EVIDENCE ACT

S. 3—Appreciation of evidence—Omissions or Discrepancies in evidence— Minor contractions and omissions do not affect core of prosecution case and cannot be taken as a ground to reject prosecution evidence

It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, it needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission. **(Mritunjoy Biswas vs. Pranab @ Kuti Biswas; 2013 CriLJ 4212 (SC)**

S. 3 – Discrepancies in testimony of witness - Unless material creates doubt about credibility of witness his evidence cannot be discarded

Once Court finds that the eye witness account is corroborated by material particulars and is reliable, it cannot discard his evidence only on the ground that there are some discrepancies in the evidence of witnesses. As has been held by the Court in State of Rajasthan v. Smt. Kalki and Another; (1981) 2 SCC 752, 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. Unless, therefore, 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. **(Subodh Nath and Anr. v. State of Tripura; AIR 2013 SC 3726)**

S. 3 – Appreciation of evidence – Consideration of

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‘ 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. **(Sujit Biswas vs State of Assam; 2013 Cri.LJ 3140) (SC)**

S. 3 – Appreciation of evidence – Presumption to consent – Two fingers test and its interpretation – Even if report is affirmative, cannot ipso facto give rise to presumption of consent

In rape cases so far as two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of condonation and interpreting forensic examination of rape survivors.

In view of international Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

Thus, undoubtedly, the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to presumption of consent. **(Lillu v. State of Haryana; 2013 CrLJ 2446)**

Appreciation of – Income certificate given by BDO about agricultural income would be valid and acceptable

Income certificate issued by the BDO on agricultural income is a valid and accepted document in the State of Sikkim and the position is the same as regards validity while being presented to other authorities also. The BDO or the Block Development Officer in a State is a revenue authority and is

competent under the State Government Rules to issue such certificates, a fact which this court takes judicial notice of.

In view of the above, objection raised on this account is clearly sustainable. **(Branch Manager, Oriental Insurance co. Ltd. v. Meena Bania; 2013 ACJ 565)**

S. 3 – Benefit of doubt against some person - Does not entitle others against whom where is cogent and reliable evidence

In the Court held agree that Surajit Sarkar cannot be absolved of his involvement in the death of Gour Chandra Sarkar merely because the other accused persons were either not identified by the eye-witnesses or had no role to play in the attack on Gour Chandra Sarkar. There is the cogent and reliable evidence of PW- 8 Achintya Sarkar to hold that Surajit Sarkar Attacked Gour Chandra Sarkar which ultimately resulted in his death. The contention of learned counsel for Surajit Sarkar is rejected. **(Surajit Sarkar v. State of West Bengal; 2013 Cr.LJ. 1137)**

Sec. 3 - Appreciation of Evidence in Criminal Trial –What is basis of reasonable doubt

The division bench of Hon‟ble High Court held that that factual chain of circumstances is broken and the version of the prosecution has not been established as was required of it. In the absence of complete chain, the guilt of the accused cannot be inferred and suspicion howsoever grave it may be, cannot take place of proof as that would be miscarriage of justice, which must be avoided by us. The facts and circumstances, lead us to conclude that the prosecution has failed to prove its case beyond reasonable doubt against the appellant and the appellant should be given benefit of doubt. We have to keep in mind that reasonable doubt is not an imaginary, petty or more probable doubt but doubt becomes a fair doubt and it is based upon reasons and common sense vis-a-vis the testimony on record.

Even Hon‟ble Apex Court, in the matter of Sujit Biswas Vs. State of

Assam-2013 Cri. L.J. 3140 (SC) has expressed its view on the same line that suspicion howsoever strong cannot assume form of proof and a doubt is not a trivial or mere a probable doubt but a fair doubt based upon reasons and common sense. **Akhilesh Kumar V. State of U.P. 2016 (95) ACC 170**

Sec. 3 - Prosecution suppressed the genesis and origin of the occurrence - failed to explain the injuries on the person of the accused - adverse

inference against the prosecution

Once the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused including death of father of the accused persons, the only possible and probable course left open was to grant benefit of doubt to the accused persons. The accused persons can legitimately claim right to use force once they saw their parents being assaulted and when actually it has been shown that due to such assault and injury their father subsequently died. In the given facts, adverse inference must be drawn against the prosecution for not offering any explanation much less a plausible one. Drawing of such adverse inference is given a go-bye in the case of free fight mainly because the occurrence in that case may take place at different spots and in such a manner that a witness may not reasonably be expected to see and therefore explain the injuries sustained by the defence party. This is not the factual situation in the present case. **Bhagwan Sahai and Anr. V. State of Rajasthan 2016(4) Supreme 409 ; AIR 2016 SC 1714**

S. 3 – Hostile witness – Statement not to be rejected merely because the prosecution declared the witness as hostile and cross-examined him – The statement can be relied upon to the extent the version is dependable on careful scrutiny.

Even PW-3 Mohan Yadav fully supported the prosecution case in his examination-in-chief. In his cross-examination, which was recorded on the same date, he gave details of the weapons being carried by each of the accused and also the specific role-played by them in assaulting the deceased and other injured persons. As his cross-examination could not be completed it was resumed on the next day and then he gave a statement that he could not see the incident on account of darkness. His testimony has been carefully examined by the learned Sessions Judge and also by two learned Judges of the High Court (Hon‟ble K.K. Misra, J. and Hon‟ble U.S. Tripathi, J.) and they have held that the witness, on account of pressure exerted upon him by the accused, tried to support them in his cross-examination on the next day. It has been further held that the statement of the witness, as recorded on the first day including his cross-examination, was truthful and reliable. It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. (See Bhagwan Singh v. State of Haryana, AIR 1976 SC 202; Rabinder Kumar Dey v. State of Orissa, AIR 1977 SC 170: Syed Akbar v. State of Karnataka; AIR 1979 SC 1848 and Khujji @ Surendra Tiwari v. State of Madhya Pradesh; AIR 1991 SC 1853). The evidence on record clearly shows that the FIR of the incident was promptly lodged and the testimony of PW-1 Ganesh Singh, PW-4 Ramji

Singh and also PW-3 Mohan Yadav finds complete corroboration from the medical evidence on record. We find absolutely no reason to take a different view. **(Radha Mohan Singh v. State of U.P.; 2006 Cri. L.J. 1121 (SC)).**

S. 3 – Appreciation of Evidence – (1) Whether variance in evidence as to the role played by the accused persons is sufficient to disbelieve witness. Held: No. (2) Principle of appreciation of evidence enumerated.

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 his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. **(State of Haryana v. Surender & Ors. etc.;**
Appeal (Crl.) 618-620 of 2001, decided by Hon'ble Supreme Court on 01/06/2007)

S. 3 – Evidence of witnesses who were relatives of deceased cannot be discarded in the absence of any infirmity in said evidence.

In State of Himachal Pradesh v. Mast Ram; (2004) 8 SCC 660, this Court observed as under:-

> "The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law." **(Dharam Pal v. State of U.P.; 2008 (1) ALJ 721)**

S. 3 – Eye-witness – Credibility of eye-witness not to be judged merely on basis of his relationship with deceased and strained relation with accused.

Now it is well settled that while appreciating the evidence of the witnesses related to the deceased, having strained relations with the accused party, their evidence cannot be discarded solely on that basis, but the court is required to carefully scrutinize it and find out if there is scope for taking view whereby the court can reach to the conclusion that it is a case of false implication. The credibility of a witness cannot be judged merely on the basis of his close relation with the deceased and as such cannot be a ground to discard his testimony, if it otherwise inspires confidence and, particularly so, when it is corroborated by the evidence of independent and injured witnesses. **(Kapildeo Mandal & Ors. V. State of Bihar; AIR 2008 SC 533)**

S. 3 - Appreciation of evidence - Minor discrepancy between two

witnesses as regards exact time should be ignored on being human

The alleged discrepancy in the prosecution evidence (PW 15 and PW 20) with regard to the availability of the deceased Sekar for recording of his statement at 4-4.30 p.m. of the day of occurrence, as pointed out by the learned counsel for the appellant, in our considered view, does not present any difficulty of resolution. The evidence on record shows that after the two deceased persons and PW 2 and PW 3 were brought to the Government hospital an information was sent from the police out post in the Hospital at Thanjayur to the Necdamangalam police station which was received at about 3 p.m. Thereafter the said information was entered in .the general diary of the police station and placed before PW 20 who came to the hospital and recorded the statement of deceased Sekhar at about 4.30 p.m. Oh the other hand, PW 15, the Judicial Magistrate, who was already in the hospital recording the dying declaration of another person, was informed by the duty medical officer at about 3.30 p.m. to record the dying declaration of deceased Sekhar and PWs 2 and 3. Thereafter, according to PW 15, he went to the ward where the injured were admitted but he was told that the patients have been taken to the operation theatre. He, therefore, went to the operation theatre where he found PWs 2 and 3 in the waiting room. At that time the deceased Sekhar was inside the operation theatre undergoing surgery. The Judicial Magistrate recorded the statements of PWs 2 and 3 and came back later to record the statement (dying declaration) of deceased Sekhar at about 9.30 p.m. There is certainly some amount of overlapping in the time mentioned by the two prosecution witnesses, i.e. PWs 15 and 20. However, reference to such time must be understood having regard to the normal course of human life, namely, that such reference is largely by approximation and not strictly by the hour of the clock. So viewed we do not find any inconsistency in the above part of the prosecution case. **(Ponnusamy v. State of Tamil Nadu; 2012 (6) Supreme 699)**

S. 3—Cr.P.C., Sec. 155—Defective investigation—Duty of Court—It has to be deeply cautious and has to ensure that determinative process is not sub-served by such defect

Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious

and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well. **(Dayal Singh vs. State of Uttaranchal; 2012 Cr.L.J. 4323 (SC)**

S. 3—Eye-witness—Relationship has no ground to disbelieve unless his testimony carries element of unfairness and undue intention of false implication

An eye-witness version cannot be discarded by the Court merely on t he ground that such eye-witness happens to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness. **(Dayal Singh vs. State of Uttaranchal; 2012 Cr.L.J. 4323 (SC)**

S.3—Appreciation of evidence—Menace of witness turning hostile—Erodes criminal judicial system

Witness turning hostile is a major disturbing factor faced by the criminal Court in India. Reasons are many for the witnesses turning hostile, but of late, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby eroding people's faith in the system. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 of the IPC imposes punishment for giving false evidence but is seldom invoked. **(State Tr. P.S. Lodhi Colony, New Delhi vs. Sanjeev Nanda; 2012 Cr.L.J. 4174 (SC)**

S. 3 - Testimony Related eye-witness – Is not to be discarded merely on account of relationship

Where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. There is no bar in law on examining

family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the Court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc. **(Shyam Babu v. State of U. P.; AIR 2012 SC 3311)**

S. 3- Injured eye-witness - Testimony of stands on higher pedestal than other witnesses

In the case on hand, Nathu Ram (PW -1) is closely related to all the deceased as he is the son of the deceased Pahunchi Lal and nephew of deceased Lalta Prasad. It is also true that Prayag Singh (PW-3), the injured witness, is the real brother of the deceased Pahunchi Lal and Lalta Prasad. Mukut Singh (PW -6) has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. We have already referred to the lengthy cross-examination of all these persons and nothing has come out to impair their credibility. We have also observed that among these three eye-witnesses, PW-3 is an injured witness and his evidence stands on higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. On the other hand, we agree with their statement and hold that the High Court was justified on relying upon their evidence. **(Shyam Babu v. State of U. P.; AIR 2012 SC 3311)**

S. 3 - Hostile witness - Statement that supports prosecution case - Can be relied upon

It was contended that some of the witnesses had turned hostile and have not supported the case of the prosecution. In this regard, reference has been made to PW13 and PW23. PW13 admitted that he was a rickshaw puller of rickshaw No. 4. He also stated that he was not examined by the police. It was at that stage that the learned prosecutor sought permission of the Court to declare him hostile, which leave was granted by the Court. This witness stated that there were 10 rikshaw pullers at Nandan Kanan and he used to park his rikshaw from 7.00 a.m. to 10.00 a.m. at that stand, while in the afternoon, he used to park his rikshaw at the Sodhpur Railway Station. He denied having seen the accused persons loading the gunny bags into the Maruti Van and also receded completely from his statement made under Section 161 of the CrPC. The other witness is PW23 who was a witness to the recovery of the Maruti Van. According to this witness, the Maruti Van was parked in his parking lot. However, on 30th November, 2003 Manik Das had taken out the vehicle from

the parking and again returned at mid night. With regard to his signature on the seizure memo which he accepted as Exhibit 13, he took up the plea that he was made to sign blank papers. The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the recovery of the Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of Manik Das that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased. Firstly, PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW 11 who have fully proved the fact as eye-witnesses to the loading of the gunny bags into the Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. For example, PW23 has stated that the driver of the Maruti Van was Manik Das and also that he had taken out the vehicle from the parking lot at about 9.30 p.m. on the day of the incident and had brought it back after mid-night. He also stated that this car was being driven by Manik Das. Similarly, PW13 also admitted that other rickshaws were standing at the stand. This was the place where PW9 and PW 11 had seen the loading of the gunny bags into the Maruti Van. In other words, even the statements of witnesses PW13 and PW23, who had turned hostile, have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. Reference in this regard can be made to the case of Govindaraju alias Govinda v. State by Sriramapuram P.S. & Anr. [(2012) 4 SCC 722]: (AIR 2012 SC 1292) **(Shyamal Ghosh v. State of West Bengal; AIR 2012 SC 3539)**

S. 3 - Penal Code (45 of 1860), S. 300 - Evidence of witnesses - Contradictions and discrepancies - Murder case - Witnesses illiterate - Variation of 15 to 20 minutes in time of occurrence - Not material contradiction

It was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW8, PW17 and PW19. Similarly, there is some variation in the statement of PW7, PW9 and PW 11. Certain variations are also pointed out in the statements of PW2, PW4 and PW6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or

variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the Police. Their statements in the Court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event, as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place. To illustrate the irrelevancy of these so called variations or contradictions, one can deal with the statements of PW2, PW4 and PW6, PW4 and PW6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of Rs.40,OOO- from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was not paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow, if the demand for payment of money made by the accused was not satisfied. According to PW4 and PW6, they had threatened to kill the deceased while according to PW2, the accused had threatened that they would not permit the accused to enjoy the said property. Statements of all these witnesses clearly show one motive, i.e., illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the property built by the deceased and his brother. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused. **(Shyamal Ghosh v. State of West Bengal; AIR 2012 SC 3539)**

S. 3 - Delay in examination of witnesses alleged to be due to time spent in arresting absconding accused - And because witnesses were poor who had to move from place to place for earning livelihood - Delay stands explained

The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in evidence that the accused persons were absconding and the. Investigating Officer had to make serious effort and even go to various places for arresting the accused, including coming from West-Bengal to Delhi. The Investigating Officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also affected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW21 PW4, PW6, and the doctor, PW16, another material witness, had been recorded at the earliest. The Investigating Officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had; knowledge of the threat that was being extended to the deceased by the accused persons, unless their statements were recorded, the investigating officer could not have-proceeded with the investigation any further particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not, attract any suspicion of the court on the credibility and worthiness of their statements. **(Shyamal Ghosh v. State of West Bengal; AIR 2012 SC 3539)**

S. 24

It is improper to say that the right to be represented by a lawyer and the right against self-incrimination would remain incomplete and unsatisfied unless those rights are read out to the accused. The obligation to provide legal aid to the accused as soon as he is brought before the Magistrate is very much part of our criminal law procedure, aimed at protecting the accused against self-incrimination. But to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 163, Cr. P. C., would inevitably render the trial illegal is stretching the point to unacceptable extremes. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge

the constitutional and legal acceptability of a confession recorded under Section 164, Cr. P. C. is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in S. 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.

Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask of a lawyer or he remains silent, it is the Constitutional duty of the Court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the Court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing ·to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial. That would have to be judged on the facts of each case. **(Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra; AIR 2012 SC 3565)**

S.3—Circumstantial evidence—Significance in prosecution—Generally one and only one hypothesis consist with guilt of accused

There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused.

There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is not guilty on the basis of the proved circumstances against him nor could there be any quantitative

test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilty on the basis of the proved circumstances. **(Mohd. Arif @ Ashfaq vs. State (NCT of Delhi); (2012) 2 SCC (Cri) 766)**

S. 3 – Child witness - No law that his evidence shall be rejected, even if it is found reliable – Corroboration is not absolute requirement it is only rule of prudence

There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable (Ref. Dattu Ramrao Sakhare v. State of Maharashtra {(1997) 5 SCC 3411} and Panchhi v. State of U.P. [(1998) 7 SCC 177] :(AIR 1998 SC 2726: 1998 AIR SCW 2777) **(Alagupandi alias Alagupandian v. State of Tamil Nadu; AIR 2012 SC 2405)**

S. 3 – Sole eye-witness – Evidence of -Sufficiency – As a rule it cannot be stated that Police Officer can or cannot be sole eye- witness in criminal case - Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record

Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. it cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

The obvious result of the above discussion is that the statement of a police officer can be relied upon and even from the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record. (**Govindaraju alias Govinda v. State by Sriramapuram P. S. & Anr.; AIR 2012 SC 1292)**

S. 3 – Interested witness – Relative of deceased – is not necessarily interested witness. Witness to be interested must have some direct interest in having accused somehow convicted for some extraneous reason

The Court in State of Rajasthan v. Smt. Kalki and another [(1981) 2 SCC 752] : (AIR 1981 SC 1390), Myladimmal Surendran and others v. State of Kerala [(2010) 11SC 129]: (AIR 2010 sc 3281: 20lO AIR SCW 5248) and Samsuddin Sheikh v, State of Gujarat and another [(2011) 10 SCC 158] : (AIR 2012 SC 37 : 2011 AIR SCW 6486), an interested witness must have some direct interest in having the accused somehow convicted for some extraneous reason and a near relative of the victim is not necessarily an interested witness. (**Amit v. State of Uttar Pradesh; AIR 2012 SC 1433)**

S. 3 - Circumstantial evidence - Conviction on basis of - Conditions to be satisfied

The prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. (**Brajendra Singh v. State of Madhya Pradesh; AIR 2012 SC 1552)**

S. 3 – Evidence of sole eye-witness – Credibility of

In the case of Joseph v. State of Kerala, (2003) 1 SCC 465, this Court has stated the principle that where there is a sole witness to the incident, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of evidence tendered by other witnesses or the material evidences placed on record. This Court further stated that section 134 of the Indian Evidence Act does not provide for any particular number of witnesses and it would be permissible for the Court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if evidence tendered by such a witness is credible, reliable, in tune with the case of the prosecution and inspires implicit confidence. In the case of Inder Singh (supra), the Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence inspiring and beyond suspicion, this, leaving no doubt in the mind of the Court. (**Ramnaresh & ors. v. State of Chhattisgarh; 2012 (3) Supreme 81)**

S.3 – Hostile witness – Admissibility of

It is settled law that 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. 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. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. 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. 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 settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. (**Bhajju v. State of M.P.; 2012 (77) ACC 192 (SC))**

Ss. 3, 30 and 24 – Confession – Admissibility of – Though it to be regarded as evidence in generic sense because of provisions of Sec. 30, even then it not an evidence as defined in Sec. 3

This Court in Haricharan case clarified that though confession may be regarded as evidence in generic sense because of the provisions of section 30 of the Evidence Act, the fact remains that it is not evidence as defined in section 3 of the Evidence Act. Therefore, in dealing with a case against an accused the Court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. (**Takdir Samsuddin Sheikh v. State of Gujarat; 2012 (77) ACC 269)**

Appreciation of Evidence in relative witnesses

Court held - The question of reliance by the prosecution on witnesses who are related to the deceased, we find that the law is well-settled that merely because the witnesses are related is not a ground to discard their evidence. On the other hand, the court has held that in many cases, the relations are only available for giving evidence, having regard to the trend in our present society, where other than relations, witnesses are not available,. It is of course true that the evidence of the interested witnesses have to be carefully scrutinized. We find that the High Court has scrutinized the evidence of the relations with due care and caution. **(Birender Poddar Vs. State of Bihar, 2011 Cri.L.J. 3120 (SC)**

Application of evidence of interested witness- principles reiterated

As to admissibility/acceptability of evidence of interested witness, the court discussed the following cases

Sarwan Singh Vs. State of Punjab (1976) 4 SCC 369: 1976 SCC (Cri) 646 a three-Judge Bench of this Court, while considering the evidence of an interested witness held that (SCC p. 376 Para 10)

―10.... it is not the law that the evidence of an interested witness should be equated with that of a tainted [witness] or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of the interested [witness has] a ring of truth such evidence could be relied upon even without corroboration.‖

The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution wa the brother of the wife of the deceased and was living with the deceased for quite a few years. The court held that: (Sarwan Singh case, SCC p.379 para 16)

―16.... but that itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent an true,‖

In Balraje Vs. State of Maharashtra (2010) 6 SCC 673 (2010) 3 SCC (Cri) 211 the Supreme Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that: (SCC p. 679 para 30)

―30.... if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.‖

The same principles have been reiterated in Prahalad Patel v. State of M.P. (2011) 4 SCC 262 : (2011) 2 SCC (Cri) 205.

State of U.P. v. Naresh (2011) 4 SCC 163 : (2011)2 SCC (cri) 216; Jarnail Singh Vs. State of Punjab (2009) 9 SCC 719: (2010) 1 SCC (Cri) 107 ; Vishnu Vs. State of Rajasthan (2009) 10 SCC 477 : (2010) 1 CC (Cri) 302.

In this light the Court held:

It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot

by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the court have to scrutinise their evidence meticulously with the little care.

The Hon'ble Court referring to its earlier decisions in Gurbachan Sigh Vs. Satpal Singh (1990) 1 SCC 445; Sohrab vs. State of M.P. (1972) 3 SCC 751 in the context of contradiction appearing as to contradictions in the deposition of witnesses laid down-

It is clear that not all the contradictions have to be thrown out form consideration but only those which go to the root of the matter are to be avoided or ignored.

Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case. **(Waman and others Vs. State of Maharashtra; (2011) SCC 295)**

S. 3 – Conviction on basis of circumstantial evidence – When can be based – Where no direct evidence is available in shape of eye-witnesses

When the prosecution case hinges on circumstantial evidence, it is an accepted proposition of law that even in cases where no direct evidence is available in the shape of eye-witnesses etc. a conviction can be based on circumstantial evidence alone. The hypothesis which can form the basis for conviction purely on circumstantial evidence was stated by the Court in the case of Hanumant Govind Nargundkar v. State of M.P.; AIR 1952 SC 343. In the aforesaid judgment, Mahajan, J. speaking for the Court stated the principle which reads thus:

> "It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, 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."

(Abuducker Siddique v. State; AIR 2011 SC 91)

S. 3 – Contradictions in Medical and ocular evidence – Whether can be ignored

It has been submitted by learned Senior Counsel for the appellants that there is a contradiction between the medical and ocular evidence. From the post mortem report of Virendra Singh (D-3) (Ext.Ka-8), it is evident that this body was having contusions; the post mortem report of Rajendra Singh (D-2)(Ext.Ka-9) reveals that he was having abrasions; and the post mortem report of Nathu Singh (D-1) (Ext.Ka-10) also reveal several abrasions. The High Court has given cogent reasons explaining these discrepancies by saying that at the time of firing, the deceased must have reacted to the assault and might have received some abrasions and contusions in order to save themselves. Rajendra Singh (PW-2) has stated that he remained at the place of occurrence till 7 p.m. and he denied his signatures. The High Court has furnished a cogent explanation for such contradiction, and held that his statement had been recorded after 3 years of the incident and thus, such infirmity is bound to occur but does not affect the credibility of the witnesses.

It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution‟s case, may not prompt the
Court to reject the evidence in its entirety.

Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. **(Brahm Swaroop & Anr. V. State of U.P.; 2011 Cri.L.J. 306 (SC)**

S. 3 – Injured witness – Reliability of – His evidence should be relied upon unless there are major contradictions and discrepancies therein

The High Court disbelieved both the witnesses Subedar (PW-1) and Balak Ram (PW-5) as being closely related to the deceased and for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused. A mere relationship cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on

the ground of his relationship with the victim of the offence. The plea relating to relatives‟ evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. **(State of U.P. v. Naresh; 2011 (3) ALJ 254 (SC)**

S. 3 – If no evidence to show that injuries could be connected with incident, then prosecution not required to be called upon to explain injuries

Much emphasis has been placed by the learned counsel on the fact that the injuries on the person of Parvati DW-9, had not been explained. The basis for this argument is the statement of DW4 Dr. Ravinder Nath, who had examined Parvati at 10.30 a.m. on the 29th September, 1991 and had found three injuries on her person and had suggested that an X-Ray be taken. Surprisingly, however, despite the fact that Parvati had three painful injuries, and an X-ray had been suggested by the doctor Parvati was subjected to an X-ray examination byDW7 Dr. N.K. Sharma of the ESI Hospital, Faridabad on the 28th of October, 1991 and it was at that stage that a fracture of the middle femur bone had been detected. This doctor further stated that the X-ray had been conducted on the directions of the Deputy Commissioner, Rewari as well as the SHO, Jatusana, and the Medical Officer, Primary Health Center, Kosli, but he admitted that the X-ray film was not on the file of the case and was not traceable at that moment and without seeing the film, he could not comment as to the
duration of the frcture. When questioned about the delay in the X-ray examination, DW9 stated that she had made several complaints to the higher authorities that the incident had not been properly recorded by the police and that an X-ray was not being carried out. When questioned further, she deposed that no copy of any such application was with her. The Court is, therefore, of the opinion that the prosecution was not called upon to explain the injuries on Parvati as there was no evidence to show that they could be connected with the incident. **(Sher Singh v. State of Haryana; AIR 2011 SC 373)**

S. 3 – Conviction of testimony of sole eye-witness can be relied upon – Consideration for

In a case involving an unlawful assembly with a very large number of persons, there is not rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless that the Court is of the view that the testimony of such sole eye-witness is not reliable. Though, generally it is a rule of prudence followed by the Courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident in a fit case the Court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement

of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot. **(Ranjit Singh & Ors. V. State of Madhya Pradesh; 2011 Cri.L.J. 283 (SC)**

S. 3 – Medical evidence and ocular evidence – Whether inconsistent – Ocular evidence should prevail over medical evidence

The trial court as well as the High Court has also considered the submissions as to whether injury No. 9 was inconsistent with the ocular version that only one shot was fired by the appellant. It was also sought to be submitted before Court that injury No. 9 is definitely from a different weapon. This according to Mr. Nagendra Rai would clearly show that the genesis of the crime has been suppressed by the prosecution. The trial court as well as the High Court, upon consideration of the same submission have concluded that both the doctors examined i.e. PW-5 and PW-10 were not ballistic experts. They were not able to state as to whether the injuries were caused by a single shot from a double-barrelled gun. Relying on
"Modi"s Medical Jurisprudence and Toxicology" (19th Ed. Pg. 221), the trial court has concluded that when a projectile strikes the body at a right angle, it is circular and oval when it strikes the body obliquely. Dr. V.P. Kulshrestha, PW-5, in his injury report has stated that injury No. (i) is 2 cm x 2 cm muscle deep and is on right shoulder. According to him, if this pellet had moved slightly to the inner side, it would have caused injury on the right side of the neck like injury No. 9 on the left side. This apart, it is not disputed that all the other injuries on the deceased could have been caused by a single shot from a double-barrelled gun. Both the trial court as well as the High Court has held that the medical evidence is consistent with the ocular evidence. So did not see any reason to interfere with the findings recorded by both the Courts. **(Om Pal Singh v. State of U.P.; 2011 Cri.L.J. 439 (SC)**

S. 3 – Hostile witnesses – Their evidence need not to be rejected embloc but should be considered with caution

When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony.
(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)

S. 3 – Abscondance of witness is not conclusive proof of guilt

Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere abscondance by the appellant after commission of the

crime and remaining untraceable for a period of six days itself cannot establish his guilt. Absconding by itself is not conclusive proof of either of guilt or of a guilty conscience. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 3 – Related witness – Credibility of

Merely because the witnesses were closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. **(Brahm Swaroop v. State of U.P.; AIR 2011 SC 280)**

Ss. 3 & 60 – Hearsay evidence – Evidentiary value – Stated

Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds are deemed to be irrelevant for the purpose of proving the truth of matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. The reasons why hearsay evidence is not received as relevant evidence are "(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility. i.e., every witness must give his testimony, under such circumstances, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is concerned, he has a line of escape by saying "I do not know, but so and so told me", (b) truth is diluted and diminished with each repetition, and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible. **(Kalyan Kumar Gogoi v. Ashutosh Agnihotri and another; AIR 2011 SC 760)**

S. 3 – Appreciation of evidence of prosecution in case of kidnapping and rape – Prosecutrix illiterate and rustic young woman – Consideration of

In this case, the prosecutrix at the relevant time was less than 18 years of age. She was removed from the lawful custody of her brother in the evening on September 19, 1989. She was taken to a different village by two

adult males under threat and kept in a rented room for many days where A-1 had forcible sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. Although the court finds that there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are natural as her recollection, observance, memory and narration of chain of events may not be precise. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

S. 3 – Oral evidence – Minor omissions in police statement is never considered to be fatal.

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.

The Hon‟ble Supreme Court has further held that minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Relationship – Credibility of witness is not a factor to affect credibility of witness

In connection with the first submission that the witnesses should not be relied upon as they related to the deceased and also that they were partisan and interested witness and further they were imbued with powerful motive to falsely implicate the appellants in the case. First of all the Court shall deal with the contention regarding interestedness of the witnesses.

It is not a safe rule to reject merely on the basis of relationship of the witness with the deceased. In such a situation it only puts the Court with the solemn duty to make a deeper probe and scrutinize the evidence with more than ordinary care.

It is well settled that the relationship is not a factor to affect credibility of a witness. It is more often that a relation would not conceal let off the hook to the real culprit. It must be observed here that if plea of false implication is made, foundation has to be laid to prop it up. It brooks no dispute that the Court has to adopt a careful approach and analyse evidence to find out

whether it is cogent and credible.

Hon‟ble Supreme Court has further held that question of motive is not material where there is direct evidence of the acts of accused. **(State of U.P. v. Akhlaq; 2010(71) ACC 764 (All HC, LB)**

S. 3 – Rustic eye-witness – Cross-examination for days together to confuse him – Practice should be deprecated.

A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to grueling cross-examination should not be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit together accused who have perpetrated heinous crime. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC) S. 3 – Child witness – Admissibility of**

There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. It would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Testimony of eye-witness – Necessity of corroboration.

In the facts of the present case, a mob attacked the deceased in the crowded corridors of the court of the 2nd Additional District Judge and PW-1, PW-5 and PW-6 in their evidence in the court claim to have seen the accused No. 1 (appellant) chasing the deceased with an axe and assaulting the deceased with axe on his neck. All these three eye witnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eye witnesses thus saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape

from the court premises. When an attack is made on the assailant by a mob in a crowded place and the eye witnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. **(Siddanki Ram Reddy v. State of Andhra Pradesh; 2010 Cri.L.J. 3910 (SC)**

S. 3 – Testimony of Hostile witness need not be rejected in entirety.

It is settled law that just because a witness turns hostile his entire evidence need not be rejected by Court. **(G. Parshwanath v. State of Karnataka; AIR 2010 SC 2914)**

S. 3 – Case diary – Cannot be used as piece of evidence directly or indirectly.

A criminal Court can use the case diary in the aid of any inquiry or trial but not as evidence. This position is made clearly by Section 172(2) of the Code. Section 172(3) places restrictions upon the use of case diary by providing that accused has no right to call for the case diary but if it is used by the police officer who made the entries for refreshing his memory or if the Court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in Section 161 of the Code and Section 145 of the Evidence Act. Court‟s power to consider the case diary is not unfettered. In light of the inhibitions contained in Section 172(2), it is not open to the Court to place reliance on the case diary as a piece of evidence directly or indirectly. The Court had an occasion to consider Section 172 of the Code vis-à-vis Section 145 of the Evidence Act and Section 162 of the Code in the case of Mahabir Singh v. State of Haryana; (2001 AIR SCW 2757 and it was stated as follows:

"A reading of the said sub-sections makes the position clear that the discretion given to the Court to use such diaries is only for aiding the Court to decide on a point. It is made abundantly clear in sub-section (2) itself that the Court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the Court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the Court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction, which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the Court from using the power under Section 172 of the Code for the purpose of explaining the contradiction". **(Md. Ankoos v. Public Prosecutor, High Court of A.P.; AIR**

2010 SC 566)

► S. 3 – Whether tape record of speeches is document – Held, "yes" as defined in S. 3 of the Evidence Act – Admissibility thereof – Held, with more caution as compared to other documentary evidence.

It is well settled that tape-records of speeches are "documents" as defined in Section 3 of the Evidence Act and stand on no different footing than photographs. There is also no doubt that the new techniques and devices are the order of the day. Audio and videotape technology has emerged as a powerful medium through which first hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and alterations by transposition, excision, etc. which may be difficult to detect and, therefore, such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasised that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence. **(Tukaram S. Dighole v. Manikrao Shivaji Kokate; AIR 2010 SC 965)**

S. 3 – Discrepancies in evidence – Not shaking basic version of prosecution – May be discarded.

The discrepancies which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies which are due to normal errors of perception or observation should not be given importance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, if it is otherwise trustworthy. **(Babasaheb Apparao Patil v. State of Maharashtra; AIR 2009 SC 1461)**

◈ S. 3 – Proof – Conduct of eye-witness – Simply because of eye-witnesses did not make any attempt to save deceased cannot be a ground to disbelieve and discard their testimony.

On a careful and cautious scrutiny of the evidence of PW-1, PW-2 and PW-4, the court finds their evidence concise, precise and satisfactory on the point that they had seen the appellant.

The evidence of these three eyewitnesses is neither embellished nor embroidered.

Simply because the eyewitnesses did not make any attempt to save the life of the deceased from the clutches of the accused persons, their abnormal conduct by itself cannot be taken as a ground to disbelieve and discard their testimony in regard to the genesis of the occurrence and the part played by the

appellant and the other convicted persons in the commission of the offence. **(Satvir v. State of Uttar Pradesh; 2009(2) ALJ 561)**

S. 3 – Related witness – Evidence of – Acceptance of

It is well settled that if the witness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would inter alia be interested in ensuring that real culprits are punished. **(Rajender Singh v. State of Haryana; 2009 Cri.L.J. 1561)**

S. 3 – Merely because the eye-witnesses are family members their evidence cannot per se be discarded.

Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. The court shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. **(State of U.P. v. Atul Singh etc. etc.; 2009(4) Supreme 332)**

S. 3 – Video recording – Admissibility of

In the present case, since all the original chips (except one) are in existence, we have no hesitation in accepting the genuineness and authenticity of the video footage which led to the telecast on 30th May, 2007. But, what about the chip that has been re-recorded on, wiping out the original?

There can be no doubt about the relevance or admissibility of the contents of the original chips which are then recorded on video footage. As observed in Robson the Court has to be prima facie satisfied as to the originality of the recordings. Even in Ram Singh the Supreme Court heard the tapes and then held them to be unreliable. Following these two decisions, and to give an opportunity to Mr. Anand and Mr. Khan to demonstrate to us the lack of integrity in the video recordings, we saw the video recordings in open Court (though on a Saturday) in their presence but found nothing odd to make us doubt the originality of the recordings or the contents thereof. Even if the „offending" portions are removed from consideration, the sum and substance of the conversations and their gist are more than apparent.

The court need to move with the times and accept and recognize that technology of the 1980s is quite different from the technology of this century, is clear from a reading of State of Maharashtra v. Praful B. Desai; (2003) 4 SCC 601: (2003 Cri.L.J. 2033) where recording of evidence by video conferencing was held permissible in law. It is true that the technology of this

century also enables an expert to doctor or morph video material, but there is no allegation in the present case that NDTV has doctored or morphed images for some purpose. A viewing of the original chips and video recordings leaves us in manner of doubt of the genuineness and reliability of the footage. In view of the above, we have no hesitation in rejecting the contention of Mr. Anand and Mr. Khan regarding the integrity of the video recordings and certainly that of the chips. **(Court on its own motion v. State & Ors.; 2009 Cri.L.J. 677 (Delhi HC)**

S. 3 – Interested witness – Reliability of

In Namdeo v. State of Maharashtra; 2007 AIR SCW 1835 2007 Cri.L.J. 1819), the Apex Court held that a witness who is a relative of deceased or victim of the crime cannot be characterized as „interested". The term „interested" postulates that the witness has some direct or indirect „interest" in having the accused somehow or other convicted due to animus or for some other oblique motive. The Apex Court also observed that a close relative cannot be characterized as an „interested" witness. He is a „natural" witness. His evidence, however, must be scrutinized carefully, if on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the „sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. The Apex Court also referred to the decision rendered in the matter of Harbans Kaur v. State of Haryana; 2005 AIR SCW 2074: (2005 Cri.L.J. 2199), in which, it was held that there is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

There, in view of the above, it cannot be held that the testimonies of PW 2, Gandami Sukdi, and PW 3, Gandami Munni, cannot be relied on only on the ground that they are the close relatives of the deceased. The court scrutinized their evidence with due care and caution and if their evidence passes the test of credibility in appreciation by applying the above principles, the conviction can well be based on their testimonies. **(Markami Deva and Ors. V. State of Chhattisgarh; 2009 Cri.L.J. 585)**

Hearsay Evidence – In dept. enquiries against employees – There is no allergy to hearsay evidence.

As far as the domestic enquiries concerning industrial employees are concerned, it has been laid down way back in State of Haryana and another v. Rattan Singh; AIR 1977 SC 1512, that in a domestic enquiry, the strict and sophisticated rules of evidence under the Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. **(Mahatam Singh v. U.P. State Road Transport Corporation, Lucknow and Others; 2009(1) AWC 464)**

S. 3 - Evidence of close relative i.e. father of deceased - Credibility of - Merely because witness happen to be father of the victim- His evidence cannot be doubted

In the present case, disclosed that a few days before the date of occurrence, accused teased his daughter and also threatened her. Her daughter Km. ‗x' explained about the accused misconduct to her cousin Ashok Kumar. Later, on having received the complaint about the indecent behaviour of the accused, he scolded him. Unfortunately, evidence of the victim's father is quite convincing and worth to believe. In fact in FIR he has not named the accused. Merely because P.W. 1 is the father of the deceased victim girl, his evidence cannot be doubted on that count in absence of any suspicion. **[Lalit Kumar Yadav @ Kuri v. State of Uttar Pradesh, 2014 (86) ACC 247]**

Ss. 3, 45—Dog tracking evidence—Credibility—Identification of accused by sniffer dog along with other evidence can be relied upon to prove guilt of accused

In the present case, the services of a sniffer dog was taken for investigation. The said dog traced the accused and he was formally arrested in the evening of the next day. The Investigating Officer, Ashok Kumar Yadav (PW-10) corroborated the evidence of Abdul Lais Khan (PW-4) to the effect that ‗Raja' sniffer dog after picking up scent from the place of occurrence tracked down the house of the accused. What is relevant to note is that the accused has not been convicted on the ground that the sniffer dog tracked down the house of the accused and barked at him. The evidence of dog tracking only shows how the accused was arrested. The Trial Court and the Appellate Court noticed the motive of the accused. Ram Chandra Chaurasiya (PW-1) disclosed in his evidence that a few days before the date of occurrence, the accused has teased his daughter and also threatened her. Her daughter Km. ‗x' complained about the misconduct of the accused to her cousin Ashok Kumar and the latter admonished the accused for the same. Ashok Kumar died subsequently but the evidence of the girl's father is quite convincing and worthy of credit. The aforesaid incident clearly reflects upon the motive of the accused. **[Lalit Kumar Yadav vs. State of U.P., 2014 Cri.L.J. 2712 (SC)]**

S. 3 - ―Evidence‖ – Definition is exhaustive - Interpretation of Statutes - Internal Aids - Definition clause - Use of words ―means and includes‖ in definition indicates it is exhaustive

Section 319 Cr.PC springs out of the doctrine *judex damanatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of s. 319 Cr.PC. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away

unpunished. This is also a part of fair trial and in order to achieve this very end that the legislature thought of incorporating provisions of s. 319 Cr.PC. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject-matter of trial.

