weak evidence' and so far the court has maintained the view that 'the last seen theory' may raise suspicion but it is not independently sufficient to lead to a finding of guilt In the case of *Rishipal* v. *State of Uttarakhand*,[50] the court discussed the principles of law governing the field. However, the court sounded few note of caution by referring to its precedent as under:

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46 (2013) 3 SCC 322.

47 *Id*. at 327.

48 (2013) 12 SCC 699.

49 (2013) 12 SCC 721.

50 (2013) 12 SCC 551.

(i) The solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded.[51]

(ii) That it is not possible to convict Appellant solely on basis of 'last seen' evidence in the absence of any other links in the chain of circumstantial evidence, the Court gave benefit of doubt to accused persons.[52]

Dying Declaration (oral)

The survey year 2013 witnessed numerous decisions by the Supreme Court of India on issue relating to admissibility, reliance and conviction which is solely based on 'Dying Declaration'. Having founded its root in legal maxim "*Nemo moriturus praesumitur mentire*" which essentially mean that a man will not meet his maker with a lie in his mouth,[53] the law relating to Dying Declaration has received varied interpretations based on facts and circumstances of the individual cases. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.[54] However, the fundamental legal position relating to the acceptability and evidentiary value of 'Dying Declaration'[55] remain intact with a minor development of law giving the exquisite and unique facts of certain cases. These are:

(i) The conviction can be founded solely on the basis of dying declaration if the same inspires full confidence.[56]

(ii) The conviction can be recorded on the basis of dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards the correctness or otherwise of the said dying declaration, the courts, in arriving at the judgment of conviction, shall look for some corroborating evidence.[57]

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51 *Arjun Marik* v. *State of Bihar* 1994 Supp (2) SCC 372.

52 *Jaswant Gir* v. *State of Punjab* (2005) 12 SCC 438.

53 For a lucid explanation and understanding of the juristic theory behind acceptability of 'Dying Declaration' kindly read the Constitution Bench decision of the Supreme Court in *Laxman* v. *State of Maharashtra* (2002) 6 SCC 710.

54 *Ibid.*

55 Although, IE Act, 1872 does not define 'Dying Declaration' but it forms an integral part of s. 32 of the Act, which deals with 'Cases in which statement of relevant fact by person who is dead or cannot be found, *etc.*, is relevant.

56 *Krishan* v. *State of Haryana* (2013) 3 SCC 280, *Khushal Rao* v. *State of Bombay* AIR 1958 SC 22 , *Kusa* v. *State of Orissa* AIR 1980 SC 559 and in *Meesala Ramakrishan* v. *State of A.P.* (1994) 4 SCC 182.

57 *Ramilaben Hasmukhbhai Khristi* v. *State of Gujarat* (2002) 7 SCC 56, *Ranjit Singh* v. *State of Punjab* (2006) 13 SCC 130.

(iii) The court, in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration, looks up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.[58]

(iv) A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.[59]

(v) There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate.[60]

(vi) It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination.[61]

(vii) It is the duty of the court to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.[62]

(viii) That a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused.[63]

(ix) That when it is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration, there was no justification or warrant to discard the credibility of such a dying declaration.[64]

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58 *Nanhau Ram* v. *State of M.P.* 1988 Supp SCC 152.

59 *Supra,* note 53.

60 *Ashabai* v. *State of Maharashtra* (2013) 2 SCC 224.

61 *Ibid*.

62 *Puran Chand* v. *State of Haryana* (2010) 6 SCC 566.

63 *Ibid*.

64 *Parbin Ali* v. *State of Assam* (2013) 2 SCC 81; *Prakash* v. *State of Madhya Pradesh* (1992) 4 SCC 225.

(x) Thus, emphasis was laid on the physical and mental condition of the deceased and the veracity of the testimony of the witnesses who depose as regards the oral dying declaration.[65]

(xi) The insistence of corroboration to a dying declaration is only a rule of prudence and not a necessity.[66]

(xii) When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration.

(xiii) The dying declaration has been proved in accordance with law, is a truthful version of the events that occurred and the circumstances leading to her death. The same is reliable and in fact, to some extent, finds corroboration from the statements of other witnesses.[67]

(xiv) It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration of the dying declaration.[68]

(xv) It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated.[69]

(xvi) Where the dying declaration suffers from an infirmity, the Courts will have to adopt a different course to adjudicate the matter in accordance with law.[70]

(xvii) It clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with the established practice and principles.[71]

(xviii) Considering the recording of dying declaration, procedure followed, her fitness to make a statement, the evidence of doctor and the evidence of Magistrate, who recorded her statement, it amply prove their case.[72]

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65 *Darshana Devi* v. *State of Punjab* 1995 Supp (4) SCC 126.

66 *Supra* note 60.

67 *Krishan* v. *State of Haryana* (2013) 3 SCC 280.

68 *State of Uttar Pradesh* v. *Ram Sagar Yadav.*(1985) 1 SCC 552.

69 *Supra* note 56.

70 *Munnu Raja* v. *State of Madhya Pradesh* (1976) 3 SCC 104.

71 *Bhajju @ Karan Singh* v. *State of Madhya Pradesh* (2012) 4 SCC 327.

72 *Rakesh* v. *State of Haryana* (2013) 4 SCC 69.

73 *Ibid.*

(xix) The claim that there was wrong description of names in the dying declaration and some of the relatives were present at the time of recording of dying declaration is not material contradictions which would affect the prosecution case.[73]

(xx) Conviction can indisputably be based on a dying declaration. But before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. Where the deceased himself/ herself had taken contradictory and inconsistent stand in different dying declaration, they should not be accepted on their face value.[74]

(xxi) The said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

(xxii) That the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon.[75]

(xxiii) That if the court finds that the capacity of the maker of the statement to narrate the facts was impaired, or if the court entertains grave doubts regarding whether the deceased was in a fit physical and mental state to make such a statement, then the court may, in the absence of corroborating evidence lending assurance to the contents of the declaration, refuse to act upon it.[76]

(xxiv) There is no statutory prescription as to in what manner or the procedure to be followed for recording a dying declaration to fall within the four corners of Section 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements.[77]

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74 *Kashi Vishwanath* v. *State of Karnataka* (2013) 7 SCC 162; also see *Mehiboobsab Abbasabi Nadaf* v. *State of Karnataka,* (2007) 13 SCC 112.

75 *Koli Chunilal Savji* v. *State of Gujarat*, AIR 1999 SC 3695; *Babu Ram* v. *State of Punjab*, AIR 1998 SC 2808.

76 *Laxmi* v. *Om Prakash* AIR 2001 SC 2383.

77 *Rafique @ Rauf* v. *State of Uttar Pradesh* (2013) 12 SCC 121.

(xxv) In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which any such statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person who made the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully support the case of the prosecution.[78]

(xxvi) That it was not absolutely mandatory that in every case a dying declaration should be recorded only by a Magistrate.[79]

(xxvii) That neither Section 32 of the Evidence Act nor Section 162(2) of the Cr PC, mandate that the dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation.[80]

Multiple Dying Declarations

In the matter of *Ashabai* v. *State of Maharashtra*,[81] the court examined the issue of multiple dying declarations and their evidentiary value. A close survey of the decisions on this issue by the Supreme Court of India leads to conclusion that the legal position is not settled as what is the fate of evidentiary value attached to such multiple dying declaration – the dying declaration which has a jurisprudential sanctity *i.e*. it is so solemn and true that a man at the death bed would not like to meet his maker with a lie on his lips. It observed as under:[82]

> When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other.

