Final Year

Sri Lanka Law College

Law of Evidence

iGuide

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
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1. RELEVANCY OF FACTS

Relevancy expresses a logical relation between two or more things, however a fact which is logically relevant maybe legally inadmissible in evidence for reasons of policy.
Thus, hearsay, opinion, bad character, similar conduct on other occasions are matters in regard to which evidence, even though it maybe logically relevant cannot be presented in a court of law, except in instances where they are specifically treated as admissible by the provisions of the Evidence Ordinance.

SECTION 5

> Evidence maybe given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others.

Therefore evidence can be given of

- Facts in issue
- Relevant facts

Explanation – section 5 shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustration:
A is tried for the murder of B by beating him with a club with the intention of causing his death. At A's trial following facts are in issue –

> A's beating B with the club;
> A's causing B's death by such beating;
> A's intention to cause B's death.

Sodige Singho Appu: Evidence admitted in disregard of section 5 is evidence improperly admitted and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice.

SECTION 6

> Facts which though not in issue, are so connected with a fact in issue so as to form part of the same transaction, whether they occurred at same/different times or places, are relevant.

Illustration A: A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after is as to form part of the transaction, is a relevant fact. The link should be sufficiently immediate.

> ***R v Yahonis Singho:*** The word by standers mean the persons who are present at the time of the incident and not those who gather at the spot after the incident.
> In this case the testimony of a witness, that soon after the murder, she heard people going past her house crying out that the accused had stabbed the deceased was held to be inadmissible, as not being shouts of by-standers.

Illustration B: A is accused of waging war against the State by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them. The general transaction may consist of a series

of connected events. In this illustration there is a uniform intention behind each incident which constitutes the "general transaction".

> ***K v Attanayaka:*** Forging currency notes case - Court held statements made by accused in the course of his attempt to pass notes are part of the acts which led up to the attempt at utterance.'

Illustration C: A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself. This illustration permits the admitting of acts between parties outside the act which is the subject of the cause of action because these other acts are part of a continuous transaction. The libellous letter can be properly understood only in the context of the entire correspondence.

R v Welgama Mendis: Murder case -Defense objected medical evidence on injuries on other persons apart from the deceased. Trial judge held injuries inflicted on other persons also form part of the same transaction which resulted in the death of the deceased. However on appeal it was held the fact persons other than deceased received injuries are admissible under section 6, but the precise nature and extent of injuries were not so connected with the fact in issue to form part of the same transaction and therefore not admissible under section .

Aronlis Perera: A was accused of murder **-**Victim made statement to daughter saying she was going out with A on day she was killed**.** Held,statement made by victim to daughter was not admissible under section 6

Herashamy: Held by court – not to warrant the admission of a statement as res gestae.

To admit evidence under Section 6 evidence must be –

- Contemporaneous and spontaneous statements and accompanying acts
- Declarations substantially contemporaneous with the act –
- The fact/act could have occurred at different places and at different times
- Statements of bystander too become relevant

SECTION 7

> Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustration A
R v Joseph Perera: Evidence of the wife regarding P's improper advances towards her was relevant under section 7 of the Evidence Ordinance as being the occasion or cause, immediate or otherwise of the deceased's murder.

Eliyathamby v Gabriel: A series of letters secretly addressed by one of the parties to the other party affected the Defendant by her confession may surely be considered as one of the effects of the interview where the wife confessed adultery to her husband and 2nd Respondent.

Kularatne Case: Dr. K had an affair with a nurse. Wife was not well so she was kept in a room. One day food was sent through the servant and it was mixed with poisons. Wife died due to the poisons. Dr. K and servant both were acquitted because there was no evidence to prove that who poisoned the food. But serving food daily to her room gave an opportunity.

Father Mathew Pieris Case: Diabetic case **-**Knew there was diabetes so made it worse

Occasion and Cause

Ordinary meaning given to the word "cause" e.g. when D is charged for murder, the fact that the deceased has taken money and that on the day of the incident D went to the deceased's house to recover the money is a relevant fact.

R v Joseph Perera – The appellants, who were charged with murder, were employed on a farm owned by one P. The deceased and his wife M were also employed under P but had left his employment in consequence of certain improper advances made to M by P. Held, that the evidence of M in regard to the conduct towards her of P was relevant under section 7 of the Evidence Ordinance as being the occasion, cause, or immediate cause of facts in issue.

Effect

A is charged with the murder of B. Marks on the ground produced by a struggle at/near the place where the murder was committed is a relevant fact (being the effect of the incident).

Constitute the state of things under which they happened

Admits introductory and ancillary facts. Facts which provide a background against a fact in issue may be clearly seen – is admissible as an introductory fact.
If the question is whether A robbed B, the fact that shortly before the robbery, B went to a fair with money in his possession and that he showed it, or mentioned the fact that he had it to third persons, is a relevant fact (the fact constitutes the state of things under which the robbery took place)

R v Podmore – an oil dealer was murdered by an employee. Part of the surrounding circumstances was held to be 2 books which lay near the corpse, containing indications of sales of oil which were alleged to be fictitious and the cause of an altercation leading to the crime.

Facts which afforded an opportunity for their occurrence or transaction

Opportunity is sufficient to make the fact admissible (no need for it to be exclusive opportunity)

R v Palmer – the fact that D procured a poison shortly before the murder and had an opportunity of administering it was held to be admissible.