The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. **(Hardeep Singh v. State of Punjab; (2014) 2 SCC (Cri.) 86)**

S. 3 - Hostile witness - Evidence of hostile witness - Can be relied upon - At least to the extent, it supported the case of the prosecution

Court is of the view that merely because the witness was declared on hostile, there is no need to reject his evidence in toto. In other words, the evidence of hostile witness can be relied upon at least to the extent, it supported the case of the prosecution. In view of the same, reliance placed on certain statements made by hostile witnesses before the trial court are acceptable. In Mrinal Das and others Vs. State of Tripura; (2011) 9 SCC 479 Hon'ble Apex Court held:

> "It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting enbloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the F.I.R., his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution." **(State of U.P. v.**

Devi Singh and others; 2014 (85) ACC 229)

Ss. 137, 138 and 3 – Examination-in-chief – Statement made in untested by cross-examination – Value and use - Is rebuttable evidence

Once examination-in-chief is conducted, the statement becomes part of the record, it is evidence as per law and in the true sense, for at best, it may be rebuttable. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence. Evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence. **(Hardeep Singh v. State of Punjab and others; (2014) 2 SCC (Cri) 86)**

S. 3—Testimony of hostile witness—Admissibility of—Cannot be discarded in full, part of his evidence which supports the prosecution case can be taken into consideration by the Court

It is settled law that the testimony of the hostile witness need not be discarded in toto and that portion of testimony in the chief-examination which supports the prosecution case can be taken for consideration. **(Veer Singh vs.**

State of U.P.; 2014 (84) ACC 681 (SC)

S. 3—Testimony of related witness—Evidentiary value—Evidence of related witness who are also alleged to be interested witness should be scrutinized with care, caution and circumspection

In this case, all the alleged eyewitnesses are closely related to the 57 deceased Purshottam and the prosecution has chosen not to examine any independent witness despite a number of houses situate in the close vicinity of the house of Purshottam and that itself creates a dent in the version of the prosecution. When relatives, who are alleged to be interested witnesses, are cited by the prosecution, it is the obligation of the court to scrutinise their evidence with care, caution and circumspection. In the case at hand, the entire occurrence took place in and around the house of Purshottam. Five people had been done to death. In such a circumstance, it is totally unexpected that other villagers would come forward to give their statements and depose in the court. It is to be borne in mind that Ram Narayan, Sarpanch of the village, solely on the basis of suspicion, had seen to it that five persons meet their end. Such a situation compels one not to get oneself involved and common sense give consent to such an attitude. Thus, no exception can be taken to the fact that no independent witness was examined. As far as the relatives are concerned, Radhey Shyam, PW 1, is the brother of the deceased; Ram Lal, PW 2, is the brother of Radhey Shyam; Panna Bai, PW 3, is the mother of Purshottam and Nirmala Bai, PW 5, is his wife; and Anita, PW 5; Badribai, PW 8; Manisha, PW 9 and Kaushalya, PW 10, are also close relatives and these witnesses have

been cited as eyewitnesses.

In Hari Obula Reddy v. State of A.p'6 a three-Judge Bench has opined that it cannot be laid down as -

> "an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon." (SCC pp. 683-84, para 13)

In Kartik Malhar v. State of Biharl this Court has stated (SCC p.621, para 15) that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that
the real culprits are prosecuted and convicted. That is the normal phenomenon of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this Court shall be careful and cautious while scanning their testimony and we proceed to do so.

Similar is the evidence of the other prosecution witnesses, which has been analysed with great anxiety by the High Court. On a careful perusal of the same, we do not find any reason to differ with the said evaluation solely on the ground that they are related to the deceased persons or that they could not have seen the occurrence. In a case of this nature, it is the relatives who would come forward to depose against the real culprits and would not like to falsely implicate others. They have witnessed the brutish crime committed and there is nothing on record to discard their testimony as untrustworthy. We find that their evidence is reliable and credible and it would not be inapposite not to act upon the same. Nothing has been elicited in the cross-examination to record a finding that the evidence is improbable or suspicious and deserves to be rejected. They have no motive to falsely implicate the accused and, that apart, their testimonies have withstood the rigorous cross-examination in material particulars and received corroboration from the evidence of the doctor. That apart, the weapons seized lend credence to the prosecution story. Quite apart from the above, it is almost well-nigh impossible to perceive that

they have any animosity for some reason to see that the accused persons are convicted. Their family members have been done to death in a ghastly manner, and in these circumstances, it cannot e thought that they would leave the real culprits and implicate the accused persons. **(Kanhaiya Lal vs. State of Rajasthan; (2013) 3 SCC (Cri) 498)**

S. 3 – Police witness – Not to be viewed with distrust if found reliable and trustworthy

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 reliable and trustworthy, the court can definitely act upon the same. **(Kashmiri Lal v. State of Haryana; 2013 Cri.LJ 3036)**

S. 3 - Appreciation of – Income-tax Return – Whether any reliance could be placed on the income-tax return by deceased who was not previously income tax assessee was filed after his death? – Held, —No‖

Contending that no evidentiary value could be attached to Ex.P17-Income tax return, learned counsel for Appellant has placed reliance upon 2003 ACJ 81 [Oriental Insurance Co., Ltd., v. Kousalya Kawar and others]. In the said case, statement of account was prepared after the demise of the deceased and before the filing of Claim Petition. In the said decision, Division Bench held that mere filing of the statement and challan is of no assistance without proof and they cannot be presumed to be correct, especially when it is a document prepared after the accident in reference to an earlier period. It was further held that the statement is with a mind to show the income and therefore, the Tribunal ought to have appraised it judicially. Under those facts and circumstances, in the said decision, the Division Bench of this Court held that no reliance could be placed upon the statement of account prepared after the demise of the deceased.

In this case, also Ex. P17 - Income tax return for the year 2000-2001 was prepared after the demise of the deceased. Apart from the evidence of PW2, no such witnesses were examined to speak about the tuition centre and that the deceased was earning Rs.1,55,000/- per annum as stated in Ex. P17 - Income tax return. Previously, deceased was not an Income tax assessee. Since previously the deceased was not an Income tax assessee, Court are not inclined to place reliance upon Ex.P17. **(United India Insurance Co. Ltd v. B. Padmavathy and others; 2013 ACJ 1837)**

S. 3 - Police witness - Deposition of – Must be treated with suspect is not an absolute rule

Court may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of

U.P. v. Anil Singh wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses. **(Ram Swaroop v. State (Govt. NCT) of Delhi; 2013 Cri.LJ 2997)**

S.3 – Affidavit – Evidentiary value of – Affidavit is not ―evidence‖ within the meaning of S.3 and it needs cross examination of deponent for reliance upon affidavit

An affidavit is not "evidence" within the meaning of Section 3 of the Evidence Act, 1872, and the same can be used as "evidence" only if, for sufficient reasons, the court passes an order under Order 19 CPC. Thus, the filing of an affidavit of one‘s own statement, in one‘s own favour, cannot be regarded as sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact situation. However, in a case where the deponent is available for cross-examination and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such a view stands fully affirmed particularly in view of the amended provisions of Order 18 Rules 4 and 5 CPC. (**Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465)**

S. 3 – Child witness - Conviction on – Basis of – Permissible if evidence of child is credible, truthful and corroborated

It is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. The corroboration is not a must to record a conviction, but as a rule of prudence, the Court thinks it desirable to see that corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable.

(Jagadevappa and Ors. v. State of Karnataka and Ors.; 2013 Cri.LJ 2658)

S. 3 - Interested witnesses - Testimony of –To be subjected to careful scrutiny and accepted by caution

In Hari Obula Reddy and others v. The State of Andhra Pradesh, a three-Judge Bench has opined that it cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or

inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

In this case, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this court shall be careful and cautious while scanning their testimony and we proceed to do so. **(Kanhaiya Lal & Ors. v. State of Rajasthan; 2013 Cri.LJ 2921)**

S. 3 – Testimony of solitary eye-witness – Relevancy – If testimony of solitary eye-witness found reliable, conviction can be based on has sole testimony

It has been held in catena of decisions of the Court 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, for the principle is that the evidence has to be weighed and not counted. In Vadivelu Thevar v. The State of Madras; AIR 1957 SC 614, it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. 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. **(Kusti Mallaiah vs State of A.P.; 2013 Cri.LJ 3098)**

S. 3 – Evidence of solitary star witness of prosecution cannot be discarded only on the ground that related, partisan and inimical witness

The evidence of star solitary witness of the prosecution, informant PW 3. From his depositions it is evident that he is related, partisan, and inimical witness but for those reasons alone his evidence cannot be discarded nor can he be treated to be untruthful witness. However his evidence has to be scanned with caution and circumspection as had been mandated by the Apex Court in innumerable decisions and therefore court has vetted his evidence with myopic scrutiny. **(Munendra v. State of U.P.; 2013 (2) ALJ 487)**

S. 3 Appreciation of evidence - Testimony of police personal cannot be rejected merely because they are police

The testimony of police personnel cannot be rejected merely because they belong to police Department, Their testimony should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of a police personnel cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. The defence is required to lay a foundation by way of cross-examining the police witnesses for discarding discarding their testimony. In the latest cases of Govindaraju @ Govinda V. State by sriramapuram P.S. and another [2012(78) ACC 545 (SC)] the Apex Court has illuminatingly highlighted the principles for appreciating evidence of police official in criminal trials. The Hon'ble Court has observed as under:-

―15. Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses of admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people: in that event, no credibility can be attached to the statement of such witness‖.

The Court in the case of Girja Prasad (supra), while particularly referring to the evidence of a police officer, said that it is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise re- liable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a. presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration.

Wherever, the evidence of the police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution

case. The Courts have also expressed the view that no infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. Rather than referring to various judgments of this Court on this issue, suffices it to note that even in the case of Girja Prasad (supra), this Court noticed the judgment of the Court in the case of Alzer Raja Khima v. State of Saurashtra: AIR 1956 SC 217 a judgment pronounced more than half a century ago noticing the principle that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefore. This principle has been referred to in a plethora of other cases as well. Some of the cases dealing with the aforesaid principle are being referred hereunder.

In Tahir v. State (Delli), (1996) 3 SCC 338 dealing with a similar question, the Court held as under:-

―In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be re- corded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, how- ever, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trust-worthy and reliable, I can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

The obvious result of the above discussion is that the statement of a police officer can be relied upon and even form the basis of conviction when it is reliable, trust-worthy and preferably corroborated by other evidence on record. (**Rati Ram and another v. State of U.P.; 2013 (81) ACC 550 (All)**

S. 3 – Affidavit – Evidentiary value of – Affidavit is not ―evidence‖ within the meaning of S.3 and it need for cross-examination of deponent for reliance upon affidavit

An affidavit is not "evidence" within the meaning of Section 3 of the Evidence Act, 1872, and the same can be used as "evidence" only if, for sufficient reasons, the court passes an order under Order 19 CPC. Thus, the filing of an affidavit of one‘s own statement, in one‘s own favour, cannot be regarded as sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact situation. However, in a case where the deponent is available for cross-examination and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such a view stands fully affirmed particularly in view of the amended

provisions of Order 18 Rules 4 and 5 CPC. (**Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013)**
4 SCC 465)

S. 3 - Interested witness – Appreciation of evidence - Evidence of related and interested witness - Ought to be examined with great care and caution than evidence of third party disinterested and unrelated witness

The Evidence of a related or interested witness should be meticulously and carefully examined. In a case where there related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. This is only a rule of prudence and not one of law. **(Raju**
Alias Balachandran & Ors. V. State of Tamil Nadu; AIR 2013 SC 983)

S. 3 – Evidence - Reliability - Has to be judged from entire statement and demeanour of witness - Expression ―Sterling worth‖ - Not of absolute rigidity in criminal jurisprudence

‗Sterling worth' is not an expression of absolute rigidity. The use of such an expression in the contest of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the witnesses, if any, noticed by the Court. Linguistically, ‗sterling worth' means ‗thoroughly excellent' or ‗of great value'. This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. It is only an expression that is used for judging the worth of the statement of a witness.
(Registrar of Jadavpur University v. Arindam Dutta Gupta and Ors.; AIR 2013 SC 1084)

S. 3 – Proof – Suspicion however strong, cannot take place of proof, clear and unimpeachable evidence is necessary to convict persons

In this case Court observed that the appellants AI-Anil and A2-Ashok were convicted for the offence punishable under Section 302 of the IPC with the aid of Section 34 thereof. Now, the question is whether the version given by PW3-Meena in the FIR that Al-Anil and A2-Ashok assaulted the deceased is to
be accepted or whether the version given by her in the examination-in-chief that AI-Anil, A2-Ashok, A4-Kishor and A5- Shankar assaulted the deceased has to be accepted or whether the version given by her in the cross-examination that AI-Anil and A2-Ashok only dragged the deceased out in the courtyard along with A3-Baba and A3-Baba assaulted the deceased with others is to be accepted. When there is such a great variance in her versions, we find it risky to convict the accused on the basis of such evidence. If her version in the FIR and examination-in-chief is to be accepted, then A5-Shankar could have been convicted with the aid of Section 34 of the IPC. But,

he has been acquitted. If the version given in the cross-examination that Al-Anil andA2- Ashok only dragged the deceased out and A3-Baba assaulted the deceased is to be accepted then it is necessary to examine whether they shared common intention with A3-Baba to commit murder of the deceased. It is possible that they did share common intention with A3-Baba. It is equally possible that they did not. If Al-Anil and A2-Ashok merely dragged the deceased and they had no intention to kill the deceased, they may be guilty of a lesser offence. It appears that unfortunately, this aspect was not examined properly by learned Sessions Judge because during the pendency of the case, A3-Baba was murdered and could not be tried. At this stage, in the absence of evidence, it is not possible for us to make out a new case. The prosecution case is, therefore, not free from doubt. Undoubtedly, the evidence on record creates a strong suspicion about involvement of AI-Anil and A2-Ashok, but, it is not sufficient to prove their involvement in the offence of murder beyond doubt. It is well settled that suspicion, however strong, cannot take the place of proof. Clear and unimpeachable evidence is necessary to convict a person. **(Anil Shamrao v. State of Maharashtra; 2013 CrLJ 2223)**

S. 3 – Discrepancies in evidence – Unless material so as to create doubt about credibility of witness, his evidence cannot be discarded

Once Court found that the eyewitness account of PW -13 is corroborated by material particulars and is reliable, we cannot discard his evidence only on the ground that there are some discrepancies in the evidence of PW-l, PW-2, PW-13 and PW-19. As has been held by this Court in State of Rajasthan v. Smt. Kalki and another [(1981) 2 SCC 752 : (AIR 1981SC 1390)], 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. Unless, therefore, 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. **(Subodh Nath v. State of Tripura; 2013 CrLJ 2308)**

SCs, STs – Caste Certificate – Challenge to status of holder of – Necessity to give opportunity to cross examine of witness is integral part and partial of the Natural Justice

The right of cross-examination is an integral part of the principles of natural justice. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the Government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence, so also when the validity of a duly granted caste certificate is challenged. The government servant concerned/ certificate holder can do so only when he is told what the charges against him are. He can, therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that the certificate holder will be able to refer to the

previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the certificate holder, he will not be able to conduct an effective and useful cross-examination. Not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice. **(Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra; (2013) 4 SCC 465)**

Sec. 3 - Evidence of hostile witness –Ought not stand effaced altogether in all eventualities – Can be accepted to the extent found dependable on a careful scrutiny.

The evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. **Raja V. State of Karnataka 2016 (7) Supreme 212**

Injured witness - generally reliable - but even an injured witness must be subjected to careful scrutiny

The proposition of law that an injured witness is generally reliable is no doubt correct but even an injured witness must be subjected to careful scrutiny if circumstances and materials available on record suggest that he may have falsely implicated some innocent persons also as an afterthought on account of enmity and vendetta.

Thus as per prosecution case there is no corresponding injury on the person of victim to support the allegation of assault against the lady. Coupled with this fact the initial version also creates a serious doubt that specific allegations against the accused persons have been developed later in the course of deposition in Court. Such allegation has come only from one witness without support from any independent witness. In such circumstances and due to lack of convincing medical evidence, the credibility of specific allegations against the accused persons required serious consideration.

The exaggerated and contradictory deposition of the victim should not be believed, in view of the fact that the parties were having land dispute from before and even then in the FIR no specific role was assigned to the some

accused persons while specific role was assigned to two co-accused. The medical evidence also does not corroborate the subsequent allegations made by the victim against the accused persons. The broad features of the case also reveal that the two male accused were allegedly having a gun and an axe in their hand and they used these weapons only to cause injuries which did not pose any danger to the life of the victim. In such circumstances the women accused could have hardly any reason to unnecessarily get involved into assault so as to cause simple injuries by fists and kicks. **Indira Devi and Ors. Versus State of Himachal Pradesh(Criminal Appeal No.524 Of 2016)**

EVIDENCE OF HOSTILE WITNESS

Sec. 3 -Hostile Witness - can be relied - if there are other material - to corroborate the said evidence

The evidence of a witness who has been declared hostile can be relied if there are some other material on the basis of which said evidence can be corroborated. More so, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile.

It is relevant to note that the trial began against six accused persons. Shivlochan in his examination-in-chief took the name of Devraj alone who was stated to haveassaulted Devi Prasad. Shivlochan did not mention in his examination-in-chief about the presence of other accused which may be a reason for the prosecution toget the witness declared as hostile. It is, however, relevant to note that even in the cross-examination the witness repeated that he heard Devraj saying "Maro Sale Ko" who had assaulted Devi Prasad and Devi Prasad@ Prachar cried "Bachao Bachao". The factum of assault by Devraj was throughout maintained by the witness. Thus, even though witness was declared as hostile witness his evidence so far as the role of Devraj is unshaken. Similarly, evidence of Ajar Das, where in his examination-in-chief he stated that accused Devraj gave three lathi blows to Devi Prasad which was seen by him. The witness further stated that Devraj threatened him to run away otherwise he shall also be assaulted. Even after the witness was declared hostile he maintained his stand that he forbidden Devraj from assaulting Devi Prasad. He further stated that he saw Devraj and Dinda assaulting Devi Prasad in the night and on the next day the dead body was found below Rakhet Pulia. The witness further stated that due to land dispute Devraj and Dinda had assaulted Devi Prasad. In cross-examination he voluntarily stated that he had seen the accused giving three lathi blows. Further, he stated that he did not see that whom he has beaten because it was dark. The statement in cross-

examination in no manner dilute the value of the evidence. It was Devi Prasad who received injury whose dead body was found next day morning. The statement that was Devraj who gave it three lathi blows obviously referred to lathi blow to Devi Prasad-deceased. Thus, we conclude that in spite of witnesses Shivlochan and Ajar Das having been declared as hostile witnesses their evidence that Devraj assaulted Devi Prasad is unshaken and has rightly been relied by the courts below in recording conviction.

Devraj V. State Of Chhattisgarh 2016(6) Supreme 30 ; (Criminal Appeal No.423 Of 2015)

Sec. 3 - Hostile Witness - statements under Section 161 of CrPC - not confronted - I.O. not spoken in his evidence - conviction is erroneous

Where the prosecution several witnesses have turned hostile, their alleged statements made to the police under Section 161 of CrPC were not confronted to them and marked as exhibits and further the I.O. has not spoken in his evidence anything about the alleged statements of the above hostile witnesses recorded under Section 161 as held by this Court in three Judge Bench in the case of V.K. Mishra v. State of Uttarakhand[(2015) 9 SCC 588]. Thus, placing reliance upon their statements under Section 161 to record the finding of conviction is erroneous in law. **Baby @ Sebastian & Anr. V. Circle Inspector Of Police, Adimaly 2016(6) Supreme 86 (Criminal Appeal No. 952 Of 2010)**

Sec. 3 - PARTISAN WITNESS Relatives of the deceased - this factor cannot discredit them - consideration of the evidence as a whole

Though an attempt has been made to contend that the witnesses are all relatives of the deceased and, therefore, partisan having regard to the substance and the coherence of their testimony, we are of the view that this factor perse cannot discredit them or adversely affect the probative worth of their statements on oath. The recovery of the personal belongings of Gurdip from the place as shown by Dharminder and that of the blood stained shirt of Suraj worn by him at the time of commission of the offence, at their instance, also in our opinion furnishes a fool proof evidence of nexus between the accused persons and the crime. There is no dispute with regard to the identity of the dead body as well. Not only the post mortem indicates that the body was identifiable as the face was not burnt which is also a fact supported by the findings recorded in the Inquest Report, the witnesses as referred to hereinabove on being shown the photographs of the dead body have identified the same to be that of Gurdip. There is no plea on behalf of the defence and rightly so, that accused No. 1

Dharminder is not alive. In that view of the matter on a consideration of the evidence as a whole, we are of the opinion that there is no room for any reasonable doubt about the culpability of the accused persons in a body to have conspired to murder Gurdip by first assaulting him with an iron rod in the leg and then set him ablaze alive by over powering him in the temple in the dead of light. The suits of the occurrence, being a temple of which accused No. 4 Rani was the Priestess, in our opinion, overwhelmingly prove her knowledge, collaboration and participation in the same. **State Of Punjab V. Suraj Prakash & Anr. 2016(4) Supreme 491 ; (Criminal Appeal No. 2056/2009)**

Section 3-- Oral evidences-- Courts must be conscious of the length of time consumed in recording the evidence of the prosecution witness.

The examination and cross-examination had taken place several times in a piece-meal manner and the Court was forced to conduct the chief-examination repeatedly because of the subsequent surrender of some of the accused persons. While appreciating the evidence of such witness, the Courts must be conscious of the length of time consumed in recording the evidence of the prosecution witness. If the evidence of such witness, who is an eyewitness who lost three sons in the fateful incidentm was consistent and there are no major deviations or discrepancies and if at all any minor discrepancies that occurred in the evidence might have been due to the long gap between the date of incident and the long delay in examination, more so, those discrepancies are not material in bringing home the guilt of the accused, thus no reason whatsoever to disbelieve his evidence. [**Sadhu Saran Singh v. State Of U.P. And Ors., (2016) 2 SCC (Cri) 275 ; (2016) 4 SCC 357 ; AIR 2016 SC 1160]**

Section 3-- Appreciation of evidence of conspiracy-- Conspiracy - always hatched in secrecy - Very difficult - to gather direct evidence – For the proof – But may be proved by chain of evidence.

A conspiracy is always hatched in secrecy and it is very difficult to gather direct evidence for the proof of the same. One witness, who was a coolie and who had overheard indistinct conversations between 6-7 persons in the first week of January, 1999, when they had come to take bath at the Mukkombu Dam. But he did not remember their faces. The another witness, who was a caretaker at the garden near Mukkombu Dam and who also could not identify the accused in the Court.

An important witness, who is a purse manufacturer and who stated that he knew accused persons. He was a member of the Al-Umma movement which was a banned organization and his job was to collect money for the undercover or arrested members of the organization. In July 1998, he then went to Mukkombu and he heard the discussion between some of accused that

Dr. Sridhar must be killed in Trichy to stop the growth of the BJP party. Around 20.1.1999, he along with all accused persons, went to Mukkombu and was told that the decision to kill Dr. Sridhar was finalized. This is corroborated to this extent by the statements of coolie and caretaker who stated their presence at Mukkombu around that time. Also, after the incident, he saw some of accused in Madurai, where one of them described how they murdered Dr. Sridhar and that another accused hurt his left hand middle finger during the attack. This statement by

purse manufacturer, who turned an approver, substantiates the allegation of conspiracy to murder Dr. Sridhar. Thus, the conspiracy was proved beyond reasonable doubt. [**Sheikh Sintha Madhar @ Jaffer @ Sintha Etc v. State Rep. By Inspector Of Police, AIR 2016 SC 1844]**

Chance witness – Relative witness – Reliable - If nothing has come out in his examination-in-chief or in cross-examination which creates a doubt on the veracity of his statement

A valiant attempt may be made by the defence to discredit the evidence of a key eyewitness, the relative of deceased, present at the time of incident on the ground that he is only a chance witness and not an eyewitness to the incident and his presence is doubtful. But, if nothing has come out in his examination-in-chief or in cross-examination which creates a doubt on the veracity of his statement, moreover, he has been consistent in his version and fully supported the prosecution story and his admission that at the time of panchnama, he has signed as suggested by the Darogaji and informant asked him as to whose names should be written and whose names should be left out in the panchnama, have to be seen in the context of preparing the panchnama and shall not be attributed otherwise to disbelieve his evidence. [**Sadhu Saran Singh v. State Of U.P. And Ors., (2016) 2 SCC (Cri) 275; (2016) 4 SCC 357; AIR 2016 SC]**

Hostile witness - Recording of evidence - Appreciation & procedures

The Investigation Officer in his evidence, has not at all spoken of the contents of the statement of the complainant, recorded by him under Section 161 of the Cr.P.C. Further, the complainant in the light of the answers elicited from him in the cross-examination by Public Prosecutor, with regard to the contents of 161 statement which relevant portions are marked in his cross-examination and the said statements were denied by him, the prosecution was required to prove the said statements of the complainant through the Investigating Officer to show the fact that the complainant in his evidence has given contrary statements to the Investigation Officer at the time of investigation and, therefore, his evidence in examination-in-chief has no evidentiary value. The same could have been used by the prosecution after it had strictly complied with Section 145 of the Indian Evidence Act, 1872. Therefore, the I.O. should have spoken to the above statements of the complainant in his evidence to prove that he has contradicted in his earlier Section 161 statements in his evidence and, therefore, his evidence cannot be discarded to prove the prosecution case.

It becomes amply clear from the perusal of the evidence of I.O. in the case that the same has not been done by the prosecution. Thus, the statements of the complainant marked from Section 161 of Cr.P.C. in his cross-examination cannot be said to be proved in the case to place reliance upon his evidence to record the findings on the charge.

Thus, the contradiction of evidence of the complainant does not prove the factum of demand of bribe by the appellant from the complainant as the statement recorded under Section 161 of Cr.P.C. put to him in his cross-examination was not proved by the I.O. by speaking to those statements in his evidence and therefore, the evidence of the complainant is not contradicted and proved his Section 161 statement in the case. **[Krishan Chander v. State of Delhi, (2016) 1 SCC (Cri) 725; (2016) 3 SCC 108**

Section 3-- Evidentiary value of child witness-Evidence thereof.

As far as the child witness is concerned, it is well settled in law that the Court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule or prudence, the Court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable. **[Haneef v. State of U.P., 2016 (94) ACC 646**

Hostile Witness

Hostile Witness - examination-in-chief - supporting prosecution - corroborated from the other Evidence on record - conviction can be recorded.

It is settled principle of law that benefit of reasonable doubt is required to be given to the accused only if the reasonable doubt emerges out from the evidence on record. Merely for the reason that the witnesses have turned hostile in their cross-examination, the testimony in examination-in- chief cannot be outright discarded provided the same (statement in examination-in-chief supporting prosecution) is corroborated from the other evidence on record. In other words, if the court finds from the two different statements made by the same witness, only one of the two is believable, and what has been stated in the cross-examination is false, even if the witnesses have turned hostile, the conviction can be recorded believing the testimony given by such witnesses in the examination-in- chief. However, such evidence is required to be examined with great caution. **Selvaraj @ Chinnapaiyan v. State represented by Inspector of Police (2015) 2 SCC(Cri) 198 ; (2015) 2 SCC 662**

S. 6- Appreciation of the principle of res gestae under S. 6 Evidence Act

Section 6 of the Evidence Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences. **(Krishan Kumar Malik Vs. State of Haryana; (2011) 7 SCC 130)**

S. 6 - Facts admissible under rule of res gestae - Nature

The test to determine admissibility under the rule of ―res gestae‖ is embodied in words ―are so connected with a fact in issue as to form a part of the same transaction.‖ It is therefore, that for describing the concept of ―res gestae‖, one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations of hurt, seeking help, of disbelief, of cautioning and the like arising out of the fact spontaneous reactions to a fact, and the like.

Where in case regarding bomb blast confession made by accused in some other case was sought to be admitted as evidence. But the confession was made 2 years after blast (fact in issue) it was held that confession in question cannot be said to have contemporaneously arisen along with bomb blast and hence would not admissible under rule of res geste. **(State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari and Ors.; 2013 Cri. L.J. 2069)**

S. 8 – Motive – Omission to state motive for crime in FIR is neither fatal the prosecution not an omission of important fact.

Non-mentioning of motive in the FIR cannot be regarded as omission to state important and material fact. As a principle, it has been ruled by the Court that omission to give details in the FIR as to manner in which weapon was used by accused is not material omission amounting to contradiction. Further, this is a case wherein FIR was filed by a rustic man and, therefore, non-mentioning of motive in the FIR cannot be attached much importance. **(State of U.P. v. Krishna Master & Ors.; 2010 Cri.L.J. 3889 (SC)**

S. 3 – Motive – If evidence of eye-witness is trustworthy and believed by court then motive is irrelevant

If the evidence of the eye-witnesses is trustworthy and believed by the court, the question of motive becomes totally irrelevant.
(Brahm Swaroop v. State of U.P.; AIR 2011 SC 280)

S.8—Existence of motive not absolute requirement of law

Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analyzing the prosecution evidence and determining the guilt of the accused. **(Alagupandi vs. State of Tamil Nadu; 2012 Cr.L.J. 3363 (SC)**

Motive

Motive for the commission of an offence no doubt assume greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results is that the court shall have to be

more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet e experience about human nature, human conduct and the frailties of human mind has shown that inducements to crime have veered around to what Wills has in his book "Circumstantial Evidence" said:

> "The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation of burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion." (**Amitava Banerjee alias Amit alias Bappa Banerjee vs. State of West Bengal; 2012 Cri.L.J. 390 (SC))**

S. 8—IPC S. 300—Act of absconding cannot form fulcrum of guilty mind

Be it noted, the other two witnesses have deposed about the accused running away from the place of occurrence immediately. That apart, the accused had absconded from the village. Court absolutely conscious that mere abscondence cannot from the fulcrum of a guilty mind but it is a relevant piece of evidence to be considered along with other evidence and its value would always depend the circumstances of each case. **(Mritunjoy Biswas vs. Pranab @ Kuti Biswas; 2013 CriLJ 4212 (SC)**

S. 8 – Motive – Existence of strong motive is not an essential pre requisite for conviction for murder when there is other credible evidence on record

The counsel for the appellant submitted that the identification of the accused in the court should not be relied upon. We have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eyewitnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eyewitnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see Malkhansingh v. State of M.P.; (2003)5 SCC 746: 2003 SCC (Cri) 1247). This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the

accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent Gopal was detained by deceased Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eyewitnesses on record, the motive pales into insignificance. (**Subal Ghorai vs. State of West Bengal; (2013) 4 SCC 607)**

S.3—Murder—Motive—Proof—Accused liable to be convicted

The motive of the crime in this case is well established and proved from the evidence of eye witnesses including the injured witness. According to the evidence of Sital Deo Yadav PW-1 who is first informant and father of the deceased Chandra Shekhar, there was enmity between the accused on the one hand and the injured Som Dutt Chaube PW-4 and first informant on the other hand. The injured Som Dutt Chaube PW-4 got the sale deed of the property of the two old ladies executed in his favour and the appellant got fictitious sale deed of the same property of those two widow laides Nauranga and Karma by setting up two imposters women executed subsequently. Thus after execution of the first sale deed in favour of the injured Som Dutt Chaube PW-4, it was the appellant who setting up two imposters women subsequently got fictitious sale deed of the property in question executed in his favour putting the title of ownership of the injured PW-4 in clouds and the same resulted into filing of the civil suit for cancelation of the fictitious sale deed in the civil Court by those two widow ladies Mst. Nauranga and Mst. Karma in which they prayed for impleading the injured PW-4 as plaintiff. There was old enmity between the parties prior to the present incident including criminal litigation. All these facts find place in the evidence of Sital Deo Yadav PW-1 mentioned hereinabove. Thus there was sufficient motive for the appellant to commit the said murder besides injuring two persons including PW-4. This is a case based on direct evidence and in such a case, motive pales into insignificance. **(Krishna Kant Chaturvedi vs. State of U.P.; 2013 Cri.L.J. 1491 (All)**

Sec. 3-- Appriciation of evidence In Suicide Cases -

The Trial Court and so also the High Court has rejected the story of suicide by the deceased and in the opinion of the Hno'ble Supreme Court rightly so, for reasons more than one. Firstly, because the death in the case at hand occurred because of strangulation/constriction force around the neck leading to asphyxia and shock as observed by the doctor which is possible not necessarily by hanging, although the doctor has opined it could be caused probably by hanging also. Secondly, because if death had occurred because of hanging, she would have been discovered by the witnesses in a hanging position, unless of course somebody had upon seeing her hanging, brought her down and placed the body on the ground or the rope by which she hung herself

had itself snapped in which event there would have been a rope partly tied to the branch of the tamarind tree and partly around her neck with a noose which the witnesses say was not there. Thirdly, because it is nobody‟s case that she was carrying a rope with herself when she was seen going towards the field. The presence of the rope and the heap of stones before the branch was obviously a make-believe situation created by the appellant, who was seen by the witness, returning from the field. Fourthly, because there was no immediate provocation for the deceased to take the step to commit suicide. All that she wanted was money from her husband to take her child to the hospital for treatment. Besides, the parents of the deceased were also present in the village around the time the deceased went towards the field which only shows that there was no intense or great provocation that could have led her to commit suicide. Fifthly, because the classic signs of death by hanging as reported in Modi‟s Medical Jurisprudence and Toxicology (23rd Edition) like face being usually pale; saliva dribbling out of the mouth down on the chin and chest; Neck Stretched and elongated in fresh bodies; Ligature mark being oblique, non-continuous and placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard yellow and parchment like; Abrasions and ecchymoses around the edges of the ligature mark, subcutaneous tissues under the mark being white or glistening; carotid arteries, internal coats being ruptured; fracture or dislocation of the cervical vertebrae were all conspicuously absent in the case at hand as is evident from the post-mortem report prepared by the doctor. [**Eshwarappa Vs State Of Karnataka, AIR 2015 SC 3037 (Criminal Appeal No. 1951 Of 2012)]**

S. 3 – If no evidence to show that injuries could be connected with incident, then prosecution not required to be called upon to explain injuries

Much emphasis has been placed by the learned counsel on the fact that the injuries on the person of Parvati DW-9, had not been explained. The basis for this argument is the statement of DW4 Dr. Ravinder Nath, who had examined Parvati at 10.30 a.m. on the 29th September, 1991 and had found three injuries on her person and had suggested that an X-Ray be taken. Surprisingly, however, despite the fact that Parvati had three painful injuries, and an X-ray had been suggested by the doctor Parvati was subjected to an X-ray examination byDW7 Dr. N.K. Sharma of the ESI Hospital, Faridabad on the 28th of October, 1991 and it was at that stage that a fracture of the middle femur bone had been detected. This doctor further stated that the X-ray had been conducted on the directions of the Deputy Commissioner, Rewari as well as the SHO, Jatusana, and the Medical Officer, Primary Health Center, Kosli, but he admitted that the X-ray film was not on the file of the case and was not traceable at that moment and without seeing the film, he could not comment as to the
duration of the frcture. When questioned about the delay in the X-ray examination, DW9 stated that she had made several complaints to the higher

authorities that the incident had not been properly recorded by the police and that an X-ray was not being carried out. When questioned further, she deposed that no copy of any such application was with her. The Court is, therefore, of the opinion that the prosecution was not called upon to explain the injuries on Parvati as there was no evidence to show that they could be connected with the incident. **(Sher Singh v. State of Haryana; AIR 2011 SC 373)**

S. 3 – Abscondance of witness is not conclusive proof of guilt

Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere abscondance by the appellant after commission of the crime and remaining untraceable for a period of six days itself cannot establish his guilt. Absconding by itself is not conclusive proof of either of guilt or of a guilty conscience. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 3 – Appreciation of evidence of prosecution in case of kidnapping and rape – Prosecutrix illiterate and rustic young woman – Consideration of

In this case, the prosecutrix at the relevant time was less than 18 years of age. She was removed from the lawful custody of her brother in the evening on September 19, 1989. She was taken to a different village by two adult males under threat and kept in a rented room for many days where A-1 had forcible sexual intercourse with her. Whenever she asked A-1 for return to her village, she was threatened and her mouth was gagged. Although the court finds that there are certain contradictions and omissions in her testimony, but such omissions and contradictions are minor and on material aspects, her evidence is consistent. The prosecutrix being illiterate and rustic young woman, some contradictions and omissions are natural as her recollection, observance, memory and narration of chain of events may not be precise. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

S. 3 - ―Evidence‖ – Definition is exhaustive - Interpretation of Statutes - Internal Aids - Definition clause - Use of words ―means and includes in definition indicates it is exhaustive

Section 319 Cr.PC springs out of the doctrine *judex damanatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of s. 319 Cr.PC. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in order to achieve this very end that the legislature thought of incorporating provisions of s. 319 Cr.PC. It is with the said object in mind that a constructive and purposive interpretation should be adopted that

advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject-matter of trial.

The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. **(Hardeep Singh v. State of Punjab; (2014) 2 SCC (Cri.) 86)**

S. 3 – Evidence - Reliability - Has to be judged from entire statement and demeanour of witness - Expression ―Sterling worth‖ - Not of absolute rigidity in criminal jurisprudence

‗Sterling worth' is not an expression of absolute rigidity. The use of such an expression in the contest of criminal jurisprudence would mean a witness worthy of credence, one who is reliable and truthful. This has to be gathered from the entire statement of the witnesses and the demeanour of the witnesses, if any, noticed by the Court. Linguistically, ‗sterling worth' means ‗thoroughly excellent' or ‗of great value'. This term, in the context of criminal jurisprudence cannot be of any rigid meaning. It must be understood as a generic term. It is only an expression that is used for judging the worth of the statement of a witness.

(Registrar of Jadavpur University v. Arindam Dutta Gupta and Ors.; AIR 2013 SC 1084)

S. 3 – Proof – Suspicion however strong, cannot take place of proof, clear and unimpeachable evidence is necessary to convict persons

In this case Court observed that the appellants AI-Anil and A2-Ashok were convicted for the offence punishable under Section 302 of the IPC with the aid of Section 34 thereof. Now, the question is whether the version given by PW3-Meena in the FIR that Al-Anil and A2-Ashok assaulted the deceased is to be accepted or whether the version given by her in the examination-in-chief that AI-Anil, A2-Ashok, A4-Kishor and A5- Shankar assaulted the deceased has to be accepted or whether the version given by her in the cross-examination that AI-Anil and A2-Ashok only dragged the deceased out in the courtyard along with A3-Baba and A3-Baba assaulted the deceased with others is to be accepted. When there is such a great variance in her versions, we find it risky to convict the accused on the basis of such evidence. If her version in the FIR and examination-in-chief is to be accepted, then A5- Shankar could have been convicted with the aid of Section 34 of the IPC. But, he has been acquitted. If

the version given in the cross-examination that Al-Anil andA2- Ashok only dragged the deceased out and A3-Baba assaulted the deceased is to be accepted then it is necessary to examine whether they shared common intention with A3-Baba to commit murder of the deceased. It is possible that they did share common intention with A3-Baba. It is equally possible that they did not. If Al-Anil and A2-Ashok merely dragged the deceased and they had no intention to kill the deceased, they may be guilty of a lesser offence. It appears that unfortunately, this aspect was not examined properly by learned Sessions Judge because during the pendency of the case, A3-Baba was murdered and could not be tried. At this stage, in the absence of evidence, it is not possible for us to make out a new case. The prosecution case is, therefore, not free from doubt. Undoubtedly, the evidence on record creates a strong suspicion about involvement of AI-Anil and A2-Ashok, but, it is not sufficient to prove their involvement in the offence of murder beyond doubt. It is well settled that suspicion, however strong, cannot take the place of proof. Clear and unimpeachable evidence is necessary to convict a person. **(Anil Shamrao v. State of Maharashtra; 2013 CrLJ 2223)**

Section 3-- Oral evidences-- Courts must be conscious of the length of time consumed in recording the evidence of the prosecution witness.

The examination and cross-examination had taken place several times in a piece-meal manner and the Court was forced to conduct the chief-examination repeatedly because of the subsequent surrender of some of the accused persons. While appreciating the evidence of such witness, the Courts must be conscious of the length of time consumed in recording the evidence of the prosecution witness. If the evidence of such witness, who is an eyewitness who lost three sons in the fateful incidentm was consistent and there are no major deviations or discrepancies and if at all any minor discrepancies that occurred in the evidence might have been due to the long gap between the date of incident and the long delay in examination, more so, those discrepancies are not material in bringing home the guilt of the accused, thus no reason whatsoever to disbelieve his evidence. [**Sadhu Saran Singh v. State Of U.P. And Ors., (2016) 2 SCC (Cri) 275 ; (2016) 4 SCC 357 ; AIR 2016 SC 1160]**

Section 3-- Appreciation of evidence of conspiracy-- Conspiracy - always hatched in secrecy - Very difficult - to gather direct evidence – For the proof – But may be proved by chain of evidence.

A conspiracy is always hatched in secrecy and it is very difficult to gather direct evidence for the proof of the same. One witness, who was a coolie and who had overheard indistinct conversations between 6-7 persons in the first week of January, 1999, when they had come to take bath at the Mukkombu Dam. But he did not remember their faces. The another witness, who was a caretaker at the garden near Mukkombu Dam and who also could not identify the accused in the Court.

An important witness, who is a purse manufacturer and who stated that

he knew accused persons. He was a member of the Al-Umma movement which was a banned organization and his job was to collect money for the undercover or arrested members of the organization. In July 1998, he then went to Mukkombu and he heard the discussion between some of accused that

Dr. Sridhar must be killed in Trichy to stop the growth of the BJP party. Around 20.1.1999, he along with all accused persons, went to Mukkombu and was told that the decision to kill Dr. Sridhar was finalized. This is corroborated to this extent by the statements of coolie and caretaker who stated their presence at Mukkombu around that time. Also, after the incident, he saw some of accused in Madurai, where one of them described how they murdered Dr. Sridhar and that another accused hurt his left hand middle finger during the attack. This statement by purse manufacturer, who turned an approver, substantiates the allegation of conspiracy to murder Dr. Sridhar. Thus, the conspiracy was proved beyond reasonable doubt. [**Sheikh Sintha Madhar @ Jaffer @ Sintha Etc v. State Rep. By Inspector Of Police, AIR 2016 SC 1844]**

S. 8 – Motive – Existence of strong motive is not an essential pre requisite for conviction for murder when there is other credible evidence on record

The counsel for the appellant submitted that the identification of the accused in the court should not be relied upon. The Court have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eyewitnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eyewitnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see: Malkhansingh v. State of M.P.; (2003) 5 SCC 746: 2003 SCC (Cri) 1247). This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent Gopal was detained by deceased Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eyewitnesses on record, the motive pales into insignificance. **(Subal Ghorai vs. State of West Bengal;**
(2013) 4 SCC 607)

Sec. 8 -Motive- scope of – Conviction can be made even in absence of motive if there is direct trustworthy evidence of witnesses as to commission of an offence.