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78 *Ibid.*

79 *Cherlopalli Cheliminabi Saheb* v. *State of Andhra Pradesh* (2003) 2 SCC 571.

80 *Dhan Singh* v. *State of Haryana* (2010) 12 SCC 277.

81 (2013) 2 SCC 224.

82 *Supra* note 30.

The survey year had another occasion to deal with the issue of multiple dying declaration in the case of *Kashi Vishwanath* v. *State of Karnataka*[83] wherein it observed that consistency in the dying declaration is the relevant factor for placing full reliance. It further observed as under:[84]

> When the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied.

In the case of *Bhadragiri Venkata Ravi* v. *public Prosecutor, High Court of Andhra Pradesh, Hyderabad* [85] while highlighting the discrepancies in two dying declarations, the court observed that in case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not be safe to rely upon the same. In fact it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout. The court also noted that when material inconsistency is present in the dying declaration, as the accused did not have a right to examine or cross- examine the deceased, such dying declaration should not be relied upon.[86]

The issue as to what extent the reliance could be placed on the statement of hostile witnesses was examined by the Supreme court in the case of *Krishan* v. *State of Haryana*[87] where the veracity of dying declaration was questioned. The hostility of the witnesses is a relevant consideration, but is not the sole determinative factor for deciding the guilt or otherwise of an accused. The court emphasised that if the said dying declaration suffers from any infirmity then the court must look for corroboration otherwise, the conviction can be based upon it. The court after perusing catena of decisions on the issue of 'evidence by hostile witnesses'[88] held that in the present case the dying declaration has been proved in accordance

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83 (2013) 7 SCC 162.

84 *Id.* at 167.

85 (2013) 14 SCC 145; also see, *Sanjay* v. *State of Maharashtra*, (2007) 9 SCC 148; *Heeralal* v. *State of Madhya Pradesh*, (2009) 12 SCC 671.

86 *Sharda* v. *State of Rajasthan* (2010) 2 SCC 85.

87 (2013) 3 SCC 280.

88 *Koli Lakhmanbhai Chanabhai* v. *State of Gujarat* (1999) 8 SCC 624; also see *Prithi* v. *State of Haryana* (2010) 8 SCC 536, *Sidhartha Vashisht @ Manu Sharma* v. *State (NCT of Delhi)* (2010) 6 SCC 1 and *Ramkrushna* v. *State of Maharashtra* (2007) 13 SCC 525.

with law, is a truthful version of the events that occurred and the circumstances leading to her death. The same is reliable and in fact, to some extent, finds corroboration from the statements of other witnesses.

In the matter of *Kantilal martaji pandor* v. *State of Gujarat*,[89] the Supreme Court considered whether a letter written by the deceased to the police station wherein the accused was charged for the offences defined under sec. 306, section 498-A read with section 120-B would constitute the Dying Declaration or not. In this case, the lower courts have reached the conclusion that the appellant were not guilty of offences under section 306. The Supreme Court also concluded that when the cause of death of the deceased is no more a question, these evidences will not be relevant by relying on its earlier decision[90] and observed as under: [91]

> Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. *** Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned.

So, a letter written by the deceased could be relevant only under section 32(1) of the IE Act, 1872, which provides that a statement, written or verbal, of relevant facts made by a person who is dead, is relevant when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. The court concluded that as the cause of the death of the deceased is no more in question in the present case, the statements made by the deceased in the letter is not relevant at all.

In *Rafique @ Rauf* v. *State of Uttar Pradesh*,[92] the Supreme Court of India examined the interplay of section 32 of the IE Act, 1872 and statement recorded under section 162 (2) of the Cr PC. The Supreme Court referred its earlier decision on the issue in *Sri Bhagwan* v. *State of U.P.*[93] wherein it held as under: [94]

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89 (2013) 8 SCC 787.

90 *Inderpal* v. *State of M.P.* (2001) 10 SCC 736.

91 *Supra* note 89 at 788.

92 (2013) 12 SCC 121.

93 (2013) 12 SCC 137.

94 *Id.* at 149.

> …[O]nce the said statement though recorded under Section 161 Cr PC assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C.

The above statement of law would result in a position that a purported recorded statement under section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under section 32(1) of IE Act, 1872 and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

The Supreme Court has considered the relevance of the statement of the statement made under section 161 of the Cr PC, 1973 after the death of maker in the case of *State of Rajasthan* v. *Shravan Ram,*[95] and held that due to discrepancies and contradictions between the two dying declarations and also in the absence of any other reliable evidence. The court held that it is trite law that it is unsafe to base the reliance on the statement made under section 161 Cr PC as dying declaration without any corroboration. Although corroboration as such is not essential but it is expedient to have the same, in order to strengthen the evidentiary value of declaration.

In the matter of *Hiraman* v. *State of Maharashtra,*[96] the appellant buttressed upon the inconsistencies and gaps present in the various sets of evidences including dying declaration. The court opined that a doubt sought to be raised has to be credible and consistent one and must be one which will appeal to a reasonable mind. The Supreme Court referred the work of noted author Granville Williams in his book "Proof of Guilt" where it was observed as under: [97]

> The evil of acquitting a guilty person goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated persons and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless.

There is a higher standard of proof in criminal cases than in civil cases, but there is no absolute standard in either of the cases.[98] What constitute a 'reasonable

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95 (2013) 12 SCC 255.

96 (2013) 12 SCC 586.

97 *Id.* at 598

98 *Gurbachan Singh* v. *Satpal Singh,* AIR 1990 SC 209.

doubt' has been elaborated and dealt by the Supreme Court in the matter of *State of U.P.* v. *Krishna Gopal* [99] and it has been observed as under:[100]

> Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the cases.

Subsequently, the Supreme Court reached a conclusion in *Hiraman* v. *State of Maharashtra*[101] as under:[102]

> Exaggerated doubts, on account of absence of corroboration, will only lead to unmerited acquittals, causing grave harm to the cause of justice and ultimately to the social fabric. With the incidents of wives being set on fire, very unfortunately continuing to occur in our society, it is expected from the Courts that they approach such situations very carefully, giving due respect to the dying declarations, and not being swayed by fanciful doubts.

Discrepancies, embellishment and improvements of witnesses in dying declaration

In the case of *State of Madhya Pradesh* v. *Dal Singh,*[103] the Supreme Court examined the issue of discrepancies, embellishments and improvements of witnesses which occur frequently in the criminal cases from the stage of trial till it get finality from Supreme Court. It observed as under:[104]

> So far as the discrepancies, embellishments and improvements are concerned, in every criminal case the same are bound to occur for the reason that witnesses, owing to common errors in observation, i.e., errors of memory due to lapse of time, or errors owing to mental disposition, such as feelings shock or horror that existed at the time of occurrence.

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99 (1988) 4 SCC 302.

100 *Id.* at 313-314.

101 (2013) 12 SCC 586.

102 *Id.* at 599.

103 (2013) 14 SCC 159.

104 *Id.* at 165

It further opined as under: [105]

> …[E]xaggeration per se does not render the evidence brittle. But it can be one of the factors against which the credibility of the prosecution's story can be tested, when the entire evidence is put in a crucible to test the same on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of a statement made by the witness at an earlier stage. Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions. The omissions which amount to contradictions in material particulars, i.e. which materially affect the trial, or the core of the case of the prosecution, render the testimony of the witness as liable to be discredited.

Burn injuries and dying declaration

The dying declaration made by a person who has been injured by burn injuries received special attention by the Supreme Court of India in two of the cases. In *State of Madhya Pradesh* v. *Dal Singh*,[106]one of the important issue which came up for consideration before the Supreme Court of India was whether a 100 percent burnt person can make a dying declaration and put a thumb impression on it or not. Besides noting the general rule of caution in appreciation of dying declaration as evidence, the court also mapped the development of law on this issue.

The Supreme Court classified the burn injuries into three categories as under and placed its reliance on the classical treaties of Modi's on Medical Jurisprudence & Toxicology:[107]

(i) The first is characterised by the reddening and blistering of the skin alone;

(ii) The second is characterised by the charring and destruction of the full thickness of the skin;

(iii) The third is characterized by the charring of tissues beneath skin, e.g. of the fat, muscles and bone.

The court further went on to note the impact, effect and state of physical-mental condition in cases of burn injuries as under: [108]

> There may also be in a given case, a situation where a part of the body may bear upon it severe burns, but a small part of the body may have

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105 *Ibid.*

106 (2013) 14 SCC 159.

107 *Dr. Jaising P. Modi "A Textbook of Medical Jurisprudence and Toxicology*" (Lexis Nexis 24th edn. 2011)

108 *Id.* at 169.

> none. When burns occur on the scalp, they may cause greater difficulties. They can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning, and on fleshy areas by the findings recorded after internal examination. Shock suffered due to extensive burns is the usual cause of death, and delayed death may be a result of inflammation of the respiratory tract, caused by the inhalation of smoke. Severe damage to the extent of blistering of the tongue and the upper respiratory tract can follow due to the inhalation of smoke.

The Supreme Court placed its reliance on its earlier decision in *Mafabhai Nagarbhai Raval* v. *State of Gujarat*[109] wherein the issued was relating to acceptability of dying declaration of a person who had suffered 99% burn injuries wherein it opined as under: [110]

> …[T]hat the doctor who had conducted the post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substituted its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily.

In the present case, the question which arose before the Supreme Court for its consideration was whether the thumb impression which has been put on the dying declaration is genuine or not. The court noted the earlier decision on this point *in State of Punjab* v. *Gian Kaur*,[111] the court gave benefit of doubt in the situation as the doctors were unable to the explain the presences of ridges and curves when the skin of the thumb had been completely burnt out. However, in the case at hand *i.e.*, *State of Madhya Pradesh* v. *Dal Singh*,[112] the Supreme Court opined as under: [113]

> So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact

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109 AIR 1992 SC 2186.

110 *Supra* note 106, also see (2013) 14 SCC 159, 169.

111 AIR 1998 SC 2809.

112 (2013) 14 SCC 159.

113 *Supra* note 106, at 170.

In the case of *Jose S/o Edassery Thomas* v. *State of Kerala*,[114] the dying declaration was recorded in the ICU in the Burns Ward (in a case of 92 % Burn), which got signed by the doctor, a plastic surgeon, wherein it was disputed that the doctor has not endorsed about the condition of the declarant of the dying declaration. The court reached the conclusion that when the evidence on record indicates that the deceased was conscious and when the cumulative effect of the evidence clearly proves the guilt of accused and chain of circumstances exclusively leads towards accused. Hence, the accused was held to be guilty in the present case.

Section 40, 41, 42 & 43

In the case of *Guru Granth Saheb sthan Meeraghat Vanaras* v. *Ved Prakash*,[115] while examining the issue as whether high court was correct in staying the proceedings of civil suits till the decision of the criminal case. The Supreme Court of India relied upon the decision of the Constitution Bench in *M.S. Sheriff* v. *State of Madras*[116] which considered the question of simultaneous prosecution of the criminal proceedings with the civil suit. The Supreme Court of India observed that no hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. The Supreme Court of India noted the settled proposition of law on section 40,41,42 & 43 of the IE Act,1872 through series of decision namely *M/s. Karam Chand Ganga Prasad etc.* v. *Union of India*,[117] *K.G. Premshanker* v. *Inspector of Police* [118] and observed as under: [119]

> …[I]f the criminal case and civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein. Moreover, the judgment, order or decree passed in previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case the Court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. In each and every case the first question which would require consideration is, whether judgment, order or decree is relevant; if relevant, its effect. This would depend upon the facts of each case

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114 (2013) 14 SCC 172.

115 (2013) 7 SCC 622.

116 AIR 1954 SC 397

117 (1970) 3 SCC 694.

118 (2002) 8 SCC 87.

119 (2013) 7 SCC 622, 628.

The Supreme Court opined that the order of the high court staying the civil proceedings till the decision of the criminal case is bad in law because:

(i) Even if there is possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration.

(ii) In the facts of the present case there is no likelihood of any embarrassment to the defendants.

Secondary evidence (section 65)

Section 65 of the IE Act, 1872 crystallises the law relating to the admissibility of secondary evidence. The general principle underlying the admissibility of secondary evidence is that when you lose the higher proof, you may offer the next best in your power. The case admits of the better evidence than that which you possess, if the superior proof has been lost without one's fault. The principle that so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it.[120] In the case of *U. Sree* v. *U. Srinivas*,[121] the issue before the Supreme Court was whether the photostat copy of the letter alleged to have been written by the wife to her father could have been admitted as secondary evidence or not. The Supreme Court set aside the findings of the courts below and its observation that when the person is in possession of the document but has not produced the same, it can be regarded as a proper foundation to lead secondary evidence. The court held that the secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it. The admissibility of secondary evidence is subject to large number of limitations,[122] content of secondary evidence cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for the section,[123] must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.[124]

Burden of proof & onus of proof

In the case of *Mohd. Khalil Chisti* v. *State of Rajasthan*,[125] the Supreme Court considered the right to private defence[126] and the 'burden of proof' *vis-a-vis*

120 *Thomas* v. *Thomas* 1 La. 166.

121 (2013) 2 SCC 114.

122 *H. Siddiqui (Dead) by LRs.* v. *A. Ramalingam* (2011) 4 SCC 240.

123 *J. Yashoda* v. *K. Shobha Rani* (2007) 5 SCC 730.

124 *M. Chandra* v. *M. Thangamuthu and Other* (2010) 9 SCC 712.

125 (2013) 2 SCC 541.

126 S. 96- 106, the IPC, 1860.

'onus of proof' in given set of facts and circumstances. The Supreme Court observed that it is well settled that fouler the crime, higher the proof,[127]termed right to self defence as a valuable right serving a social purpose.[128] The Supreme Court observed that the non- explanation of the major injuries suffered by the accused during the course of incident weakens the case of prosecution.[129]

However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case but in all those cases, the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.[130] The court further held that the onus is on the accused to establish that his action was in exercise of the right of private defence. The Supreme Court laid down the proposition of law in following words:[131]

> There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read with Sections 96 to 106 of the Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability.

In the case of *Gian Chand and Brothers* v. *Rattan Lal alias Ratan Singh,*[132] the Supreme Court of India was considering the issue of 'burden of proof' in cases

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127 *Lakshmi Singh* v. *State of Bihar* (1976) 4 SCC 394.

128 *Babulal Bhagwan Khandare* v. *State of Maharashtra* (2005) 10 SCC 404.