It is settled legal position that even if the absence of motive, as alleged, is accepted, that is of no consequence and pales into insignificance when direct

evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. **Saddik @ Lalo**
Gulam Hussain Shaikh V. State of Gujarat, 2016 (7) Supreme 202

Sec. 8 - Motive – Importance of motive in the cases which are based on circumstantial evidence

Hon‘ble Division Bench held that it is true that in cases which are based on circumstantial evidence, motive assumes more importance. But its contrary is also true that absence of motive, by itself, cannot a ground to discard the entire case of the prosecution even in cases based on circumstantial evidence. On this point, reference may be made to the pronouncement of Hon'ble the Apex Court in the case of Ujjagar Singh Vs. State of Punjab reported in (2007) 13 SCC 90, wherein Hon'ble the Apex Court in paragraph no. 17 has observed as under:

"17. ..... It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliche) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. ....."

Reliance may also be placed in the case of Vijay Shankar Vs. State of Haryana reported in (2015) 12 SCC 644, wherein Hon'ble the Apex Court in paragraph no. 12 has observed as under:-

In each and every case, it is not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence. Proof of motive only adds to the weight and value of evidence adduced by the prosecution. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution.

In the present case, absence of convincing evidence as to motive makes the court to be circumspect in the matter of assessment of evidence and this aspect was not kept in view by the High Court and the trial court." (emphasis added by us) **Awadesh Kumar Awasthi** v. **State Of U.P., 2016 (6) ALJ 306**

If the prosecution has failed to prove the precise motive - corollary is not that no criminal offence would have been committed

No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.

Although prosecution is not very certain about the motive, upon taking into consideration the evidence of witness, a faint probability is created, regarding intentions of the accused to lay hands on the cash which could have been in possession of the victim, as against the initial story that the accused was enraged against the victim, because the victim used to tease him on the point of his marriage with a bar girl. Motive is a mental state, which is always locked in the inner compartment of the brain of the accused and inability of the prosecution to establish the motive need not necessarily cause entire failure of prosecution. **Praful Sudhakar Parab V. State Of Maharashtra AIR 2016 SC 3107 (Criminal Appeal No.261 Of 2008**)

Sec. 8 - Whether Motive is always necessary in every Criminal Act

The division bench of Hon‟ble High Court held that It is settled principle of law that normally motive remains behind every criminal act but where occular evidence against accused is clear, cogent and reliable, the question of motive is of no importance and looses its
importance.

In the case of Shivraj Bapurey Jadhav vs. State of Karnataka 2003 (47) Allahabad Criminal Cases 408 SC the Apex Court has held that "if direct ocular evidence is there on record, law of motive becomes insignificant."

In the case of Bipin Kumar Mondal vs. State of West Bengal AIR 2010 SC

3638, Apex Court held that "proof of motive is not essential where direct evidence establishes crime. In a case based on circumstantial evidence, motive does assume great importance, but to say that the absence of motive would dislodge the entire prosecution story, is giving this one factor an undue importance. The motive is in the mind of accused and can seldom be fathomed with any degree of accuracy."

Since in this case the motive has been stated and established by the prosecution and the happening of occurrence in question at the instance of accused persons is proved by the eye witness account of two eye witnesses which is duly corroborated with medical evidence on record, I find that the argument of appellants with regard to lack of motive of appellants and their false implication due to alleged enmity, have no force. **Om Prakash & Others V. State, 2016 (95) ACC 93**

Sec. 8 - Motive – Proof of – where the case is based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence.

Where the case is based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence. If motive is indicated and proved, it strengthens the probability of the commission of the offence. In the case at hand, evidence adduced by the prosecution suggesting motive is only by way of improvement at the stage of trial which, in our view, does not inspire confidence of the court. **Tomaso Bruno & Anr. v. State of U.P., 2015(2) Supreme 278.**

S. 9 – Identification parade – Identification in Court – Value – How to appreciate identification evidence – Legal Position explained:

As was observed by this Court in Matru v. State of U.P. (1971 (2) SCC 75) identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See: Santokh Singh v. Izhar Hussain (1973 (2) SCC 406). The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The

identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Evidence Act. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. [See Kanta Prashad v. Delhi Administration (AIR 1958 SC 350), Vaikuntam Chandrappa and others v. State of Andhra Pradesh (AIR 1960 SC 1340), Budhsen and another v. State of U.P. (AIR 1970 SC 1321) and Rameshwar Singh v. State of Jammu and Kashmir (AIR 1972 SC 102)].

In Jadunath Singh and another v. The State of Uttar Pradesh (1970) 3 SCC 518), the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive considerations of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar.

This Court noticed the observations in an earlier unreported decision of this Court in Parkash Chand Sogani v. The State of Rajasthan (Criminal Appeal No. 92 of 1956 decided on January 15, 1957), wherein it was observed :- ―It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person who is well-known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances.‖ The Court concluded:

> ―It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra) (AIR Cri LJ), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case.‖

In Harbajan Singh v. State of Jammu and Kashmir (1975) 4 SCC 480), though a test identification parade was not held, this Court upheld the conviction on the basis of the identification in Court corroborated by other circumstantial evidence. In that case it was found that the appellant and one Gurmukh Singh were absent at the time of roll call and when they were arrested on the night of 16th December, 1971 their rifles smelt of fresh gunpowder and that the empty cartridge case which was found at the scene of offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Noticing these circumstances this Court held:- ―In view of this corroborative evidence we find no substance in the argument urged on behalf of the appellant that the Investigating Officer ought to have held an identification parade and that the failure of Munshi Ram to mention the names of the two accused to the neighbours who came to the scene immediately after the occurrence shows that his story cannot be true.

As observed by this Court in Jadunath Singh v. State of U.P. (AIR 1971 SC 363) absence of test identification is not necessarily fatal. The fact that Munshi Ram did not disclose the names of the two accused to the villages only shows that the accused were not previously known to him and the story that the accused referred to each other by their respective names during the course of the

incident contains an element of exaggeration. The case does not rest on the evidence of Munshi Ram alone and the corroborative circumstances to which we have referred to above lend enough assurance to the implication of the appellant.‖

It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

In Ram Nath Mahto v. State of Bihar (1996) 8 SCC 630) this Court upheld the conviction of the appellant even when the witness while deposing in Court did not identify the accused out of fear, though he had identified him in the test identification parade. This Court noticed the observations of the trial Judge who had recorded his remarks about the demeanour that the witness perhaps was afraid of the accused as he was trembling at the stare of Ram Nath-accused. This Court also relied upon the evidence of the Magistrate, PW-7 who had conducted the test identification parade in which the witness had identified the appellant. This Court found, that in the circumstances if the Courts below had convicted the appellant, there was no reason to interfere.

In Suresh Chandra Bahri v. State of Bihar (1995 Supp (1) SCC 80), this Court held that it is well settled that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. From this point of view it is a matter of great importance, both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. Thereafter this Court observed:- ―But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TI parade.‖

In State of Uttar Pradesh v. Boota Singh and others (1979 (1) SCC 31), this Court observed that the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad daylight, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes.

In Ramanbhai Naranbhai Patel and others v. State of Gujarat (2000 (1) SCC 358) after considering the earlier decisions this Court observed:- ―It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the

names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the Court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this Court in the case of State (Delhi Admn.) v. V. C. Shukla (AIR 1980 SC 1382) wherein also Fazal Ali, J. speaking for a three-Judge Bench made similar observations in this regard. In that case the evidence of the witness in the Court and his identifying the accused only in the Court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye-witnesses. It, therefore, cannot be held, as tried to be submitted by learned Counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye-witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned Counsel for the appellants that the later decisions of this Court in the case of Rajesh Govind Jagesha v. State of Maharashtra (AIR 2000 SC 160) and State of H.P. v. Lekh Raj (AIR 1999 SC 3916), had not considered the aforesaid three-Judge Bench decisions of this Court. However, in our view, the ratio of the aforesaid later decisions of this Court cannot be said to be running counter to what is decided by the earlier three-Judge Bench judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned Counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the Court may be treated to be of no assistance to the prosecution, the fact remains that these eye-witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well within imprinted in their minds especially when they were assaulted in broad daylight. They could not be said to be interested in roping in innocent persons by shielding the real accused who had assaulted them.‖

These aspects were recently highlighted in Munshi Singh Gautam (dead) and Ors. v. State of M.P. (2005 (9) SCC 631).17. In the instant case the accused persons have been identified by PWs 1 and 11 and no infirmity was noticed in their evidence. Additionally, evidence of PW 22 clearly shows that all requisite formalities with regard to Test Identification Parade were adopted and followed. In that view of the matter there is no merit in the appeal which is accordingly dismissed. **(Heera & Anr v. State of Rajasthan; Appeal (Crl.) 1307 of 2006, Decided by Hon‘ble Supreme Court on 20/06/2007)**

S.9—Test identification parade—Delay in holding does not perse fatal to validity of parade

There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade. In all cases, without exception, the purpose of the identification parade is to provide

corroborative evidence and is more confirmatory in its nature. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade. There is nothing on record before us to say that the photographs of the accused were actually printed in the newspaper. Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused. **(Munna Kumar Upadhyaya vs. State of A.P.; 2012 Cr.L.J. 3068 (SC)**

S. 9 – Test identification parade - Delay in holding – Not per se fatal to validity of parade

S. 9 –Test identification parade - Photographs of accused published months before parade –Veracity of parade does not stand impaired

There was some delay in holding the identification parade. But the delay per se cannot be fatal of the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade. There is nothing on record before us to say that the photographs of the accused were actually printed in the newspaper. Even if that be so, they were printed months prior to the identification parade and would have lost their effect on the minds of the witnesses who were called upon to identify an accused. **(Munna Kumar Upadhyaya alias Munna Upadhyaya v. State of Andhra Pradesh; AIR 2012 SC 2470)**

S. 9 – Test Identification parade – When it is not fair.

The test identification parade in this case has not been fair to the appellant. Although eight suspects were arrested, only the appellant and one other were produced before the witnesses at the Test Identification Parade. This gives room for a lot of doubt on the case of the prosecution that none other than the appellant was the assailant. In State of Maharashtra v. Suresh, on which reliance was placed by Mr. Reddy, the Court found that the suspect was permitted to stand anywhere among seven persons and the witnesses were then asked to identify the person whom they saw on the crucial day and on these facts the Court held that the test identification parade was conducted in a reasonably fool proof manner. This is not what has been done in the present case and, therefore, the corroboration of the substantive evidence of PWs 1, 5 and 6 on the identification of the suspect by the test identification parade is not trustworthy. **(Siddanki Ram Reddy v. State of Andhra Pradesh; 2010**

Cri.L.J. 3910 (SC)

S. 9 – Identification test – Not substantive evidence – Such test are not for purpose of helping investigating agency on right lines.

Identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines.

It is also held by the Court that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in Court. **(Musheer Khan v. State of Madhya Pradesh;
AIR 2010 SC 762)**

► S. 9 – Test identification parade – Necessity of holding stated.

The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. **(Mulla & Anr. v. State
of U.P.; AIR 2010 SC 942)**

► S. 9 – Test identification parade is to be held at stage of investigation by police cannot be demanded by accused to be held at or before inquiry of trial.

The evidence of test identification is admissible under S. 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one, which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court. **(Mulla & Anr. v. State
of U.P.; AIR 2010 SC 942)**

► S. 9 – Test identification parade – Failure to hold – Effect of.

Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction. As was observed by the

Court in Matru v. State of U.P.; (1971) 2 SCC 75: AIR 1971 SC 1050, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. **(Mulla & Anr. v. State of U.P.; AIR 2010 SC 942)**

S. 9 – Test Identification parade – When it is not necessary.

In the instant case, all the witnesses have stated that they had otherwise known the accused persons and they were not strangers to them. In the moonlight and lantern light they clearly identified them. Therefore, the test identification parade was really not necessary in
this case. Whether test identification parade is necessary or not would depend on the facts and circumstances of each case. The Court in a series of cases has taken the view that the test identification parade under Section 9 of the Evidence Act is to test the veracity of the witness and his capacity to identify the unknown persons whom the witness must have seen only once but in the instance case the witnesses were otherwise known to accused persons, therefore, the test identification parade has no great relevance in the facts and circumstances of this case. **(State of U.P. v. Sukhpal Singh & Ors.;**
2009 Cri.L.J. 1556)

S. 9 – Lack of moon-light or artificial light does not per se preclude identification of the assailants, if they are known from before.

The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code and the Indian

Evidence Act, 1872 (in short the ‗Evidence Act'). It is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of the Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. **(Hem Singh @ Hemu v. State of Haryana; 2009(4) Supreme 338)**

S. 9 – Identification by voice – Reliability of

Undisputedly it was a dark night. They claimed to have identified them from their voice. Though such identification in some cases is possible in the instant case no evidence was adduced to show that the witnesses were closely acquainted with the accused to even identify him from his voice that too from a very short reply, purported to have been given. This fact was lost sight of by the Trial Court. The High Court found the possibility of identification as claimed by PWs 1 and 2 an impossibility. So far the purported extra judicial confession is concerned the High Court found that the same also has not been established through the evidence of PW 3. The reasons given by the High Court to discard the evidence of PW 3 do not suffer from any infirmity. **(Inspector of Police, T.N. v. Palanisamy @ Selvan; 2009 Cri.L.J. 788)**

S. 9 – Test identification parade – Non-holding of – Murder case – Incident does not see to have lasted for a long time. Failure to hold identification parade is a serious drawback in the prosecution case

Significant aspect of this case is absence of identification parade. Persons who were named in the FIR and others, who had witnessed the incident at different stages did not know all the assailants but they claimed that they could identify the assailants. But the prosecution failed to hold test identification parade. It is argued that identification made in court is sufficient. The incident does not seem to have lasted for a long time. The eye-witnesses were sitting outside the Satsang hall. It cannot be said that they had sufficient opportunity to see the faces of the accused who were on the run. In such a case failure to hold identification parade is a serious drawback in the prosecution case. **[Balbir v. Vazir, 2014 CrLJ 3697]**

S.9—Test identification parade—When desirable

An identification parade is not mandatory nor can it be claimed by the suspect as matter of right. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the

suspect has been seen by the witness or victim for some length of time. In Malkhan Singh v. State of M.P., (2003) 5 SCC 746, it was held:

> **—**The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. **(Prakash vs. State of Karnataka; 2014 Cri.L.J. 2503 (SC)**

S. 9 – Test identification parade – Neither a substantive piece of evidence nor a rule of law

The primary object of the Test Identification Parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the Test Identification Parade is really to find whether or not the suspect is the real offender. In Kanta Prashad v. Delhi Administration; AIR 1958 SC 350, the Court stated that the failure to hold the Test Identification Parade does not make the evidence of identification at the trial inadmissible. However, the weight to be attached to such identification would be for the Court to decide and it is prudent to hold the Test Identification Parade with respect to witnesses, who did not know the accused before the occurrence.

Above-mentioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused. In Malkhan Singh v. State of M.P.; (2003) 5 SCC 746, the Court clarified that the Test Identification Parade is not a substantive piece of evidence and to hold the Test Identification Parade is not even the rule of law, but a rule of prudence so that the identification of the accused inside the Court room at the trial, can be safely relied upon. **(Ashok Debbarma @ Achak Debbarma v. State of Tripura; 2014 (85) ACC 277)**

Sec. 9 -Test Identification Parade - after a long period from incident – incident in broad daylight - but the time to see the accused was not sufficient – not reliable.

It is very clear that in the present case the incident of firing occurred in the circumstances wherein much time was not available for the eye-witnesses to clearly see the accused. In such a situation, it was of much more importance that the Test Identification Parades were to be conducted without any delay. The

first Test Identification Parade was held after about 1½ months of the incident. The second Test Identification Parade was conducted by after more than a year of the incident. Even if it is taken into account that Accused was arrested after a year and within one month thereafter the test Identification Parade was conducted, still it is highly doubtful whether the eye-witnesses could have remembered the faces of the accused after such a long period. Though the incident took place in broad daylight, the time for which the eye-witnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing. **State Of Maharashtra V. Syed Umar Sayed Abbas & Ors (2016) 2 SCC (Cri) 457 ; (2016) 4 SCC 735 (Criminal Appeal Nos. 345-346 Of 2012)**

Section 9-- Joint TIP - No manner, affect the validity of the TIP it is merely a corroborative evidence- Actual identification-done in the Court- Is the substantive evidence

The questions are raised whether the Test Identification Parades were vitiated on account of delay or for holding those TIPs jointly, or on account of the identity of the accused having been already revealed before the TIP could be conducted. Where, it is clear from the evidence that there is no inordinate delay in conducting the TIP, as when the accused were arrested, within reasonable time they were produced for the TIP. Also, there is no invariable rule that two accused persons cannot be made part of the same TIP. Joint TIP would thus, in no manner, affect the validity of the TIP. The purpose of a TIP is to ensure that the investigation is going on the right track and it is merely a corroborative evidence. The actual identification must be done in the Court and that is the substantive evidence. If the accused is already known to the witness, the TIP does not hold much value and it is the identification in the Court which is of utmost importance. [**Sheikh Sintha Madhar @ Jaffer @ Sintha Etc v. State Rep. By Inspector Of Police, AIR 2016 SC 1844 ; 2016(3) Supreme 752]**

Section 9-- T I Parade-Occurrence at night-at a place with improper lighting–All the accused-appellants not known to witness–Identification-the first time in court- After a gap of more than 2 years - Not beyond reasonable doubt,

The prosecution witness identified the accused-appellants in court for the first time, during trial, in the year 1997-98 and the incident occurred in the year 1995. Thus, after considering some undisputed facts like occurrence of incident at night, at a place with improper lighting and all the accused-appellants were not known to the forest officers, except one present at the place of incident, there should have been TIP conducted at the instance of the investigating officer. Therefore, the identification of the accused-appellants by the prosecution witness for the first time after a gap of more than 2 years from the date of incident is not beyond reasonable doubt, the same should be seen with

suspicion. [**Noorahammad And Ors v. State Of Karnataka, (2016) 2 SCC (Cri) 97; (2016) 3 SCC 325]**

S. 11 – Plea of alibi – Concurrent finding of courts below cannot be disturbed

The learned counsel appearing for the appellant has contended that the plea of alibi of Rajender, Krishan and Kilash should have been accepted by the High Court. The accused have led their defence and produced defence witnesses to prove their plea of alibi. It is also their contention that the evidence of the defence witnesses should be appreciated at par with the prosecution witnesses.

In this regard, reliance is also placed upon the judgment of this court in Munshi Prasad ors. vs. State of Bihar, (2002) 1 SCC 351. The Trial Court as well as the High Court disbelieved the plea of alibi of accused Rajender, Krishan and Kailash. (**State of Haryana v. Shakuntala ors; 2012 (3) Supreme 113)**

S. 17 – Admissibility in evidence depends on whether admission relates to relevant fact or fact in issue

Sections 17 to 31 of the Evidence Act pertain to admissions and confessions. Sections 17 to 31 define admissions/confessions, and also, the admissibility and inadmissibility of admissions/confessions. An analysis of the aforesaid provisions reveals, that an admission or a confession to be relevant must pertain to a "fact in issue" or a "relevant fact". In that sense, Section 5 (and consequently Sections 6 to 16) of the Evidence Act are inescapably intertwined with admissible admissions/confessions. It is, therefore, essential to record here, that admissibility of admissions/confessions would depend on whether they would fall in the realm of "facts in issue" or "relevant facts". That in turn is to be determined with reference to Sections 5 to 16 of the Evidence Act. The parameters laid down for the admissibility of admissions/confessions are, however, separately provided for under the Evidence Act, and as such, the determination of admissibility of one (admissions/confessions) is clearly distinguishable from the other (facts in issue/relevant facts) **(State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari and Ors.; 2013 Cri.L.J. 2069)**

Admission – Value of – A mere piece of evidence but not conclusive, maker is liberty to prove that they are mistaken or were untrue

Supreme Court in Kishori Lal v. Chaltibai, AIR 1966 SC 405, held that admissions are mere pieces of evidence. Admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or were untrue. Admission of Bechai in his written statement, having

been explained in his oral statement and that explanation has been accepted by that Court. Now the petitioner cannot rely on that admission again. **Adya Prasad V.**
D.D.C., Mirzapur, 2016 (133) RD 4 (Alld.HC)

Ss. 17 and 21- Admission made in a court of law- Held, is valid and relevant piece of evidence to be used in other legal proceedings.

The aforesaid provision requires giving of one month‘s notice to the tenant. From perusal of the Notice, dated 27.8.1991 sent by Appellant on 28.8.1991, it is clear that one month‘s clear Notice was given to the Respondent seeking upon him to vacate the premises. Thus, there has been compliance of Section 13(6) of the Act and once the Respondent‘s tenancy was determined on his failure in compliance there for, suit was maintainable.

Learned Single Judge of the High Court had not been able to point out any perversity in the Judgement and decree of the appellate Court, yet, Committed a grave error of law in allowing the Respondent‘s Second Appeal on absolutely flimsy and cursory ground. The same cannot be sustained in law and in our opinion is against the well settled principles of law.

In this view of the matter, judgment and decree of the learned Single Judge do not appear to be in conformity with law. Other ground of bona fide requirement was already held in favour of the Appellant. In our considered opinion appellant‘s suit was rightly decreed by the lower Appellate Court and the same could not have been set aside by the learned Single Judge, moreso when he had noticed that there was no substantial question of law involved in the second Appeal.

Thus, looking to the matter from all angles, it is considered opinion that the impugned judgement and decree of the learned Single Judge cannot be sustained in law. The same are hereby set aside and quashed. The judgment and decree of the lower appellate court are hereby restored and Appellant‘s suit for eviction is decreed. Appeal is thus allowed.

In the facts and circumstances of the case, parties to bear their respective costs. **(Mritunjoy Sett(D) by LRs. V. Jadu Nath Dasak (D) by LRs.; (2011 (29) LCD 1395) (SC)**

Ss. 17 and 23 – Scope of – Pleading, compromise and the evidence recorded in abated suit containing admission are admissible in evidence and can be relied upon.

Pleading, compromise and the evidence recorded in the abated suit, containing admissions, are admissible in evidence and can be relied upon as held in Ram Prasad's case (supra). The consolidation authorities have not committed any illegality in relying upon the compromise, filed in revenue suit,

which contained the admission of the petitioners and the petitioners could not give any explanation in respect of their admission or contradictory evidence could be adduced by them. Admission, being best evidence against the person, who admitted a fact, can be relied upon. **Khattoo and others v. Dy. Director of Consolidation, Varanasi and others, 2015(127) RD 311.**

Sections 17 to 31- Admission made by a party a decisive factor unless it is proved to be erroneous

On the other hand, case of the petitioner was Hulas was son of Jodhan of village Tulapur, pargana Kiriyat, district Mirzapur. After death of Jodhan, his mother remarried to Mahadeo. Hulas, being of tender age at that time, came with his mother on remarriage (tarail) to the house of Mahadeo. The petitioner could not adduce any evidence to prove that Hulas was son of Jodhan. He has failed to prove his case.

Only arguments remained about the alleged admissions of Hulas in plaint of Suit No. 430 of 1989 and compromise filed in restoration application in Case No. 692 of 1988. The respondent denied filing of the Suit No. 430 of 1988 and compromise in Case No. 692 of 1988. The petitioner could not adduce any evidence to prove that plaint of Suit No. 430 of 1989 and compromise in Case No. 692 of 1988 were signed by Hulas. Consolidation authorities found that plaint of Suit No. 692 of 1988 was filed on 17.03.1989 and was withdrawn on 15.07.1989. The compromise was filed on 20.06.1989. Filing of these document by Hulas was not proved. There was no occasion for Hulas to file the suit as his name was already mutated over the land purchased by him through sale deed and the land inherited by him from Mahadeo. This was fraud on Court by the petitioner himself. Thus it was found that alleged plaint and compromise was not filed by Hulas.

Supreme Court in Union of IndiaVs. Ibrahim Uddin, (2012) 8 SCC 148, held that admissions are governed under Sections 17 to 31 of the Evidence Act, 1872 and such admissions can be tendered and accepted as substantive evidence. "Admissions" made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. In this case, it was not proved that the alleged plaint and compromise were filed by Hulas. An admission is not a conclusive proof. The respondents on the basis of documentary as oral evidence proved that Hulas was son of Mahadeo. The petitioner has absolutely no explanation of two sale deeds dated 23.03.1967 and 24.04.1967 jointly obtained by Ram Nath and Hulas in which names of their father was mentioned as Mahadeo. After 1967, the petitioner for the first time in 1997 began to say that Hulas was not son of Mahadeo. Joint living in same house and joint acquisition of sale deeds in 1956 in the names of their wife and in 1967 in their names was proved. Consolidation Officer found that in village Ramna, khata 443 was recorded in the names of Hulas and Ram Nath sons of Mahadeo. In village Sir Goberdhanpur plots 690, 806 and 821 were recorded jointly in the names of Sharda son of Hulas and Ram Nath son of Mahadeo. From these documents also it was proved that

Hulas was son of Mahadeo. Thus the findings of facts recorded by the consolidation authorities do not suffer from any illegality. **[Bal Kishun v. Dy. Director of Consolidation, Varanasi and others 2015 (112) ALR 83]**

In this matter the trial Court found Accused/Respondent guilty of offences of murder and house-trespass. The High Court set aside such conviction. Against the Judgment of High Court, appeal was filed. The issue decided by the Apex court was that whether High Court rightly interfered with conviction imposed by Trial Court.

It was held, cumulative consideration of evidence amply established crime in which Accused were involved, resulted in killing of Deceased. The High Court concluded that offence was not made out on ground that there was delay in lodging of First Information Report and conduct of witnesses did not inspire confidence. It was observed by Hon'ble Court that High Court ought to have examined evidence and expressed reasons as to why detailed consideration of

evidence did not inspire confidence in order to interfere with conclusion of Trial Court. High Court had miserably failed to carry out such exercise and without assigning reasons, had chosen to interfere with conviction imposed by Trial Court. Eye witnesses were all convincing and were corroborative in every minute aspect of occurrence. Materials on record established case of Prosecution. Appeal allowed. **State of Rajasthan v. Chandgi Ram 2014CRILJ4571, 2014(4) CRIMES 42 (SC) , 2014 (10) SCALE 352, 2014 (9) SCJ 692, (2015)1 SCC(CRI) 442**

S. 18 – Statement – When cannot be regarded as an admission.

Section 18 of the Indian Evidence Act provides that a statement made by certain class of persons is an admission. One of these is a statement made by a party to the proceedings. Raghunandan Singh was not a party in the present proceedings. Therefore his statement cannot be regarded as an admission made by a party. A statement made by a person having a pecuniary interest or proprietary interest in the property in dispute is also binding upon the parties who have derived their interest from him.

(Sukhdeo Singh and Others v. Deputy Director of Consolidation, Jalaun at Orai and Others; 2007 (103) RD 59)

S. 18 – Statement – Where cannot be regarded as an admission.made by attesting witness – Sufficient compliance of formal proof of the execution as well as of the attestation of the gift deed.

The question is whether the attestation has been proved. In support of their case that the gift deed was duly executed, evidence of Ram Swarup and of one of attesting witness Ram Prakash was led. Ram Prakash has stated that at

the time when Raghunandan Singh had executed the gift deed he was present and another attesting witness Chandi Prasad was also present. He further states that he put his signature on the gift deed and apart from him Chandi Prasad and Raghunandan Singh had also put their signatures in the presence of the Registrar. In my opinion this statement made by the attesting witness is a sufficient compliance of formal proof of the execution as well as of the attestation of the gift deed. **(Sukhdeo Singh and Others v. Deputy Director of Consolidation, Jalaun at Orai and Others; 2007 (103) RD 59)**

S. 24— Extra Judicial Confession – Whether sufficient to base a conviction – Held,

While dealing with a stand of extra judicial confession, Court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder, which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word-by-word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may be many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness‘s capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous. (**Ajay Singh v. State of Maharashtra; Appeal (Crl.) 829 of 2007, Decided by Hon‘ble Supreme Court on 06/06/2007)**

S. 24—Extra-judicial confession— Reliability of

In this case, Hon’ble Court has observed that it can be relied upon when it is true, voluntary and made in fit state of mind. **(Suresh Vadnur vs. State of**

Goa; 2012 Cr.L.J. (NOC) 484 (Bom)

Sec.6 – Statements of P.Ws 1 and 2 in the court inconsistent with their reporting at police station – admissibility – Testimony not admissible as evidence.

According to PWs 1 and 2, after receipt of information about the crime, they had reached Gandhi Chowk where PW-6 Kejabai was crying aloud that the appellant had killed his wife and children. Thereafter PWs 1 and 2 along with Chait Ram went to the police station and at their instance information was recorded in General Diary at Ext.P-37. The extract of General Diary Entry is completely silent about any relevant features regarding the crime or the role of the appellant and in fact shows lack of knowledge about the crime. All that it says is that they had heard sounds of shouting coming from the house of the appellant. It is not the case of the Prosecution, that the recording vide Ext.P-37 was in any way incorrect. The version of PWs 1 and 2 in Court is thus completely inconsistent with the contemporaneous record, namely, extract Ext.P-37. If they were aware that the appellant had killed his wife and daughters even before they reached the police station, as they now claim in Court, the nature of their reporting would have been completely different. The fact that their reporting did not disclose any essential features of the crime is accepted on record and their reporting was also never treated as FIR in the matter. We find it extremely difficult to rely on the testimony of PWs 1 and 2 and would presently eschew from our consideration the statements of these two witnesses. **Dhal Singh Dewangan V. State of Chattisgarh, 2016 (6) Supreme 679**

Ss. 6 and 24 – Extra – Judicial confession – Admissibility and evidentiary value of – Principles reiterated

It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

Now, court has not examined some judgments of the Court dealing with the aspect.

In Balwinder Singh V. State of Punjab, 1995 Supp (4) SCC 259 the court stated the principle that: (SCC p. 265, para 10)

"10. An extra judicial confession by its very nature is rather a weak type

of evidence and requires appreciation with a great deal of care and caution. Where an extra judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

In Pakkirisammy v. State of T.N., (1997) 8 SCC 158 the court held that: (SCC p.162, para 8)

"8. ……It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra – judicial confession."

Again in Mavita v. State of T.N., (1998) 6 SCC 108 the Court stated the dictum that: (SCC p. 109, para 5)

"4. There is no doubt that convictions can be based on extra-judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the (witnesses) to whom it is made."

While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in State of Rajasthan v. Raja Ram, (2003) 8 SCC 180 stated the principle that: (SCC p. 192, para 19).

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made."

The Court further expressed the view that: (SCC p. 192, para 19)

"19. …..Such a confession can be relied upon and conviction and thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused. ……"

In Aloke Nath Dutta v. State of W.B., (2007) 12 SCC 230, the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material as unjustified, observed: (SCC pp. 265-66, paras 87 & 89)

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.

"89. A detailed confession which would otherwise be within the special

knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a be based only on the sole basis thereof."

Accepting the admissibility of the extra judicial confession, the court in Sansar Chand V. State of Rajasthan, (2012) 10 SCC 604, held that (SCC p. 611, paras 29-30)

"29. There is no absolute rule that an extra – judicial confession can never be the basis of a conviction, although ordinarily an extra – judicial confession should be corroborated by some other material.

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. Court is satisfied that the confession was voluntary and was not the result of inducement, threat or promise a contemplated by Section 24 of the Evidence Act, 1872."

Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in Rameshbhai Chandubhai Rathod v. State of Gujarat, (2009) 5 SCC 740, held as under: (SCC pp. 772-73, para 53)

"53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. (ref. Sk. Yusuf v. State of W.B. and Pancho v. State of Haryana, (2011) 10 SCC 165.

Upon a proper analysis of the above referred judgments of this Court, it will be appropriate to state the principles which would make an extra judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra – judicial confession alleged to have been made by the accused:

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

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

(iii) It should inspire confidence.

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

and is further corroborated by other prosecution evidence.

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

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

(Sahadevan & another Vs. State of Tamil Nadu; (2012) 6 SCC 403)

S. 24 – Extra-judicial confession - Principles for deciding whether it is admissible and capable of forming basis of conviction

The principles which would make an extra-judicial confession, an admissible piece of evidence capable of forming the basis of conviction of an accused are as follows:-

(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 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. **(Shadevan & Anr. V. State of Tamil Nadu; AIR 2012 SC 2435)**

Ss. 24, 114(f) – Extra-judicial confession – Injured accused – History given to doctor and recorded in usual course of business – Not extra-judicial confession - Can be relied upon

The statement in so far as they concern the use of various articles in commission of crime and recovery of such articles and stolen items, would form a valid and admissible piece of evidence for the consideration of the court. The history given to the doctor at the time of treatment would not be strictly an extra-judicial confession, but would be a relevant piece of evidence, as these documents had been prepared by PW 33 in the normal course of her business. Even the accused do not dispute that they were given treatment by the doctor in relation to these injuries. Thus, it was for the accused to explain this aspect. This Court has had the occasion to discuss the effect of extra-judicial confessions in a number of decisions. **(Munna Kumar Upadhyaya alias Munna Upadhyaya v. State of Andhra Pradesh; AIR 2012 SC 2470)**

S.24—Extra-judicial confession—Credibility of

Accused alleged to have killed entire family of deceased and stolen

valuables kept in almirah. Finger print taken from almirah found matching with that of accused. Evidence of witnesses and that of recovery of valuable from accused supporting evidence of finger print experts. Hence, mere failure of I.O. to state in his chief examination about taking of finger prints of accused. Does not call for rejection of finger prints evidence.

Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the Court should find out whether there are other cogent circumstances on record to support it. **(Munna Kumar Upadhyaya vs. State of A.P.; 2012 Cr.L.J. 3068 (SC)**

S. 24 – Extra judicial confession – Admissibility of

The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162(1) Cr.P.C. but as mentioned in the proviso to Section 162(1) Cr.P.C. it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the police to whom she had stated that her son (the accused)had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such statement.

The court of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) Cr.P.C., and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in the court she denied that she had made such statement before the police. The court is of the opinion that her statement to the police can be taken into consideration in view of the proviso of Section 162(1) Cr.P.C.

In opinion of the court, the statement of the accused to his mother Smt. Dhillo Devi is an extra judicial confession. In a very recent case the Court in Kulvinder Singh & Anr. V. State of Haryana Criminal Appeal No. 916 of 2005 decided on 11.4.2011 (reported in 2011 AIR SCW 2394, referred to the earlier decision of the Court in State of Rajasthan v. Raja Ram; (2003) 8 SCC 180: AIR 2003 SC 3601, where it was held –

> "An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be

proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.".

No doubt Smt. Dhillo Devi was declared hostile by the prosecution as she resiled from her earlier statement to the police. However, as observed in State v. Ram Prasad Mishra & Anr.; AIR 1996 SC 2766:

> "The evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but can be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

Similarly in Sheikh Zakir v. State of Bihar; AIR 1983 SC 911, the Court held:

> "It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the conviction."

In Himanshi alias Chintu v. State (NCT of Delhi); (2011) 2 SCC 36: AIR 2011 SC (Cri) 426, the Court held that the dependable part of the evidence of a hostile witness can be relied on.

Thus, it is the duty of the Court to separate the grain from the chaff, and the maxim "falsus in uno falsus in omnibus" has no application in India vide Nisar Ali v. The State of Uttar Pradesh; AIR 1957 SC 366. In the present case the Court is of the opinion that Smt. Dhillo Devi denied her earlier statement from the police because she wanted to save her son. Hence, the Court accepts her statement to the police and reject her statement in court. The defence has not shown that the police had any enmity with the accused, or had some other reason to falsely implicate him. **(Bhagwan Dass v. State (NCT) of Delhi; AIR 2011 SC 1863)**

S. 24 – Extra judicial confession – Credibility of witness to whom it is made – Determines its value.

An extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other evidence. The value of the evidence as to confession depends upon the veracity of the witness to whom it has been made. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. **(Mohd. Azad @ Samin v. State of West Bengal; 2009 AIR SCW 752 (G) Cal HC)**

S. 24 – Extra-judicial confession – Voluntariness – Factors to considered.

If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with, is, whether when the accused made the confession, he was a freeman or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed.

So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. Every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonial untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind for the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession.

The value of evidence as to confession depends on the reliability of the witness who gives evidence. A confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. **(Chattar Singh v. State of Haryana; 2008 AIR SCW 7426 P. & H.)**

S. 24 – Extra-judicial Confession – Reliability of

Confession alleged to be made by accused to former President of village Panchayat almost week after occurrence. President neither reduced it into writing nor producing accused before Police. Information about making of confession given to Police only after many hours, confession is unreliable. **(Inspector of Police, T.N. v. Palanisamy @ Selvan; 2009 Cri.L.J. 788)**

S. 24 – Extra-judicial Confession – Nature of – It is a weak kind of evidence unless there are good reasons for placing implicit reliance on it or coroborated by independent circumstances

It is well settled that an extra-judicial confession is a weak kind of evidence and unless there are good reasons for placing implicit reliance on it, or it is corroborated by independent circumstances, it is a tenuous basis for showing the complicity of the accused. In the present case there are no good reasons why the appellant would have gone to the house of Updesh Kumar for the purpose of making this extra-judicial confession before PW 9 Ram Naresh and Vedesh Kumar. The said Vedesh Kumar has also not been produced in Court for supporting this version. Most significantly, this extra-judicial confession is said to have been given 3 or 4 days after the incident, whereas the appellant had already been arrested on the second day after the crime. Section 161 Cr.PC statement of this witness, Ram Naresh was also recorded after one and a half months on 28.5.2002. Therefore, court‘s view that this extra judicial confession also does not help in establishing the complicity of the appellant in this crime. (**Nem Singh alias Mula v. State of U.P.; 2013 (82) ACC 711)**

Ss. 24, 25, 26, 30 – Admission/confession - Admissible only against its maker i.e. Admission/confession made by accused in one case not admissible as confession against accused in another case

The admission/confession is admissible only as against the person who had made such admission/confession. Naturally, it would be inappropriate to implicate a person on the basis of a statement made by another. Therefore, the next logical conclusion, that the person, who has made the admission/confession, should be a party to the proceeding because that is the only way a confession can be used against him. Section 24 leads to such a conclusion. Under Section 24, a confession made ―by an accused person‖, is rendered irrelevant ―against the accused person‖, if made under threat, inducement of promise. Likewise Section

25 contemplates, that a confession made to a police officer cannot be proved ―as against a person accused of any offence‖. A confession made by a person while in custody of the police, cannot ―be proved as against such person.‖ The gamut of the bar contemplated under Sections 25 and 26, is however marginally limited by way of a proviso thereto, recorded in Section

27 of the Evidence Act. There under, a confession has been made admissible, to the extent of facts ―discovered‖ on the basis of such confession. The scheme of the provisions pertaining to admissions/confessions depicts one way traffic. Such statements are admissible only as against the author thereof. Therefore the admission/confession made by accused in one case would not be admissible as confession against accused in other case. **(State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari and Ors.; 2013 Cri. L.J. 2069)**

Ss. 3, 30 and 24 – Confession – Admissibility of – Though it to be regarded as evidence in generic sense because of provisions of Sec. 30, even then it not an evidence as defined in Sec. 3

This Court in Haricharan case clarified that though confession may be regarded as evidence in generic sense because of the provisions of section 30 of the Evidence Act, the fact remains that it is not evidence as defined in section 3 of the Evidence Act. Therefore, in dealing with a case against an accused the Court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. (**Takdir Samsuddin Sheikh v. State of Gujarat; 2012 (77) ACC 269)**

S. 25 – Extra judicial confession – Confession made by accused before ex-sarpanch – Reliability

On the issue of extra-judicial confession, Phool Singh (PW-10) has deposed that he was the Ex-Sarpanch and both the appellants/accused approached him on 13.10.1997 and disclosed that they had committed the murder of Amardeep-deceased and he should take them to the police. He deposed that both the accused came to him at about 1.00 p.m. and he produced them before the police at about 3.30/4.00 p.m. Undoubtedly, both the appellants/accused had been arrested by the police only on 13.10.1997, as it is not the defence version that they had been arrested earlier to 13.10.1997, neither have they challenged the deposition of Phool Singh (PW-10) that he did not produce them before the police, not it had been their case that they had been arrested from somewhere else. Phool Singh (PW-10) faced the gruelling cross-examination but defence could not elucidate anything to discredit him and the courts below have found that the deposition of Phool Singh (PW-10) in respect of the extra-judicial confession made to him by the accused remained a trustworthy piece of evidence as rightly been relied upon. **(Kulvinder Singh & Anr. V. State of Haryana; AIR 2011 SC 1777)**

S. 25 – Confession to police by accused who committed offence under NDPS Act – Admissibility of

The consent statement signed by the appellant has not been used as a confession; therefore, the bar under Section 25 would not be applicable. A statement in order to be treated as a confession must either admit in terms of an offence or at any rate substantially all the facts which constitute the offence. No confession has been made in this case through the consent given by the appellant with regard to any of the ingredients of the offence with which he was subsequently charged. **(Jarnail Singh v. State of Punjab; AIR 2011 SC 964)**

S. 25 – Confession to police officer inadmissible U/s. 25 of evidence though its admissible in TADA cases U/s. 15 of TADA

Confession to a police officer is inadmissible vide Section 25 of the Evidence Act, but it is admissible in TADA cases vide Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987.