129 The Supreme Court referred to its earlier precedent on this issue *i.e.Lakshmi Singh* v. *State of Bihar* (1976) 4 SCC 394 and observed as under:

> It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:
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> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

130 *Waman* v. *State of Maharashtra* (2011) 7 SCC 295.

131 (2013) 2 SCC 541, 556.

132 (2013) 2 SCC 606.

of fraud, misrepresentation. The elaborate decision of the Supreme Court clearly laid down following principles of law:

(i) That the burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it and the said principle may not be universal in its application and there may be an exception thereto.[133]

(ii) When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation.[134]

(iii) There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.[135]

Further, in the case of *Gian Chand Case,*[136] the Supreme Court considered the effect of variance between proof and pleadings. It observed that because of variance between pleading and proof, the rule of *secundum allegata et probate* would be strictly applicable.

In the case of *Sunder alias Sundarajan Case,* [137]the Supreme Court of India reiterated the position of law as to onus of proof would be on kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody, till he was eliminated. Highlighting the purpose of section 106 of the IE Act, 1872 that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him, the court held that the appellant did not provide any evidence as to when the kidnapped child was released from his custody.

While delving on the issue of burden of proof under section 106 of the Evidence Act, 1872, the Supreme Court in the case of *Babu @ Balasubramaniam* v. *State of Tamil Nadu,*[138] held that doctrine of '*falsus in uno falsus in omnibus'*

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133 *Anil Rishi* v. *Gurbaksh Singh* (2006) 5 SCC 558.

134 *Krishna Mohan Kul* v. *Pratima Maity and others* (2004) 9 SCC 468.

135 *A. Raghavamma* v. *A. Chenchamma* AIR 1964 SC 529.

136 *Supra* note 132.

137 *Supra* note 29.

138 (2013) 8 SCC 60.

has no application in India and highlighted the interplay between section 114 and 106 of the Act in following words:[139]

> A fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilized. Section 106 however is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference.

Standard of proof

In the Survey Year 2013, the Supreme Court of India has expressed its varied opinion on the 'standard of proof' and appreciation of evidence by the court of law in reaching a conclusion based on the facts and circumstances of each case. In the case of *Rev.Mother Marykutty* v. *Reni C Kottaram*,[140] it opined as follows:[141]

> The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies

Deliberating on the issue of standard of proof in a departmental enquiry case, the Supreme Court in the matter of *Rajkumar* v. *Jalgaon Municipal Corporation*[142] observed that in a departmental inquiry, the disciplinary authority is expected to prove the charges on preponderance of probability and not on proof beyond reasonable doubt. The Supreme Court further limited the scope of interference by the high court in exercise of its writ jurisdiction under article 226 of the Constitution observed that the high court cannot re-appreciate the evidence acting as a court of

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139 *Tulsiram Sahadu Suryawanshi* v. *State of Maharashtra* (2012) 10 SCC 373,374-375.

140 (2013) 1 SCC 327.

141 *Bharat Barrel* & *Drum Mfg*. Co. v. *Aminchand Pyare Lal* (1989) 3 SCC 35, 50-51.

142 (2013) 2 SCC 740.

appeal[143] nor it is the function of the high court in a petition for a writ under article 226 to review the evidence and to arrive at an independent finding on the evidence especially when the charged officer had not participated in the inquiry and had not raised the grounds urged by him before the high court by the inquiring authority.[144] It further observed as under:[145]

> It is a well acceptable principle of law that the High Court while exercising powers under Article 226 of the Constitution does not act as an appellate authority. Of course, its jurisdiction is circumscribed and confined to correct an error of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of the principles of natural justice

In the case of *Goudappa* v. *State of Karnataka,*[146] the Supreme Court of India considered a case in which a crime was committed in furtherance of common intention and how the evidence needs to be appreciated in such cases. The court observed pithily and succinctly in following words: [147]

> But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time- honoured way, 'the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.

Hostile witness

Every year there are a series of decisions by the Supreme Court on the various aspects of 'hostile witness'. The central issue which surrounds every decision is to what extent the reliance could be placed on statement of hostile witness. A survey of decisions rendered in year 2013, reveals the following proposition of law: [148]

(i) The hostility of the witnesses is a relevant consideration, but is not the sole determinative factor for deciding the guilt or otherwise of an accused.

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143 *State Bank of India* v. *Ramesh Dinkar Punde* (2006) 7 SCC 212.

144 *State of Andhra Pradesh* v. *Sree Rama Rao* AIR 1963 SC 1723.

145 (2013) 2 SCC 740 at 750.

146 (2013) 3 SCC 675.

147 *Pandurang* v. *State of Hyderabad* AIR 1955 SC 216, 222.

148 *Supra* note 56.

(ii) The court must consider the cumulative effect of hostile witnesses and the reliability of a dying declaration.[149]

(iii) There is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.[150]

(iv) The evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident.[151]

(v) The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence.[152]

(vi) The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution.[153]

(vii) The general principle of appreciating evidence of eyewitnesses in such a case is that where a large number of offenders are involved, it is necessary for the court to seek corroboration, at least, from two or more witnesses as a measure of caution.[154]

(viii) Credible evidence of even hostile witnesses can form the basis for conviction.[155]

(ix) That evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.[156]

(x) That his evidence to the effect of the presence of accused at the scene of the offence was acceptable and the prosecution could definitely rely upon the same.[157]

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149 *Ibid.;* Also see, *Bhajju @ Karan Singh* v. *State of M.P.* (2012) 4 SCC 327.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 *Ibid.*

156 *Lahu Kamlakar Patil* v. *State of Maharashtra* (2013) 6 SCC 417.

(xi) That when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in to as it is well-settled[158]

(xii) Hostile witness is not necessarily a false witness[159]

(xiii) Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful.[160]

Evidence and proof of custom

In the case of *Laxmibai* v. *Bhagwanthbuva,*[161] the Supreme Court of India examined the evidentiary value of 'custom' and 'usage' and its evidentiary value. After elaborating upon the essential ingredients of 'custom' *i.e.,* it must be ancient, uniform, certain, continuous and compulsory, the court also opined that no custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. The court stated that the evidence adduced by a party concerned must prove the alleged custom. A custom cannot be extended by analogy or logical process and it also cannot be established by *a priori* method. When a custom has been judicially recognized by the court, it passes into the law of the land and proof of it becomes unnecessary under section 57 of the IE Act, 1872. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy.[162]

'Will' as a document and presumption

The IE Act, 1872 makes an elaborate provision in relation to the 'standard of evidence', which is required to prove a 'Will'. The court in the matter of *M. B. Ramesh* v. *K. M. Veeraje,*[163] held that the application of presumption under section 90 of the IE Act, 1872 does not apply to a Will[164] rather it has to be proved in accordance with the provisions of Indian Succession Act, 1925 read with section 68 of the IE Act,1872. The principle underlying section 90 of the IE Act, 1872 is that the age of a document is unsuspicious character, the production from proper custody and other circumstances is a rule founded on necessity and convenience.

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157 *Sidhartha Vashisht alias Manu Sharma* v. *State (NCT of Delhi) (*2010) 6 SCC 1.

158 *Attar Singh* v. *State of Maharashtra* (2013) 11 SCC 719

159 *Shatrughan* v. *State of M.P.* (1993) Crl LJ 3120

160 See *supra* note 158; *Sat Paul* v. *Delhi Administration,* AIR 1976 SC 294.

161 (2013) 4 SCC 97.