Confession is a very weak kind of evidence. As is well known, the wide spread and rampant practice in the police in India is to use third degree methods for extracting confessions from the alleged accused. Hence, the courts have to be cautious in accepting confessions made to the police by the alleged accused. **(Arup**
Bhuyan v. State of Assam; AIR 2011 SC 957)

S. 25 – Extra-judicial confession is capable of sustaining conviction provided it is voluntary and truthful and not made under inducement

The confessional statement in the case at hand has been made by the appellant almost immediately after the commission of the crime. The appellant is alleged to have gone over to P.W.1 S.K. Natarajan, Village Administrative Officer, who was the concerned Village Administrative Officer of Veriappur and narrated to the witness the genesis of the incident leading to his throwing baby Savitha into the well at a short distance from his house. P.W. 1 S.K. Natarajan recorded the confessional statement of the appellant, which was marked Exh. P-1
at the trial, and got the same signed from the appellant and took the appellant with him to the jurisdictional police station. At the police station P.W. 1 S.K. Natarajan got the first information report regarding the incident registered as Crime No. 61/05 setting legal process into motion in the course whereof Investigating Officer was taken to the well by the appellant in which he had thrown the child. At the well, the Inspector of police prepared the Mahazar which was signed by the witness including P.W. 1 S.K. Natarajan himself and took charge of the dead body of the child which had, by that time, been brought out of the well. A towel lying about 20 ft. from the well was also seized.

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 extra judicial confession ought to be made a basis for holding the accused guilty. **(R. Kuppusamy vs. State Rep. by Inspector of Police; 2013(81) ACC 995)**

S.26—Extra-judicial confession—Recorded when accused was in police custody—Mere fact that no police officer was standing near accused at the time when he made alleged extra judicial confession—Admissibility of—Held, "so called confession cannot be admitted

The language of Sec. 26 makes it crystal clear that a confession made by him in the custody of the police officer cannot be proved against the appellant. We need not advert to the decisions which make out a distinction between 'custody' and 'formal arrest', as in this case, the formal arrest has already been made, admittedly. The mere fact that no police official was standing near the appellant at the time when he made the alleged extra judicial confession cannot and shall not detract against the fact that he continued to be in the custody of the police officer. In that view of the matter, it appears to us to be evidence that the so-called confession cannot be admitted in evidence. **(Salim vs. State of Kerala; 2012 Cr.L.J. 3198)**

S.26—Extra-judicial confession made to respectable person namely medical officer while accused was in police custody—Admissibility of

Extra judicial confession, made to respectable person namely medical officer while accused was in police custody, can be ignored and need not be reckoned as relevant probative material against appellant in adjudication of guilt against him. **(Salim vs. State of Kerala; 2012 Cr.L.J. 3198)**

S.27—Discovery statement—Credibility when discovery is delayed—Satisfactory explanation for delay—Held, discovery statement could not be discarded

It has been held in Suresh Chandra Bahri vs. State of Bihar, 1995 SCC (Cri) 60 that even if the discovery statement is not recorded in writing but there is definite evidence to the effect of making such a discovery

statement by the investigating officer concerned, it can still be held to be a good discovery. The question is of the credibility of the evidence of the police officer before whom the discovery statements were made. If the evidence is found to be genuine and creditworthy, there is nothing wrong in accepting such a discovery statement. **(Mohd. Arif @ Ashfaq vs. State (NCT of Delhi); (2012) 2 SCC (Cri) 766)**

S. 27 – Applicability of – Principles reiterated

In State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675, this Court observed (SCC p. 679, para 14) the following as the conditions prescribed in Section 27 of the Evidence Act, 1872 for unwrapping the cover of ban against admissibility of statement of the accused to the police (1) a fact should have been discovered in consequence of the information received from the accused; (2) he should have been accused of an offence; (3) he should have been in the custody of a police officer when he supplied the information; (4) the fact so discovered should have been deposed to by the witness. The Court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence.

In the present case, the recoveries have been effected upon the statement of the accused under Section 27 of the Evidence Act. These recoveries, in court's view, were made in furtherance to the statement of the accused who were in police custody and in the presence of independent witnesses. May be that one of them had not been examined, but that by itself shall not vitiate the recovery or make the articles inadmissible in evidence. The aspect which the Court has to consider in the present case is whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not, and most importantly, the link with and effect of the same viz-a-viz the commission of the crime. (**Sahadevan and another vs. State of Tamil Nadu; (2012) 6 SCC 403)**

S. 27 – Penal Code, S. 300 – Recovery made on disclosure by accused – Reliability – Murder case - Disclosure made by Accused leading to recovery of kerosene bottle, Moped etc. - Post mortem report and forensic report however not indicating presence of kerosene on body or belongings of deceased – Recovery evidence cannot be relied upon

The aspect which the Court has to consider in the present case is whether these recoveries have been made in accordance with law and whether they are admissible in evidence or not and most importantly the link with and effect of the same vis-à-vis the commission of the crime. According to the post-mortem report Ext. p-10 as well as the forensic report Ext. P.22, kerosene or its smell was neither found on the body nor the belongings of the deceased and, therefore, it creates a little doubt as to

whether the recovered items were at all and actually used in the commission of crime. However, as far as TVS moped, MO-6 is concerned, there is sufficient evidence to show that it was used by the accused but the other contradictions and discrepancies noted above over shadow this evidence and give advantage to the accused. **(Shadevan & Anr. V. State of Tamil Nadu; AIR 2012 SC 2435)**

S. 27 – Recovery of weapon etc. – Statement of witness, Police Officer in that regard – Not reliable and not inspiring confidence – Accused would be entitled to benefit of doubt

The Court said the we are certainly not indicating that despite all this, the statement of the Police Officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not aspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the Investigating Officer recorded the statement of the accused and the article was recovered pursuant thereto, is not a sufficient ground to discard the evidence of the Police Officer relating to recovery at the instance of the accused. {See State Government of NCT of Delhi v. Sunil & Anr. [(2001) 1 SCC 652 : (2000 AIR SCW 4398)]}. Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the Police Officer itself is unreliable then it may be difficult for the Court to accept the recovery as lawful and legally admissible. The official acts of the Police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence. (**Govindaraju alias Govinda v. State by Sriramapuram P. S. & Anr.; AIR 2012 SC 1292)**

S. 27-- Court held that articles which are stated to have been discovered are easily available in the market. There is nothing special about them. Belated discovery of these articles raises a question about their intrinsic evidentiary value. Besides, if as contended by the prosecution, the accused wanted to sell parts of the tractor, it is difficult to believe that they would preserve them till1.8.1999. The evidence relating to discovery of these articles must, therefore, be rejected. (**Pancho Vs. State of Haryana; (2012) 1 SCC (Cri) 223)**

S. 27 – Application of

With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to be conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 of the

Act is the information leading to discovery and not any opinion formed on it by the prosecution. (**Mustkeem @ Sirajudeen v.**
State of Rajasthan, 2011 (5) Supreme 67)

Ss.27 and 106 – Attractibility of Sec. 106 of above act.

This is a case where Section 106 of the Evidence Act is clearly attracted which requires the accused to explain the facts in their exclusive knowledge. No doubt, the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts when are strictly within the knowledge of the accuse4d. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance again the accused as held in number of judgments, including State of Rajasthan vs. Jaggu Ram, (2008)12 SCC 51.

In view of the above, court not found any ground to interfere with the conviction and sentence of the appellants. The appellants are on bail. They may be taken into custody for undergoing the remaining sentence. [**Suresh & Anr. v. State of Haryana, 2014(8) Supreme 289]**

S. 27 – Recovery and arrest of accused – S. 27 only requires that the person leading to recovery must be an accused and he must be —in the custody of a police officer‖ - It is not essential that such an accused must be under formal arrest

As the material brought on record would show, the accused was in the custody of the investigating agency and the fact whether he was formally arrested or not will not vitiate the factum of leading to discovery. However, it may be stated that the accused was also arrested on that day. Court had dealt with the issue that formal arrest is not necessary as Mr. Jain has seriously contended that the arrest was done after the recovery. As court had clarified the position kin law, the same would not make any difference. **[Chandra Prakash v. State of Rajasthan, 2014 (4) Supreme 646]**

S. 27 –Expression custody – Meaning and scope

Section 27 of the Evidence Act explains how much of information received from the accused may be proved. Section 27 reads as follows:

27. How much of information received from accused may be proved.- Provided 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.

The expression ―custody which appears in Section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police.

This Court in State of Andhra Pradesh v. Gangula Satya Murthy (1997) 1 SCC 272 held that if the accused is within the ken of surveillance of the police during which his movements are restricted, then it can be regarded as custodial surveillance. Consequently, so much of information given by the accused in ―custody‖, in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not.

Reference may also be made to the Judgment of this Court in A.N. Venkatesh v. State of Karnataka (2005) 7 SCC 714. In Sandeep v. State of Uttar Pradesh (2012) 6 SCC 107, this Court held that it is quite common that based on admissible portion of the statement of the accused, whenever and

Wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the Court as to nature of recoveries and as to how they came into the possession or for planting the same at the place from where they were recovered. Reference can also be made to the Judgment of this Court in State of Maharashtra v. Suresh (2000) 1 SCC 471, in support of the principle. Assuming that the recovery of skeleton was not in terms of Section 27 of the Evidence Act, on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as ―conduct‖ under Section 8 of the

Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of Diana was concealed in his house, especially when the statement made by him to PW14 is admissible in evidence. **[Dharam**

Deo Yadav v. State of U.P., 2014(86) ACC 293]

S. 27- Applicability of recovery of incriminating articles – Defence plea that mandate of S. 27 of the act was not satisfied should be repel

In Bodh Raj alias Bodha and others v. State of Jammu and Kashmir, AIR 2002 SC 3164, it was held that a statement even by way of confession made in police custody which distinctly relates to the facts discovered is admissible in evidence against the accused. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus what is admissible being the information, same has to be proved and not the opinion formed on it by the police officer. The exact information given by the accused while in custody which led to the recovery of the article has to be proved; the exact information must be adduced

through evidence.

In the present case the recovery of ‗Gamchha' and ‗Baniyan' at the instance of the accused from the underneath the Takhat (Cot) is an important factor that connects the accused with the crime. According to the report of the chemical examiner and serologist, blood was also found on the said ‗Gamchha' and ‗Baniyan' belonging to the accused. This leads to the conclusion that at the time of committing murder the accused was wearing the ‗Gamchha' and ‗Baniyan' and thereafter he concealed them underneath the Takhat.

Therefore, the aforesaid contention raised on behalf of the appellant that the alleged recovery of clothes i.e. Gamchha and Baniyan do not satisfy the mandate of Section 27 of the Indian Evidence Act cannot be sustained. **[Lalit Kumar Yadav @ Kuri v. State of Uttar Pradesh, 2014 (86) ACC 247]**

S.27—Disclosure statement—Admissibility in evidence

The expression ―custody‖ which appears in Section 27 did not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police. Consequently, so much of information given by the accused in ―custody‖ in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Assuming that the recovery of skeleton was not in terms of Section 27 of the Evidence Act, on the premise that the accused was not in the custody of the police by the time he made the statement, the statement so made by him would be admissible as ―conduct‖ under Section 8 of the Evidence Act. In the instant case, there is absolutely no explanation by the accused as to how the skeleton of deceased was concealed in his house, especially when the statement made by him to SHO is admissible in evidence. **(Dharam Deo Yadav vs. State of U.P.; 2014 Cri.L.J. 2371 (SC)**

S. 27 – Recovery evidence – Reliability – Dishonestly receiving stolen property – There was not public witness of recovery - Recovery held to be highly doubtful

Now as regards appeal of accused Ghan Shyam Seth is concerned, he admittedly runs a jewellery shop and the police has allegedly recovered five gold items of jewellery from shop on the pointing out of accused Sartaz alias Raju and Sanjay Harijan on 31.8.2002 at about 3.30 p.m.

This recovery is highly doubtful for the following reasons:

i) that there is no public witness of recovery, although the shop of accused Ghan Shyam Seth is situated in dense commercial market;

ii) that no identification of the recovered jewellery items was conducted from the ladies of the complainant's family, because all the items allegedly belonged to mother and niece of deceased, so the male members of his family were not in a position to identify them. This conclusion is further fortified from the fact that in the report dated 29.8.2002 Ex. Ka-2 the complainant has stated that the ladies of the house have informed about the details of the stolen jewellery items;

iii) that full particulars of jewellery items e.g. their shape or weight etc. had not been mentioned in 2nd report furnished by PW-l to the investigating officer on 29.8.2002, so that they may be correctly identified;

iv) that theft of jewellery items could not be proved by cogent and reliable evidence;

v) that the prosecution has failed to lead any evidence to show that the accused dishonestly received, retained or handled the jewellery items believing them to be stolen;

vi) that had the accused knowledge about the jewellery items to be stolen then he should not have kept them in the same shape and would have certainly melt them.

In view of the aforesaid circumstances, Court were of the considered view that learned trial Court has not correctly appreciated the evidence on record and illegally convicted and sentenced accused Ghan Shyam Seth for the offence punishable u/s. 411, IPC. Thus, his appeal succeeds. **(Sanjay Harijanv. State of U.P.; 2013 (6) ALJ 734)**

S. 27 - Discovery evidence – Statement as to person with whom article is found – Is covered by S. 27

The Court, while dealing with the law relating to Section 27 of the Indian Evidence Act referred the judgment in case of State (NCT of Delhi) vs. Navjot Sandhu; (2005) 11 SCC 600**,** wherein it was observed that where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects

that goes into evaluation of that particular piece of evidence. As regards Joint disclosures, it was also observed that, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. ―A person accused‖ need not necessarily be a single person, but it could be plurality of the accused. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. Court did not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, court found no good reason to eschew such evidence from the regime of S. 27.

The Court also, referred the judgement in Jaffar Hussain Dastagir vs. State of Maharashtra; (1969) 2 SCC 872, 875 wherein it was observed that, under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. **(Sanjay Dutt v. State of Maharashtra, through CBI (STF); AIR 2013 SC 2687)**

S. 27 – Recovery evidence – Evidentiary value

In the present case, allegation that in broad-day light and in busy market place accused fired two shots at police party. Both shots missed target no one was hit. Incident was witnessed by passersby but no independent witness had come forward to support prosecution case.

Recovery of revolver and empty cartridges from accused but no opinion of Ballistic expert was on record regarding alleged recovered items. There were apparently no independent witness of incident and recovery other than police personals, raised suspicion. So evidence did not appear creditable and prosecution failed to prove its case beyond reasonable doubt. Hence, conviction of accused not proper. **(Shiv Kant v. State of U.P.; 2013 (3) ALJ 252)**

Section 27- Information given by the accused would be admissible

In the light of Section 27 of the Evidence Act, whatever information given by the accused in consequence of which a fact is discovered only would be admissible in the evidence, whether such information amounts to confession or not. The basic idea embedded under Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.

The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information The "fact discovered" as envisaged under Section 27 of the Evidence Act 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.

In the present case, Accused Nos. 4 & 7 disclosed the names of their co-accused at whose instance various incriminating materials including pistols, cartridges, bullets, blood stained articles were recovered. Simply denying their role without proper explanation as to the knowledge about those incriminating material would justify the presumption drawn by the Courts below to the involvement of the accused in the crime. The confession given by the accused is not the basis for the courts below to convict the accused, but it is only a source of information to put the criminal law into motion. Hence, the accused cannot take shelter under Section 25 of the Evidence Act. [**Pawan Kumar @ Monu Mittal Vs. State of Uttar Pradesh & Anr. AIR 2015 SC 2050 (Mnaju Nath Case)]**

The words employed in Section 27 does not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence.

In connection with other case, the accused was arrested and while he was interrogated, he led to discovery in connection with the stolen contraband articles from the malkhana which was the matter of investigation

in FIR no. 96 of 1985. There is no shadow of doubt that the accused-appellant was in police custody. Section 27 of the Indian Evidence Act, 1872 provides that when any fact is deposed to as discovery in consequence of the information received from a person accused of any offence in custody of a police officer, so much of such information whether it amounts to confession or not as relates distinctly to the fact thereby discovered may be proved. It is well settled in law that the components or portion which was the immediate cause of the discovery could be acceptable legal evidence. The words employed in Section 27 does not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence. Therefore, when the accused-appellant was already in custody in connection with other case and he led to the discovery of the contraband articles, the plea that it was not done in connection with that case in which he was arrested, is absolutely unsustainable. (Para 30) [**Mohan Lal Versus State of Rajasthan AIR 2015 SC 2098 (Criminal Appeal No. 1393 Of 2010)]**

Section 27 Evidence Act – recovery on the disclouser / Information given by the accused would be admissible – recovery not in pursuance to the disclosure statement – not admissible under section 27.

The Section 27 is in the form of proviso to Sections 25 and 26 of the Evidence Act. It makes it clear that so much of such information which is received from a person accused of any offence, in the custody of a police officer, which has led to discovery of any fact, may be used against the accused. Such information as given must relate distinctly to the fact discovered. In the present case, the information provided by all the accused/ appellants in the form of confessional statements, has not led to any discovery. More starkly put, the recovery of scooter is not related to the confessional statements allegedly made by the appellants. This recovery was pursuant to the statement made by Harish Chander Godara. It was not on the basis of any disclosure statements made by these appellants. Therefore, the situation contemplated under Section 27 of the Evidence Act also does not get attracted. Even if the scooter was recovered pursuant to the disclosure statement, it would have made the fact of recovery of scooter only, as admissible under Section 27 of the Evidence Act, and it would not make the so-called confessional statements of the appellants admissible which cannot be held as proved against them. [**Indra Dalal Versus State Of Haryana 2015 (5) Supreme 457]**

S. 30 – Confession by accused – Use of against co-accused – Consideration of

Court has held that when such overwhelming evidence independent of confession of Appellant Nasir is on record court is convinced that the confession of appellant Nasir can be fully applied and thereby, the involvement of Aftab in the criminal conspiracy and the following insurrection on the police force at the American Centre stands fully established and accordingly court answer the said question to the effect that the confession of Appellant Nasir can be relied on as against appellant Aftab. **[Md. Jamiluddin Nasir v. State of West Bangal, 2014 AIR (SC) 2587]**

S. 32 – Dying Declaration – When can be the basis of conviction – Conviction can be based on dying declaration which was credit worthy and reliable and it would not be interfered with.

It is seen from the doctor‟s evidence that the deceased disclosed the history to the doctor that the accused poured kerosene on her body and set her on fire and that the judicial Magistrate has recorded the dying declaration of the deceased. It is also seen from the doctor‟s evidence that before her statement was recorded by the Sub-Judicial Magistrate he had examined her and found that she was conscious and in a position to give the statement. Accordingly, the doctor has signed the endorsement appearing on the dying declaration. He has also identified his signature on the dying declaration. In cross-examination nothing contrary has been elicited to discredit the doctor‟s evidence. **(Ashok Laxamn Gaikwad v. state of Maharashtra, 2006(3) Supreme 519 SC)**

Whether dying declaration can be made the basis of conviction. – Held,

Though conviction can be raised solely on the dying declaration without any corroboration the same should not be suffering from any infirmity. **(State of Rajasthan v. Wakteng; Appeal (crl.) 677 of 2002, decided by Hon‘ble Supreme Court on 07/06/2007)**

S. 32 –Whether statement recorded by a police personnel and having thumb impression of the deceased falls within the category of dying declaration-Held,

Merely because a statement is recorded by a police personnel and the thumb impression of the deceased was affixed it cannot straightaway be rejected. (See State of Rajasthan v. Teja Ram (1999 (3) SCC 507), Rajik Ram v. Jaswant Singh Chauhan (AIR 1975 SC 667) and famous Tahsildar‘s case, Tahsildar

Singh v. State of U.P; (AIR 1959 SC 1012). In Paras Yadav and Ors. v. State of Bihar (1999 (2) SCC 126) it was held that the statement of a deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can be taken as a dying declaration after the death of the injured if he was found to be in a fit state of health to make a statement. If the dying declaration is recorded by an investigating officer the same can be relied upon if the evidence of the prosecution witness is clearly established beyond reasonable doubt that the deceased was conscious and he was removed to the hospital and he was in a fit state of health to make the statement. In the instant case, the position appears to be different. **(State of Rajasthan v. Wakteng; Appeal (Crl.) 677 of 2002, decided by Hon'ble Supreme Court on 07/06/2007)**

S. 32 –When dying declaration can be relied upon - Circumstance enumerated by Hon'ble Supreme Court;

While great solemnity and sanctity is attached to the words of dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the Court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the Court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once the Court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction. **(State of Rajasthan v. Wakteng; Appeal (Crl.) 677 of 2002, decided by Hon'ble Supreme Court on 07/06/2007)**

S. 32 – Dying declaration- Generally – If dying declaration found acceptable, it need not to be in question and answer form.

Dying declarations which were four in number were made before different authorities including a Magistrate. The Executive Magistrate Shashikant was examined as PW 6. The learned trial Judge was not correct in discarding the said dying declarations. It is now well settled that a dying declaration if found to be acceptable, the same need not be described to be in question and answer form.

In Laxman v. State of Maharashtra; 2002 SCC (Cri) 1491 the law has been laid down in the following terms:

> "Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks upto the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaraton, the medical opinion will not

prevail, nor can it be said that since there is no certificationof the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. **(Vithal v. State of Maharashtra; (2008) 1 SCC (Cri) 91)**

S. 32—Dying declaration—Court attached intrinsic value of truthfulness to such statement—If made voluntarily can form basis of conviction

The ‘dying declaration’ is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. Moreso, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration. **(Sudhakar vs. State of M.P.; 2012 Cr.L.J. 3985 (SC)**

S. 32—Multiple contradictory dying declarations—Which to be relied?

In cases involving multiple dying declarations made by the deceased, for determining which of the various dying declarations should be believed by the Court, the test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters. Each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In case where there is more than one dying declaration, it is the duty of the Court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. **(Sudhakar vs. State of M.P.; 2012 Cr.L.J. 3985 (SC)**

S. 32 - Dying Declaration

Penal Code, 1860 – S.302 – Murder trial, appreciation of evidence, Dying declaration, Acceptability, Acquittal restored, State of mind of deceased who was drugged/sedated with painkillers, at the time dying declaration was recorded , cause of death, septicemia due to 97% burns, trial court acquitted appellant finding that dying declaration does not inspire confidence, High Court reversed judgment of trial Judge and sentenced appellant to life imprisonment, various important witnesses not produced by prosecution, Dying declaration totally in conflict with prosecution version as to: (i) time of burning (ii) relation of appellant with deceased -Deceased was under influence of Fortwin and Pethidine injections (sedative painkillers) at the time of recording of dying declaration-Deceased was thus not supposed to be having normal alertness, when Magistrate recorded statement of deceased, doctor was not present and subsequently on request of police officer, doctor offered his opinion, that patient was fit to make a statement, procedure adopted by Magistrate while recording dying declaration is not acceptable, Held, dying declaration does not inspire confidence , appellant is entitled to benefit of doubt.

- Registration of birth certificate reveals prosecutrix was less than 16 years of age on date of incident, Radiologist‟s report revealed that age of prosecutrix was 16 to 17 years, Defence also produced certificate from Hospital, IO in order to aid appellant-accused h ad made a statement that certificate on record did not belong to prosecutrix, Registration of birth certificate duly proved by Medical Record Officer and CMO, NDMC and it was explained that birth certificate produced by defence was of a different

female child, Documents have thoroughly been examined by courts below, No reason to examine issue further, Radiologist‟s report cannot predict exact date of birth, Margin of error in age ascertained by radiological examination is two years on either side, Original record produced before court, Held., prosecutrix was less than 16 years of age on date of incident. (**Surinder Kumar vs. State of Haryana; (2012) 1 SCC (Cri) 230)**

S. 32 – Dying Declaration – Admissibility of – Consideration for

The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle o necessity. A dying declaration, if found reliable, can form the basis of a conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or he circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so inform that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

Another consideration that may weigh with the Court, of course with reference to the facts of a given case, us whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the court that reliance ought to be placed thereon rather than distrust.

It will also be of some help to refer to the judgment of this Court in the case of Mutthu Kutty and another v. State by Inspector of Police, T.N., 2005 (25) AIC 729 (SC) = (2005) 9 SCC 113 = 2005 (51) ACC 309 (SC), where the Court, in paragraph 16 and 17, held as under :

> “16. Though a dying declaration is entitled to great weight it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court

is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat, (1992) 2 SCC 474 = 1992 SCC (Cri) 403 = AIR 1992 SC 1817

– 1992 (2() ACC 527 (SC) (SCC pp. 480-481, paras 18-19)

iv) (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P.)

vii)If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar)

viii)The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the results of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor.)

ix) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P.)

x) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake sigh v. State of M.P.)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P.)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar).

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

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

State of U.P. v. Madan Mohan)

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra) (**Bhajju v. State of M.P.;**
2012 (77) ACC 192 (SC))

S. 32 – Dying Declaration – When can form basis of conviction

The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence r3esulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian
Evidence Act, 1872 (for short „the Act") is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Sec. 32 makes the statement of the deceased admissible, which is generally described as a „dying declaration". The „dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man"s mind, the sale feeling as that the conscientious and virtuous man under oath. The dying declaration is admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man"s mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth. Once the court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid own as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. (**Bhajju @**

Karan Singh v. State of M.P.; 2012 (2) Supreme 439 (MP))

S. 32 - Dying Declaration-Certificate of Doctor regarding Fitness of Mental Condition of the maker-Absence of such certificate- Effect

Referring to the judgment of Supreme Court in **Varipuppal Srinivas vs. State of A.P., AIR 2009 SC 1487, Mohan Lal vs. State of Haryana, AIR 2007 SC (Supp.) 1139, Kanti Lal vs. State of Rajasthan, AIR 2009 SC 2703 and Shaikh Rafiq vs. State of Maharashtra, AIR 2008 SC 1362**, it was held-

It is trite law that dying declaration, like any other piece of evidence, can be accepted or rejected in the same manner in which the

depositions of a living witness can be done. If adjudged to be true containing true and faithful narration of events it does not require any corroboration to establish guilt of the accused and by itself is sufficient to prove the charge. For a dying declaration to be acted upon has to be above board and free from all suspicion. Section 32 of Evidence Act is an exception to the general rule of cross examination by the defence and therefore, before it is acted upon, an unblemished credence has to be attached to it and it has to be proved convincingly that recording of D/D was done taking all possible precautions and it is free from any tutoring, embellishment and was true and voluntary. Natural corollary of it is that if the D/D suffers from the vices of tutoring, concoction, embellishment and full of un-naturalities and contradictions etc it has to be rejected like any other evidence. Further if the dying declaration is directly and substantially contradicted by the other surrounding circumstances and depositions of witnesses, it cannot be accepted as a gospel truth and has to be rejected as untruthful.

Regarding certification of mental condition by the doctor, the court held that in absence of any certificate by the doctor prior to recording of the dying declaration that she was in a fit mental state to give the declaration in a coherent and convincing manner, no reliance can be placed on the said statement especially when it is mentioned in her autopsy report that she had 90% superficial and deep burns. It is further noted that the said D/D was not recorded in the presence of the doctor nor there is evidence to that effect and hence it is difficult to rely upon such a D/D in total absence of any evidence regarding mental and physical condition of the deceased. (**Govind Hari Swamy vs. State of U.P., 2011(5) ALJ 90 (All.H.C. Single Judge)**

S. 32 – Dying declaration – Veracity

Declaration recorded by Magistrate without making efforts to find out as to whether Magistrate of area in which hospital lay was available or not. The endorsement of doctor that deceased was fit to make statement taken by Magistrate after recording dying declaration. The conduct of witness and manner in which he recorded declaration, renders declaration suspicious. **(Subhash v. State of Haryana; AIR 2011 SC 349)**

S. 32 – Multiple dying declarations – Acquittal of accused in view of minor discrepancies – Propriety of

It has rightly been pointed out by the learned counsel for the appellant that the entire prosecution story would depend on the dying declarations. It must be borne in mind that all three dying declarations, the first one which formed the basis of the FIR, the second recorded by

the ASI as a statement under Section 161 of the Cr.P.C. and a third recorded by the Tahsildar are unanimous as all the accused find mention therein. The High Court has by way of abundant caution, already given the benefit to three of the assailants on the plea, that they, though armed, had not caused any injury to the deceased. The motive too has also been established as there appeared to be deep animosity between the parties and that the accused Abrar, the appellant had, in fact, appeared as a witness in several cases in which Mohd. Ashfaq or his sons were the accused. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To court mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter-se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground. The court, particularly, notice that the dying declaration had recorded by the Tahsildar after the Doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar.

The court is therefore, of the opinion that no fault whatsoever could be found in the dying declarations. **(Abrar v. State of Uttar Pradesh; AIR 2011 SC 354)**

S. 32 – Dying declaration recorded by Tahsildar – Ground for consideration

Factually, it is to be noticed that the Tehsildar, who recorded the dying declaration appeared as PW-6, he has clearly stated that although no doctor was present in the hospital, he was informed by the pharmacist that Rishipal Singh was in a fit state to make a statement. He, thereafter, isolated the injured Rishipal Singh and recorded his statement. He further stated that he wrote down word by word what Rishipal Singh had stated. The contents of the statement were read to the injured who stated that he understood and accepted the same. Only thereafter, he put his thumb impression on the statement. It is undoubtedly true that the statement has not been recorded in the question and answer form. It is also correct that at the time when the statement was recorded Rishipal Singh was in a "serious condition".

There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a

fit state of mind.

A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

In court‟s opinion, the trial court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer for would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification by the doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. **(Om Pal Singh v. State of U.P.; 2011(1) ALJ 551 (SC)**

S. 32 – Dying declaration can be sole basis for conviction if it can be shown that person making statement was not influenced by any exterior factor and made statement which duly recorded

Where immediately after the incident, the deceased was taken to the Government Hospital, and upon getting information with regard to the offence Sub Inspector had rushed to the Government Hospital, and the deceased had made her statement before him and thereafter she had made her dying declaration before a judicial officer and said statement was scrupulously recorded by the Judicial Officer who had found the deceased to be conscious and fit to make statement, the dying declaration was trustworthy and reliable and can be sole basis for conviction of accused for offence punishable U/s. 304, Part 2 IPC. **(Chirra Shivraj v. State of Andhra Pradesh; AIR 2011 SC 604)**

S. 32 – Statement recorded as dying declaration but injured witness, however, survives then statement cannot be treated as dying declaration – But has to treated as of a superior high degree then statement recorded U/s. 161 of Cr.P.C.

In Sunil Kumar & Ors. V. State of M.P.; AIR 1997 SC 940, the Court dealt with the issue and held:

> "……that immediately after PW.1, injured witness was taken to the hospital and his statement was recorded as a dying declaration which, consequent upon his survival, is to be treated only as a statement recorded under Section164 Cr.P.C. and can be used for corroboration or contradiction. This statement recorded by the Magistrate at the earliest available
> opportunity clearly discloses the substratum of the prosecution case including the names of the appellants as assailants and there is

not an iota of material on record to show that this was the upshot of his tutoring. On the contrary, this statement was made at a point of time when PW 1 was in a critical condition and it is difficult to believe that he would falsely implicate the appellants leaving aside the real culprits…….that there was only some minor inconsequential contradictions which did not at all impair his evidence. Then, again, as already noticed, the evidence of the doctors fully supports his version of the incident." (Emphasis added)

In Maqsoodan & Ors. V. State of U.P.; AIR 1983 SC 126, the Court dealt with a similar issue wherein a person who had made a statement in expectation of death did not die. The court held that it cannot be treated as a dying declaration as his statement was not admissible under Section 32 of the Indian Evidence Act, 1872, but it was to be dealt with under Section 157 of the Act, 1872, which provides that the former statement of a witness may be proved to corroborate later testimony as to the same fact.

Thus, in view of the above, it can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high degree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under Section 157 of the Act, 1872. **(Ranjit Singh & Ors. V. State of Madhya Pradesh; 2011 Cri.L.J. 283 (SC)**

S. 32 – Dying Declaration – Absence of certificate of fitness by the Doctor not sufficient to discard the dying declaration

The Supreme Court has held that the Trial Court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer form would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification by the Doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. The statement made by the injured is candid, coherent and consistent. The court sees no reason to disbelieve the same. **(Om Pal Singh v. State**

of U.P.; 2010(71) ACC 923 (SC)

S. 32 – Dying declarations – Principle on which they are admitted in evidence is indicated in legal maxim "Nemo moriturus praesumitur mentiri".

In this case, the conviction of the appellant is based on the last dying

declaration Exh. P-18, said to have been recorded in presence of Executive Magistrate. The principle on which dying declarations are admitted in evidence is indicated in legal maxim:

"Nemo moriturus proesumitur mentiri a man will not meet his Maker with a lie in his mouth."

It is indicative of the fact that a man who is on a deathbed would not tell a lie to falsely implicate an innocent person. This is the reason in law to accept the veracity of her statement. **(Sharda v. State of Rajasthan; AIR 2010 SC 408)**

S. 32 – Dying declaration – If it is found to be true and voluntary – Conviction can be based on it without further corroboration – Principles governing dying declaration stated.

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Paniben v. State of Gujarat; AIR 1992 SC 1817

(i) there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja & Anr. V. the State of Madhya Pradesh; (1976) 2 SCR 764)]

v) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of Uttar Pradesh v. Ram Sagar Yadav and Ors.; AIR 1985 SC
xi) and Ramavati Devi v. State of Bihar; AIR 1983 SC 164)].

xii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy and Anr. V. the Public Prosecutor; AIR 1976 SC

1994).

xiii)Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of Madhya Pradesh; (1974) (4) SCC 264).

xiv) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (See Kaka Singh v. State of M.P.; AIR 1982 SC 1021).

xv) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath and Ors. v. State of U.P.; (1981) (2) SCC 654)

xvi) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurthi Laxmipati Naidu; AIR 1981 SC 617).

xvii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Oza and Ors. v. State of Bihar; AIR 1979 SC 1505)

xviii) Normally 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. (See Nanahau Ram and Anr. V. State of Madhya Pradesh; AIR 1988 SC 912)

(xii) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan and Ors.; AIR 1989 SC 1519).

(xiii) Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra; AIR 1982 SC 839) and Mohan Lal and Ors. v. State of Haryana; 2007 (9) SCC 151).

(Varikuppal Srinivas v. State of A.P.; AIR 2009 SC 1487)

S. 32 – Magistrate need not to make an independent enquiry about the fitness of injured, if doctor certified it.

The conclusions of the High Court that PW 11 should not have gone by what the doctor i.e. Kanchana said and should have made independent enquiries is to say the least an absurd conclusion.

It is not understood as to what the High Court meant by observing that PW 11 should have found out from the deceased as to whether she

was conscious and was in a fit condition to give the statement. The doctor who was attending to the deceased has clearly certified that she was in a fit condition to make the statement.

The High Court was of the view that the evidence of PW 11 shows that her satisfaction was a subjective satisfaction solely on the basis of the opinion of the Doctor. There is nothing wrong in such a satisfaction being arrived at because the doctor is an appropriate person to certify on that aspect. **(State of Tamil Nadu v.**

Karuppasamy; 2009 Cri.L.J. 940)

S. 32 – Dying Declaration – Can be acted upon without corroboration

It is well settled that a dying declaration can be acted upon without corroboration. In Khusal Rao v. State of Bombay [1958 SCR 552: (1958 Cri.L.J. 106]. Harban Singh v. State of Punjab; 1962 Suppl (1) SCR 104: (1962 (1) Cri.L.J. 479) and Gopal Singh v. State of M.P.; AIR 1972 SC 1557: (1972 Cri.L.J. 1045), it is held by the Supreme Court that there is not even a rule of prudence, which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing, then the Court may for its assurance, look for corroboration to the dying declaration. In Kanak Singh Rai Singh Rav v. State of Gujarat; (2003) 1 SCC 73: (2003 Cri.L.J. 855), it is held by the Supreme Court that the law is well settled and if a dying declaration is made voluntarily and truthfully by a person, who is physically in a condition to make such statement, there is no impediment in relying such a declaration. **(Anisetti Veerabhadra Rao & Anr. V. State of Andhra Pradesh; 2009 Cri.L.J. 730)**

S. 32 – Dying Declaration – Reliability – Determination of

In the present case, the Doctor has given certificate firstly on the top of the dying declaration, as stated above, and, then in the last portion of the dying declaration, he again made an endorsement that "patient remains conscious during giving her statement". Apart from the above, evidence of the Executive Magistrate would show that what questions he had asked to the deceased and what answers were given by the deceased to the said questions. The answers of the deceased to the questions asked by the Magistrate would show that she was properly responding to them and when she was responding to the questions asked by the Executive Magistrate, the Magistrate continued to record the declaration till end by putting subsequent questions, which were also properly replied by her in the manners she wanted to reply. This shows that when the Executive

Magistrate was satisfied with the answers of the questions given by the deceased, he continued to complete the dying declaration and the subjective satisfaction of the Magistrate can be gathered from such course of action adopted by him from beginning to end while recording the dying declaration. Even in the cross-examination, not a single question was asked to the Executive Magistrate that the deceased was not in a position to make the dying declaration. **(Lokendra Tiwari alias Kaushlendra v. State of Chhattisgarh; 2009 Cri.L.J. 420 (Chhattisgarh HC)**

S. 32(1) – Dying declaration – Though such an expression has not been used in any statute – It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death such statements are admitted on two grounds:- (1) Necessity for victim being generally the only principle eye-witness of crime, (2) The sense of impending death which creates a sanction equal to the obligation to the oath.

Section 32 of the Indian Evidence Act deals with the cases in his statement of relevant fact by person who is dead or cannot be found etc. is relevant. The general rule is that all oral evidence is must be direct viz., if it refers to a fact which could be seen it must be the evidence of witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it, if it refers to a fact which could be perceived by any other sense it must be the evidence of a witness who says he perceives it by that sense. These aspects are elaborated in S. 60. The eight clauses of S. 32 are exception to the general rule against hear say just stated. S. 32(1) is generally prescribed us dying declaration the grounds for admission are the victim being generally the only eye-witness of the crime, the exclusion of the statement might deflect the ends of justice and sense of impending death creates a sanction equal to obligation to an oath. When the party is at the point of death, when every hope of this world is gone, when every motive of falsehood is silenced and the mind is induced by the most powerful consideration to speak truth, a situation so solemn and so lawful is considered by law as creating an obligation equal to which is imposed by a positive oath administered in a court of justice. Though the dying declaration is entitled to a great weight, it is worthwhile to note that the accused has no power to cross-examination. Such a power is essential for elicitating the truth as an obligation of oath could be. This is the reason the courts insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that statement of deceased was

not a result of either tutoring or prompting or production of imagination.The court must be further satisfied that the deceased was in a fit state of mind after clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly it can based its conviction without further corroboration. It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. **(Smt. Shakuntala v. State of Haryana; 2007 (5) Supreme 668)**

S. 32(1) – Dying declaration – Dying declaration recorded by PSI – Reliability of

In the present case, Doctor examined patient and permitted PSI to record statement of injured – Doctor categorically stated that statement of injured victim was recorded by PSI in his presence and after the statement was recorded, also certified that patient was conscious enough to make statement. So, there is no reason to discard dying declaration. Hence, conviction confirmed. **(Narayan Manikrao Salgar v. State of Maharashtra; (2012) 8 SCC 622)**

S.32(1)- Dying declaration recorded by Magistrate evidentiary value

Dying declaration-Credibility-Matters to be considered - Dying declaration allegedly recorded by Magistrate-PW 10 brother of deceased made an application to SDM for recording dying declaration-No nothing on dying declaration that SDM had gone to hospital on application of PW 10-SDM had not been approached by police or medical authorities for recording dying declaration nor had he obtained any opinion in writing from doctor about deceased‘s fitness to make a statement. Hospital did not fall within his jurisdiction either-Endorsement had been taken from doctor after dying declaration had been recorded-Application of PW 10 had not been produced before I.O., but produced for first time in court – Earlier, deceased‘s statement recorded by doctor and attested by ASI in which deceased stated that she had been burnt in an accident-Repeated efforts by I.O. to record her dying declaration by Magistrate failed because of incapacity of victim –Held, dying declaration, raises a deep suspicion about its veracity. **(Subhash v. State of Haryana, (2011)2 SCC (Cri)** SC
689)

S. 32(1) – Oral dying declaration – Must be considered with care and

caution – oral dying declaration allegedly made by deceased to his mother, her testimonies needs corroboration from independent witness.

The deceased‟s mother being an interested witness, her testimony without corroboration from the independent witness including the medical officer cannot be blindly accepted to prove that the deceased had regained consciousness when she met him in the hospital and named the appellant to be the assailant. Her testimony cannot be accepted for another reason that she has not stated in her statement recorded by the police under Section 161 Cr.P.C. that before his death the deceased named the appellant as an assailant and it was for the first time in the Court that she made the said statement.

The oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother, who arrived at the hospital only on the following day when the doctor had already operated the deceased for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased to his mother relied upon by the prosecution and accepted by the trial court and the High Court, was not cogent, satisfactory and convincing to hold that the deceased before his death was in a fit condition to make oral declaration to his mother.

(Arun Bhanudas Pawar v. State of Maharashtra; (2009) 1 SCC (Cri) 112 (SC)

S. 32(1) – Dying declaration – Multiple, inconsistent dying declarations – Conviction on the basis of – Cannot be sustained.

A short question which arises for consideration before Supreme Court is as to whether having regard to the contradictory and/or inconsistent stands taken by the deceased in her dying declarations; the impugned judgment can be sustained in law.

The deceased had made four dying declarations: two before the medical officers, one before the Executive Magistrate and one before the police officer. In her statements before the medical officers, she alleged that while she had been cooking in her house in the morning at 1100 hrs on 29.5.2004, accidentally, the stove burst and she sustained burn injuries. In her dying declaration recorded by Parappa Gurappa Thotagi, ASI, she alleged:

"I have been married with Shri Mehbooba Saheb Mamadapur 6 years ago. I have three children. My husband is a driver. He was again and again troubling me, beating me. My mother-in-law, father-in-law and husband were forcing me to bring golden chain. They have been giving harassment to me in this manner.

On 29.5.2004, in the morning at about 9.30 when I was in the house again my father-in-law, mother-in-law and husband started abusing me. My husband thrashed me on my back. As soon as I fell down, they poured kerosene which was in the stove on my body and by lightening the matchbox they burnt me."

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. In this case, 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. **(Mehiboobsab Abbasabi Nadaf v. State of Karnataka; (2009) 1 SCC (Cri) 287 (SC)**

S. 32- Dying declaration – Admissibility of

The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moritusus prasumitus mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death. **(Umakant v. State of Chhatisgarh, 2014 (6) Supreme 655)**

S. 32 - Dying Declaration- It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated- Merely because dying declaration was not in question answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be

brushed aside and its reliability cannot be doubted.

It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated. However, the reliability of declaration should be subjected to close scrutiny and the Courts must be satisfied that the declaration is truthful.

In the case of *K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618*, this Court observed that:

―6. The accused pleaded innocence and averred that they had been falsely implicated due to enmity. Thus, it would appear that the conviction of the accused depends entirely on the reliability of the dying declaration Ext. P-2. The dying declaration is undoubtedly admissible under section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While grant solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rencour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

The submission of Ms. Meenakshi Arora, learned Senior Counsel appearing for the appellant that the dying declaration is untenable being without mentioning the time when the statement was recorded as also not in the question answer form, cannot be sustained. Merely because dying declaration was not in question answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability cannot be doubted**. [Prem Kumar Gulati vs. State of Haryana and another, 2014 (87) ACC 885, SC]**

S. 32 - Dying Declaration – If dying declaration not recorded in actual words of maker but on dictation of some other person – Creates suspicion

The sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our opinion, this by itself creates a lot of suspicion about credibility of such statement and the prosecution has to clear the same to

the satisfaction of the court. The trial court on over-all consideration of the evidence of PW-25, PW-30 and PW-36 coupled with the fact that there was over-writing about the time at which the statement was recorded and also insertion of two names by different ink did not consider it safe to rely upon the dying declaration and acquitted the accused for want of any other evidence. In the circumstances, in courts view, it cannot be said that the view taken by the trial court on the basis of evidence on record was not a possible view. The accused were entitled to the benefit of doubt which was rightly given to them by the trial court. **[Muralidhar @ Gidda and another v. State of Karnataka, 2014 (86) ACC 259]**

S. 32 – Oral dying declaration – Reliability

It is well settled that an oral dying declaration can form basis of conviction if the deponent is in a fit condition to make the declaration and if it is found to be truthful. The courts as a matter of prudence look for corroboration to oral dying declaration. As we have already noted, the dying declaration of deceased Krishna Gir does not inspire confidence. One can perceive an effort to involve number of persons by giving their minute particulars. It does not appear to be a natural voluntary statement of a dying man. The prosecution could have infused some credibility in it if it had examined the driver of the car in which deceased Krishna Gir was taken to the hospital and Ramgiriji who was also in the car. It is not understood why such vital evidence is kept back. Thus, there is no corroboration to lend assurance to the dying declaration of deceased Krishna Gir. In this connection, we may usefully refer to Heikrujam Chaoba Singh vs. State of Manipur, (1999) 8 SCC 458 : (AIR 2000 SC 59) where the deceased was stated to have made a dying declaration to his brother in the ambulance. There were four other persons in the ambulance. None of them was examined. This Court refused to place reliance on the dying declaration as the disinterested persons sitting in the van were not examined. In the instant case, admittedly PW-3 Prithvi Gir was very close to deceased Krishna Gir. He was the successor of deceased Krishna Gir. There was enmity between the accused and deceased Krishna Gir followers. The prosecution should have, therefore, examined the driver or Ramgiriji who was in the car. This is an additional reason why alleged dying declaration of deceased Krishna Gir cannot be relied upon. **[Balbir v. Vazir, 2014 AIR (SC) 2778]**

S. 32(1) - Dying declaration - Credibility - Mode of recording of - Relevance

No doubt, it is emphasised by Supreme Court that recording of such a statement in the form of questions and answers is the more appropriate method which should generally be resorted to - However, that would not mean that if such a statement otherwise meets all requirements of S. 32(1) and is found to be worthy of credence, it is to be rejected only on ground that it was not recorded in the form of questions and answers - Executive Magistrate recorded statement of deceased before her death - Before taking statement, certificate of doctor was taken - Dying declaration was rightly accepted as admissible under S. 32(1) of Evidence Act. [**Satish Chandra & Another vs. State of M.P., (2014) 6 SCC 723]**

S. 32 - Dying declaration – Not recorded in form of question and answer – No reason to discard it – If trustworthy

Simply because the statement is not recorded in the form of questions and answers, is no reason to discard it once. It is otherwise found to be trustworthy and can be treated as the dying declaration admissible under s. 32 of the Evidence Act. No doubt, it is emphasised by this Court that recording of such a statement in the form of question and answer is more appropriate method which should generally be resorted to. However, that would not mean that if such a statement otherwise meets all the requirements of s. 32 and is found to be worthy of credence, it is to be rejected only on the ground that it was not recorded in the form of questions and answers. **(Satish Chandra and another v. State of M.P.; 2014 (85) ACC 915)**

S. 32—Dying declaration—Admissibility

From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it related to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of his death or as to any of the circumstances of transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in Court‘s opinion, is not admissible in evidence.

All these decisions support the view which Court has taken that the note written by the deceased does not relate to the cause of his death or to

any of the circumstances of the transaction which resulted in his death and therefore, is inadmissible in law. **(Babubhai bhimabhai bokhiria vs. State of Gujarat; 2014 Cri.L.J. 2290 (SC)**

S. 32 – Dying Declaration – An exception to hearsay rule - To be carefully scrutinized by the Court - No requirement as to corroboration of a dying declaration

Dying declaration is undoubtedly admissible under s. 32 of the Indian Evidence Act, but due care has to be given by the person who records the statement. Dying declaration is an exception to the hearsay rule when it is made by the declarant at the time when it is believed that the declarant death was near or certain. Dying declaration is based on the maxim, ―*Nemo moriturus praesumitur mentire*‖ i.e. a man will not meet his maker with a lie in his mouth. Dying declaration is a statement made by a dying person as to the injuries culminated in his death or the circumstances under which the injuries were inflicted. Hearsay evidence is not accepted by the law of evidence because the person giving the evidence is not narrating his own experience or story, but rather he is presenting whatever he could gather from the statement of another person. That other person may not be available for cross-examination and, therefore, hearsay evidence is not accepted. Dying declaration is an exception to hearsay because, in many cases, it may be sole evidence and hence it becomes necessary to accept the same to meet the ends of justice.

The Court has to carefully scrutinize the evidence while evaluating a dying declaration since it is not a statement made on oath and is not tested on the touchstone of cross-examination. In Harbans Singh & another v. State of Punjab; AIR 1962 SC 439 the Court held that it is neither a rule of law nor of prudence that dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. Reference may also be made to the decision of the Court in State of Uttar Pradesh v. Ram Sagar Yadav and others; (1985) 1 SCC 552. The Court in State of Uttar Pradesh v. Suresh alias Chhavan and others; (1981) 3 SCC 635 held that minor incoherence in the statement with regard to the facts and circumstances would not be sufficient ground for not relying upon statement, which was otherwise found to be genuine. Hence, as a rule of prudence, there is no requirement as to corroboration of dying declaration before it is acted upon. **(Bhagwan Tukaram Dange v. State of Maharashtra; 2014 (85) ACC 658)**

S. 32 (1) – Dying declaration - When not admissible - Letter of deceased stating that in the event of his death the appellant shall be held responsible as appellant intended to kill him – Only an apprehension expressed by the deceased but no circumstance of any

transaction resulting in the death - Held, requirement of the provision not fulfilled – Such evidence inadmissible in law

In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once so held, the note does not satisfy the requirement of s. 32(1) of the Evidence Act. The note, therefore is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under s. 319 CrPC.

The Note written by the deceased does not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death and therefore, is inadmissible in law. **(Babubhai Bhimabhai Bokhiria and another v. State of Gujarat and others; (2014) 2 SCC (Cri) 644)**

S. 32—Dying declaration – Admissibility of

Doctor's endorsement about fitness of deceased, absence not material when doctor who examined deceased himself states on oath that deceased was fit to make statement. Moreso as in present case deceased died 5 days after getting burned and had received only 34% burns. **(Anjanappa vs. State of Karnataka; 2014 Cr.L.J. 368 (SC)**

S. 32—Dying declaration—Reliability of

The law is well settled that if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. Such view was taken by this Court in Kanaksingh Raisingh Rav v. State of Gujarat; (2003) 1 SCC 73 wherein this Court held:

> —5. ….. The question then is, can a conviction be based primarily on the dying declaration of the deceased in this case? In this regard Court does not think it is necessary to discuss the cases cited by the learned counsel which are noted hereinabove because, in Court's opinion, the law is well settled i.e. if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. In the instant case, the evidence of PW 5, the doctor very clearly shows that the deceased was conscious and was medically in a fit state to make a statement. It is because of the fact that a Judicial Magistrate was not available at that point of time, he was requested to record the statement, which he did. His evidence in regard to the state of mind or the physical

condition of the deceased to make such a declaration has not been challenged in the cross- examination. That being so, it should be held that the deceased was in a fit state of mind to make a declaration as held by the courts below. The next question for consideration is whether this statement is voluntary and truthful. It is not the case of the defence that when she made the statement either she was surrounded by any of her close relatives who could have prompted her to make an incorrect or false statement. In the absence of the same so far as the voluntariness of the statement is concerned, there can be no doubt because the deceased was free from external influence or pressure. So far as the truthfulness of the statement is concerned, the doctor (PW 5) has stated that she has made the said statement which, as noted above, is not challenged in the cross-examination. The deceased in her brief statement has, in clear terms, stated that because of the quarrel between her and the accused, the accused had poured kerosene and set her on fire which, in Court's opinion, cannot be doubted.....

What Court found in the present case is that the dying declaration (Ext. PF) which was recorded by Dr Rajinder Rai (PW 4) was also signed by Manoj (Appellant 1) which indicates that Appellant 1 was present when the statement was recorded. Nothing is on the record to suggest that any of the relation of the deceased was present to influence Dr. Rajinder Rai (PW 4). Thus, Court found that there is no infirmity in the finding of the Sessions Judge as affirmed by the High Court. **(Manoj vs. State of Haryana; (2013) 3 SCC (Cri) 865)**

S. 32(1)—Dying declarations recorded in language not spoken/known by deceased—Effect of—Creates doubt and not admissible

The three dying declarations which were originally recorded in Kannada. According to the learned counsel for the appellant, the deceased had no knowledge of Kannada language and could speak only Telugu. The credibility of the three dying declarations (Ext. P-12, Ext. P-22 and Ext. P-29) i to be doubted. In the first dying declaration (Ext. P-12) dated 14-1-2000 the thumb impression of the victim has been shown. Whereas in the second dying declaration (Ext. P-22) taken on the same day i.e. 14-1-2000 and the third dying declaration (Ext. P-29) given on the next day i.e. 15-1-2000, the victim had stated that she had not given her signatures since her hand was completely burnt. Dr Bhimappa (PW 22), who signed Ext. P-22, in his cross-examination, stated that he was not aware whether Neelamma (the deceased) was talking in Telugu. Dr Dhanjaya Kumar (PW 20), who signed Ext. P-12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that Neelamma was talking in Telugu language. Padmavathi (PW 8), mother of the deceased, in her cross-

examination stated that Neelamma (the deceased was not knowing the correct writing in Telugu. But she was writing some Telugu.

The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased Neelamma was talking in Telugu. It has also not been made clear as to who amongst the Tahsildar, PSI or SI or the doctors who had signed Ext. P-12, Ext. P-22 and Ext. P-29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those exhibits and that at the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu and that the deceased understood the contents of the same.

The abovementioned facts create doubt in our mind as to the truthfulness of the contents of the dying declarations as the possibility of the deceased being influenced by somebody in making the dying declarations cannot be ruled out. **(Kashi Vishwanath vs. State of Karnataka; (2013) 3 SCC (Cri) 257)**

S. 32(1)—Multiple dying declarations—Material contradictions and other serious irregularities—Effect of

A comparison of the three dying declarations shows glaring material contradictions. In the first dying declaration (Ext. P-12), she (the deceased) stated that her husband instigated her to pour kerosene on her own body, therefore, she poured the kerosene on her own body and her husband further poured kerosene on her and put on fire using a matchbox. In the second dying declaration (Ext. P-22), she (the deceased) stated that her husband along with L poured kerosene on her body and put on fire by using matchstick. In the third dying declaration (Ext. P-29), she (the deceased) stated that her husband poured kerosene on her and L lit the matchstick and threw upon her body.

Apart from these contradictions, the credibility of the three dying declarations (Ext. P-12, Ext. P-22 and Ext. P-29) is to be doubted for other reasons as well. In the first dying declaration (Ext. P-12) dated 14-1-2000 the thumb impression of the victim has been shown. Whereas in the second dying declaration (Ext. P-22) taken on the same day i.e. 14-1-2000 and the third dying declaration (Ext. P-29) given on the next day i.e. 15-1-2000, the victim had stated that she had not given her signatures since her hand was completely burnt. The witnesses in their cross-examination have stated that they were not aware whether the deceased was talking in Telugu. The doctor PW 20 who signed Ext. P-12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that the deceased was talking in Telugu language. On a careful perusal of the materials on record, it cannot be said that the prosecution in this case has established its case

beyond reasonable doubt to base a conviction of the appellant. Hence, he is acquitted. **(Kashi Vishwanath vs. State of Karnataka; (2013) 3 SCC (Cri) 257)**

S. 32 – Dying Declaration - Two dying declarations - Apparent discrepancies conviction not safe - Accused entitled to benefit of doubt

It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. **(Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P. Hyderabad; 2013 (4) Supreme 450)**

S. 32 – Dying declaration - Certificate by doctor that maker is fit to make statement not an essential requirement in every case

Law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must satisfy that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such stat of the deceased is not essential in every case, Subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such statement cannot be subjected to cross-examination. However, the Court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity. **(State of Madhya Pradesh v. Dal Singh & Ors.; 2013 Cri.LJ 2983)**

S. 32 – Multiple dying declarations made in a fit state of mind - Discrepancies not material - Can be relied upon

In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant. **(Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P. Hyderabad; 2013 (4) Supreme 450)**

S. 32 (1) – Dying declaration – Evidentiary value – Declaration recorded in presence of Magistrate in fit mental condition and it

proved by autopsy report – Conviction on basis of dying declaration would be proper

In instant case, the deceased suffered burn injuries on 4.6.2001 at about 4.30 p.m. in her matrimonial home. There is eye-witness account of the incident through Hunny PW-9, minor son of the deceased. The deceased was admitted in Sheel Hospital, Bareilly on 4.6.2001 due to 80% burn injuries of I and II degree and discharged from there on 13.6.2001. There is no medico-legal report of the victim. Her dying declaration was recorded on 5.6.2001 at 4.25 p.m. by PW 11 and thereafter she died on 15.6.2001 in the house of the accused-appellant. Thus she remained alive for about ten days after the incident. Although she was severely burnt but the above facts show that her condition was not overtly critical or precarious when her dying declaration was recorded by PW 11. In this connection court may usefully refer to the case of Munnawar & Ors. v. State of Uttar Pradesh & Ors.; (2010) 5 SCC 451: (2010 (4) ALJ 241), wherein the Apex Court held as under:

"that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded."

The dying declaration was recorded with the intervention of Sheel Hospital, Bareilly and police of out-post Avas Vikas, P. S. Prem Nagar, Bareilly by Addl. City Magistrate-I, Bareilly Rameshwar Dayal PW 11, who has no animus with the accused or affinity with the deceased or the complainant's family. The dying declaration of the deceased recorded by PW- 11 is reproduced as under:

> A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case.

The story of having burn injuries while cracking joke is belied by the statement of Dr. Harpal Singh PW-4 who had conducted autopsy on the corpse of the deceased on 15.6.2001. He has found that her scalp hairs were burnt. If the deceased sustained burn injuries while working on kerosene -stove accidentally, then scalp hairs cannot be burnt in any situation. Thus court found that the dying declaration of the deceased has no legal infirmity at all and it is also consistent with the case of the prosecution. The deceased has spoken about the manner in which she sustained burn injuries at the hands of the accused. She had not

implicated any other family member of the accused-appellant. The defence could not show that the dying declaration is the result of tutoring of Smt. Laxmi deceased in any manner. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ**
226)

S. 32 (1) – When dying declaration can become sole basis of conviction without corroboration – When it is voluntary, true, reliable, free from suspicious circumstances, and recorded in accordance with established practice and principles

It is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attendedby suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same. **(Krishan v. State of Haryana; (2013) 3 SCC (Cri)**
125)

S. 32(1) – Dying declaration – Format prescribed for recording – Effect of – Indeed no such format can be prescribed, so it is not obligatory that a dying declaration should be recorded in question-answer

Insofar as the case before us is concerned, we may only note that there is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question-answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time. **(Surinder Kumar v. State of Punjab; (2013)**

3 SCC (Cri) 246)

S. 32 – Dying declaration – Doctor certifying fitness of patient to make statement – magistrate directing all police officials of Relatives out of the room
– Magistrate recording the statement after being satisfied about parties it is condition – After recording doctor certifying patients‘ condition during recording of statement – Dying declaration duly

recorded – No need of corroboration

Coming to the claim that inasmuch as the husband Rakesh also sustained bum injuries in his hands, it is highly impossible to set her ablaze, it is relevant to note that the incident occurred late night on 14.05.1998, though the accused-husband took her to the hospital admittedly, he did not try to get any treatment from the doctor for the alleged burn injuries. As rightly pointed out by the learned counsel for the State, if he had sustained burn injuries in his hands nothing prevented him from taking treatment on the same day from the same doctor. Admittedly, he did not get treatment till he was arrested on 21.05.1998. In view of the same, the argument of the learned counsel for the appellant that inasmuch as the burn injuries were found on the hands of the husband, it was necessary to look for corroboration is liable to be rejected. In view of the factual position, the decisions of various Courts relied on by the counsel for the appellants on this aspect are not applicable to the case on hand and there is no need to refer the same. (**Rakesh vs. State of Haryana; 2013(3) Supreme 500)**

S. 32 – Multiple dying declarations – Variance – If such variation was only as regard nature of demand then such variation is of no importance

It was contended that there is a variation between the two dying declarations with respect to the reasons for setting her on fire. Now as far as this variation between the two statements is concerned, it is only this much that in her first statement Chandrakala had stated that the appellant used to harass and ill-treat her because he was demanding gold from her, and was asking her to marry her sister to him for which she was not agreeable. In the second dying declaration she had once again stated that he was demanding gold from her, but had also added that he had sought the transfer of the land belonging to her maternal uncle to him. This time she has not stated about his insisting to marry her sister. The demand for gold is the common factor in both the statements. In the first statement she has additionally referred to his insisting on marrying her sister, whereas in the second one she has referred to his demand for the agricultural land of her maternal uncle. The Sessions Court and the High Court have not given any importance to this variation, and in our view rightly so. This is because one must understand that Chandrakala had suffered 91 % burn injuries. Earlier, the duty-doctor had asked her as to how the incident had occurred, and later on the Head Constable on duty had repeated the query. Any person in such a condition will state only that much which he or she can remember on such an occasion. When asked once again, the person concerned cannot be expected to repeat the entire statement in a parrot-like fashion. One thing is very clear in both the statements viz., the greed of the appellant and her being harassed on

that count. Besides, it is relevant to note that her mother and brother have both corroborated her statement that the appellant was demanding gold and land from her. Initially Chandrakala spoke about this demand for gold and later also for the land. This cannot in any way mean an attempt to improve. Similarly, the non-mention on the second occasion of his insistence to marry her sister cannot be an omission to discredit her statements**. (Hiraman v. State of Maharashtra; 2013 CrLJ 2191)**

S. 32 – Multiple dying declarations – Reliability of Discrepancies and contradictions in dying declarations make them unreliable

Court may now examine, whether statement of PW3 – Prem Chand recorded under Section 161, Cr.P.C., marked as Ex.P6 could be accepted as a dying declaration, wherein it was stated by him that the deceased was raising hue and cry and was abusing her father in law for ablazing her. PW3 was declared as hostile. Further, PW4 and PW5, the neighbours, who have stated to have seen the deceased in a burning state and raising hue and cry, neither disclosed the cause of death nor mentioned the names of any of the accused persons. Consequently, the dying declaration made by Prem Chand remained uncorroborated. It is trite law that it is unsafe to base reliance on the statement made under Section 161 Cr.P.C. 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. The court in Arvind Singh v. State of Bihar (2001) 6 SCC 407 while dealing with the case of oral dying declaration stated as follows:

> ―Dying declaration shall have to be dealt with care and caution.
>
> Corroboration is not essential but it is expedient to have the same, in order to strengthen the evidentiary value of declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence.‖

The Court in Bhajju Alias Karan Singh v. State of Madhya Pradesh (2012) 4 SCC 327 while dealing with admissibility of dying declaration held as follows:

―The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction.

The Court had occasion to consider the scope of multiple dying declarations in Smt. Kamla v. State of Punjab (1993) 1 SCC 1, this Court held as follows:

> ―A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying

declaration they should be consistent particularly in material particulars.‖

In Lella Srinivasa Rao v. State of A.P. (2004) 9 SCC 713, the Court had occasion to consider the legality and acceptability of two dying declarations. Noticing the inconsistency between the two dying declarations, the Court held that it is not safe to act solely on the said declarations to convict the accused persons.

Court have gone through both the dying declarations and there are not only material contradictions in both the declarations but also inter se discrepancies in the depositions of the witnesses as well. In the first dying declaration recorded by ASI, signed by PW13, there is no mention of the names of any of the accused persons and the deceased had stated that she could not recognize the person who set her ablaze even though the declaration was in consonance with Rule 6.22 of the Rajasthan Police Rules, 1965.

Due to discrepancies and contradictions between the two dying declarations and also in the absence of any other reliable evidence, in our view, the High Court is justified in reversing the order of conviction which calls for no interference by this Court. In view of above, the appeal is, therefore, dismissed**. (State of Rajasthan vs. Shravan Ram & Anr.; AIR 2013 SC 1890)**

S. 32 – Dying Declaration – Reliability – Failure to secure present of Magistrate to record statement and to record it in question-answer form, do not affect its evidentiary value

Chandrakala having suffered 91 % burn injuries, there was hardly any time to secure the presence of competent Magistrate or to record her statement in a detailed question-answer form. Absence of these factors itself will not take away the evidentiary value of the recorded statement. The parameters from this paragraph are as follows:

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that 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; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying

declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was no the result of tutoring by interested parties.‖

The court has further held that bears special sanctity, if made at earliest opportunity without any influence ought to be accepted as relevant and truthful as to cause of death. Absence of corroboration does not take away its relevance.

(Hiraman v. State of Maharashtra; 2013 CrLJ 2191)

S. 32 – Dying declaration – Credibility of – Statement of deceased concealing injury to defence side in same incident is unworthy of credence

A dying declaration is just like any other piece of evidence and can be accepted or discarded in the same manner as any other oral or documentary evidence. It does not stand on a better or higher footing than oral testimonies of a witnesses, If it is found to be un-tutored, unembellished, reliabilities documented in the words of the dying man, at the earliest opportunity and does not suffer from vices of failing memory or critical condition of the deceased then, even without corroboration, it is sufficient for holding an accused guilty. Since admissibility of dying declaration is an exception to the rule of hear-say evidence it should be approached by the Courts very cautiously, in the given facts and surrounding circumstances, especially because it is seldom made in the immediate presence of the accused who also does not have any opportunity to test the veracity of the maker of such a statement through cross-examination. It is because of these reasons that the Apex Court has to dilate and deliberate on these facets of law, succinctly and lucidly, in Khushal Rao v. State of Bombay, AIR 1958 SC 22 decades ago. Hon'ble Supreme Court has lucidly adumbrated in that decision some guide lines for acceptability of dying declarations in the following words:-

"16. On a review of the relevant provisions of the Evidence Act

and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the

Full Bench of the Madras High Court, aforesaid, (1) that 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;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence that other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6 that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the lying man for observation, for example, whether there was sufficient light if the crime was corn mitted at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement has been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court. in a given case, has come to the

conclusion that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in the case."

Again in a full Bench decision in Thurukanni Pompiah and another v. State of Mysore, All 1965 SC 939 Apex Court, while disbelieving, the dying declaration as truthful piece of evidence, on the facts and circumstances of that case.

"9. Under Cl. (1) of S. 32 of the Indian Evidence Act, 1872, a statement made by a person who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is a relevant fact in cases in which the cause of that person's death comes into question, and such a statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The dying declaration of Eranna is, therefore, relevant and material evidence in the case. A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused that had no opportunity to test its veracity by cross-examination. If Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. "

In yet another decision Harbans Singh v. State of Punjab, AIR 1962 SC 439 it has been observed by the Apex Court as under:-

"18. In view of this latest pronouncement of this Court - which it should be stated in fairness to the Trial Judge was made long after he gave his judgment - it must be held that it is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. The evidence furnished by the dying declaration must be considered by the Judge, just as the evidence of any witness, though undoubtedly some special considerations arise in the assessment of dying declaration which do not arise in the case of assessing the value of a statement made in Court by a person claiming to be a witness of the occurrence. In the first place, the Court has to make

sure as to what the statement of the dead man actually was. This it is often a difficult task, specially where the statement had not been put into writing. In the second place, the Court has to be certain about the identity of the persons named in the dying declarations - a difficulty which does not arise where a person gives his depositions in Court and identifies the person who is present in Court as the person whom he has named. Other special considerations which arise in assessing the value of dying declarations have been mentioned by this Court in 1958 SCR 552: (AIR 1958 SC 22) and need not be repeated here."

Now applying the guide lines to facts and circumstances of the present appeal, court at the very outset, record that none of the alleged three dying declarations mentions about the murder of deceased Smt. Atli and her sustaining gunshot wounds in the same incident and thus all the three dying declarations suffer from the same criticism as that of PW3 and therefore, for concealing injury to the defence, side it becomes unworthy of credence. **(Munendra v. State of U.P.; 2013 (2) ALJ 487)**

S. 32 (1) - Dying declarations - Reliability - Mere presence of some close relatives of deceased would not affect credibility of declaration

Ms. Shalini Nagpal, Judicial Magistrate, First Class, Rohtak, who recorded the dying declaration of the deceased, was examined as PW-10. According to her, on 16.05.1998, the police had moved an application before her for recording the statement of Kailash, and she had visited PGIMS, Rohtak at about 5.50 p.m. on the same day and contacted the doctor concerned in Ward No.5 and sought his opinion about her fitness to make a statement. She asserted that the doctor had declared Kailash fit to make a statement (Memo Ex PB/3). She further explained that thereafter, she recorded her statement in the form of question and answers form which is Ext. PB. The statement was concluded by her at 6.25 p.m and PW-6, after examining the deceased certified that Kailash was in her sense throughout the period of her examination. She also deposed that the statement (Ex.PB) had been recorded by her in the very language of Kailash without any addition or omission and her certificate to that effect is Ex. PB/5. The certificate of the doctor about the physical condition of the deceased during the course of examination is Ex. PB/4. She also informed the Court that the statement was read over to Kailash who accepted the contents to be correct. She also stated that she did not obtain the thumb impression of the patient as both her hands were burnt, hence she elected to obtain the impression of her right toe. In the cross examination, she admitted that the document exhibited as Ex. PB by her is the carbon copy prepared by her in the same process. It is also clear from her evidence that before recording the statement of the deceased, she specifically

directed the police officials and relatives to leave the ward so that the patient was not under any influence while making the statement before her. Though, in the evidence, it has come on record that few of the relatives were standing in the ward, in view of the assertion of the Magistrate (PW-10) who recorded her statement, mere presence of some of the close relatives would not affect the contents of the declaration. (**Rakesh vs. State of Haryana; (2013) 2 SCC (Cri.) 312)**

S. 32(2) – Cr.P.C., S. 162 – Statement U/s. 161 Cr.P.C. of an injured recorded by I.O. during course of Investigation can be accepted as dying declaration and it becomes admissible in evidence as substantive piece of evidence

When Court tests the submission of the earned Counsel for the appellant in the case on hand at the time when 161 Cr.P.C. statement of the deceased was recorded, the offence registered was under section 326, IPC having regard to the grievous injuries sustained by the victim. PW -4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW-4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under section 161 Cr.P. C. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent Counsel merits acceptance.

Learned Senior Counsel made a specific reference to section 162 (2) Cr. P. C. in support of his submission that the said section carves out an exception and credence that can be given to a 161 statement by leaving it like a declaration under section 32(1) of the Evidence Act under certain exceptional circumstances.

Going by section 32(1) Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the extraordinary credence attached to such statement fall under section 32(1) of the India Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration. **(Irshad and another vs. State of U.P.; 2013(81) ACC 734)**

Ss. 32 and 60—Doctrine of dying declaration—Meaning and exception

The doctrine of dying declaration is enshrined in the legal maxim ‘Nemo moriturus praesumitur mentire’, which means a man will not meet his maker with a lie in his mouth’. The doctrine of Dying Declaration is

enshrined in section 32 of the Indian Evidence Act, 1872 (hereinafter called as, 'Evidence Act') as an exception to the general rule contained in section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases. In the incident deceased suffered burn injuries on 17.5.2003 at about 8 p.m. There is no eye-witness of the incident. She was admitted in S.R.N. Hospital, Allahabad on 18.5.2003 at 5.25 p.m. and the doctor has found that burn injuries found on her person were about one-day old. It means that in injured condition the deceased was kept at home by accused for one day. This shows their callous attitude and ill-intention. She had expired on 22.5.2003 at 7.20 a.m. in the aforesaid hospital. Her dying declaration was recorded on 20.5.2003 at 10 a.m. by PW 10. Thus, she remained alive for about five days after the incident. Although she was severely burnt but the above facts show that her condition was not overtly critical or precarious when her dying declaration was recorded by PW 10. In this connection we may usefully refer to the case of Munnawar and others vs. State of Uttar Pradesh and others, 2010 (70) ACC 853 (SC), wherein the Apex Court held as under:

> "that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded."

The dying declaration was recorded by Dy. Collector D.P. Singh PW 10, who has no animus with the accused or affinity with the deceased or the complainant's family. **(Km. Anita vs. State of U.P.; 2013 (80) ACC 46 (All)**

S. 32(1)—Dying Declaration—Consideration for its admissibility

It is clear that the statement made by the deceased by way of a declaration is admissible in evidence under section 32(1) of the Evidence Act. It is not in dispute that her statement relates to the cause of her death. In that event, it qualifies the criteria mentioned in section 32 (1) of the Evidence Act. There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. 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. As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declarationis voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in the event, there is no impediment in convicting the accused on the basis of such dying declaration. 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. **(Ashabai vs. State of Maharashtra; 2013 (80) ACC 923 (SC)**

Sec. 32 – Dying declaration

The dying declaration of Raj Kumar was allegedly recorded at 10:45 p.m. on 19.03.2008 at Agra by Shri Naresh Pal Gangwal, who was the then SDM. Dr. Vanay Singh (PW-6), who first examined the body of the deceased at the General Hospital categorically stated in his statement that he was unconscious when he was brought to the hospital at 12:45 p.m. The dying declaration is also alleged to have been recorded on the said date at 10:45 p.m. It is really very hard to believe that Raj Kumar, who was unconscious in the noon, regained consciousness in front of SDM that too in the absence of certificate of the duty doctor that the patient is fit to make a statement. In view of such infirmities in the dying declaration, we are of the opinion that the High Court has rightly discarded the same. It has already been held by this Court in a catena of cases that when a dying declaration is suspicious, it should not be acted upon without corroborative evidence. **Pankaj V. state of Rajasthan 2016 (6) Supreme 619.**

Sec. 32 - Dying declaration

The Hon‘ble Allahabad High Court held that a dying declaration can form sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as proved under the law, is reliable and gives cogent and plaussible explanation of the occurrence of the events. It may not be necessary to look for corroboration of the dying declaration, as envisaged if a dying declaration is jointly to be recorded by a Executive Magistrate with certificate of a medical doctor about the mental fitness of the declarant to make the statement.

Santosh v. State of U.P., 2016 (97) ACC 218

Sec. 32 A - dying declaration is entitled to great weight - the statement must not be a result of tutoring, prompting or a product of imagination - recorded by the police officer as well as the Executive Magistrate are

fully corroborated - oral dying declaration to the father of the deceased - not reliable

On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in-laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. **State of Gujarat V. Jayrajbhai Punjabhai Varu AIR 2016 SC 3218 (Criminal Appeal No. 1236 Of 2010)**

Sec. 32 - Discrepancy With Eye Witness - once the dying declaration is found reliable, trustworthy and consistent with circumstantial evidence - is adequate to bring home the guilt

It is true that in the dying declaration, the deceased had stated that he did not know the person who extinguished the fire by pouring water. It could be that while he was in flames, the deceased could not identify the person who tried to save him. The prompt lodging of the FIR and the fact that one of the eyewitnesses was having burn injuries establishes the presence of the eyewitnesses. In any case, even if the eyewitness account is taken to be inconsistent with this part of the dying declaration, once the dying declaration

is found reliable, trustworthy and consistent with circumstantial evidence on record, such dying declaration by itself is adequate to bring home the case against the accused. **Mumtaz@ Muntyaz; Dilshad @ Pappu V. State Of U P (NOW Uttarakhand) : 2016(4) Supreme 711 ; 2016 LawSuit(SC) 635 ; 2016 (6) JT 232, 2016 AIR(SC) 3151, 2016 (2) AllCriR 2221**

Sec. 32 - SEVERAL DYING DECLARATION

Each dying declaration - on its own merit

Each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs. **Raju Devade V. State Of Maharashtra : 2016(5) Supreme 201 ; 2016 LawSuit(SC) 617 ; 2016 (6) JT 430, 2016 AIR(SC) 3209, 2016 CrLJ 3568**

Section 32-- Dying declaration-- The principles of appreciation of Dying Declaration

On bare perusal of Section 32(1) of the Evidence Act, it is clear that the statement as to death must be made by the person himself and if any discrepancy arises, the same cannot be relied upon. The Hon'ble Supreme Court has in a catena of judgments laid down the parameters to gauge the veracity of a dying declaration. In Atbir v. Government of NCT of Delhi [(2010) 9 SCC 1; (2010) 3 (Cri) 1110] summarized the principles on its appreciation, laid down earlier, which are reiterated as under:

vi) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

vii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

viii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

ix) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

x) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

xi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

xii) Merely because a dying declaration does not contain all the details as to

the occurrence, it is not to be rejected.
xiii) Even if it is a brief statement, it is not to be discarded.
xiv)When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
xv) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration." [**State (Government Of NCT Of Delhi) v. Nitin Gunwant Shah, (2016) 1 SCC (Cri) 361; (2016) 1 SCC 742]**

Section 32-- Dying declaration based on - Recorded by Head Constable – His evidence reliable – Declarant was in fit mental condition.

One cannot question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, the deceased was found to be mentally fit to give his statement regarding the occurrence. Further, evidence of Head Constable was shown to be trustworthy and has been accepted by the courts below. [**Gulzari Lal v. State Of Haryana, (2016) 2 SCC (Cri) 325 ; (2016) 4 SCC 583]**

Section 32 Evidence Act - Oral Dying Declaration – permissible and admissible – examine it is voluntary, truthful and made in a conscious state of mind - without any influence.

The aforesaid judgment makes it absolutely clear that the 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 communication is positive and definite. There cannot be any cavil over the proposition that a dying declaration cannot be mechanically relied upon. In fact, it is the duty of the Court to examine a dying declaration with studied scrutiny to find out whether the same is voluntary, truthful and made in a conscious state of mind and further it is without any influence. [**Vijay Pal Versus State (GNCT) Of Delhi (2015) 2 SCC (Cri) 733 ; (2015) 4 SCC 749 (Criminal Appeal No. 2153 Of 2011)]**

S.32 – Two medical endorsements and one statement – There is no discrepancy in three statements – Conviction can be based on properly recorded dying declaration.

Learned counsel for the appellant attacking the acceptability of the dying declaration has urged that when there are more than one dying declaration, and inconsistency is perceptible, the Court should be extremely careful before placing reliance on it. To bolster the daid submission he has drawn inspiration from the decisions in Lella Srinivasa Rao v. State of A.P., (2004)9 SCC 713, Amol Singh v. state of Madhya Pradesh, (2008)5 SCC 469,

Sharda v. State of Rajasthan, (2010)2 SCC 85, and State of Rajasthan v. Sharavan Ram & Anr., (2013)12 SCC 255.

At this juncture, we may also fruitfully refer to a two-Judge Bench decision in Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh, (1993)2 SCC 684, where the Court observed that:-

> ―A dying declaration made by person on the vergy of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration therefore enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations then the court has also to scrutinize all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same.‖

In this matter, there is no circumstance from which it can remotely be inferred that she was tutored or her statement was embellished by any kind of influence. On the contrary, her testimony has been consistent and, therefore, the reliance placed on the same by the learned trial Judge as well as by the High Court is absolutely impeccable and, therefore, we do not find flaw in the judgment of conviction and order of sentence.

Consequently, the appeal, being devoid of merit, stands dismissed. Shaileshbhai @ Pappu Balubhai Chunara & Anr. v. State of Gujrat,
2015(2) Supreme 82

S. 32 – Dying declaration

In this matter appeal was filed against order by which accused/Appellants convicted for offence of murder and voluntarily causing grievous hurt with common intention under Sections 34,114,302 and 332 of Code. This issue before the court was whether impugned order of conviction on basis of dying declaration was sustainable.

It was held that Appellants were convicted by placing reliance on dying declaration of deceased. Deceased had, said that accused persons were totally hostile to her and in order to extinguish her life spark had poured kerosene on

her. Hospital records tendered in evidence was that patient was conscious and well oriented and was in position to follow instructions. The doctor had examined patient and clearly stated that she was in fit and conscious condition to give dying declaration. Executive Magistrate had taken precautions by removing all relatives of injured from room and approached doctor to verify about fitness of patient, and after being satisfied that she was fit enough to give dying declaration, recorded same in a questionnaire form. Deceased during recording of statement had categorically stated that she had quarrel on date of occurrence with Appellants and, therefore, one of accused poured kerosene on her. Nothing had been brought on evidence to discredit testimony of Executive Magistrate who had recorded dying declaration in questionnaire form. No circumstance from which it could remotely be inferred that she was tutored or her statement was embellished by any kind of influence. Deceased testimony had been consistent and, therefore, reliance placed on same for conviction of Appellants was absolutely impeccable. Order of conviction was maintainable and required no interference - Appeal dismissed. **Shaileshbhai v. State of Gujarat 2014(3) ACR 3428, 2015 CriLJ 604, 2014(10) SCALE 301, (2015)1 SCC (Cri) 285.**

Section 32 Evidence Act - Dying Declaration

When two deaths have taken place in the same transaction - circumstances of the transaction resulting in one death - closely interconnected with the other death - dying declaration of one has relevance for death of other person.

According to the prosecution, the deceased was subjected to cruelty and on the fateful day, the appellant returned home in drunken condition and started abusing the deceased and her mother Prabha Bai who had come on a visit to her daughter's house. Thereafter, the appellant poured kerosene on the deceased and set her on fire. Prabhabai and Vimalbai, PW1, tried to extinguish the fire and received burn injuries in the process. They were taken to Medical College and Hospital, Nagpur. The deceased made a dying declaration ('DD') (Exhibit 45) before PSI Sunil Eknadi Wanjari. She succumbed to her injuries at 6.25 A.M. on 29th March, 1999. Prabhabai also made a DD **(Exhibit 43)** before the PSI Bhila Narayan Bachao (PW5), on the basis of which FIR was lodged at Police Station Imambada. Rajiv Babarao Raut (PW3), Special Judicial Magistrate (SJM) also recorded DD of Prabhabai **(Exhibit 41)** at 9.30 A.M. on 29th March, 1999. The said Magistrate also recorded the statement of PW1 Vimalbai **(Exhibit 29)**. Prabhabai died on 1st April, 1999 at 2.2.0 A.M. with 77% burn injuries. The dead bodies were subjected to post mortem.

In the present case, the Hon'ble Supreme Court was concerned with the

question whether statement of Prabhabai is relevant for determining cause of death of Savita. In other words, Question is what happens when two deaths have taken place in the same transaction and circumstances of thetransaction resulting in one death is closely interconnected with the other death.