162 *Salekh Chand* v. *Satya Gupta* (2008) 13 SCC 119.

163 (2013) 7 SCC 490.

164 *Bharpur Singh* v. *Shamsher Singh* (2009) 3 SCC 687.

It also recognizes the limitation on the possibility of obtaining living testimony to the signing or the handwriting of a document. While deliberating over the other aspect, the court observed that the provision of section 71 of the IE Act, 1872 is permissive and enabling section permitting a party to lead other evidence in certain circumstances. However, section 71 of the Act is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in section 68 of the IE Act, 1872. However, the settled position is clear that 'where the attesting witnesses are not before the court, section 71 of the IE Act, 1872 has got no application'.

The court listed out the settled proposition of law in *H .Venkatachala Iyenger* v. *B.N. Thimmajamma,*[165] which has been crystallized over a period of year on the nature and standard of evidence required to prove a Will. These are as under: [166]

i. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

ii. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

iii. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

iv. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was

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165 AIR 1959 SC 443.

166 *M.B. Ramesh* v. *K.M. Veeraaje* (2013) 7 SCC 490, 501-502.

made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

v. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

vi. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

Evidence of a document

In case of *Laxmibai case*,[167] the court considered the evidentiary value of a 'Document' particularly adoption deed. It stated that party to an instrument cannot be a valid attesting witness to the said instrument, for the reason that such party cannot attest its own signature. A document must be construed, taking into consideration the real intention of the parties. In this case, the Supreme Court stressing upon the substance rather than form of the document held that mere technicalities cannot defeat the purpose of adoption deed when none of the party has made any attempt to disprove it.

Classification of oral testimony

In the case of *State of Rajasthan* v. *Babu Meena*,[168] the facts of the case related to the credibility of oral testimony of the prosecutrix which the courts below has found not reliable and hence, acquitted the respondents. The court reiterated that; if the statement of the prosecutrix is found to be worthy of credence and reliable, requires no corroboration and the court may convict the accused on the sole testimony of prosecutrix.[169] However, such oral testimony of the prosecutrix could be classified into three categories as under:[170]

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167 *Supra* note 161.

168 (2013) 4 SCC 206.

169 *Vijay* v. *State of Madhya Pradesh* (2010) 8 SCC 191.

170 *Supra* note 168 at 209..

(i) Wholly reliable - In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion.

(ii) Wholly unreliable - In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.

(iii) Neither wholly reliable nor wholly unreliable.

Quality of evidence

In the case of *Laxmibai* case [171] highlighting the principle contained in and the essence of section 134 [172] of the IE Act, 1872, the Supreme Court held that 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 in law of evidence that any particular number of witnesses is to be examined to prove/ disprove a fact.

Non – examination of material witness

In the case of *Harivadan Babubhai Patel* v. *State of Gujarat*,[173] the issue before the court was effect of non- examination of material witness in a criminal case. The court observed as under:[174]

i. That 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.

ii. 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.

iii. That 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.

The Supreme Court has further observed that the court of facts must ask itself - 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

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171 *Supra* note 161.

172 S. 134 Number of witnesses- No particular number of witnesses shall in any case be required for the proof of any fact *etc.*

173 (2013) 7 SCC 45.

174 *Id*. at 54.

examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.[175] However, in the case of *Dahari* v. *State of Uttar Pradesh*[176] the Supreme Court held that when the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witness, no adverse inference could be drawn against the prosecution.

Presumption under section 106 of the Act

The Supreme Court of India in the matter of *Sunder alias Sundarajan,*[177] opined that the section 106[178] of the IE Act,1872 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

Presumption under section 113 A

Highlighting the purpose of statutory presumptions as enshrined in section 113-A of the Indian Evidence Act, 1872, the Supreme Court in the matter of *Vajresh Venkatray Anvekar* v. *State of Karnataka*[179] held that presumption under section 113-A of the IE Act, 1872 springs into action which says that when the question is whether the commission of suicide by a woman had been abetted by her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. The court further stated that the question is whether the appellant has been able to rebut this presumption or not.

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175 *Id.* at 55; also see, *Tikhaji Hiraji* v. *Thakore Kubersing Chamansing,* (2001) 6 SCC 145.

176 (2012) 10 SCC 256.

177 *Supra* note 29.

178 S. 106- 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.

179 (2013) 3 SCC 462.

Burden of proof under section 113-B

To curb the menace of 'dowry death' the legislature introduced a series of amendments in various statutes and the IE Act, 1872 is no exception. Sec. 113-B of the Act deals with the 'presumptions as to dowry death' and in the case of *Vipin Jaiswal* v. *State of A.P.,*[180] the court opined that the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. It is also settled canon of interpretations that the penal provisions, has to be strictly construed. The court further held that the onus is on the prosecution to prove beyond reasonable doubt and the ingredients of section 498 of IPC must be proved for the court to draw the presumptions under section 113-B of the IE Act, 1872. The prosecution has to prove besides the demand of dowry, harassment or cruelty caused by the accused to the deceased soon before her death.

However, in another case namely *Ranjit Singh* v. *State of Punjab,*[181] the Supreme Court invoking section 113-B of the IE Act, 1872 held that irrespective of the fact whether the accused had any direct connection with the death or not, he shall be presumed to have committed the "dowry death" provided the other requirements of the provision is satisfied.

In another case *i.e., Kulwant Singh* v. *State of Punjab,*[182] the court laid down that the presumption of a dowry death as envisaged under section 113-B of the IE Act, 1872 could be invoked in four circumstances[183] given below:[184]

i. The question before the court must be whether the accused has committed the dowry death of a 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.

The court further laid down that the decision of Supreme Court in *Appasaheb* v. *State of Maharashtra*[185]were required to be understood in the context of the case. It was held that *Appasaheb* cannot be read as laying down an absolute

180 (2013) 3 SCC 684.

181 (2013) 12 SCC 333.

182 (2013) 4 SCC 177.

183 *Tarsem Singh* v. *State of Punjab* (2008) 16 SCC 155.

184 *Id*. at 159.

185 (2007) 9 SCC 721.

proposition that a demand for money or some property or valuable security on account of some business or financial requirement could not be termed as a demand for dowry.

Further, in the case of *Gurnaib Singh* v. *State of Punjab*,[186] the Supreme Court of India while interpreting the provision of section 113-B in juxtaposition with section 304-B, IPC, the court opined that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In all such cases the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where section 113-B of the IE Act, 1872 and section 304-B IPC are pressed into service and forms a very relevant requirement to invoke the presumption under the Act.

However, what constitute "soon before" is left to be determined by the courts depending upon the facts and circumstances of each case. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned.

In the case of *Atmaram S/o Raysingh Rathod* v. *State of Maharashtra*,[187] the Supreme Court of India held that the word "cruelty" would have the same meaning under section 113-A of the IE Act, 1872 which it has under section 498-A of the IPC.

Presumption under section 118-a of Negotiable Instrument Act, 1881

In the case of *Rev.Mother Marykutty* v. *Reni C Kottaram*,[188] the Supreme Court considered the case of statutory presumptions under section 118-A of the Negotiable Instrument Act, 1881. It was held that that once execution of the promissory note is admitted, the presumption under section 118-A of the Negotiable Instrument Act, 1881 would arise that it is supported by a consideration. Such a presumption is rebuttable. The court further opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

Credence of injured witness

The Supreme Court in the matter of *Manga* v. *State of Uttarakhand*[189] wherein the appellant have been convicted by the courts below for the offences under section 302, 307 read with section 149 and sections 147 & 148 of IPC. The court answered the issue whether the evidence of injured witnesses should be relied upon or not. The court citing earlier decisions of this court held that the due credence be given to the evidences of injured witnesses as since his presence at the scene of crime is seldom doubtful.