The Hon'ble Supreme Court discussed "Relevant", "facts in issue" and section 6 of the Evidence Act and concluded that such statement may not by itself be admissible to determine the cause of death of anyone other than the person making the statement. However, when the circumstances of the transaction which resulted in death of the person making the statement as well as death of any other person are part of the same transaction, the same will be relevant also about the cause of death of such other person.

Thus, when a dying declaration relating to circumstances of the transaction which resulted in death of a person making the declaration are integral part of circumstances resulting in death of any other person, such dying declaration has relevance for death of such other person also. **Tejram Patil v. State of Maharashtra 2015 (2) Supreme743 Factors to be observed – while relying on dying declaration – coded again**

It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated. However, the reliability of declaration should be subjected to close scrutiny and the courts must be satisfied that the declaration is truthful. The Hon'ble Supreme Court again coded the factors to be observed when the case is based on dying declaration as follows :

xvi) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of convictiorn unless it is corroborated;

xvii) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

xviii) that it cannot be laid down as a general proposition that a dying declaration

is a weaker kind of evidence than other pieces of evidence;

xix) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

xx) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and

answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

xxi) that in order to test the reliability of a dying declaration, the court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.**Prem Kumar Gulati v. State of Haryana and another 2015 (3) Supreme 538**

Section 32-- Dying declaration– Duties of authorites - Whenever a person is brought to a hospital in an injured state which indicates foul-play

When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration.

The central question, however, remains as to whether the alleged Dying Declaration attracts authenticity. Since the prosecution has succeeded in showing/proving by preponderance of probability that a dowry death has occurred, the burden of proving innocence has shifted to the accused. It appears to us to be unexceptionable that whenever a person is brought to a hospital in an injured state which indicates foul-play, the hospital authorities are enjoined to treat it as a medico-legal case and inform the police. If the doctor, who has attended the injured, is of the opinion that death is likely to ensue, it is essential for him to immediately report the case to the police; any delay in doing so will almost never be brooked. The police in turn should be alive to the need to record a declaration/statement of the injured person, by pursuing a procedure which would make the recording of it beyond the pale of doubt. This is why an investigating officer (I.O.) is expected to alert the jurisdictional Magistrate of the occurrence, who in turn should immediately examine the injured. When this procedure is adopted, conditional on the certification of a doctor that the injured is in a fit state to

make a statement, a Dying Declaration assumes incontrovertible evidentiary value. We cannot conceive of a more important duty cast on the Magistrate, since the life & death of a human being is of paramount importance. We think that only if it is impossible for the Magistrate to personally perform this duty, should he depute another senior official. Non-adherence to this procedure would needlessly and avoidably cast a shadow on the recording of a Dying Declaration. The prosecution, therefore, would be expected to prove that every step was diligently complied with. The prosecution would have to produce the doctor or the medical authority to establish that on the examination of the injured/deceased, the police had been immediately informed. The I.O. who was so informed would then have to testify that he alerted the Magistrate, on whose non- availability, some responsible person was deputed for the purpose of recording the Dying Declaration. We are not in any manner of doubt that where medical opinion is to the effect that a person is facing death as a consequence of unnatural events, the responsibility of the Magistrate to record the statement far outweighs any other responsibility. There may be instances where there was no time to follow this procedure, but that does not seem to be what has transpired in the case in hand. In cases where some other person is stated to be recipient of a Dying Declaration, doubts may reasonably arise. **[Ramakant Mishra @ Lalu Etc.Versus State Of U.P., (2015) 3 Scc (Cri) 503; (2015) 8 Scc 299,** Criminal Appeal Nos.1279-1281 Of 2011**]**

Appreciation of Evidence

We have seen the whole evidence. The only explanation that this witness has given is that he did not mention the name of the accused in the FIR as he could not property hear the name of the culprit when the matter was informed to him by his younger brother. This witness has specifically admitted that he was in the hospital from 10 p.m. to 3 a.m. and he looked after the injured person. He also asserted that he never went outside the hospital during that period. He also admitted that there was another person in the village who was related to them bearing the same name as that of the appellant. A specific suggestion was given to him that Oinam Deben Singh and L. Subhaschandra Singh had never informed him about the dying declaration made by the deceased involving the present appellant. **(Waikhom Yaima Singh Vs. State of Manipur; (2012) 1 SCC (Cri) 788)**

S. 35 – Entries made in school leaving certificate – Not in conformity with terms of S.35 – Cannot be accepted as proof of age.

Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible there under: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto. The deposition of the Head Master of the school in this case did not satisfy the requirements of the law laid down in the aforementioned decisions.

Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case**. (Ravinder Singh Gorkhi v. State of U.P.; 2006 (4) Supreme 337)**

S. 35 – Documentary evidence – Which documents have evidentiary value.

Section 35 of the Evidence Act provides that an entry in any public or other official book or register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specifically enjoined by law of the country in which such book or register is kept, is itself a relevant fact. Having regard to the provisions of Section 35, entries in school admission registers in regard to age, caste etc. have always been considered as relevant and admissible. [See: Umesh Chandra v. State of Rajasthan; 1982 (2) SCC 202 and State of Punjab v. Mohinder Singh; 2005 (3) SCC 702]. In Kumari Madhuri Patil v. Addl. Commissioner [1994 (6) SCC 241], this Court observed that caste is reflected in relevant entries in the public records or school or college admission register at the relevant time and certificates are issued on its basis. In Birad Mal singhvi, this Court after referring to the

ingredients of Section 35 held thus:

> "An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove
> the age of the person in the absence of material on which the age was recorded. The entries regarding dates of birth contained in the scholar‟s register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record, was examined. In the absence of the connecting evidence, the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value."

This Court further held unless the parents, or persons conversant with their date of birth were examined, the entry in the school register by itself will not have much evidentiary value. In this case, we are concerned with the „caste‟ and not the date of birth. The residents of a village have more familiarity with the „caste‟ of a co-villager, than the date of birth of the co-villager. Several villagers who knew the respondent and their father, including a cousin of the respondent has been examined and they have stated the caste of the respondent. Appellant has also produced other documentary evidence which clinch the issue, namely the application made by the respondent‟s father for admission of respondent to school, birth register extract and village Pariwar Register extracts to establish the caste of the respondent. Further the said entries in the school register were made nearly forty years prior to the election petition. When read with other oral and documentary evidence, it cannot be said that Ex. PW-2/A has no evidentiary value even by applying the strict standards mentioned in Birad Mal Sanghvi. **(Desh Raj v. Bodh Raj; AIR 2008 SC 632)**

S. 35 – Document – Admissibility and probative value of document is different things.

A document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The authenticity of the entries in the official record by an official or person authorized in performance of official duties would depend on whose information such entries stood recorded any what was his source of information. The entries in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. **(Madan Mohan Singh & Ors. V. Rajni Kant & Anr.; AIR 2010 SC 2933)**

S. 35 – Revenue records or mutation order – Do not confer any right of title over the agricultural land.

Revenue records or mutation order – Do not confer any right of title over the agricultural land. **(Manvishram v. Sitaram & Anr.;**
AIR 2009 (NOC) 2454 (MP HC)

S. 35 – Khasra entries – Do not convey title – Entries are only relevant for purposes of paying land revenue and has nothing to do with ownership

The High Court committed a grave and manifest error of law in reversing the well reasoned judgment and decree passed by the Trial Court by simply placing reliance upon Khasara entires even without properly appreciating the settled law that Khasara entries do not convey title of the suit property as the same is only relevant for the purposes of paying land revenue and it has nothing to do with ownership. **[Municipal Corporation, Gwalior v.**
Puran Singh, 2014 AIR (SC) 2665]

S. 35 - Admissibility of document - Conditions for

It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under s. 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.

Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of s. 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent.‖
(Vinod v. State of U.P. and another; 2014 (85) ACC 466)

S. 35 – Marriage certificate – Issued by advocate exercising power of marriage officer – Advocate never authorized by any provision to register any marriage or to act as marriage officer – Marriage certificate

issued by him would be void document – Cannot be relied upon as proof of marriage of parties – Consequently parties not entitled to any protection on basis of said void document

No advocate has been delegated or assigned any powers of the Marriage Officer, therefore, the Advocate Kamta Prasad is not a person authorized to act as a Marriage Officer and to register any marriage. The marriage certificate as such is a nullity and a void document. In view of the facts and circumstances, as there is no reliable proof of marriage of the petitioners, their marriage cannot be recognized in law specially in exercise of writ jurisdiction. Accordingly, the protection which has been claimed in this writ petition cannot be extended to any of them. No case for exercise of discretion in favour of the petition has been made out. **(Satyam Kumar & Another v. State of U.P. & Others; 2014 (1) ALJ 204)**

Ss. 110, 35 Entries – Revenue entries – Status of – Revenue entries are not an evidence – to show title to tenure holder but shows possession of the property concerned by the person.

It is no doubt true that the revenue entries are not an evidence to show title of tenure holder but shows possession of property concerned by the person, whose name is recorded in the revenue entries. That too a presumption only. This presumption is rebuttable.

In Narain Prasad Agarwal v. State of Madhya Pradesh, 2007(8) SCALE 250, the Court said:

"Record of right is not a document of title. Entries made therein in terms of section 35 of the Indian Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt that such a presumption is rebuttable."

In Gurunath Manohar Pavaskar and others v. Nagesh Siddappa Navalgund and others, 2008(104) RD 243(SC) = 2008(70) ALR 176, the Court said:

"A revenue record is a not a document of title. It merely raises a presumption in regard to the possession. Presumption of possession and/ or

continuity thereof both forward and backward can also be raised under section 110 of the Indian Evidence Act."

The entries in revenue record may refer to the possession of the person on the land in dispute and prima facie it may raise a presumption of title but

such presumption is rebuttable.

In Nair Service Society Ltd. v. K.C. Alexander and others, AIR 1968 SC 1165, construing section 110 of Evidence Act, the Court said:

"Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

In Chief Conservator of Forests v. Collector and others, AIR 2003 SC 1805, the Court said:

"Presumption, which is rebuttable is attracted when the possession is prima facie lawful and when the contesting party has no title."

Recently, referring to above authorities, the Court in State of A.P. and others v. M/s. Star Bone Mill and Fertifizer Co., 2013(120) RD 643 (SC), the Court said:

"13. The principle enshrined in section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of section 6 of the Specific Relief Act, 1963, section 145 of Code of Criminal Procedure, 1973, and sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possesion one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possesion was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title must make out a caseof trespass/ encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence,

circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under section 110 of the Evidence Act." **Kamla v. Smt. Gulabi Devi and another, 2015(127) RD 110.**

Sec. 35-- Recovery of weapon – not necessary

Conviction of the appellant-Ramvilas and other accused is based mainly on the evidence adduced by six eye witnesses. All the eye witnesses have consistently spoken about the occurrence and the overt acts of the accused including the appellant-Ramvilas. Courts below have recorded the concurrent findings of fact observing that the testimony of eye witnesses is credible and trustworthy. Deceased-Bansilal had sustained as many as twenty six injuries. Evidence of eye witnesses is amply corroborated by medical evidence. By perusal of the records, no cogent reasons are forthcoming to disbelieve the testimony of the eye witnesses and we find no reason to interfere with the concurrent findings recorded by the courts accepting the evidence of eye witnesses as trustworthy. In the incident, the presence of witness at the time and place of occurrence cannot be doubted. Evidence of the injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard the evidence of the injured witnesses. The contention that the presence of accused at the scene of occurrence was doubtful as no "katta" was seized from him nor any gun shot injury was found on the person of deceased-Bansilal. As observed by the High Court all the eye witnesses have spoken in one voice
so far as carrying of "katta" by appellant-Ramvilas and therefore his presence at the scene of occurrence cannot be doubted merely because no "katta" was recovered from him. It has come out in the evidence that the appellant-Ramvilas had exhorted the other accused in attacking the deceased and also actually participated in the attack. As pointed out by the courts below that the appellant-Ramvilas nowhere pleaded in his examination under Section 313 Cr.P.C. that he was neither present at the scene of occurrence nor involved in the incident. Held the appellant guilty. [**Ramvilas Versus State of M.P.., AIR 2015 SC 3362 (Criminal appeal nos. 1786-1787 of 2009)]**

S. 45—Expert Evidence—Reliability—Courts look upon expert evidence with greater sense of acceptability but are not absolutely guided by such evidence

The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the Courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. Where the eye-witness account is found credible and

trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the date which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by examining the terms of science, so that the Court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing.

The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but no otherwise. **(Dayal Singh vs. State of Uttaranchal; 2012 Cr.L.J. 4323 (SC)**

S. 45—Expert evidence—Breach of professional duties—Directions issued for courts

Supreme Court directed Courts to record specific finding against Investigating Officers indulging in deliberate dereliction of duty and conducting of designedly defective investigation and direct disciplinary action them. Similar course directed to be adopted against expert witnesses indulging in acts of omission or commission in breach of professional duties and even against prosecution witnesses. **(Dayal Singh vs. State of Uttaranchal; 2012 Cr.L.J. 4323 (SC)**

S.45—Finger print evidence—Reliability of

Accused alleged to have killed entire family of deceased and stolen valuables kept in almirah. Finger print taken from almirah found matching with that of accused. Evidence of witnesses and that of recovery of valuable from accused supporting evidence of finger print experts. Hence, mere failure of I.O. to state in his chief examination about taking of finger prints of

accused. Does not call for rejection of finger prints evidence. **(Munna Kumar Upadhyaya vs. State of A.P.; 2012 Cr.L.J. 3068 (SC)**

S. 45 – Expert opinion – Relevancy of

It is to be noted that in this case according to the medical evidence the shot had hit the head of the humerous that got punctured and the signs of the would were medically towards inside and slightly towards below and it was from the right to left. Once the pellets hit a hard substance like the humerous bone, they can get deflected in any direction and on that basis it cannot be said that there is an inconsistency between the medical evidence and the ocular evidence. The Court is in agreement with the High Court that the ocular evidence in this case is highly consistent and leaves no room for any doubt about the commission of the offence by the appellant. **(Lallan Chaubey v. State of U.P.; AIR 2011 SC 241)**

S. 45 – Medical expert opinion vis-à-vis – Direct evidence – Which evidence given precedence – Direct and reliable evidence takes precedence over expert opinion. (Pankaj Kumar v. State of H.P.; 2010 Cri.L.J. (NOC) 1171 (HP)

S. 45 – Evidentiary value of expert opinion – Death by shot in head – Absence of tattooing and blackening of skin surrounding wound is rule out case of suicide as shot was not fired from blank range.

The deceased and the accused were working in the same organization. They were office bearers of the same Union. Two days before the incident, the deceased had left that Union and become the President of the rival union. They, therefore, resented the action of the deceased. They formed a common intention to eliminate the deceased. They went to the house of the deceased and invited him to accompany them to resolve the Union disputes. They took him to Hotel Genesis where they consumed liquor; they were also served food by the hotel staff. At some point of time the pistol of the deceased was taken by one of the appellants. It is wholly irrelevant whether it was voluntarily given by the deceased or taken by the assailant. Thereafter, one of the accused persons shot the deceased in the head with his own pistol. They then wiped the fingerprints on the pistol and threw the pistol down next to the body of the deceased. They tried to escape. This would tend to indicate towards the guilt rather the innocence of the appellants. Two of them were captured just outside the hotel, the other two managed to escape. The injury on the deceased does not indicate that he had shot himself. The injuries show that the shot has not been fired at point blank range. There is no tattooing or blackening of the skin surrounding the entire wound. The consumption of liquor cannot be doubted in view of the evidence given by the waiter, who served the food.

All these circumstances taken together clearly form such a continuous and unbroken chain as to leave no manner of doubt that the deceased was shot dead by one of the appellants. The cleaning of the pistol to remove the

fingerprints is a circumstance which is a strong pointer to the guilt of the appellants. **(Santokh Singh & Anr. V. State of Punjab; AIR 2010 SC 3274)**

S. 45 – Evidence of finger print expert is not substantive evidence but such evidence can only be used to corroborate some items of substantive evidence on record.

It will be noticed that under the Indian Evidence Act, the word admissibility‟ has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Indian Evidence Act. But one thing is clear that evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence, which are otherwise on record. **(Musheer Khan @ Badshah Khan and Anr. v. State of Madhya Pradesh; AIR 2010 SC 762)**

S. 45 – Expert witness – Credibility of – Expert is not a witness of fact and lies evidence is of an advisory character and credibility of such witness depends on reasons stated in support of his conclusion.

An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. **(Ramesh ChandraAgrawal v. Regency Hospital Ltd.; AIR 2010 SC 806)**

S. 45 – Expert evidence – Admissibility – Need to hear an expert opinion is first and foremost requirement.

The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court‟s knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are.

i) That the expert must be within a recognized field of expertise.

ii) That the evidence must be based on reliable principles, and

iii) That the expert must be qualified in that discipline. **(Ramesh Chandra Agrawal v. Regency Hospital Ltd. & ors.; 2010(1) ALJ 740 (SC)**

S. 45 – Opinion of Expert – Relevance of

Section 45 of the Evidence Act indicates that where the Court has to form an opinion as to the identity of the handwriting on a document, the opinion upon that point of persons especially skilled in such matter becomes a relevant fact. The power of attorney executed by defendant No. 1 can be proved by a variety of methods, such as, the signatures and handwriting of the said defendant from other admitted documents and then comparing it and forming an opinion. Alternatively, expert opinion can also be taken. The opinion of an expert is only an evidence of opinion and is not decisive or conclusive. It is not substantive evidence. The opinion of the expert can be relied by the plaintiff when the opinion is supported by other corroborative evidence. The handwriting experts‟ opinion only corroborate the internal or external evidence that comes on the record, as held by the Supreme Court in AIR 1973 SC 2200, Ram Narain v. State of Uttar Pradesh. Further, such evidence has to be received by the Court with great caution and may be accepted, if it is corroborated by other evidence supporting the view of the expert.

Evidence to support the plaint allegation is by way of filing documents and proving it by way of oral evidence. Opinion of an expert is an aid to corroborate the other evidence on that point and, as stated earlier, it is not conclusive in nature. The law prescribes that substantial justice has to be made by the Court. That is the legal system of our country but could the plaintiff be ousted on this count by not permitting him to lead the evidence by production of an expert evidence or should an opportunity be given to the plaintiff to prove his case. **(Ajay Swaroop Mehrotra v. D.N. Raina (Deceased) & Ors.; 2009(2) ALJ 311)**

S. 45 – Applicability of

In the opinion of the Court, in the light of the provision of Section 45 of the Evidence Act, opinion of an expert could at some stage become relevant fact. That stage has not as yet arrived but the Court could foresee such a situation but has unnecessarily closed the door of the plaintiff by rejecting his application and not permitting him to lead the evidence.

In view of the aforesaid, the impugned order cannot be sustained and is quashed. **(Ajay Swaroop Mehrotra v. D.N. Raina (Decd.) through L.Rs. and Others; 2009(1) AWC 141)**

S. 45—DNA test—Evidentiary value—Consideration of

In this case, Hon‘ble Supreme Court has observed that investigating agency has to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. **(Dharam Deo Yadav vs. State of U.P.; 2014 Cri.L.J. 2371 (SC)**

Sting operation - Validity of as a method of crime detection – Legal principles of various jurisdictions discussed - Issue has not yet been tested in Indian Law

The expression _sting operation‘ seems to have emerged from the title of a popular movie called ―The Sting‖ which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person into committing a crime. Being essentially a deceptive operation, though designed to nab a criminal, a sting operation raises certain moral and ethical questions. The victim, who is otherwise

innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of the circumstances raising the potential question as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issue that arises from such an operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act.

Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner as will be noticed hereinafter, the same is not the position in India which makes the issues arising in the present case somewhat unique. A sting operation carried out in public interest has had the approval of this Court in R.K. Anand vs. Registrar, Delhi High Court; (2009) 8 SCC 106 though it will be difficult to understand the ratio in the said case as an approval of such a method as an acceptable principle of law enforcement valid in all cases.

Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between ―the trap for the unwary innocent and the trap for the unwary criminal‖ (per Chief Justice Warren in Sherman vs. United States; 356 US 359 (1958) approving situations where government agents ―merely afford opportunities or facilities for the commission of the offense‖ and censuring situations where the crime is the ―product of the creative activity‖ of law enforcement officials (Sorrell vs. United States; 287 US 435 (1932)).

In the latter type of cases the defence of entrapment is recognized as a valid defence in the USA. If properly founded such a defence could defeat the prosecution. Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognized as absolute principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet to be answered. **(Rajat Prasad v. C.B.I.; 2014 (85) 993)**

S. 45 – Expert evidence - Admissibility – Court is not bound by evidence of experts which is to a large extent advisory in Nature – Court must derive its own conclusion upon considering opinion of expert which may be adduced by both sides, Cautiously and upon taking into consideration authorities on the point on which he deposes

Court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration difference between an _expert witness‘ and an _ordinary witness‘. Opinion must be based on a person having special skill or knowledge in medical science. It could be

admitted or denied. Whether such evidence could be admitted or how much weight should be given thereto, lies within domain of court. Evidence of an expert should be interpreted like any other evidence. **(Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Other; 2013(4) CPR 639 (SC)**

S. 45 – Opinion of expert - Evidentiary value – Explained

When there are contradictory opinions of handwriting experts, in is always open to the Court concerned to form its opinion after careful consideration of expert‘s opinion as also document concerned. It is not uncommon where two experts employed by different parties gave opinion heavily influenced by the interest of the party concerned who approach them.

In any case evidence of an expert is only an opinion. Expert evidence is only a piece of evidence and external evidence. It has to be considered along with other pieces of evidence, which would be the main evidence and which is the corroborative one depends upon the facts of each case. An expert‘s opinion is admissible to furnish the Court a scientific opinion which is likely to be outside the experience and knowledge of Judge, this kind of testimony, however, has been considered to be of very weak nature and expert is usually required to speak, not to facts, but to opinions. It is quite often surprising to see with what facility, and to what extent, their view would be made to correspondent with the wishes and interests of the parties who call them. They do no, indeed, wilfully misrepresent what they think but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously deposed, they are incapable of expressing candid opinion. **(Om Prakash v. Baijnath Singh; 2013 (4) ALJ 569)**

S. 45 – Non-filing of report of forensic science laboratory – Effect of – If report could not be brought on record, it would not effect merits of case which based on testimony of eye-witnesses including injured eye-witness

The last argument of learned counsel for the appellants is that no report of Forensic Science Laboratory has been filed in the case so adverse inference should be drawn against the prosecution. No doubt PW-4, the investigating officer has stated in his examination-in-chief that the case property was sent to Forensic Science Laboratory for examination and has also proved the case property in his deposition before the trial Court, but no report of the Laboratory has been filed by the prosecution. Two empty cartridges were also recovered from the spot. It would have been better if the report of Laboratory was filed during trial, but if it could not be brought on record for any reason what so ever it would not affect the merits of the case which is based on testimony of eye-witnesses including an injured witness. **(Kallu s/o Nanhku Singh and Anr. v. State of U.P.; 2013 (3)ALJ 215)**

Ss. 45 and 138—Photographic evidence of photographer—When credible and can be admissible

In this case court has held that PW 2 photographer being thoroughly cross-examined, his deposition being relied on by trial court and no expert being examined to discredit his evidence—Evidence of PW-2, held, is credible and cannot be doubted on ground that another photograph was not examined. Appellate court erred in considering irrelevant material, while most relevant evidence i.e. adoption ceremony and adoption deed, were disregarded on basis of mere surmises and conjectures. (**Laxbai vs. bhagwantbuva; (2013) 4 SCC 97)**

S. 47 – Handwriting of accused – Proof

The contention that the evidence of Sundaram (PW-14), who was examined for the purpose of proving the handwriting of the appellant and whose competency to identify the writing of the appellant itself is doubtful, as rightly pointed out by the respondent that it was admitted by A-5 (appellant herein), while questioning under Section 313 that she had been working in Sugir Tours and Travels run by PW-14 during 1987-91 and, hence, the evidence of PW-14, who identified the writings available in Exhs.P-2 to P-43 as that of A-5 is admissible under Section 47 of the Indian Evidence Act. We are satisfied that the same was rightly acted upon by the trial Court and the High Court while holding the charge against the accused-appellant as proved to have committed in pursuance of the conspiracy**. (Hema v. State, through Inspector of Police, Madras; AIR 2013 SC 1000)**

S. 45—Opinion of Expert—Validity of—Expert opinion is only an opinion evidence on either side but did not aid in interpretation

In Forest Range Officer & others vs. P. Mohammed Ali and others; AIR 1994 SC 120, it was observed:

> "The expert opinion is only an opinion evidence on either side and does not aid us in interpretation."

In the context of opinion of Handwriting Expert, in Fakhruddin case, the Court held that the opinion of Handwriting Expert though is relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. Reliance was placed on earlier decisions in Ram Chandra vs. State of Uttar Pradesh; AIR 1957 SC 381 (at page 388) and Ishwari Prasad Misra vs. Mohammad Isa; AIR 1963 SC 1728 where it was observed that expert evidence as to handwriting is an opinion evidence and it can rarely, if ever, take the place of substantive evidence. It cannot be conclusive because it is after all opinion evidence. In para 11 of the judgment in Fakhruddin (supra), the Apex Court further observed, where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the

expert or other witnesses. This has been relied upon in present case. **(Abdul Rahman vs. District Judge, Mahoba; 2013 (1) ARC 111)**

S. 45 – Robbery – Expert evidence – Chance fingerprints lifted from entrance glass doors of bank – Non-examination of photographer – Also non-production of negatives of photographs of chance fingerprints – Said lapse cannot result in acquittal of accused – Criminal trials should not be made casualty for such lapses in investigation or prosecution

Contention of respondents is that evidence of PW-15-Fingerprint Expert incriminates the appellants A.K. Singh and U.K. Singh. However, in proving this incriminating evidence, there seems to be lapses on the part of the prosecution. As noticed earlier, police constable Tirumal Kumar-photographer of MFSL Unit had taken the photographs of the preserved chance fingerprints. To prove the chance fingerprints lifted from the entrance glass doors of the bank, the prosecution should have proved the photographs by examining constable-Trimul Kumar and should have produced the negatives of the photographs of the chance fingerprints. This lapse in the prosecution, in our view, cannot result in acquittal of the appellants. The evidence adduced by the prosecution must be scrutinized independently of such lapses either in the investigation or by the prosecution or otherwise, the result of the criminal trial would depend upon the level of investigation or the conduct of the prosecution. Criminal trials should not be made casualty for such lapses in the investigation or prosecution. Evidence of PW-14 (Manager) and PW-
18 (Cashier) identifying the appellants and their evidence as to identity of the appellants in the test identification parade ought not to have been disbelieved by the tribunal. In exercise of power under Section 30 of the Armed Forces Tribunal Act, this Court normally does not re-appreciate the evidence and slow to interfere with the findings of the tribunal unless there is substantial question of public importance. But when it is found that appreciation of evidence in a given case is vitiated by serious error, this Court can re-appreciate the evidence and interfere with the findings. In our view, the tribunal was not right in disbelieving the evidence of PW-14 (Manager) and PW-18 (Cashier) in identifying the appellants A.K. Singh, U.K, Singh and D.K. Singh as culprits and their identity in test identification parade and their conviction is to be affirmed on the evidence of PW-14 and PW-18, if not on the evidence of fingerprint expert and the appeals are liable to be dismissed. **Ajay Kumar Singh v. The Flag Officer, Commanding-in-Chief and others, 2016 Cri.L.J. 4174 (SC)**

Section 45-- Medical evidence – Doctor opinion – Use of weapon – Possibility of injury caused by the said weapons.

The Doctor, who conducted the post-mortem, stated that many of the injuries found on the deceased were all cut injuries and could have been caused by cutting weapons, like an Aruval and not by knives as stated by witness in her testimony. A knife is essentially used for stabbing but it can also be used for slicing and cutting depending upon the manner and angle at which it is used. The witness had stated that she saw the accused attacking the deceased and it cannot be technically taken to be stabbing or slicing. The post-mortem report states that most of the wounds are deep cut wounds but the same can be caused by a knife. To this extent, the statement of witness is corroborated by the medical examination. [**Sheikh Sintha Madhar @ Jaffer @ Sintha etc v. State Rep. By Inspector of Police, AIR 2016 SC 1844 ; 2016(3) Supreme 752]**

S.45 – Expert opinion – Evidentiary value – Opinion of expert witness on technical aspects has relevance but opinion has to be based upon specialized knowledge and data.

The opinion of expert witness on technical aspects has relevance but the opinion has to be based upon specialized knowledge and the data on which it is based has to be found acceptable by the Court. In Madan Gopal Kakkad versus Naval Dubey, (1992)3 SCC 204, it was observed as under:

> ―34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on
>
> examination. The expert witness is expected to put before the Court all materials inclusive of the date which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court. ‖
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> 35. Nariman, J. in Queen v. Ahmed Ally, (1998)3 SCC 309, while expressing his view on medical evidence has observed as follows:
>
> ―The evidence of medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.‖ **Sultan Singh v. State of Haryana, 2014(8) Supreme 746.**

S. 53 & 54

Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused.

Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of. **(Narender Kumar v. State (NCT of Delhi); AIR 2012 SC 2281)**

S. 58 & 145 – A pleading in regard to existence of a document may be necessary for advancing case of a party, but when a witness admits a document to be in his own handwriting without anything more, effect thereof may have to be considered having regard to the provisions contain U/s. 145 Indian Evidence Act in terms thereof only requirement would be that his attention is drawn before a writing could be proved.

An admission made by a party can be used against him. When such admission is made by a Karta of the Hindu Undivided Family, who is managing the family property as well as family business affair the same would be a relevant fact. When a claim was made by a plaintiff for rendition of account in the list, issuance of document purported to have been authored by one of the parties is in the opinion of the Court was required to be taken into consideration. It is also a trite common law that when in cross-examination a witness accepts the correctness of a document the same would be relevant. A pleading in regard to existence of a document may be necessary for advancing the case of a party, but when a witness admits a document to be in his own handwriting without anything more, the effect thereof may have to be considered having regard to the provisions contained in S. 145 of the Indian Evidence Act in terms whereof the only requirement would be that his attention is drawn before a writing can be proved. **(Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.; 2007 (5) Supreme 357)**

S. 58 - Admission – Failure of party to prove its defence not amounts to admission

It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of

the plaintiff. To an admission made without following procedure under O. 12 or admission having not made during the course of trial S. 58 of Evidence Act does not get attracted. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

Ss. 59 and 60—Evidentiary value of oral testimony

Do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and the reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. 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. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.
(State of Rajasthan vs. Babu Meena; (2013) 4 SCC 206)

S. 60 – Hearsay evidence – Newspaper reports would be regarded as hearsay evidence, hence cannot be relied upon

If one examines newspaper publications produced at Exts. P.5 and P.6, it becomes at once clear that the reports were entirely hearsay. The reporters of Exts. P.5 and P.6 were examined in this case. They have categorically, and in no uncertain terms, stated that they had no personal knowledge of the events published in Exts. P.5 and P.6. Therefore, what was reported in the newspapers could not have been regarded anything except hearsay. There is no manner of doubt that the High Court has misdirected itself in placing reliance on the hearsay evidence, which was produced before the Court in the form of Exts. P.5 and P.6. In view of clear proposition of law laid down by the Court in Quamarul Ismam v. S.K. Manta and Others; 1994 Supp. (3) SCC 5: AIR 1974 SC 1733, and Laxmi Raj Shetty and another v. State of Tamil Nadu; AIR 1988 SC 1274, the hearsay evidence could not have been used by the learned Judge for coming to the conclusion that contemporaneous newspapers publications Exts. P.5 and P.6 corroborate the testimony of the respondent No. 1. **(Joseph M. Puthussery v. T.S. John & Ors.; AIR 2011 SC 906)**

S.60 – Oral evidence must be direct – Hearsay evidence not admissible

The principle underlining the judgment of the Supreme Court is nothing but the rule of hearsay evidence. Section 60 of the Evidence Act mandates that oral evidence must be direct and it aims at the rejection of evidence which is not direct, that is what is known as hearsay evidence. It is a

fundamental rule of evidence that hearsay evidence is not admissible. (**Smt. Anita Sonkar v. Smt. Shakuntala Misra; 2014 (123) RD 855)**

Section 60 –Aimed to ensure that whatever is offered as evidence shall itself sustain the character of evidence –Discussed.

Question arises whether law of evidence has been correctly followed here? The law of evidence has been divided in two parts by eminent Jurist Salmond. According to him first part consists of rules for the measurement and determination of the probative force of evidence the second consists of rules determining the modes and conditions of the production of evidence. Here we have to consider whether law of evidence has been substantially complied with in reference to the testimony of (DW1). The second part i.e. the manner in which the evidence is produced will be first discussed by us.

The wisdom underlying the provisions contained in Section 60 of the Evidence Act is not far to see. 'This Section is aimed to ensure that whatever is offered as evidence shall itself sustain the character of evidence. It must be immediate. It may not involve an intermediate agency or delivered through a medium, second hand or to use the technical expression "hearsay'.

As for example when the purpose is merely to ascertain what the deponent had heard from the dying person in such a case the evidence adduced to prove that would not be called hearsay, but if the purpose is to inquire as to whether the dying person was murdered by A or B, such evidence will amount to "hearsay'. In this way application of the provisions of Section 60 of the Evidence Act has to be ensured, i.e. with reference to the purpose for which the oral evidence is being given. **(Rajesh Jha v. State of U.P., 2015 (91) ACC 393)**

S. 61 – Proof of document – Modes of

Contents of a document are not automatically proved only because the same is marked as an exhibit. However, the factum of an accident could also be proved from the FIR. In the claim petition itself a reference was made to the lodging of the FIR. **(Oriental Insurance Company Limited v. Premlata Shukla and Others; (2009) 1 SCC (Cri) 204 (SC)**

S. 62, 65 & 67 – Secondary evidence – To enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of original documents – Conditions laid down in S. 65 of the Act must be fulfilled before secondary evidence could be admitted – Photocopies marked and taken as secondary evidence in terms of S. 63 of the Act and they ought not to have been receipt a secondary evidence.

Secondary evidence of the contents of a doucment 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 in the section. In the present case the original was with one P. Srinibas Rao only when condition prescribed in S. 65 are satisfied documents can be admitted as secondary evidence. **(Smt. J. Yashoda v. Smt. K. Shobha Rani; 2007 (5) Supreme 293)**

S. 63 & 65 – Secondary evidence – Documents in question photocopies – It can be admitted as secondary evidence only when conditions prescribed U/s. 65 are satisfied.

Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

The admitted facts in the present case are that the original was with one P. Srinibas Rao. Only when conditions of section prescribed in section 65 are satisfied, documents can be admitted as secondary evidence. In the instant case clause (a) of section 65 has not been satisfied. Therefore, the High Court‟s order does not suffer from any infirmity to warrant interference. **(Smt. J. Yashoda v. Smt. K. Shobha Rani; Date of Judgment: 19/04/2007; Appeal (Civil) 2060 of 2007)**

Ss. 63 and 65 - Secondary Evidence - Admissibility

The original certificate of admission is given to the allottee and only a counterpart is retained on the record. The said certificate in original does not form part of the record of the L.M.C. or the Assistant Collector.

The law is settled that the party should produce the best evidence possible within his reach and not merely rely upon the secondary evidence and that when secondary evidence is produced instead of the primary some reason or explanation must be given for not producing the original.

The evidence on record is that the record of the LMS has been lost or destroyed but it is not the case of the petitioner that the certificate of lease issued to him has been lost or destroyed or that no such certificate was never given to him. There is no explanation for not production the original of the certificate of admission so given. In the absence of such a case and evidence from the side of the petitioner, secondary evidence in the form of photocopy of the certificate of admission was not admissible in evidence.

In view of above, court has the opinion that no illegality or error has

been committed either by the trial court or the Board of Revenue in refusing to rely upon the photocopy of the certificate of lease. The oral evidence to prove that the lease was actually granted to the petitioner in the absence of the documentary evidence is of no avail. (**Ajuddhi vs. State of U.P.; 2012 (5) ALJ 20)**

S. 65 – Secondary evidence – When permissible

After the death of Siya Ram on 24th October, 1977, the postmortem on the body of the deceased was performed by Dr. S.N. Rai, P.W. 4, who notice four ante-mortem injuries as follows:

"(1) Lacerated would 2.5 cm x ¾ cm x bone deep, on Rt. Side head, 6.5 cm above the eyebrow of right eye.

xix) Lacerated wound 2.5. cm x 1 cm x bone deep injuries 1-2 cm on the left side of the head.

xx) Contusion 6 cm x 4 cm in the right side of the face involving whole orbital area.

xxi) Diffused, swelling on the Rt. Side of head parietal region." (**Mano Dutt v. State of U.P.; 2012 (77) ACC 209 (SC))**

S. 63 – Document proof by secondary evidence – Duplicate copy of conversion certificate is acceptable under this section

It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduce in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where party is genuinely unable to produce the original through no fault of that party. **(M.Chandra v. M. Thangmuthu & Anr.; AIR 2011 SC 146)**

S. 65(e) – Secondary evidence – Admissibility of

In this instant case, the appellant had failed to produce even the receipt stated to have been issued by the Election Commissions office; the Tribunal held that mere production of the cassette with the Election Petition would not lead to the inference that it had been produced in evidence and being a public document, it was not required to be proved. Having perused the material on record, the Court are in complete agreement with the Tribunal that in the absence of any cogent evidence regarding the source and the manner of its acquisition, the authenticity of the cassette was not

proved and it could not be read in evidence despite the fact that the cassette is a public document.

In Ziyauddin Burhanuddin Bukhari; AIR 1975 SC 1788, relying on R. v. Maqsud Ali, a Bench of three Judges of the Court held that the tape-records of speeches were admissible in evidence on satisfying the following conditions:

"(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

xxii) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

xxiii) the subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

Similar conditions for admissibility of a tape-recorded statement were reiterated in Ram Singh & Ors. v. Col. Ram Singh; AIR 1986 SC 3, and recently in R.K. Anand v. Registrar, Delhi High Court; (2009) 8 SCC 106.

Tested on the touchstone of the tests and safeguards, enumerated above, The Court are of the opinion that in the instant case the appellant has miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent. Admittedly, the appellant did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the respondent or his agent. On a careful consideration of the evidence and circumstances of the case, The Court are convinced that the appellant has failed to prove his case that the respondent was guilty of indulging in corrupt practices. **(Tukaram S. Dighole v. Manikrao Shivaji Kokate; AIR 2010 SC 965)**

S. 65 – Secondary evidence – Admissibility – Photocopy of revenue map of village, allegedly prepared by Lekhpal of village sought to be produced – Nothing on record to prove authenticity of said document – Document not admissible as secondary evidence

Where original document is in existence, but produced, secondary evidence by production of copies is not admissible unless conditions are satisfied. The provision has been designed to provide protection to persons who, in spite of their best efforts, are unable to, for the circumstances beyond their control, to place before the Court, primary evidence of a document as required by law. Secondary evidence should not and cannot be allowed unless the circumstances exist to justify as provided under Act, 1872. Further, if the document is to be admitted in secondary evidence, the facts thereof have to be proved. The certified copy of the original can be treated as secondary evidence. But the contents of the documents sought to be marked as secondary evidence cannot be admitted in evidence without production of the original document. Under no circumstances can secondary evidence be

admitted as a substitute for inadmissible primary evidence.

Under what circumstances the secondary evidence relating to document must be proved by primary evidence is an exception to the cases falling under Sections 65 and 66 of Act, 1872. The person seeking to produce secondary evidence relating to a document can do so only when the document is not in his possession. To enable a person to take recourse to Sections 65 and 66 of Act, 1872, it would be necessary to establish that the document sought to be summoned was executed and that the said document is not with him, but in

possession of the person against whom the application is made to be produced for proving against him. Also whenever secondary evidence is to be admitted, very existence of such a document has to be established.

In the instant case, conditions precedent before entertaining secondary evidence were not complied with and that too making the foundation to record a finding crucial to decide the entire plaint case in a particular manner i.e. in favour of plaintiff. It had not been stated anywhere and at least nothing was available from record as to how and when plaintiff had any occasion to obtain a Photostat copy of revenue map, who allowed him to obtain it and wherefrom he got it. There was nothing to prove its authenticity also. Document not admissible as secondary evidence. **(Ram Das Singh v. Duli Chand; 2013 (6)**
ALJ 590)

S. 65 A- Secondary Evidence of Electronic Records- Section 65-A, 65-B, 59,62,63 and 65 Evidence Act, 1872-

Electronic record produced for the inspection of the court is documentary evidence under Section 3 of the Evidence Act, 1872 (the Evidence Act). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B of the Evidence Act. The purpose of these provision is to sanctify secondary evidence in electronic from generated by a computer. The very admissibility of electronic record which is called as ―computer output‖, depends on the satisfaction of the four conditions prescribed under Section 65-B(2) of the Evidence Act.