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186 (2013) 7 SCC 108.

187 (2013) 12 SCC 286.

188 (2013) 1 SCC 327.

189 (2013) 7 SCC 629.

Medical evidence

In the case of *State of Himachal Pradesh* v. *Jai Chand*,[190] the Supreme Court of India reversed the decision of high court which acquitted the respondent in the present case. The court placed its reliance on the medical report given the doctors and prevailing circumstances in the case which created a suspicion about the action of respondent and his family members.

Evidence of child witness

In the case of *Hamza* v. *Muhammedkutty*,[191] the Supreme Court of India held that under section 157 of the IE Act, 1872 the previous statements of witness could be used to corroborate later testimony. In this very case another issue was as to what evidentiary value should be attached to the 'Child Witness'. The Supreme Court of India relied on the celebrated work of Glanville Williams[192] where he opined that 'Children are suggestible and sometimes given to living (sic- live) in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth'. The Supreme Court stated that as a rule of practical wisdom, evidence of child witness must find adequate corroboration and once adequately corroborated, it could be relied upon.[193]

Medical evidence versus ocular evidence

The issue of inconsistency between two set of evidence i.e. medical and ocular evidence and which set of evidence should be given primacy over the other has been considered in the case of *Radha Krishna Nagesh* v. *State of A.P*.[194] However, the proposition of law which emerges out from the analysis of these decisions remains free from chaos. The court held as under: [195]

> ...[I]t is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.

The court further noted that in order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report would not by itself substantiate the plea of

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190 (2013) 10 SCC 298.

191 (2013) 11 SCC150.

192 Glanville Williams "*The Proof of Guilt*" (Stevens & Sons, London 1955).

193 (1998) 7 SCC 177.

194 (2013) 11 SCC 688.

195 *Id.* at 701.

contradiction or variation. The Supreme Court has put it very succinctly that it is not that every minor variation or inconsistency that would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

Admissibility of evidence

The Supreme Court of India has pointed out the difference between the 'admissibility of a document' and the 'probative value such documents' in the case of *Joseph Johan Peter Sandy* v. *Veronica Thomas Rajkumar*.[196] It was held that even a document may be admissible, still its contents have to be proved as the appellant did not examine either the attesting witness of the document, nor proved its contents, no fault can be found with the judgment of the high court.

Evidence of an accomplice / approver (section 133)

Section 133 of the IE Act, 1872, states that an accomplice is a competent witness against an accused person and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. In the case of *Venkatesha* v. *State of Karnataka*,[197] it was held that the proposition that the approver's testimony needs corroboration cannot, be doubted as a proposition of law. The court noted the juristic basis of such corroboration i.e. the approver is by his own admission a criminal, which by itself makes him unworthy of an implicit reliance by the court, unless it is satisfied about the truthfulness of his story by evidence that is independent and supportive of the version given by him.

Sole witness (section 134)

One of the cardinal facets of criminal jurisprudence is that it is the merit of the statement of particular witness which is relevant and not the number of witnesses examined by the prosecution. This is reflected from the provision of section 134 of the IE Act, 1872 which states that no particular number of witnesses shall in any case be required for the proof of any fact. In the matter of *Kusti Mallaiah* v. *State of Andhra Pradesh*,[198] the court opined that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable; as the principle is that the evidence has to be weighed and not counted. The testimony of a single witness may be categorized into three as under:[199]

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196 (2013) 3 SCC 801.

197 (2013) 12 SCC 99.

198 (2013) 12 SCC 680.

199 *Id*. at para 17.

(i) wholly reliable,

(ii) wholly unreliable, and

(iii) neither wholly reliable nor wholly unreliable.

The court noted the difficulty which it faces in those testimonies which falls in third category in following words: [200]

> The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

Another important aspect which was discussed by the Supreme Court in this very case was the observation of Supreme Court where the minor discrepancies in the testimony of sole witnesses cause the trouble for the prosecution case. The Supreme Court observed that the minor variations in the accounts of witnesses are often the hallmark of the truth of the testimony. It stated as under: [201]

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

Credibility of witness

One of the cardinal aspects of the 'Law of Evidence' is to test the veracity and credibility of evidences adduced by the parties. The importance of which is always reiterated by the courts in availing the opportunity of right to cross-examination of the witnesses. The rule of prudence which Supreme Court adopts in the criminal cases that the findings of the lower courts after appreciating the evidence in criminal matter should not be overturned; derives its strength from the fact that it is the lower courts/ trial courts where examination of witnesses, cross-examination of witnesses and other aspects of evaluation of evidences takes place. In the survey year 2013, there have been numerous cases dealing on various facets of credibility of witnesses. In the case of *Laxmibai* ,[202] it was held that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice, or where there is a sufficient balance of improbability to displace

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200 *Ibid*.

201 *Ibid.*

202 See *supra* note 161, Also see, *Smt. Rajbir Kaur* v. *M/s. S. Chokosiri & Co.*, AIR 1988 SC 1845; *Sarju Pershad Ramdeo Sahu* v. *Jwaleshwari Pratap Narayan Singh*; AIR 1951 SC 120, *Jagdish Singh* v. *Madhuri Devi*, AIR 2008 SC 2296, *Dharamvir* v. *Amar Singh*, AIR 1996 SC 2314; *Santosh Hazari* v. *Purushottam Tiwai (Dead) by Lrs.* AIR 2001 SC 965; and *G. Amalorpavam* v. *R.C. Diocese of Madurai* (2006) 3 SCC 224.

his opinion as to where credibility lies, the appellate court must interfere with the finding of the trial judge on a question of fact. The court opined that when a piece of evidence when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will best serve the interest of justice. The judgment of a court can be tested on "touchstone of dispassionate judicial scrutiny based on a complete and comprehensive appreciation of all views of the case, as well as on the quality and credibility of the evidence brought on record".[203]

In the case of *Subodh Nath* v. *State of Tripura,*[204] the issue before the court was the credibility of a juvenile witness who was also an eyewitness to the case. The court repelling the argument held that when the evidence of child witness has been corroborated by material particulars by reliable testimony, direct and circumstantial, hence, it could not be doubted. Further, the Supreme Court of India observed that in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like.[205] Unless the discrepancies are 'material discrepancies' so as to create a reasonable doubt about the credibility of the witnesses, the court will not discard the evidence of the witnesses.

Further, in the case of *Kumar* v. *State of Tamil Nadu*[206] the credibility of witness was questioned on the fact that the complainant has named a total of six persons in complaint, *per contra*, in the oral evidence, he had only referred to four of them. The court repelling this argument observed the evidence as fair submission and opined that the witness did not want to unnecessarily rope in persons who were not involved in the crime. On that score, it cannot be held that the whole of the evidence has to be rejected and once the evidence supports the complaint supported by medical evidence and version of other eyewitness, there is no reason to impeach the credibility of such witnesses merely on such trivial difference.

Eyewitness and surrounding circumstances

In the case of *Manjit Singh* v. *State of Punjab,*[207] the Supreme Court deliberated on the issue of non- examination of crucial witnesses and its impact on the appreciation and evaluation of the courts in various circumstances. The court reiterated the settled position of law that 'it is not the quantity, but the quality of witnesses/ evidences that is material'[208] and the evidence has to be weighed and

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203 *Id.* at 117.

204 (2013) 4 SCC 122.

205 *Id.*at 129.

206 (2013) 12 SCC 699.

207 (2013) 12 SCC 746.

208 *Namdeo* v. *State of Maharashtra* (2007) 14 SCC 150; also see *Bipin Kumar Mondal* v. *State of W.B.* (2010) 12 SCC 91.

not counted.[209]The court further clarified that the test is whether the evidence has a ring of truth, is cogent, credible, trustworthy and reliable.[210] Further, the legislative intent from section 134 of the IE Act, 1872 clearly establish that there is no requirement of that there must be particular number of witnesses to record an order of conviction against the accused. However, the court further opined the primacy and importance of material witnesses in the case as under: [211]

> That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness.

The court has recorded that it is undoubtedly the duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised.[212] The charge of withholding a material witness from the court levelled 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.[213]

Sole eyewitness turning hostile

In the matter of *Gudu Ram* v. *State of Himachal Pradesh,*[214] the question before the Supreme Court of India was whether, despite the sole eyewitness to the incident turning hostile, could the lower courts legitimately convict the accused or not? The court examined the jurisprudence and traversed through the settled legal position on reliance of 'evidence of hostile witness' and observed that 'proof cannot be substituted by robust suspicion'. It held that evidence of hostile witness need not be completely rejected merely because he has turned hostile[215], courts must look for corroboration of the same in cases of circumspection,[216] the court also must not lose sight of the fact that the witness who makes different statements at different times has no regard for truth[217] and there is no legal bar to base a

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209 *Ibid.*

210 *Bipin Kumar Mondal* v. *State of W.B.* (2010) 12 SCC 91.

211 *State of U.P.* v. *Iftikhar Khan* 1973 SCC (1) 512.

212 *Masalti* v. *State of U.P.* AIR 1965 SC 202.

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

214 (2013) 11 SCC 546.

215 *Ibid.*

216 *Karuppanna Thevar* v. *State of Tamil Nadu* (1976) 1 SCC 31.

217 *Ibid.*

conviction upon his testimony if corroborated by other reliable evidence.[218] The court while reaching the conclusion heavily relied upon the ratio of decision in *Bhajju* v. *State of M.P*.[219] and *Ramesh* v. *State of U.P*.[220] wherein it is observed as under:[221]

The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law.

Trustworthy eyewitness is present – motive loses its significance

In the case of *Habib* v. *State of Uttar Pradesh*,[222] the Supreme Court of India reiterated the legal position that if there is direct trustworthy evidence of witnesses as to the commission of offence, motive part loses its significance. Hence, the ocular testimony of the witnesses could not be discarded merely because the motive is not proved, if the occurrence of such crime is proved.[223] However, the court cautioned itself from the mechanical rejection of vital aspect of evidence appreciation by reiterating that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted.[224]

Acquittal of co- accused

In the case of *Manjit Singh* v. *State of Punjab*,[225] the Supreme Court of India examined the issue of whether the acquittal of co- accused weakens the prosecution story in respect of other accused in a criminal case or not. The court in its erudite decision put the proposition of law in a succinct manner that the maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be regarded as liars.[226] It is merely a rule of caution. While dealing with the similar aspect where the very credibility of the witnesses was questioned in relation to the

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218 *Bhagwan Singh* v. *State of Haryana* (1976) 1 SCC 389.

219 (2012) 4 SCC 327.

220 (2012) 5 SCC 777.

221 *Id*. at para 19.

222 (2013) 12 SCC 568.

223 *Sheo Shankar Singh* v. *State of Jharkhand (*2011) 3 SCC 654; also see *Bipin Kumar Mondal* v. *State of West Bengal* (2010) 12 SCC 91.

224 *State of Punjab* v. *Ajaib Singh* (2005) 9 SCC 94; also see *V.N. Ratheesh* v. *State of Kerala* (2006) 10 SCC 617.

225 (2013) 12 SCC 746.

226 Also see, *Dalbir Singh* v. *State of Haryana* (2008) 11 SCC 425, also see *Krishna Mochi* v. *State of Bihar* 2002 (6) SCC 81, *Yanob Sheikh alias Gagu* v. *State of West* (2013) 6 SCC 428.

applicability of aforesaid maxim, the Supreme Court in *Yogendra alias Yogesh* v. *State of Rajasthan*[227] stated as under: [228]

> The court must make every attempt to separate falsehoods from the truth, and it must only be in exceptional circumstances, when it is entirely impossible to separate the grain from the chaff, for the same are so inextricably entertwined, that the entire evidence of such a witness must be discarded.

The court has reiterated that the acquittal of a co-accused per se is not sufficient to result in acquittal of the other accused. The court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The court must examine the entire prosecution evidence in its correct perspective before it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case.

The court stated that the principle of law which has been laid down consistently by the courts through judicial decision is to test the acceptability of the evidence on record. Even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused.[229] The court also noted the possibility of human error in criminal justice system and requirement of 'Standard of proof' for justice delivery system as under:[230]

> Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal case, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human process. Judicial quest for perfect proof often accounts for police presentations of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic.[231]

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227 (2013) 12 SCC 399, Also see, *Ranjit Singh* v. *State of Madhya Pradesh,* AIR 2011 SC 255, *Balaka Singh* v. *State of Punjab*, AIR 1975 SC 1962; *Ugar Ahir* v. *State of Bihar*, AIR 1965 SC 277; *Nathu Singh Yadav* v. *State of Madhya Pradesh*, AIR 2003 SC 4451.

228 *Id.* at 404

229 *Balraje alias Trimbak* v. *State of Maharashtra* (2010) 6 SCC 673.

230 *Inder Singh* v. *The State (Delhi Administration)* (1978) 4 SCC 161.

231 *Id.* at 162-163.

Interested witness

The Supreme Court in the case of *Habib* v. *State of Uttar Pradesh*[232] as well as in the case of *Shanmugam* v. *State Represented by Inspector of Police, T.N*.[233] had occasion to examine the evidentiary value of 'interested witness' and the caution which needs to be adopted while appreciating the evidences of such witnesses. The court reiterated the proposition of law laid down in the decision of *Raju @ Balachandran* v. *State of Tamil Nadu,*[234] wherein it classified the witnesses in four categories namely namely (i) a third party disinterested and unrelated witness (such as a bystander or passer-by); (ii) a third party interested witness (such as a trap witness); (iii) simply a related-cum- an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; (iv) a related-cum- interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused.[235] However, it is important to note down the following pointers while appreciating the evidences of interested witnesses which has been evolved through the judicial interpretations and forms an integral part of 'law' as defined under article 141 of the Constitution of India:

(i) Interested witnesses being relatives is not a reason to discard their evidence, if the evidence is trustworthy.[236]

(ii) The mechanical rejection of the evidence on the sole ground that it is interested would invariably lead to the failure of justice.[237]

(iii) In a murder trial, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be trustworthy.[238]

(iv) The paramount consideration of the court is to ensure that miscarriage of justice is prevented.[239]

(v) A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness.[240]

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232 (2013) 12 SCC 568.

233 (2013) 12 SCC 765.