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

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

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

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

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

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

The person concerned occupying he responsible official position concerned need only to state in the certificated that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic pen drive, etc., which contains the statement which is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India. [**Anvar P.V. vs. P.K. Basheer, (2014) 10 SCC 473]**

Sec. 65B(2) and (4) – Admissibility of mobile phone call details

Qua the admissibility of the call details, it is a matter of record that though PWs 24, 25, 26 and 27 have endeavoured to prove on the basis of the printed copy of the computer generated call details kept in usual ordinary course of business and stored in a hard disc of the company server, to co-relate the calls made from and to the cell phones involved including those, amongst others recovered from the accused persons, the prosecution has failedto adduce a certificate relatable thereto as required under Section 65B(4) of the Act. Though the High Court, in its impugned judgment, while dwelling on this aspect, has dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained

under Section 65 of the Act had been complied with, in the teeth of the decision of this Court in Anvar P.V. (supra) ordaining an inflexible adherence to the enjoinments of Sections 65B(2) and (4) of the Act, we are unable to sustain this finding. As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65B(2) had been complied with, in absence of a certificate under Section 65B(4), the same has to be held inadmissible in evidence. **Harpal Singh @ Chhota V. State of Punjab 2016 (8) Supreme 270**

Electronic evidence – Grounds for admissibity – Source and authenticity are two key factors for electronic evidence; if the Source is not admissible as evidence question of authenticity of its translation does not arises.

It is to be noted that in the first complaint filed by the second respondent the de facto complainant, there is no allegation for any demand for bribe by the appellant. The allegation of demand is specifically against accused no.2 only. That allegation against the appellant is raised only subsequently. Be that as it may, the only basis for supporting the allegation is the conversation that is said to be recorded by the voice recorder. The Directorate of Forensic Science Laboratories, State of Maharashtra vide Annexure-B report has stated that the conversation is not in audible condition and, hence, the same is not considered for spectrographic analysis. Learned Counsel for the respondents submit that the conversation has been translated and the same has been verified by the panch witnesses. Admittedly, the panch witnesses have not heard the conversation, since they were not present in the room. As the voice recorder is itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for an electronic evidence, as held by this Court in Anvar P.V. v. P.K.Basheer and others, 2014(10) SCALE 660. **Sanjaysinh Ramrao Chavan v. Dattafray Gulabrao Phalke and** others., 2015(1) Supreme 195.

Ss. 106 and 65B – Burden of proof to establish alibi lies on accused, however in exceptional case like the instant on the burden shift to prosecution to establish the opposite.

Three Italian nationals namely Tomaso Bruno (Accused No.1), Elisa Betta Bon Compagni (Accused No.2) and Francesco Montis (Deceased) came as tourists to India from London and arrived at Varanasi on 31.1.2010 and they checked in at Hotel Buddha, Ram Katora, Varanasi.

For two days the accused and deceased went around the city. On 3.2.2010, the deceased complained of a mild headache on account of which, they went out late and returned early and thereafter, stayed in the room for the entire evening. On 4.2.2010 at about 8-00 a.m. A-2 informed Ram Singh (PW-1), the Manager of hotel Buddha, Varanasi, that the condition of the deceased was not fine, after which the accused, PW-1 and others took the deceased to S.S.P.G.Hospital, Varanasi for treatment, where the doctors declared the ailing tourist as ‗brought dead'.

Dr. R.K.Singh (PW-10) conducted autopsy and issued Ex. Ka-10, opining that the cause of death was asphyxia due to strangulation.

Trial court convicted the accused persons under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment, imposed a fine of Rs.25,000/- each with a default clause.

To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW-1 Ram Singh. Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in court's view, which is the best evidence, raises serious doubts about the prosecution case.

Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra, (2012)9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in providing the guilt of the accused. Similarly, in the case of State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005)11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers. **Tomaso Bruno & Anr. v. State of U.P., 2015(2) Supreme 278.**

S. 68 - Execution of gift deed - Proof of

The plaintiff was the brother of Mohan. Mohan neither had a son nor a daughter and that during his life time his wife Smt. Tirthi has died. It was

alleged that the defendant got a gift-deed executed through an imposter of Mohan, which was liable to be cancelled on the grounds: that Mohan did not at all execute the gift-deed; that the statement in the gift-deed that the defendant was daughter of Mohan was incorrect; that the gift deed was executed without a mental act of the donor; that there was no valid acceptance of the of the gift; that the defendant did not enter into possession of the property; and that even if the defendant is found to be daughter of Mohan, she does not have any such relationship as she herself is married and mother of many children.

The defendant contested the suit by denying the plaint allegations and claiming that she was the only daughter of Mohan and that Mohan had no son or other issue. It was claimed that the gift was voluntarily executed by Mohan, which was duly attested by the witnesses and registered in accordance with law of registration; and that the gift was duly accepted by her and that her name was duly recorded in the revenue records pursuant to the gift-deed. It was also claimed that the suit was barred by limitation as also by principles of estoppels and acquiescence.

As regards the second contention, that is with regards to the reliability of Paper No. 44 Ga, the Trial Court has considered the reliability of the document and came to a conclusion that the said death certificate was obtained in the year 2005 and the entry therein, with respect to the date of death of Mohan, was made with reference to the Parivar Register, but the Parivar Register did not disclose the date of death of Mohan as 25.5.1991. Accordingly, the correctness of the entry with regard to the date of death of Mohan, in Paper No. 44-Ga, was disbelieved. The Trial Court also took notice of the fact that the gift-deed has the photograph of Mohan pasted on it, which was not disputed by any of the witnesses including the plaintiff. Accordingly, the Trial court disbelieved the evidence led by the plaintiff of the effect that Mohan had died on 25.05.1991. The finding of the trial court was affirmed by the lower appellate court. Even otherwise, from the averments made in the plaint, which has been brought on records as an annexure on the affidavit in support of the stay application, court did not find that there is any averment to the effect that Mohan had died on 25.05.1991 or that he was not alive on the date of execution on the gift-deed. For this reason also, the second contention of the learned counsel for the appellant cannot be accepted.

Even if it is assumed that the defendant was minor on the date of execution of the gift deed, the gift would not be invalidated for lack of acceptance by another guardian or next friend, as acceptance can be implied by the conduct of the donee. In the case of K Balakrishnan V.K. Kamalam; (2004) 1 SCC 581 : 2004 SCFBRC 129, the apex court after noticed number of authorities, in paragraph 30 of its judgment, held as under;

"As seen above, the case of minor done receiving a gift from her parents, no express acceptance can be expected and is possible, and acceptance can be implied even by mere silence or such conduct of the minor donee and his other natural guardian as not to indicate any disapproval or repudiation of it."

In the instant case, the counsel for the appellant has not been able to point out any material to show that the gift was repudiated by the donee or her natural guardian, or that she disapproved of it. (**Chaudhary Ramesar vs. Smt. Prabhawati Phool Chand; 2013(1) 263)**

Sec. 68- Will- Nature & Scope- Proof –Manner- Discussed

Alleged will dated 11.06.2004 executed by late Sri Govind Ram Suri in favour of appellant-Smt. Sushila Suri was never acted upon and is a fictitious one, not proved by the appellant as per the provisions of Indian Evidence Act, 1872 and Indian Succession Act. In this regard, it is submitted that as per the provisions of Section 68 of Indian Evidence Act, 1872, the will is to be proved by one of the attesting witness, till date Smt. Sushila Suri has not proved the said will, so no benefit can be granted in her favour as the same is surrounded by suspicious circumstances, executed by Sri Govind Ram Suri without free will and it is an outcome of fraud and undue influence. In support of the argument reliance has been placed on the judgment given by Hon'ble the Apex Court in the case of Smt. Yashwant Kaur Vs. Smt. Amrit Kaur and Ors., 1977 (1) SCC 369. **Smt. Sushila Suri v. Dr. Susheel Suri and others, 2016 (34) LCD 2610**

Evidence Act, Sec 68 – Validity of will – Requirement of valid will – Discussed

In Bharpur Singh Vs. Shamsher Singh, AIR 2009 SC 1766 and three Hon'ble Judges Bench of Supreme Court in Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, (2009) 4 SCC 780, after reviewing earlier 161 judgments held that as per provisions of Section 63 of the Succession Act, for the due execution of a will:

i) the testator should sign or affix his mark to the will;

ii) the signature or the mark of the testator should be so placed that it should

appear that it was intended thereby to give effect to the writing as a will;

iii) the will should be attested by two or more witnesses, and

iv) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

The attestation of the will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution.

Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.

In the present case, Dhanpat, attesting witness of the will has proved due execution of the will, according to the aforementioned principles. The arguments of the counsel for the petitioners that Dhanpat has stated that Munesar had signed the will although it bears thumb impressions, is not correct. He has stated that after preparation of the will, Munesar signed it; he had affixed his thumb impressions. This is continuous sentence and part of it cannot be read separately. **Baldev v. Dy. Director of Consolidation and others, 2015(127) RD 584**

S. 69 – Provisions of S. 69 can be invoked only after all processes of the court to produce the attesting witness has been exhausted – This having not been done, the appellate court committed a serious error in law.

In a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the hand- writing of the testator or executants. The burden of proof then may be shifted to others. **(Babu Sing v. Ram Sahai @ Ram Singh, 2008 (3) Supreme 314)**

Ss. 73, 45 – Comparison of signatures – Sending documents for opinion of expert - S. 73 enables Court to undertake exercise of comparison of signature, writing or seal without need for sending same to opinion of handwriting expert - S. 45 does not cast an obligation on Courts to send a disputed document for expert's opinion as matter of course

Under Section 73 of the Act, the Court is empowered to ascertain whether a signature, handwriting or seal is that of the person, by whom it purports to have been written or made, and compare any signature, writing or seal, admitted or proved to the satisfaction of the Court, to have been written or made by that person with the one, which is to be proved. This provision, thus, enables the Court to undertake the exercise of comparison of the signature, writing or seal without need for sending the same to the opinion of the handwriting expert. Section 45 of the Act recognized the opinions of the experts in handwriting or finger impressions as relevant facts. Section 45 does not cast an obligation on the Courts to send a disputed document for expert's opinion as matter of course. It is only when the court forms an opinion that, having regard to the facts of the particular case.

Since the Court below has formed an opinion that it can by itself undertake the exercise of comparison, of the signatures, between the admitted and disputed documents, it cannot be said that the discretion exercised by the Court below is either unsound or irrational calling for interference of this court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. **(Gowry Shankar v. J.L. Babu & Anr.; AIR 2012 AP 118)**

S. 73 - Scope and object - Expert opinion is only an opinion evidence on either side and does not aid as in interpretation

In Hari Singh vs. Lachmi; 59 IC 220 the Court observed that the evidence of skilled witness, howsoever eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, howsoever confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect. An expert witness howsoever impartial which calls him. The mere fact of opposition in the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favorable to its interests.

In **Haji Mohammad Ekramul Haq vs. The State of West Bengal; AIR 1959 SC 488** the Court held that an opinion of expert unsupported by any reason is not to be relied on.

In the **Forest Range Officer and others vs. P. Mohammed Ali and**

other; AIR 1994 SC 120 the Court said:

> ―The expert opinion is only an opinion evidence on either side and does not aid us in interpretation.‖

Who an expert witness would be, has been considered in **State of Himachal Pradesh vs. Jai Lal and other; AIR 1999 SC 3318** and it says:

> ―An expert witness, is one who has made the subject upon which he speaks a matter of particular study, practice; or observations; and the must have a special knowledge of the subject.‖
>
> ―Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.‖
>
> ―18. An expert is not a witness of fact. His evidence is really of an advisory charger. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgement by the application of these criteria to the facts proved by the evidence of the case. Convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.‖
>
> ―19. The report submitted by an expert does not go in evidence automatically. He is to examined as a witness in Court and has to face cross-examination.‖
>
> (emphasis added)

In **Murari Lal vs. State of Madhya Pradesh 1980 SCC (Cri) 330,** it was held that the Court itself can compare writings since it is so enable vide

Section 73 of the Evidence Act. The expert‘s opinions only act as an aid to the Court and not binding on it. In absence of reliable Expert‘s opinion or no opinion, the Court can seek guidance from authoritative text books, own experience and knowledge. (**Om Prakash vs. Baijnath Singh (Dead) Represented by Lrs.; 2013(2) ARC 685)**

S. 73 – Scope of – Court is competent to compare the signatures, after comparing signatures court recorded a finding and such finding cannot be said to be pervers.

Under section 73 of the Evidence Act, the Court is competent to compare the signatures and after comparing the signatures, the Court has recorded a finding which cannot be said to be perverse. Although the petitioner has denied that no notice was served upon him and the order was

ex parte, but the burden was upon him to prove that the application and vakalatnama filed in Reference Case No. 1278 was not of him. In the absence of any evidence, the finding of fact recorded by the DDC in this respect cannot be set aside by this Court. **Mohd. Ghayas v. Dy. Director of Consolidation, Ghaziabad and others, 2015(127) RD 316.**

S. 90 – Old documents – Presumption u/s 90 does not relate to correctness of statements contained in document

The alleged partition in the year 1819 among the ancestors of Respondent 1-plaintiff even if had taken place, cannot be a proof of title of Respondent 1-plaintiff over the suit property as the pedigree has not been proved. Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. That the contents of the document are true or it had been acted upon, have to be proved like any other fact. More so, in case the will is ignored, there is nothing on record to show as to how Respondent 1-plaintiff could claim the title. (**Union of India Vs. Ibrahim Uddin and another; (2012) 8 SCC 148)**

S. 90 – Presumption u/s 90 relate only to signature, execution and attestation of document and not to correctness of statement made in it

Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. The contents of the document are true or it had been acted upon have to be proved like any other fact. **(Union of India v. Ibrahim Uddin; 2013 (4) ALJ 66)**

Section 90 of the Evidence Act, 30 years old document

A registered gift deed was filed in a suit 5 months before it became 30 years old. It was held that no presumption under Section 90, Evidence Act regarding correctness of the signature of the donor, its execution and attestation could be raised. Reference was made to Section 68 and 69 of Evidence Act requiring proof of a document required by law to be attested. (e.g. gift deed) by at least one of the attesting witness, if alive. In the case in question no attesting witness was examined. Accordingly, it was held that the gift deed could not be used as evidence. **Om Prakash v. Shanti Devi, AIR 2015 SC 976 (Section 3, Evidence Act** See under Civil Procedure Code serial no. VII,B)

Ss. 91, 92 – Oral evidence – Admissibility of oral evidences to explain or contradict terms and conditions of written document is inadmissible

Written agreement for sale of property entered into between buyer and seller. Therein buyer admitted possession of one room of the property sold and part payment made. Later on buyer revoked the agreement and filed a suit for refund. Buyer submitted oral evidence stating that he was not given possession of the room and hence revoked the agreement. Trial Court admitted oral evidence and granted refund. In appeal against this order it was held that the terms and condition of a written document cannot be explained or controverter by oral evidence and such oral evidence is inadmissible under S. 92. In such circumstances buyer not entitled for refund. **(Gulzar Khan v. Smt. Vijay Laxmi; 2013 (4) ALJ 417)**

Ss. 101, 102 & 111 – Suit for declaration that sale deed is forged fabricated and void document – Trial court framed the issue "whether the sale deed was forged and fabricated" – On application of defendant the issue was recast "whether the sale deed was valid and genuine" – High Court held that when a person was in fiduciary relationship the burden would be on the person who was in dominating position – This legal position and presumption would arise when fiduciary relationship is first established by the plaintiff – The issue as originally framed by the Trial Court putting burden on plaintiff was right.

The burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rules may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The application in his written statement denied and disputed the said averments made in the plaint. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fall if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance. **(Anil Rishi v. Gurbaksh Singh 2006(4) Supreme 62)**

S. 101 and 102 - Burden of proof and ‗onus of proof', - Distinction of

Section 101 of Evidence Act in nutshell provides that a person who asserts a particular facts has to prove the same. Section 102 of Evidence Act provides that the burden of proof would lie on that person who would fail if no evidence at all were given on either side.

Section 111 of Evidence Act provides that where there is a question as to the good-faith of a transaction between the parties, one of whom stands to the other in a position of active confidence, the burden of proving the good-faith of the transaction will be on the party who is in a position of active confidence.

In K.S. Nanji and Co. Versus Jatashankar Dossa and others, AIR 1961 SC 1474 while considering the provisions of Section 101 of Evidence Act a clarification was made by the Hon'ble Supreme Court between the burden of proof and onus. It was held therein by the Apex Court that the burden of proof is on a plaintiff who asserts a right, and it may be having regard to the circumstances of each case, that the onus of proof may shift to the defendant. In context of the pleadings and evidence the Hon'ble Apex Court clarified the position of burden of proof and onus as follows:-

> "Under the evidence act there is an essential distinction between the phrase "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. Under S.101 of the evidence act, the burden in the former sense is upon the party who comes to court to get a decision on the existence of certain facts which he asserts. That burden is constant throughout the trial; but the burden to prove in the sense of adducing evidence shifts from time to time having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other."

A conjoint and plain reading of Sections 101 and 102 of Evidence Act makes it clear that the burden of proof would always remain upon a person who asserts that fact and in case no evidence is given by him in support of his said assertion, he would fail in proving that fact. Meaning thereby that the burden of proof remains constant; whereas, the onus may shift from time to time according to the facts and circumstances of each case depending upon the nature of the evidence adduced by the parties subject to presumption of fact or law raised in favour of one or the other.

The question of applicability of Section 111 of Evidence Act which provides a protection to an executant of a transaction against a party who is in a position of active confidence or in a position to dominate his will, will not arise. Applicability of this section would have arisen only when instead of making allegations of execution by impersonation, the plaintiff-respondent had made allegations in his pleadings against the defendant-appellant of

having got the sale-deed executed by the deceased himself by playing fraud upon him. **[Chandra Kali (Smt.) v. Smt. Indrawati & Others, 2014(2) ARC 598]**

Ss. 101 & 104 – Criminal trial – Burden of proof is on prosecution in criminal trial, more serious crime stricter proof is required

In a criminal trial involving a serious offence of a brutal nature, the court should be vary of the fact that it is human instinct to react adversely to the commission of the offence and make an effort to see that such an instinctive reaction does not prejudice the accused in any way. In a case where the offence alleged to have been committed is a serious one, the prosecution must provide greater assurance to the court that its case has been proved beyond reasonable doubt. **(Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200)**

S. 103 – Burden of proof and Onus of proof – There is a distinction – Burden of proving fraud, undue influence or misrepresentation lied on the person making it – While burden of proof never shifts, onus of proof shifts

In Krishna Mohan Kul v. Pratima Maity and others, [(2004) 9 SCC 468], it has been ruled thus: -

> "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."

The said aspect can be looked from another angle. Rules 3, 4 and 5 of Order 8 form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance. It is clearly postulated therein that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact (see Badat and Co., Bombay vs. East India Trading Co.; AIR 1964 SC 538). (**Gian Chand & Brothers and another vs. Rattan Lal @ Rattan Singh; 2013(1) Supreme 322)**

S. 106 – Evidence of last scene – The burden is on accused to prove what happened thereafter since these facts are especially within the knowledge of accused.

There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove

what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provide3s the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

In the instant case the accused was not on cordial terms with his wife. On the evening of February 2, 1998 he was seen in his house with his wife 9deceased). The house of the respondent was found locked on the 4th, 5th and 6th February, 1998. On February 6, 1998 when his house was opened the dead bodies of his wife and daughters were found, and the medical evidence established that they had been strangulated to death, the cause of death being asphyxia. Since the respondent was not traceable the mother of the deceased became anxious to know about their whereabouts and requested prosecution witnesses to search for them. In the course of investigation the respondent never appeared at any stage, and for the first time he appeared on the scene when he was arrested on February 17, 1998. Even after his arrest he did not offer any explanation as to when he parted company with his wife nor did he offer any exculpatory explanation to discharge the burden under S. 106 of the Evidence Act. These above said incriminating circumstances form a complete chain and are consistent with no other hypothesis except the guilt of the accused respondent. If he was with his wife on the evening of February 3, 1998, he should have explained how and when he parted company and/or offered some plausible explanation exculpating him. The respondent has not pleaded alibi, nor has be given an explanation which may support his innocence. The High Court has ignored important clinching evidence which proved the case of the prosecution. Therefore the order of acquittal of accused passed by the High Court would be liable to be set aside. **(State of Rajasthan v. Kashi Ram; AIR 2007 SC 144)**

S. 106 – Burden of proof – Prosecution has to prove its own case and it cannot be shift on accused.

There are conflicting judgments of the trial Court and the High Court, therefore, the Court have carefully gone through the entire evidence de novo. The High Court, in Court‟s considered view and could not have shifted the burden of proof on the accused. According to the fundamental principles of the Evidence Act, it is for the prosecution to have proved its own case.

It is a well settled legal position that when the view which has been taken by the trial court is a possible view, then the acquittal cannot be set aside by merely substituting its reasons by the High Court. In considered view of the Court, the judgment of the High Court is contrary to the settled legal position and deserves to be set aside. **(Dhanpal v. State by Public**

Prosecutor, Madras; 2009
Cri.L.J. 4647 (SC)

S. 106 – Burden of proving fact specially within knowledge lies on accused to prove fact as to how his wife received injuries in view of S. 106 of above Act

It is necessary to keep in mind the provisions of Section 106 of the Evidence Act which says that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence, The burden would be comparative of a lighter character. In view of S. 106 Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping; quiet and offering no explanation on the supposed premise that the burden to establish it's case lies entirely upon the prosecution to offer any explanation.

The accused has not led any oral evidence in defence to explain the circumstances in which the deceased sustained burn injuries in her matrimonial home.

As such the Court find that the defence is harping on one ground or the other to explain the circumstances in which the deceased has sustained burn injuries. It is important to note that had the deceased suffered burn injuries while cooking food or heating milk on kerosene stove, then her scalp hairs could not be burnt in this manner of incident. Thus, these circumstances unerringly point towards the guilt of the accused and none other. **(Shalu Kumar Rastogi v. State of U.P.; 2013 (4) ALJ 226)**

S. 106 – Burden of proof – Burden on inmates of house to give cogent explanation as to how murder committed in secrecy inside house

Where offence like murder is committed in secrecy inside house, initial burden to establish case would undoubtedly be upon prosecution, but nature and amount of evidence to be led by it to establish charge cannot be of same degree as is required in other cases of circumstantial evidence. Burden would be comparative of lighter character. In view of S. 106, Evidence Act, there will be corresponding burden on inmates of house to give cogent explanation as to how crime was committed. Inmates of house cannot get away by simply keeping quiet and offering no explanation on supposed premise that burden to establish it‘s case lies entirely upon prosecution to offer any explanation. **(Santosh Nai S/o Ojha Nai v. State of U.P.; 2013(3) ALJ 209)**

Section 106 – Presumption – Drawn of

The competing arguments and the materials on record have received our due scrutiny. It is patent in the present factual setting that there is no eye witness to the occurrence and that the prosecution case is based wholly on circumstantial evidence. The genesis of the suspicion against the appellants, being their amorous association to the anguish disliking of the deceased, he being almost reduced to a helpless entity, having failed to prevent such liaison inspite of his best endeavours. There is indeed some evidence suggestive of such an alliance between the appellants at the relevant point of time.

This, per se, in our comprehension, however, cannot be accepted as a decisive incriminating factor to deduce their culpability qua the charge of murder of the deceased Gurunathan.

In this matter the place of occurrence is a well, away from the residence of the deceased for which any definitive presumption against his wife Nathiya, as a conspirator of the crime, cannot be drawn without the risk of going wrong to cast a burden on her, as contemplated under Section 106 of the Evidence Act. **Nathiya V. Srate Rep. by Inspector of Police, Bagayam Police Station 2016(8) Supreme 122**

Sec. 106- Offence like murder committed inside a house - initial burden be upon the prosecution - but a corresponding burden on the inmates of the house - to give cogent explanation - When the accused not offer any explanation - strong circumstance against him.

When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of occurrence, when accused and his father were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime. **Gajanan Dashrath Kharate V. State Of Maharashtra (2016) 2 SCC (Cri) 436 ; (2016) 4 SCC 604 (Criminal Appeal No. 2057 Of 2010)**

Offence committed in secrecy inside a house - the initial burden upon the prosecution - but the nature and amount of evidence - to be led by it - cannot be of the same degree as is required in other cases of circumstantial evidence - burden would be of a comparatively lighter

character.

Where it is established that the deceased was murdered in the house of the appellants where blood stains were found ; The appellants have failed to disclose as to how deceased has died which was especially within their knowledge ; It is nobody's case that any outsider came in the house ; There is no report lodged to police by the appellants regarding homicidal death of the deceased who was wife of appellant Manoj and daughter-in-law of appellant Jamnadas as discussed above AND False explanation has been given by the appellants in their statements under Section 313 Cr.P.C. that the deceased had gone to her relative's place and that she was missing which is an additional link on the record against them, in the chain of circumstances. Relying on Trimukh Maroti Kirkan v. State of Maharashtra, 2006 10 SCC 681 held that where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."**Jamnadas; Manoj V. State Of M P : 2016 Law Suit(SC) 612 ; 2016(5) Supreme 164 ; 2016 (6) JT 189, 2016 AIR(SC) 3270, 2016 CrLJ 3668**

Section 106 - Fact is especially within the knowledge - Burden of proving - Upon him

Section 106 of the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time of her death, it is for him to show as to in what manner she died, particularly, when the prosecution has successfully proved that she died homicidal death. In the present case, the appellant has got hurriedly buried body of his wife before anyone from the parental side of his wife could reach. The post mortem report reveals that the tongue of the deceased was protruded from mouth from teeth inside the mouth, which further corroborates homicidal death of the deceased. Under all the above statements and the medical evidence on record, the charge as against the appellant stood proved beyond all reasonable doubts that he

committed murder of his wife, and attempted to destroy the evidence by hurriedly getting buried the body. [**Harijan Bhala Teja v. State of Gujarat, AIR 2016 SC 2065]**

Section 106 and 114(g) of Evidence Act - to invoke - prosecution to establish presence of accused – but party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him

To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 68, 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section
(2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the

court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him.

The presumption under Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption, under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party. [**Tomaso Bruno & Anr Versus State Of U.P. (2015) 3 SCC (Cri) 54 ; (2015) 7 SCC 178 (Criminal Appeal No. 142 Of 2015)]**

Ss. 106 and 65B – Burden of proof to establish alibi lies on accused, however in exceptional case like the instant on the burden shift to prosecution to establish the opposite.

Three Italian nationals namely Tomaso Bruno (Accused No.1), Elisa Betta Bon Compagni (Accused No.2) and Francesco Montis (Deceased) came as tourists to India from London and arrived at Varanasi on 31.1.2010 and they checked in at Hotel Buddha, Ram Katora, Varanasi.

For two days the accused and deceased went around the city. On 3.2.2010, the deceased complained of a mild headache on account of which, they went out late and returned early and thereafter, stayed in the room for the entire evening. On 4.2.2010 at about 8-00 a.m. A-2 informed Ram Singh (PW-1), the Manager of hotel Buddha, Varanasi, that the condition of the deceased was not fine, after which the accused, PW-1 and others took the deceased to S.S.P.G.Hospital, Varanasi for treatment, where the doctors declared the ailing tourist as ‗brought dead'.

Dr. R.K.Singh (PW-10) conducted autopsy and issued Ex. Ka-10, opining that the cause of death was asphyxia due to strangulation.

Trial court convicted the accused persons under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment, imposed a fine of Rs.25,000/- each with a default clause.

To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW-1 Ram Singh. Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best

evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in court‘s view, which is the best evidence, raises serious doubts about the prosecution case.

Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra, (2012)9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in providing the guilt of the accused. Similarly, in the case of State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005)11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers. **Tomaso Bruno & Anr. v. State of U.P., 2015(2) Supreme 278.**

S. 106 - Burden of Proof – It is always on the prosecution to establish its case beyond reasonable doubt – Lapse on part of investigating agency – No ground to throw out the prosecution case where there is overwhelming evidence to prove the offence.

It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence. **State of Karnataka v. Suvarnamma and another, 2015(88) ACC 317 (S.C.).**

S. 108- Presumption of Civil Death-

Presumption under section 108 Evidence Act -even if the suit was not filed, the presumption could be drawn, if the conditions imperative for raising the presumption were satisfied. Once a presumption of civil death is raised on the satisfaction of the conditions given in Section 108 of the Indian Evidence Act, the burden of proof that he is alive, is then shifted to the person who affirms that the person reported missing was seen and is alive. The provision of Section 108 of Evidence Act would be applied for claiming compassionate appointment. **(Ramakant Singh Vs. State of U.P. and others; 2011 (4) AWC 4268)**

S. 108 – Civil death – Presumption and determination during consolidation proceedings and in mutation - Explained

The Court have considered the arguments of Counsel for the parties and examined the record. The issue relating to civil death of Aas Mohammad arose, in relation to the mutation of his name over the agricultural land before the Consolidation Officer as such it was within the jurisdiction of Consolidation Officer to decide this issue and he was bound to decide this issue. Section 108 of the Evidence Act, 1872, provides that when the question is whether a man is alive or dead and if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. In this case, Taj Mohammad, who is real brother of Aas Mohammad, appeared in the witness box and stated that Aas Mohammad was not heard for more than seven years. Thus the burden to prove that Aas Mohammad was alive was shifted upon respondents-4 and 5. Aas Mohammad did not appear before the Consolidation Officer either in compliance of remand order dated 10.1.1990, by which he was directed to appear before the Consolidation Officer or in compliance of the order dated 18.2.1999 passed by Consolidation Officer, by which he was directed to appear from cross-examination. In such circumstances, the presumption of his civil death was liable to be raised under section 108 of the Evidence Act, 1872, as the presumption remained unrebutted. Supreme Court in LIC of India v. Anuradha; 2004(97) RD 338(SC) = 2004(55) ALR 418, held that the presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. Thus under the law, the consolidation authorities were liable to raise presumption of law in favour of Taj Mohammad and others. (**Ved Prakash v. Dy. Director of Consolidation, Muzaffarnagar; 2013(121) RD 565)**

Ss. 110, 35 Entries – Revenue entries – Status of – Revenue entries are not an evidence – to show title to tenure holder but shows possession of the property concerned by the person.

It is no doubt true that the revenue entries are not an evidence to show title of tenure holder but shows possession of property concerned by the person, whose name is recorded in the revenue entries. That too a presumption only. This presumption is rebuttable.

In Narain Prasad Agarwal v. State of Madhya Pradesh, 2007(8) SCALE 250, the Court said:

"Record of right is not a document of title. Entries made therein in terms of section 35 of the Indian Evidence Act although are admissible as a

relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt that such a presumption is rebuttable."

In Gurunath Manohar Pavaskar and others v. Nagesh Siddappa Navalgund and others, 2008(104) RD 243(SC) = 2008(70) ALR 176, the Court said:

"A revenue record is a not a document of title. It merely raises a presumption in regard to the possession. Presumption of possession and/ or

continuity thereof both forward and backward can also be raised under section

110 of the Indian Evidence Act."

The entries in revenue record may refer to the possession of the person on the land in dispute and prima facie it may raise a presumption of title but such presumption is rebuttable.

In Nair Service Society Ltd. v. K.C. Alexander and others, AIR 1968 SC 1165, construing section 110 of Evidence Act, the Court said:

"Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

In Chief Conservator of Forests v. Collector and others, AIR 2003 SC 1805, the Court said:

"Presumption, which is rebuttable is attracted when the possession is prima facie lawful and when the contesting party has no title."

Recently, referring to above authorities, the Court in State of A.P. and others v. M/s. Star Bone Mill and Fertifizer Co., 2013(120) RD 643 (SC), the Court said:

"13. The principle enshrined in section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title

over the land in question may be. It is for this purpose, that the provisions of section 6 of the Specific Relief Act, 1963, section 145 of Code of Criminal Procedure, 1973, and sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possesion one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possesion was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title must make out a caseof trespass/ encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possesion and/or continuity thereof, both forward and backward, can also be raised under section 110 of the Evidence Act." **Kamla v. Smt. Gulabi Devi and another, 2015(127) RD 110.**

S. 112 – DNA test – Significance of - Result of a genuine DNA test is scientifically accurate

As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 if the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance,

which would give way to the other is a complex question posed before court.

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

In court's opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the work community to be correct, the latter must prevail over the former. **(Nandla Wasudeo Badwaik v. Lata Nandlal Badwaik & anr.; 2014 (1) Supreme 27)**

S. 112 – Birth during subsistence of marriage as proof of legitimacy – Presumption as to u/s 112 of above Act.

In this matter appeal was filed against order passed by High Court directing, holding of DNA test, of husband and male child born to Appellant-wife. The question for consideration before the court was Whether impugned order of approving holding of DNA test of wife in respect of infidelity was justified.

Held that Husband had made clear and categorical assertions in petition filed by him under Section 13 of Hindu Marriage Act, alleging infidelity and gone to extent of naming person, who was father of male child born to Appellant/wife. It was in process of substantiating his allegation of infidelity, that husband had made application for conducting DNA test, which would establish whether or not, he had fathered male child born to Appellant/wife. It was also observed that it would be impossible for Respondent/husband to establish and confirm assertions made in pleadings in respect of Appellant-wife's infidelity. DNA testing was most legitimate and scientifically perfect means, which husband could use, to establish his assertion of infidelity. Appeal disposed of. **Dipanwita Roy v. Ronobroto Roy 2014(12) SCALE 126, (2015)1 SCC 365, 2014 (9) SCJ 461, 2014 (4), (2015) 1 SCC (CRI.) 683**

S. 113-A – Attractability – Presumption as to abetment of suicide – Arises

only if it is shown that her husband or any relative of her husband had subjected her to cruelty as per the terms defined Section 498-A, IPC

Section 113 A only deals with a presumption which the Court may draw in a particular fact situation which may arise when necessary ingredients in order to attract that provision are established. Criminal law amendment and the rule of procedure was necessitated so as to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry. Legislative mandate of the Section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative or her husband had subjected her to cruelty as per the terms defined in Section 498 A, IPC, the Court may presume having regard to all other circumstances of the case that such suicide has been abetted by the husband or such person, though a presumption could be drawn, the burden of proof of showing that such an offences has been committed by the accused under Section 498 A, IPC is on the prosecution. **(Pinakin Mahipatray Rawal v. State of Gujarat; 2013 CrLJ 4448 (SC)**

S. 113-A – Presumption as to absence of consent – Applicability

As there was a fiduciary relationship between the accused and the prosecutrix being in their custody and they were trustee, it became a case where fence itself eats the crop and in such a case the provisions of Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the _Evidence Act') (which came into effect from 25.12.1983) are attracted. Undoubtedly it is a case which provides for a presumption against any consent in a case of rape even if the prosecutrix girl is major, however, every presumption is rebuttable, and no attempt had ever been made by any of the appellants or other accused to rebut the said presumption.

In view of the above, Court is of the considered opinion that it was a fit case where the provisions of Section 114-A of the Evidence Act are attracted and no attempt had ever been made by any of the appellants or other accused to rebut the presumption. In such a case, we do not see any reason to interfere with the finding of fact recorded by the courts below. **(Mohan Lal & Anr. v. State of Punjab; 2013 Cri.LJ 3265 (SC)**

113-A – Requirement of

Under S. 113-A of the Indian Evidence Act, the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband (in this case) had subject her to cruelty. Even if these facts are established the Court is not bound to presume that her husband had abetted the suicide. Section 113-A

S. 113-A—Presumption under suicide committed by a woman in her matrimonial home—Presumption u/s. 113-A springs into action

Court observed that two most vital circumstances which must be kept in mind while dealing with this case are that Girija had committed suicide in the matrimonial home and her death took place within seven years of her marriage. Presumption under section 113-A of the Indian Evidence 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 question is whether the appellant had been able to rebut this presumption. **(Vajresh Venkatray Anvekar vs. State of Karnataka; 2013 (81)**
ACC 24 (SC)

Ss. 113-B and 113-A—Presumption under—When revocable

Once the prosecution failed to prove the basic ingredients of

harassment or demand for dowry and the evidence brought on record was doubted by the trial court, it was not open to the High Court to convict Accused-1 on presumption referring to S. 113-A or 113-B of the Evidence Act. The presumption of innocence of the accused being primary factor, in the absence of exceptional compelling circumstances and perversity of the judgment, it was not open to the High Court to interfere with the judgment of acquittal by the trial court in a routine manner. **(S. Anil Kumar vs. State of Karnataka; (2013) 3 SCC (Cri) 289)**

S. 113-B – Presumption as to dowry death – The onus to prove shifts exclusively and heavily on accused

In such a fact situation, the provisions of Section 113B of the Indian Evidence Act, 1872 providing for presumption that accused is responsible for dowry death, have to be pressed in service. The said provisions read as under:-

> "Presumption as to dowry death:- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death."

It may be mentioned herein that the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where discretion has been conferred upon the court wherein it had been provided that court may presume to abatement of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. **(Bansi Lal v. State of Haryana; AIR 2011 SC 691)**

S. 113-B – Cr.P.C. S. 227 – Dowry death – Presumption as to – Discharge of accused husband by ignoring legal provision of S. 113-B would be illegal.

In this case, the specific allegation was made by complainant Suraj Singh in its report as well as his statement recorded under section 161 Cr.P.C. that the respondent No. 2 made demand of Rs. 22,000/- for scooter and the deceased informed her parent by writing a letter dated 5.7.1994 about demand of dowry and cruelty committed by the respondent No. 2 due to non fulfillment of demand but the learned trial court did not consider this aspect

of evidence. A strong circumstance was also found against respondent No. 2 that Sneh Lata died under unnatural circumstances soon after two months of her marriage in respect of which no information was sent to her parents and family members and soon after her death, her dead body was cremated. Under these circumstances, the learned trial court passed perverse order without considering above facts, circumstances and evidence on record as well as committed illegality in ignoring the legal provisions of section 304-B of IPC and section 113-B of Indian Evidence Act. **(Suraj Singh v. State of U.P. & Anr.; 2010(6) ALJ**
43 (All HC)

S. 113-B – Presumption as to dowry death – Available only if trial is for offence of dowry death.

The presumption as to dowry death can be raised only on proof of the following essentials:

(1) 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.)

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

xxv) Such cruelty or harassment was for, or in connection with, any demand for dowry.

xxvi) Such cruelty or harassment was soon before her death.

(Tarsem Singh v. State of Punjab; AIR 2009 SC 1454)

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(xiv) 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.

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

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

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

(Tarsem Singh v. State of Punjab; 2009 AIR SCW 928 (A) Punjab & Haryana HC)

S. 113-B—Words ―Shall Presume‖—Leave no option to the court but to presume

The evidentiary value of the identification is stated in section 113-B of the Evidence Act, 1872. The key words in this section are ―shall presume‖ leaving no option with Court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113-B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her.

The presumption under section 113-B of the Act is mandatory may be contrasted with section 113-A of the Act which was introduced contemporaneously. Section 113-A of the Act, dealing with abetment to suicide, uses the expression ―may presume‖. This being the position, a two-stage process is required to be followed in respect of an offence punishable under section 304-B of the I.P.C.: it is necessary to first ascertain whether the ingredients of the section have been made out against the accused; if the ingredients are made out, then the accused is deemed to have caused the death of the woman but is entitled to rebut the statutory presumption of having cause a dowry death. **(Suresh Kumar vs. State of Haryana; 2014 (84) ACC 360**
(SC)

S. 113–B - Dowry death and presumption regarding – Applicability - Proof of unnatural death and dowry relates harassment to woman son before her death are essential

A perusal of Section 113B of the Evidence Act and Section 304B, I.P.C. shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the ―death occurring other wise than in normal circumstances‖ The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case presumption operates. As observed earlier, if the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. In the case on hand, admittedly, the prosecution heavily relied on the only evidence of Sibo (PW-2) –mother of the deceased which, according to us, is a hearsay, in any event, a very general and vague statement which is not sufficient to attract the above provisions. In such circumstances, as argued by the learned counsel for the appellant, accidental death cannot be ruled out. (**Bakshis Ram and another v. State of Punjab; 2013 Cri.LJ 2052)**

Section 113B - Role of presumption under section 304 B IPC

The key words under Section 113B of the Evidence Act, 1872 are

―shall presume‖ leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case on hand, accused persons failed to prove beyond reasonable doubt that the deceased died a natural death. When Kavita allegedly committed suicide, her husband, though he was not present in the house, was present in his office at M.D. University, Rohtak at the relevant time but he did not make any sincere effort to take her to the hospital which was very near to the place of the incident. Similarly, husband got the deceased examined by DW-2 in order to create an impression that she was struggling with chronic depression but the truth floated upon the surface when the deceased reveals that the accused persons were maltreating her and she had started picking up the ideas of suicide. Lastly, husband falsely informed the court that having learnt about the death of his wife Kavita, he left for Delhi to inform her family members. In fact, the accused never went to Delhi and the complainant received a telephonic message from an unknown person regarding the death of his daughter. So far as Maya Devi- appellant No. 1 herein is concerned, there is no denying the fact that she was working as a teacher in a government school and she was not present at the relevant time at the place of incident but it is very much clear from the evidence on record that both the accused persons had a dominating role in the entire episode and she had always accompanied her son- (husband of deceased) herein to the house of the complainant for the dowry demands.

The presumption under Section 113B of the Act is mandatory may be contrasted with Section 113A of the Act which was introduced contemporaneously. Section 113A of the Act, dealing with abetment of suicide, uses the expression ―may presume‖. This being the position, a two-stage process is required to be followed in respect of an offence punishable under Section 304-B IPC: it is necessary to first ascertain whether the ingredients of the Section have been made out against the accused; if the ingredients are made out, then the accused is deemed to have caused the death of the woman but is entitled to rebut the statutory presumption of having caused a dowry death. From the evidence on record, we are of the opinion that in the present case Kavita died an unnatural death by committing suicide as she was subjected to cruelty/harassment by her husband and in-laws in connection with the demand for dowry which started from the time of her marriage and continued till she committed suicide. Thus, the provisions of Sections 304B and 498A of the IPC will be fully attracted. [**Maya Devi & Anr. v.s State of Haryana, AIR 2015 SAC 125]**

S.113-B – Dowry death – Presumption – object – Presumption U/s. 113-B of Indian Evidence Act has been enacted to check menace of dowry

deaths and in appreciating evidence, social back ground of legislation cannot be ignored.