234 (2012) 12 SCC 701; also see *Govindaraju* v. *State*, (2012) 4 SCC 722 at 739.

235 Dr. K.S. Chauhan, "Law of Evidence" XLVIII *ASIL* 618-620, (2012).

236 (2013) 12 SCC 568.

237 *Brathi* v. *State of Punjab* (1991) 1 SCC 519.

238 *State of Jammu and Kashmir* v. *S. Mohan Singh* (2006) 9 SCC 272.

239 *V.N. Ratheesh* v. *State of Kerala* (2006) 10 SCC 617.

240 *Raju @ Balachandran* v. *State of Tamil Nadu* (2012) 12 SCC 701.

241 (2013) 12 SCC 568.

(vi) The essence of any such appreciation is to determine whether the deposition of the witness on to the incident is truthful hence acceptable.[241]

(vii) That the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections.[242]

(viii) A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely.[243]

(ix) No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan and cannot be accepted as correct.[244]

(x) While appreciating the evidence of witness considering him as an interested witness, the court must bear in mind that the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason.[245]

(xi) As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable.[246]

(xii) It is open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.[247]

(xiii) The time-honoured principle is that evidence has to be weighed and not counted. [248]

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242 *Shanmugam* v. *State Represented by Inspector of Police*, T.N. (2013) 12 SCC 765.

243 *Dalip Singh* v. *State of Punjab* (1954) 1 SCR 145.

244 *Masalti* v. *State of U.P.* (1964) 8 SCR 133.

245 *Kartik Malhar* v. *State of Bihar* (1996) 1 SCC 614; also see *Rakesh and Anr.* v. *State of Madhya Pradesh* JT 2011 (10) SC 525.

246 *Shanmugam* v. *State Represented by Inspector of Police*, T.N. (2013) 12 SCC 765.

247 *Amit* v. *State of Uttar Pradesh* (2012) 4 SCC 107; also see *Vadivelu Thevar* v. *The State of Madras* AIR 1957 SC 614; *Sunil Kumar* v. *State Govt. of NCT of Delhi* (2003) 11 SCC 367; *Namdeo* v. *State of Maharashtra* (2007) 14 SCC 150; also see *Bipin Kumar Mondal* v. *State of West Bengal*, AIR 2010 SC 3638.

248 *Darya Singh* v. *State of Punjab* (1964) 3 SCR 397, also see *Takdir Samsuddin Sheikh* v. *State of Gujarat.* (2011) 10 SCC 158.

(xiv) The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. [249]

(xv) The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.[250]

The difference between a partisan witness on one hand and an interested witness who is unrelated to the victim but has some beneficial interest in the outcome of a litigation on the other, remains obscure. However, in an appeal against acquittal, the appellate court is entitled to re-appreciate the evidence on record if the court finds that the view of the trial court acquitting the accused was unreasonable or perverse. The golden thread which runs through the web of administration of justice in criminal cases and that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted.

Police official as witness

The issue as to whether the conviction could be sustained merely on the strength of evidences adduced by the Police Official as witness was considered in the case of *Pramod Kumar* v. *State (Govt. of NCT of Delhi).*[251] The contention of the appellant was primarily based on the non- examination of independent witness by the prosecution and merely reliance on the evidence of official witness (Police) does not inspire the confidence in the prosecution version. However, the court in its wisdom held that the cardinal principle of criminal law *i.e.* 'it is the quality of the evidence which weighs over the quantity of evidence' is unimpeachable. It opined that the witnesses from the department of police cannot *per se* be said to be untruthful or unreliable. It would depend upon the veracity, credibility and un-impeachability of their testimony. It further observed as under: [252]

[T]hat there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the court can definitely act upon the same. If, in the course of scrutinising the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust.

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249 *Ibid.*

250 *Ibid.*

251 (2013) 6 SCC 588.

252 *State of U.P.* v. *Anil Singh*, 1988 Supp (2) SCR 611, also see *State*, *Govt. of NCT of Delhi* v. *Sunil* 1988 Supp SCC 686, *Ramjee Rai* v. *State of Bihar* (2001) 1 SCC 652, *Kashmiri Lal* v. *State of Haryana* 2013 AIR SCW 3102.

Burden of proof under section 105

While elaborating upon the 'burden of proof' under section 105 and the general exception contained in the IPC, 1860 the Supreme Court in *Mariappan* v. *State of Tamil Nadu*,[253] held that the burden of proving an offence is always on the prosecution and never shifts, however, the existence of circumstances bringing the case within the exception under section 84 of the IPC, 1860 lies on the accused.

Expert witness

In the case of *Veerpal Singh* v. *Secretary, Ministry of Defence*,[254] the Supreme Court reiterating the extent of judicial review of expert evidences cautioned that the courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. It has been worthy to note that the evidences of experts as envisaged under the IE Act, 1872 has been put on a higher pedestal but that does not make it full proof in light of present day circumstances where degrading moral values has become the hallmark of society. The Supreme Court pithily observed as under:[255]

> What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial / quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release / discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable.

Non- examination of investigation officer

In the case of *Lahu Kamlakar Patil* v. *State of Maharashtra*,[256] the Supreme Court examined the issue of impact of non- examination of investigation officer at the trial stage. The Supreme Court categorically stated that it is an accepted principle of law that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused.[257] It further noted the dictum of law as pronounced in the matter of *Bahadur Naik* v. *State of Bihar*[258] and it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused.

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253 (2013) 12 SCC 270.

254 (2013) 8 SCC 83.

255 *Id.* at 94.

256 2013 (6) SCC 417.

257 *Behari Prasad* v. *State of Bihar* (1996) 2 SCC 317.

258 (2000) 9 SCC 153.

However, considering the facts and circumstances of the present case *i.e.* especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under section 161 of the Code – the court opined that it is a proper case where the investigation officer should have examined and his non- examination creates a lacuna in the case of the prosecution. [259]

III CONCLUSION

Present survey has been an attempt to consolidate and crystallise the development of law on the subject matter of law of evidence. The survey year witness numerous decisions on Dying Declaration and appreciation of evidences, evidentiary values of various classes of witnesses including interested witness, hostile witness, police official as witness, sole witness, chance witness etc. The principles of law which emerges out after a detailed analysis of case laws on the subject matter has been the highlights of this survey. The decision of Supreme Court in *Yakub Abdul Razzak Memon* v. *State of Maharashtra*[260] is a *magnum opus* on the various issues of law of evidence, its appreciation, and evaluation of witnesses, legitimacy of test identification parade in complex and organised crimes like Terrorism. The decision sets a different parameters for the evaluation and appreciation of evidences in such cases in which it is nearly impossible to establish the commission and motive of crime, where the perpetrator of crimes execute the crime through shadow handlers without entering the territorial jurisdiction. Certainly, the voluminous decision by the Supreme Court has sent the precedent in a right perspective considering the real threat of such organised crime. The survey signs off with a note of cheer for the momentous tasks of delivering justice to "We The People" through its decisions by the Supreme Court of India.

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259 For details as in which all other circumstances the examination of investigation officer is imperative kindly see, *Arvind Singh* v. *State of Bihar* (2001) 6 SCC 407, also see *Rattanlal* v. *State of Jammu and Kashmir* (2007) 13 SCC 18 ; *Ravishwar Manjhi* v. *State of Jharkhand* (2008) 16 SCC 561.

260 (2013) 13 SCC 1