In this matter court has also noted that the presumption under Section 113B of the Indian Evidence Act has been enacted to check the menace of the dowry deaths and in appreciating the evidence, the social background of the legislation cannot be ignored. **Sultan Singh v. State of Haryana, 2014(8) Supreme 746.**

Section 113-B Evidence Act – Presumptions- Presumption of innocence of accused/suspect.

Article 20 of our Constitution while not affirming the presumption of innocence does not prohibit it, thereby, leaving it to Parliament to ignore it whenever found by it to be necessary or expedient. Even though there may not be any Constitutional protection to the concept of presumption of innocence, this is so deeply ingrained in all Common Law legal systems so as to render it ineradicable even in India, such that the departure or deviation from this presumption demands statutory sanction. The presumption of innocence has also been recognised in certain circumstances to constitute a basic human right. However, the tenet of presumed innocence will always give way to explicit legislation to the contrary. Parliament has been tasked with the responsibility of locating competing, it not conflicting, societal interests. It is quite apparent that troubled by the exponential increase in the incidents of bride burning. Parliament thought it prudent, expedient and imperative to shift the burden of proof in contradistinction to the initial onus of proof on to the husband and his relatives in the cases where it has been shown that a dowry death has occurred. The inroad into or dilution of the presumption of innocence of an accused has, even dehors statutory sanction, been recoginised by the courts on those cases where death occurs in a home where only the other spouse is present; as also where an individual is last seen with the deceased. The deeming provision in Section 304-B IPC is, therefore, neither a novelty in nor another to our criminal law jurisprudence.

—Soon before her death‖

The words “soon before her death” indicated that there must be a live link between the cruelty emanating from a dowry demand and the death of a young married woman, as is sought to be indicated by the words “soon before her death”, to bring Section 304-B into operation; the live link will obviously be broken if the said cruelty does not persist in proximity to the untimely and abnormal death. It cannot be confined in terms of time. The demand for

dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304 –B or the suicide under Section 306 IPC.

Presumption against accused u/s 113-B of Evidence Act read with 304-B IPC

Section 113B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others. In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word 'deem' to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote as the court is required to ascertain the purpose behind the statutory fiction brought about by the use of the word "deemed" so as to give full effect to the legislation and carry it to its logical conclusion. There are rebuttable as well as irrefutable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. **Sher Singh v. State of Haryana, (2015) 3 SCC 724**

Section 113-B

Since the burden of proving innocence beyond reasonable doubt shifts to the Accused in the case of a dowry death, as it has in the present case, it was imperative for the defence to prove the sequence of events which lead to the recording of the alleged Dying Declaration by the Tehsildar DW1.

This burden has not even been faintly addressed. It appears that at the time of seeking bail the accused had requested the Sessions Court to call for the alleged Dying Declaration. Keeping in perspective that none of the Accused was present when the deceased was receiving medical treatment in the hospital, or when the Dying Declaration was allegedly recorded, or at the

time of death, or even at time of cremation, the in which the manner the Accused learnt of the of th Dying Declaration has not existence e been disclosed. The statement of the I.O. also does not clarify the position; he has stated that he learnt of existence of the Dying from the the Declaration relative of deceased On the application Sher the burde s the . of Singh, n and necessity o provin this sequence of events stood transferred to f g the shoulders of Accused since Section 304B of the IPC had been the attracted. The I.O. has that all the Accused, including the late father-in- deposed law, Gorakh Nath, had absconded after the In fact, in cross- incident. the examination, I.O states that - "there is no reliable information the . about the Dying Declaration... On keeping this information that the Dying Declaration of Lakshmi was recorded by the Magistrate I did not any Vijay consider need of this thing". Neither the Doctor DW2 who had allegedly certified that the deceased in a fit condition to make a statement theTehsildar was nor who allegedly written down the alleged Dying Declaration has had stated the manner in which the Tehsildar had been locate to perform conscripted or d this important recording. The Dying appears to hav Declaration e mysteriously popped up and referred to at the time of praying The for bail. chain or of events which lead to its recording remains sequence undisclosed. In statement, the Tehsildar has not clarified the in which his manner he happene to record the Dying Declaration and the of its transmissio d timing n to Court. Since the onus of proof had shifted to the this

the Accused, alleged sequence of events should have been proved beyond reasonable doubt by them. We may emphasise that the Tehsildar as well as the Doctor who allegedly certified that the deceased was in a fit state to make the Dying Declaration has been produced by the defence. The Doctor should have spoken of the sequence of events in which the Tehsildar came to record the Dying Declaration. The alleged exculpating Dying Declaration is, therefore, shrouded in suspicion and we have not been persuaded to accept that it is a genuine document. The defence has failed to comply with Section 113B of the Evidence Act. [**Ramakant Mishra @ Lalu Etc. Versus State Of U.P., (2015) 3 SCC (Cri) 503; (2015) 8 SCC 299,** Criminal Appeal Nos.1279-1281 Of 2011**]**

S. 114 – Reference to persons as „mama" or „bhagina" – Not necessarily mean that they are related by blood – Often because of closeness of families even distant relatives are addressed as „mama" or „bhagina".

It was stated that in the said letters the appellant was described as mama, and he referred to the sons of Nirmala Devi as bhagina (sister"s son). From this it was sought to be inferred that Nirmala Devi must have been the sister of the appellant. On the basis of these letters alone we are not prepared to draw this inference. There is evidence on record to show that Nirmala Devi was also distantly related to the appellant. In any event, the two families were on visiting terms and it cannot be denied that the appellant and the respondent were known to each other. The assertion of the appellant that he came to know Nirmala Devi only after objections were filed in his succession case cannot be accepted. But even so, we cannot jump to the conclusion that since he described himself as the mama it must be held that he was the brother of Nirmala Devi, the respondent herein. Very often because of closeness of families even distant relatives are addressed as uncle, and sometimes-even persons unrelated are referred to as uncle i.e. chacha or mama, etc. We expected some more evidence to be examined to support the plea that the appellant was the brother of the respondent. (**Virendra Kumar Tripathy v. Nirmala Devi, (2006) 3 SCC 615).**

S. 114 – Presumption as to service of notice – Consideration of

In the present case it has already been established that the appellant had purchased the property out of her own funds. Therefore, it could certainly be expected that when she came to know about the clandestine sale of her property to respondent No. 1, she would send him a notice, which she sent on 8.4.1987. As noted earlier, the notice is sent from one house on the College Road to another house on the same road in the city of Pathankot. The agreement of purchase is signed by the defendant No. 3 five days thereafter i.e. 13.4.1987. The appellant had produced a copy of the notice along with

postal certificate in evidence. There was no allegation that the postal certificate was procured. In the circumstances, it could certainly be presumed that the notice was duly served on respondent No. 1 before 13.4.1987. The High Court, therefore, erred in interfering in the finding rendered by the Additional District Judge that respondent No. 1 did receive the notice and, therefore, was not *bona fide* purchaser for value without a notice. **(Samittri Devi and another v. Sampuran Singh and another; AIR 2011 SC 773)**

S. 114 – Presumption of marriage – Live-in-relationship between parties if continued for a long time cannot be termed in as "walk in and walkout" relationship but it shows clearly presumption of marriage.

The live-in-relationship if continued for such a long time, cannot be termed in as "walk in and walk out" relationship and there is a presumption of marriage between them which the appellants failed to rebut. **(Madan Mohan Singh & Ors. V. Rajni Kant & Anr.; AIR 2010 SC 2933)**

S. 114 (f) –Service of summons- Presumption of

Under Section 114 Illustration (f) of the Evidence Act, 1872 the Court may presume service of notice through registered post. Expression "may presume" is a factual presumption. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. Wherever expression "may presume" has been used in the Act, a discretion has been given to the Court to presume a fact or it may call upon the party to prove the fact by leading evidence. Presumption of service of summon of the defendant is drawn on the basis of report of Process Server. Thus the burden lies upon the plaintiff to prove the report of Process Server was correct. On the denial of service by the defendant, presumption raised under the Act on the basis of expression 'may presume' stood rebutted and burden is shifted upon the plaintiff to prove due service by leading evidence. **(Shiv Murat and another v. State of U.P. and others 2014 (5) AWC 5295)**

S. 114 - Court may presume existence of certain facts - Object and scope of

Relevant provision is Section 114, Illustration (e) and (f), Indian Evidence Act, 1872 which reads as under:

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

Illustrations

The Court may presume-

…

(e) The judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases."

In Sukumar Guha Vs. Naresh Chandra Ghosh; AIR 1968 Cal. 49, a Single Judge referred to Section 114, Illustration (f) of Act, 1872, Section 106 of Act, 1882 and Section 27 of Act, 1897 said that presumption under Section 27 of Act, 1897 can arise only when a notice is sent by registered post while there may arise a presumption under Section 114 of Act, 1872 when notice is sent by ordinary post or under certificate of posting. Both the presumptions are rebuttable. When the cover containing notice has been returned to the sender by postal authorities, then that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Whether it was tendered and, if so, to whom tendered, remains a matter to be ascertained on evidence. If acceptable evidence is available that it was tendered to the party personally, then such facts may bring the service of notice within the second mode, namely, tendered or delivered personally to such party. If however, tender or delivery is not to the party personally but to a member of his family or a servant, then it may be effective tender or delivery only when the notice was addressed to the residence of the party. Such personal tender or vicarious tender may be effective even if it was through the agency of post office, and proof of that tender comes from testimony of any person present at the event, and not only by examining the postman. Here what court found that when the Court talks of evidence, when court read it in the context of Section 114 of Act, 1872, a registered envelop received back from postal authority with the endorsement of postman of "refusal" will constitute a valid evidence to show that it was served upon the addressee but he refused to accept unless proved otherwise and for that purpose the examination of postman for constituting a prima facie evidence further would not be required in view of Section 14 of Act, 1898. This Section 14 of Act, 1898 has been omitted by the Court. **(Santosh Kumari (Smt.) Vs. IVth ADJ Bareilly; 2013(1) ARC 308)**

S. 114 –A – Medical evidence showing non-rupture of hymen and not supporting the prosecution case- Court to give utmost weightage to version of the prosecutrix as definition of rape also includes attempt to rape

In fact, at this stage, the amendment introduced in the Indian Evidence Act, 1872 in Section 114-A laying down as follows is worthwhile to be

referred to:-

> ―Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub- section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.‖

Section 114-A no doubt addresses on the consent part of the woman only when the offence of rape is proved but it also impliedly would be applicable in a matter of this nature where the victim girl had gone to the extent of committing suicide due to the trauma of rape and yet is sought to be disbelieved at the instance of the defence that she weaved out a concocted story even though she suffered the risk of death after consuming poison. If this were to be accepted, we fail to understand and lament as to what is the need of incorporating an amendment into the Indian Evidence Act by incorporating Section 114A which clearly has been added to add weight and credence to the statement of the victim woman who suffers the offence of rape and a claustrophobic interpretation of this amended provision cannot be made to infer that the version of the victim should be believed relating merely to consent in a case where the offence of rape is proved by other evidence on record. If this view of the matter is taken into account relying upon the amended Section 114-A of the Indian Evidence Act which court clearly do, then even if there had been a doubt about the medical evidence regarding non rupture of hymen the same would be of no consequence as it is well settled by now that the offence of rape held to have been proved even if there is an attempt of rape on the woman and the actual commission of rape. Thus, if the version of the victim girl is fit to be believed due to the attending circumstances that she was subjected to sexual assault of rape and the trauma of this offence on her mind was so acute which led her to the extent of committing suicide which she miraculously escaped, it would be a travesty of justice if court to disbelieve her version which would render the amendment and incorporation of Section 114A into the Indian Evidence Act as a futile exercise on the part of the Legislature which in its

wisdom has incorporated the amendment in the Indian Evidence Act clearly implying and expecting the Court to give utmost weightage to the version of the victim of the offence of rape which definition includes also the attempt to rape. **[Puran Chand v. State of H.P., 2014 (86) ACC 279]**

S. 115 – Promissory Estoppel – Principle of estoppel does not operate at the level of government policy – A speech made in the Parliament by Minister cannot be treated as a promise or a representation made to a person attracting the principle of promissory estoppel.

Finance Minister‟s statement referring to a proposal to continue the grant of exemption from payment of sale tax for a period of 10 years is merely a budget proposal which could not give rise to any right to the parties and it did not amount to order or notification extending the period of exemption which was required to found a plea based on promissory estoppel. Plaintiffs are not entitled to found any case of promissory estoppel merely on the basis of the speech made by the Minister in the Assembly of a proposal to ban sale of toddy in the State. **(State of Karnataka & Anr. V.l K.K. Mohandas & etc.; 2007 (5) Supreme 736)**

S. 115 – Doctrine of Promissory Estoppel cannot be invoked for enforcement of promise made by Govt. Contrary to law

The rule of promissory estoppels being an equitable doctrine has to be moulded to suit the particular situation. It is not a hard and fast rule but an elastic one, the objective of which is to do justice between the parties and to extend an equitable treatment to them. This doctrine is a principle evolved by equity, to avoid injustice and though commonly named promissory estoppels, it is neither in the realm of contract nor in the realm of estoppels. For application of doctrine of promissory estoppels the promise must establish that he suffered in detriment or altered his position by reliance on the promise. Normally, the doctrine of promissory estoppels is being applied against the Govt. And defence based on executive necessity would not be accepted by the Court. However, if it can be shown by the Govt. That having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Govt. To the promise made by it, the Court would not raise an equity in favour of promise and enforce the promise against the Govt. Where public interest warrants, the principles of promissory estoppels cannot be invoked. Government can change the policy in public interest. However, taking cue from this doctrine, the authority cannot be compelled to do something which is not allowed by law or prohibited by law. There is no promissory estoppel against the settled proposition of law. Doctrine of promissory estoppels cannot be invoked for enforcement of a promise made contrary to law, because none can be compelled to act against the statute. Thus, the Govt. or public authority cannot be compelled to make a provision

which is contrary to law. **(M/s. Shree Sidhbali Steels Ltd. & Ors. V. State of U.P. & ors.; AIR 2011 SC 1175)**

S. 115 – Estoppel and res-judicata – Distinction between

Sometimes, the doctrine of "res judicata" is considered as a branch of law of estoppel. There is distinction between doctrine of „res judciata‟ principle of „issue estoppel‟ and „rule estoppel‟ under Section 115 of the Evidence Act.

Doctrine of res judicata creates legal embargo on hands of the Court to a judicial determination of deciding the same question over again even though earlier determination may be demonstratedly erroneous. When the proceedings between the same parties have attained finality, they are bound by the judgment and cannot be permitted to re-agitate the same lis. The determination of the issue in the same set of facts in the previous lis between the parties would give rise to an issue estoppel. It operates in any subsequent proceedings between the same parties. The doctrine of res judicata is based on rule of procedure.

However, doctrine of mere estoppel is based on rule of evidence. In case of estoppel under Section 115 of the Evidence Act, there is embargo on the party to plead or prove a particular fact whereas in case of res judicata, the prohibition is operative against the Court to deal with the same kind of issue again and again. **(Yamunabai Purushottam Deogirikar and Ors. v. Mathurabai Nilkanth Choudhari and Ors.; AIR 2010 (NOC) 109 (Bom = 2009 (5) AIR Bom R. 742)**

S. 115 – Promissory estoppel – Applicability in land acquisition matter.

Where an assurance was given by Land Acquisition Officer, who was Collector within meaning of S. 3(c) that reference shall be made, he would be bound to fulfil his promise being statutory authority and having regard to principles of promissory estoppel. In such a case, it would not be a case where a statutory authority has been asked by a higher authority to perform his jurisdiction in a particular manner. Moreover, had a reference been made pursuant to the request made by the awardees, could it be held to be wholly illegal or without jurisdiction only because the protest made in regard to the quantum of compensation under the award is oral and not in writing. The answer to the said question must be rendered in the negative. The form, mode and manner of protest are procedural in nature. The statute does not provide for a thing to be done in a particular manner. Further, the doctrine that where a statute prescribes a thing to be done in a manner as prescribed or not at all is applicable where statutory authority is to perform his function in terms of the provisions of the statute is not meant to be applied to a litigant. A procedure, as is well known, is handmaid of justice. A substantive provision providing for substantive right or a statutory provision providing for a substantive right shall prevail over the procedural aspect of the matter. **(M/s.**

Steel Authority of India Ltd. V. S.U.T.N.I. Sangam; AIR 2010 SC 112)

S. 115 – Implementation of tariff – Representation made to consumer of electrical energy in furtherance where of he had altered his position – Doctrine of promissory estoppel shall apply.

The matter as regards fulfilment of the conditions of licence granted by the Commission in favour of the licensee is a matter between the parties thereto. If the Corporation fails to comply with any of the conditions laid down in the licence or violates the tariff, the licence of the licensee may be revoked. A penal action may also be taken. But the same would not mean that the licensee can be permitted to take advantage of his own wrong. It can approbate and reprobate, particularly when it is the beneficiary thereof.

If it had made a representation pursuant, whereto or in furtherance whereof a consumer of electrical energy had altered its position, the doctrine of promissory estoppel shall apply. The doctrine of promissory estoppel, it is now well-settled, applies also in the realm of a statute. **(M/s. Badri Kedar Paper Pvt. Ltd. V. U.P. Electricity Regulatory Commn. & Ors.; 2009(2) ALJ 565)**

S. 115—Estoppel—Doctrine of election—Is based on rule of estoppels—Principle that one cannot approbate and reprobate is inherent in it.

The doctrine of election is based on the rule of estoppels the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppels by election is one among the species of estoppels in pais (or equitable estoppels), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had. **[State of Punjab vs. Dhanjit Singh, AIR 2014 SC 3004]**

S. 115 – Estoppel – Applicability- Promissory estoppel cannot be invoked for enforcement of promise made contrary to Law

The law as interpreted or explained by the Supreme Court always has retrospective consequences unless applied prospectively through an express direction. The principle of promissory estoppel, therefore, cannot be invoked compelling the authorities for enforcement of a promise made contrary to the law or which is prohibited by law. **(Dheera Singh v. UT Chandigarh Admn. & Ors.; AIR 2013 P&H 93)**

S. 116—Estoppels—Tenants are stopped from challenging title of landlord, however, title of transferee can be challenged by tenants installed by the transferee

Chapter VIII of the Evidence Act under the heading ‗Estoppel' is important for the present purposes. This fasciculus comprises only three provisions, being Sections 115 to 117. For ease of reference we shall

reproduce Section 116:-

> ―116. Estoppel of tenant; and of licensee of person in possession.- No tenant of immovable property, or person claiming through such tenant, shall, during the continuation of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.‖

Plainly, this provision precludes the consideration of any challenge to the ownership of the Trust as the claim for arrears of rent was restricted to the period prior to the sale of the suit land by the Trust to the Transferees, namely Defendants 7 to 9 in O.S.5/78. The position would have been appreciably different, were the said Defendants 7 to 9 to lay any claim against the Tenants for arrears of rent or, for that matter, any other relief. This is for the reason that Section 116 of the Evidence Act would not come into play in any dispute between the Tenants on the one hand and the Transferees on the other. **[Sri Gangai Vinayagar Temple vs. Meenakshi Ammal, 2014 (8) Supreme 133]**

S. 118 – Competent witness

Indian Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease – whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. **(Golla Yelugu Govindu v. State of Andhra Pradesh, 2008 (2) Supreme 592)**

S. 118 – Competent witness – Determination of

The legal position as to who should give evidence in regard to the matters involving personal knowledge has been laid down by this court in Man Kaur (dead) by LRS v. Hartar Singh Sangha, (2010) 10 SCC 512. This court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent lone can give evidence in

regard to the transaction. **(Mrs. Sardamani Kandappan v. Mrs. S Rajalakshmi & ors., 2011 (5) Supreme 1)**

S. 118 – Child witness – His evidence cannot be rejected per se and courts, as a rule of prudence is required to consider such evidence with close scrutiny

As per the provisions of Section 118 of the Evidence Act all persons are competent to testify, unless the court consider that by reason of tender years they are incapable of understanding the questions put to them and of giving rational answers but then it is for the Judge to satisfy himself as regards fulfilment of the requirement of the said provision. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness cannot be rejected per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness can record conviction based on his testimony. If after careful scrutiny of a child witness‟s statement the court comes to the conclusion that there is impress of truth in it, there is no reason as to why the court should not accept the evidence of child witnesses. **(Bindu v. State (NCT) of Delhi; 2009 Cri.L.J. 4582)**

S. 118 – Witnesses - Who may testify - Legality

The proposition of law about the competence of a person to testify as a witness is governed by s. 118 of the Evidence Act. Giving evidence before a Court of law is an act within the meaning of the said provision. However, everyone is not entitled or competent to give evidence as witness before a Court unless one fulfills the requirements of the qualifications envisaged in s. 118 of the Evidence Act. **(Anita Sonkar (Smt.) v. Smt. Shakuntala Misra; 2014 (2) ARC 47)**

Section 120 of Evidence Act, 1872 – The evidence of husband on behalf of wife was held admissible in law. It was further held that in all civil proceedings the husband or wife of any party to the suit shall be a competent witness who can depose for one another. Writ petition allowed.

AIR 2005 SC 439, (2005)2 SCC 217, 1961 ALJ 353, (2010)10 SCC 512, 2007(40) AWC 4176, Andhra Pradesh Law Times 35, 1996 MLJ 199 ref.

It was observed that Section 120 of the Indian Evidence Act, 1872 provides for the deposition of the husband and wife as witnesses. It reads as under:-

> "120. Parties to civil suit, and their wives or husbands, Husband or wife of person under criminal trial-In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively shall be competent witness."

The above provision clearly provides that in all civil proceedings the husband or wife of any party to the suit shall be a competent witness. The aforesaid provision permits the husband to depose for the wife and the vice versa.

The above Rule of law has been enunciated on the well founded Indian mythology wherein husband and wife are believed to be one person and not a separate. It is in consonance with the concept of 'Ardhnariswar'. Even in western culture, wife is referred as a better half meaning to be part of the same person.

In *Rajni Shukla v. Special Judge Banda 2007(40) AWC 4176* a learned Single Judge of this court while considering the provision of Section 120 of the Evidence Act vis-a-vis the above decision of the Supreme Court in *Janki Vasdev Bhojwani v. Indu Sindh Bank Ltd., AIR 2005 SC 439,* concluded and held the husband and wife can depose for one another and as such directed that husband of the plaintiff to give oral evidence which shall be confined to the facts within his knowledge.

Thus, in view of the aforesaid facts and circumstances and the legal position as enunciated above, the evidence of the husband of the petitioner so as to prove the notice and its service upon the respondent No.1 is admissible under Section 120 of the Evidence Act and the courts below manifestly erred in law in brushing it aside on the basis of the decision of the Supreme Court in *Janki Vasdev Bhojwani (Supra)* case and in dismissing the suit. [**Smt. Munni**
Devi v. Smt. Sona Devi, 2014(32) LCD 2623]

S. 120- Scope of –Husband /wife of spouse can be a competent witness on behalf of has/her spouse

Section 120 of Indian Evidence Act reds that “in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses”. It is settled legal position that for the facts within his personal knowledge, the husband/ wife or spouse can be a competent witness on behalf of his/her spouse, provided his testimony is found believable and had passes the test of cross-examination, as well as the scrutiny of the Court. **Smt. Siddh Sri Devi V. Satish Chandra Tripathi and others, 2016 (117) ALR 811**

S. 120 – Husband and wife – competent witnesses qua each other – Scope of

Section 120 of the Evidence Act, 1872 provides for the deposition of the husband and wife as witness. It reads as under-

> 120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.- " In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

The above provision provides that the husband or the wife is competent witnesses qua each other. In other words in all civil proceedings a husband can depose for a wife and the wife for the husband.

The son of the landlady is not a person covered under the aforesaid provision and as such is not a competent to depose on her behalf. **Sunehri Lal v. Smt. Premwati, 2015 (127) RD 398 (All.)**

Sections 123 and 124--

Government cannot claim privilege on the ground of nation interest in respect of report of a committee which enquired into allegation of sexual harassment by officials as the contents of the report do not relate to affirms of the State or anything concerning national security. It has not been shown that the contents of the report are in any manner detrimental to the interests of the country.

[Nisha Priya Hatia v. Ajt Sath AIR 2016 SC 2319]

Ss. 125, 17 – Admission/confession - Probative value does not depends upon it communication to other

Admissions and confessions are exceptions to the ―hearsay‖ rule. The Evidence Act places them in the province of relevance, presumably on the ground, that they being declarations against the interest of the person making

them, they are in all probability true. The probative value of an admission or a confession des not depend upon its communication to another. Just like any other piece of evidence, admissions/ confessions can be admitted in evidence only for drawing inference of truth. There is, therefore, no dispute whatsoever, that truth of an admission or a confession cannot be evidenced, through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a ―fact in issue‖ or as a ―relevant fact‖ **(State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari and Ors.; 2013 Cri. L.J. 2069)**

132 Evidence Act.

No prosecution - against the maker of a statement - while deposing as a "witness" before a Court - on the basis of the "answer" given - within the sweep of Section 132 of the Evidence.

The factual background in which application under Section 319 of the Code of Criminal Procedure came to be filed by the appellant herein is as follows:

Some three months after the death of Vijayan the 2nd respondent herein L. Venkatesh (who was examined as PW64 and for the sake of convenience hereinafter referred to as "PW64") was examined by the Police on 11.09.2008 and his statement under Section 161 Cr.P.C. was recorded. Subsequently, on 26.09.2008, his statement was recorded under Section 164 Cr.P.C. by the learned Metropolitan Magistrate, George Town, Chennai. Finally, the second respondent was examined as PW64 in the trial of the abovementioned case. The substance of the statements is that sometime in November 2007, one Karuna, the second accused had offered to pay PW64 an amount of Rs.5 lakhs if PW64 killed Vijayan. PW64 accepted the proposal. Karuna made an initial payment of Rs.50,000/- to PW64 on his accepting the proposal. Thereafter, PW64

contacted the third accused and disclosed the proposal whereupon the third accused agreed to join PW64. The third accused was paid an amount of Rs.10,000/- by PW64. However, subsequently, PW64 developed cold feet and started maintaining a distance from the second accused Karuna. But according to PW64, the second accused and the third accused were in contact with each other. After coming to know about the murder of Vijayan through newspapers, PW64 contacted the third accused and enquired about the matter

upon which the third accused informed PW64 that the third accused along with three other named persons had murdered Vijayan and collected an amount of Rs. 4 lakhs from the second accused. The third accused further threatened PW64 that he would be "finished" if he revealed the information to anybody.

The question arises before the Hon,ble Supreme Court as whether the PW64 could be tried together with the other accused standing under trial. This question was answered as he could be tried alongwith the other accused by virtue of section 319 Cr. P. C. But under the facts of the case the other problem arises to the extent that whether the other requirements of Section 319 are satisfied warranting the summoning of PW64. This problem addressed by the Hon, Supreme Court as follows:

Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. The policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act. (Para 43)

The proviso to Section 132 of the Evidence Act is a facet of the rule against self incrimination and the same is statutory immunity against self incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within

the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court.

Further it is expressed that the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the commission of the crime for which the other accused are being tried requires a deeper examination. **R. Dineshkumar @**

Deena State Rep. By Inspector of Police & Others 2015(2) Supreme 403 ; AIR 2015 1816 SC

S. 133 – Accomplice – Woman who is victim of sexual assault is not accomplice to crime and her evidence cannot be tested with suspicion as that of an accomplice

The expressions „against her will‟ and „without her consent‟ may overlap sometimes but surely the two expressions in clause First and clause Secondly have different connotation and dimension. The expression „against her will‟ would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression „without her consent‟ would comprehend an act of reason accompanies by deliberation. **(State of U.P. v. Chhoteylal; AIR 2011 SC 697)**

Ss. 133, 24 to 26 and 114III.(b) – Evidence of an accomplice – Evidentiary value – Consideration of

In relation to Akshardham Temple Attack by to fidayeens (terrorist attackers), the statements of alleged accomplices (PWs 50, 51 and 52) not being able to established any connection of attack with A-1 to A-6 except casting a mere suspicion regarding involvement of A-1 to A-6. Name of A-6 had no been mentioned in the evidence of any of the accomplices/ approvers. If money collected by A-3 was use to run relief camps in Gujarat, it merely casts a suspicion. Court has held that the twin test was not satisfied in present case. Though it can be presumed that the accomplices have implicated themselves, their statements have failed to prove the guilt of accused beyond reasonable doubt. Further, there were complaints about wrongful confinement of accomplices and police torture to depose as directed by police and further, the evidence of accomplices was not corroborated by independent witnesses, rater their evidence contradicted the prosecution story. Therefore, it has held that their statements are not admissible and could not have been used by courts below to corroborate the confessions of accused persons. [**Adambhai Sulemanbhai Ajmeri and others v. State of Gujarat, (2014)7 SCC 716]**

Ss. 3 & 134 – Indian Penal Code – 149 – Conviction on testimony of sole eye-witness in offence of unlawful assembly – Reliance on

In a case involving an unlawful assembly with a very large number of persons, there is not rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless that the Court is of the view that the testimony of such sole eye-witness is not reliable. Though, generally it is a rule of prudence followed by the Courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident in a fit case the Court may believe a

reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot. **(Rajnit Singh v. State of Madhya Pradesh; AIR 2011 SC 255)**

S. 134 – Solitary witness – Reliability of – Testimony if wholly reliable can be sufficient to convict accused.

In Sunil Kumar v. State Govt. of NCT of Delhi; (2003) 11 SCC 367=AIR 2004 SC 552, the Court repelled a similar submission observing that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

In another case of Namdeo v. State of Maharashtra; (2007) 14 SCC 150=AIR 2007 SC (Supp) 100, the Court reiterated the similar view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, 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.

Thus, in view of the above, the bald contention made by Shri Bagga that no conviction can be recorded in case of a solitary eye-witness has no force and is negatived accordingly. **(Bipin Kumar Mondal v. State of West Bengal; 2010 Cri.L.J. 3880 (SC)**

S. 134 - Testimony of single witness - Court may act upon – Provided witness is wholly reliable - Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses

The Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity multiplicity or plurality of witnesses. It is not the number of witnesses but quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be

weighed and not counted. It is quality and not quantity which determines the

adequacy of evidence as has been provided under s. 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. **(Veer Singh v. State of Uttar Pradesh; (2014) 1 SCC (Cri) 846)**

S. 134 – Number of witness - There is no requirement under law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact - It is not the number of witnesses but quality of their evidence which is important

In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by s. 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. **(Gulam Sarbar v. State of Bihar; (2014) 2 SCC (Cri) 195)**

S. 134—Evidence of sole eye-witness of the occurrence—Reliability of

Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity multiplicity or plurality of witnesses. It is not the number of witnesses but -quality of their evidence which is important as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section 134 of the Evidence Act. As a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. **(Veer Singh vs. State of U.P.; 2014 (84) ACC 681 (SC)**

S. 137 – Re-examination of witness – Purpose is only to get clarifications of same doubts created in cross-examination.

The purpose of the re-examination is only to get the clarifications of some doubts created in the cross-examination. One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination. The Trial Court has obviously faulted in allowing such a re-

examination. Be that as it may, even if the Court accepts that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in the firm opinion of the Court, is nil. **(Pannayar v. State of Tamil Nadu by Inspector of Police; AIR 2010 SC 85)**

S. 137 – Cross-examination – Necessacity of – Document produced by prosecution was in favour of accused – No necessity to cross-examine any prosecution witness on those documents.

If the copy of any document supporting the prosecution case had not been supplied by the prosecution, the accused would have been justified to seek an opportunity to further cross-examine the prosecution witnesses on that document, but when the documents are in favour of the accused-applicant, there is no necessity to cross-examine any prosecution witness on those documents and the accused can safely rely on these documents as they have been proved by the prosecution. **(Ramkesh Sharma v. State of U.P. & Anr.; 2009(1) ALJ 81)**

Ss. 137, 138 and 3 – Examination-in-chief – Statement made in untested by cross-examination – Value and use - Is rebuttable evidence

Once examination-in-chief is conducted, the statement becomes part of the record, it is evidence as per law and in the true sense, for at best, it may be rebuttable. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence. Evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence. **(Hardeep Singh v. State of Punjab and others; (2014) 2 SCC (Cri) 86)**

Ss. 137, 138 and 3 – Examination-in-chief – Statement made in untested by cross-examination– Value and use - Is rebuttable evidence

Once examination-in-chief is conducted, the statement becomes part of the record, it is evidence as per law and in the true sense, for at best, it may be rebuttable. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence. Evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence. **(Hardeep Singh v. State of Punjab and others; (2014) 2 SCC (Cri) 86)**

S. 138 - Cross examination by defence counsel

Court held - Provisions of Section 138 of the Evidence Act, gives defence right to cross-examine the witness. The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. Section 138 does not mandate that cross-examination should be confined to the facts spoken during the examination-in-chief. The parties have liberty to elicit anything from the witness as long as it relates to the relevant facts. However, irrelevant topics sometimes pursued at great length, and persistence shown in going over the same ground again and again in the hope of making the witness to give discrepant statements must not be permitted. Control over the Court proceedings by the Presiding Officer in such a situation is expected. **(Sunil Atmaram More Vs. State & Anr, 2011 Cri.L.J. 3281 (Bombay High Court)**

S. 145 – Applies only after examination-in-chief

Section 145 Evidence Act applies only after examination-in-chief as is provided under Section 138 of the Evidence Act is over and that he can be cross-examined by the adverse party. Thus, for cross-examining a witness any party has to substitute it as an adverse party. Prosecution can be allowed to cross-examine only when it transform itself as an adverse party. Without such a legal character, of adverse party, the prosecution cannot be allowed to cross-examine its own witness. **(CBI, Lucknow v. Arun Kumar Kaushik; 2006(55) ACC 629)**

S. 145 – Evidence – FIR – Appreciation of – Once police submitted charge-sheet U/s. 304 – Attain argument by placing reliance on FIR is not sustainable

There appears to be no doubt that originally, the first information report was lodged under section 302 read with section 392, Indian Penal Code. However, later on, the police submitted charge-sheet under section 304-A, Indian Penal Code in the case Crime No. 361 of 1995. It is settled law that contents of F.I.R. are not substantive evidence but only corroborative evidence and may be used during trial. Once the police submitted charge-sheet under section 304-A, Indian Penal Code (accidental death), then argument by placing reliance on the F.I.R. seems to be not sustainable. Tribunal has rightly held that F.I.R. is not substantive evidence and when the police submitted charge-sheet under section 304-A, Indian Penal Code, then the F.I.R. loses its sanctity with regard to its contents except to use it for the

purpose of contradiction under section 145 of the Evidence Act. (**New India Assurance Co. Ltd. Vs. Ranni and others; 2012 ACJ 2624)**

Sec. 145-- For contradiction

Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction. [**V.K. Mishra & Anr Versus State Of Uttarakhand & Anr., AIR 2015 SC 3043 (Criminal Appeal No.1247 Of 2012) with Rahul Mishra Versus State Of Uttarakhand & Anr., (Criminal Appeal No. 1248 of 2012)]**

Approach when two views possible-burden of proof- appreciation of Evidence- under S. 149 IPC

The Hon'ble Supreme Court referring to its earlier judgement in Shivaji Sahabrao Babode vs. State of Maharashtra (1973) 2 SCC 793: 1973 SCC (Cri.) 1033, Ramesh Babulal Doshi Vs. State of Gujarat (1996) 9 SCC 225:1996 SCC (Cri.) 972; Jaswant Singh Vs. State of Haryana (2000) 4 SCC 484 : 2000 SCC (Cri.) 991, Raj Kishore Jha Vs. State of Bihar (2003) 11 SCC 519: 2004 SCC (Cri.) 212, State of Punjab Vs. Karnail Singh (2003)11 SCC 271 : 2004 SCC (Cri.) 135, State of Punjab Vs. Phola Singh (2003) 11 SCC

58 : 2004 SCC (Cri.)276, Suchand Pal Vs. Phani Pal (2003) 11 SCC 527 : 2004 SCC (Cri.) 220 and Sachchey Lal Tiwari Vs. State of U.P. (2004) 11 SCC 410 : 2004 SCC (Cri.) supp 105

Held –if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the fact of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

Emphasising that expressions like ―substantial and compelling reasons‖, ―good and sufficient grounds‖, ―very strong circumstances‖, ―distorted conclusions‖, ―glaring mistakes‖, etc. Are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the Court stated that such phraseologies are more in the nature of ―flourishes of language‖ to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guild of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal.

Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the Court to completely discard such evidence.

In the present case, it has been establishment that more than five persons constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death.

Section 149 consists of two parts: the first part deals with the commission of an offence by any member of an unlawful assembly in prosecution of the common object of that assembly; the second part deals with the commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know the likelihood of the offence being committed in prosecution of that object. In either case, every member of that assembly is guilty of the same offence, which other members have committed in prosecution of the common object. **(State of Rajasthan Vs. Abdul Mannan; (2008) 8 Supreme Court cases 65)**

S. 165—Recording of voice—Following closure of evidence—Legality

The simple prayer by way of filing the objection by the defence side is that in case of non-recording of voice of the prosecutrix, the impugned C.D. be accepted as defence evidence, the same cannot be allowed to be done by the trial Court. There are certain rules which are required for proving any document prepared by Electronic Media and certain rules are provided there for the accused persons who will have to prove the impugned C.D. as observed and then only the trial Court at the stage of the judgment may draw its own conclusion as the facts and circumstances of the case warrant.

In this case, according to the learned counsel for the parties, the impugned C.D. contains the conversation allegedly held between the prosecutrix and the accused which has been prepared from some mobile set.

So far as contention of the learned counsel for the revisionist regarding adverse inference against the prosecutrix in case of failure of recording of her voice due to her unwillingness is concerned, it is again open for consideration of the trial Court after hearing the arguments at the stage of the judgment. The prosecution evidence has already been closed and the case is at the stage of defence evidence, the impugned order is illegal and not sustainable in law as the same is beyond the provisions of the Code of Criminal Procedure, 1872. **(Smt. Rukumani Devi vs. State of U.P.; 2012 (5) ALJ 488)**

Section 165 & Article 20(3) of the Constitution of India –

Trial Judge well within its jurisdiction to call upon the accused persons to give their voice sample in the Court to discover or to obtain proper proof of relevant facts-For determination of their involvement in the crime and also to arrive at a just decision of the case. Taking of voice sample of accused by police during investigation is not hit by Article 20 (3) of the Constitution.

Section 65-B of Indian Evidence Act, 1872- Admissibility of electronic records- Voice sample is physical non-testimonial evidence and can not be

held to be conceptually different from physical non-testimonial evidence like DNA, semen, sputum, hair, blood, finger nails etc. **Smt. Leena Katiyar v. State of U.P., 2015 (89) ACC 556 (HC)**

Ss. 302, 376, 366 and 201: – **Appreciation of evidence and punishment of death sentence**

Appellant- accused convicted on basis of circumstantial evidence for kidnapping, raping and killing a minor girl and causing disappearance of evidence of offence. Death sentence, confirmed – Held, appellant (working as a mason in house of grandfather of victim) was a matured man aged about 43 yrs. He held a position of trust and misused the same, in a calculated and pre-planned manner, to rape a girl aged about 7 yrs. He sent the girl to buy betel and few minutes thereafter, in order to execute his diabolical and grotesque desire, proceeded towards the shop where she was sent. She was of thin build and 4 ft of height and such a child was incapable of arousing lust in a normal situation. Appellant won the trust of child and she did not understand desire of appellant, which was evident from fact that while she was being taken away by appellant, no protest was made and the innocent child was made prey of appellant‘s lust – Post-mortem report shows various injuries on face, nails and body of child. These injuries show the gruesome manner in which she was subjected to rape. victim was an innocent child who did not provide even an excuse, much less a provocation for murder such cruelty towards a young child is appalling. Appellant had stooped so low, as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt invited extreme indignation of community and shocked the collective conscience of society. Their expectation from authority conferred with the power to adjudicate, is to inflict death sentence, which is natural and logical, Appellant is menace to society and shall continue to be so and he cannot be reformed, Undoubtedly, case in hand falls in the category of rarest of rare case. Hence, High Court was right in confirming death sentence of appellant. **(Modh. Mannan Alias Abdul Mannan v. State of Bihar, (2011)2 SCC (Cri) SC 626)**

Appreciation of Evidence S. 376 IPC

IO made an attempt to help appellant-accused, in examination in chief he deposed that birth certificate was genuine, in cross examination he deposed that “birth certificate of prosecutrix did not relate to prosecutrix”. IO

was not declared hostile, Held, in view of birth certificate available on record, and accepted as genuine, this part of statement of IO cannot be believed. Criminal Justice should not be made a casualty for wrongs committed by investigating officers. Investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct.

- Court have already noted the statement of the accused himself to the Executive Magistrate at the time when he was admitted in the hospital. Since he was alive, the statement recorded by the Executive Magistrate had been treated as statement under Section 164 of the Code of Criminal Procedure, 1973 (in short "the Coe") and proceeded further. Though the said statement is not a dying declaration, however, the accused knowing all the seriousness confessed about the killing of his brother, his wife and their child and causing injuries to the other two children. (**Mohd. Imran Khan vs. State Government (NCT of Delhi); (2012) 1 SCC (Cri) 240)**