SECTION 8(1)

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive:
Though motive is not necessary, it is relevant because it establishes the actus reus or mens rea or both and it may explain facts which are difficult to explain and it is relevant when determining "intention".

Absence of motive is important – though not conclusive proof of innocence, may give strong presumption of innocence.

Once motive is established it is not necessary to establish adequacy thereof
***R v Sahie* –** evidence of motive must be of the strictest kind, mere suggestions are not enough and cannot be proved by hearsay evidence.

Sathasivam's Case
Court held with regard to section 8(1), evidence of motive for the commission of the alleged crime would without doubt be relevant – but if it be alleged, it must be strictly proved. Deceased sent a letter to third party saying that she feared a threat to her life when her husband returns from abroad. H, the accused, read the letter later. The letter was held to be inadmissible as there was no evidence to prove that after the accused read the letter it caused a strong resentment against the wife and that established the motive to kill her.

***R v Anandagoda* –** P led evidence to show that the deceased was the D's mistress and that she gradually became a nuisance to him.

Illustration A – A is tried for the murder of B. The fact that A murdered C, that B knew about it and that B had tried to extort money from A are relevant.

> ***Natha Singh v Emperor* –** evidence of motive for murder as wanting to conceal another murder is admissible but not for the purpose of showing that D was a person likely to have committed murder.
>
> ***De Silva v King* –** this is so even if D had already been convicted of an offence.

Illustration B – A sues B upon an instrument for the payment of money. B denies making of the instrument. The fact that at the time when the instrument was alleged to be made, the fact that B required money for a particular purpose is relevant.

Preparation:

Evidence of preparation and measures taken to bring about the result which is the subject of inquiry is relevant. Premeditated action must be preceded by appropriate preparation. The existence of a plan is usually employed evidentially to indicate the subsequent doing of the act planned. Preparation can be proved by the acts of a person / a statement in which preparation is asserted.

***Coomaraswamy* –** statements asserting preparation can be proved even by hearsay evidence.

Acts of preparation need not be confined to events immediately preceding the alleged offence.

***R v Senevirathne* –** D charged with killing his wife with chloroform. Evidence that D had bought chloroform some months before the offence was admissible.

SECTION 8(2)

> The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Preparation:
Preparation and antecedent conduct are closely interrelated. But conduct antecedent to a fact in issue may be something remote from and unconnected with the transaction which constitutes the fact in issue e.g. declaration of intent or threats.

Subsequent Conduct:
Includes all acts by which an inference can be drawn that the person committing the acts had something to do with the transaction which is the subject matter of the case – the fact of absconding, possession of stolen property or proceeds therefrom or an attempt to conceal things which might have been used in the commission of a crime is relevant.

SECTION 9

Facts necessary to

1. Explain or introduce a fact in issue or relevant fact or
2. Support or rebut an inference suggested by a fact in issue or relevant fact or
3. Establish the identity of anything or person or
4. Fix time or place where any fact in issue or relevant fact happened or
5. Show relation of parties by whom such fact was transacted

Are relevant.

Jarlis Case - Identification parade was used to corroborate identity in court

Eliyathamby v Gabriel

SECTION 10

> When there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Peiris v Silva:

A and B extorted money from C
Hearsay as regards to B
Conspiracy has to be shown separately
Section 10 can be only applied if there are sufficient facts to establish a conspiracy between two or more persons to commit an offence

Queen v Liyanage: "said, done and written" applies during the conspiracy period and not after.

SECTION 11

Facts not otherwise relevant are relevant –
If they are inconsistent with any fact in issue or relevant fact;
If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

SECTION 14

Facts showing the existence of any state of mind – such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling – are relevant, when the existence of any such state of mind, or body, or bodily feeling is in issue or relevant.

SECTION 15

When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Jayawardena v Diyonis: Accused charged with having been in unlawful possession of ganja. Prosecution led evidence to show that accused had sold ganja before as medicine**.** Held – this evidence was admissible as shedding light on the accused's intention
Similar occurrences under section 15 must be proved by direct evidence and not hearsay evidence.

Dias v Wijethunga: Here one transaction was related to the sale of furniture while the sale of house was envisaged by the other transaction. There was not such similarity in regard to the different occurrences as to warrant the invocation of the principle contained in section 15.

Waidyasekara case: Evidence of previous convictions can be led not with the fact that it is prejudicial to the accused.

RES GESTAE

Res gestae (Latin "things done") may be broadly defined as matters incidental to the main fact and explanatory of it. This includes acts and words which are so closely connected therewith so as to constitute part of the transaction. Res Gestae initially identified in *Ratten v R* as being capable of being used in 3 different ways

- When a situation of fact is under consideration it could be used to understand what is happening in a broader sense
- It could be used to admit words spoken as a relevant fact (but not to assert the truth of the words)
- It could be used to admit a hearsay statement by a victim/bystander which would indicate the identity of a criminal

Sections 6, 7 and 8 deal with the concept of res gestae. Courts are not generally interested in transactions between third parties but these sections are exceptions to this.

Res Inter Alios Actae Res (Latin for "a thing done between others does not harm or benefit others") are not admissible.

2. CORROBORATION

Corroboration means, Evidence in support of principle evidence. It must be an independent evidence which **Confirms Support or Strengthen** the evidence of a particular witness.

Corroboration need not necessary be by another witness. It may be –

(01) An admission by the accused or defendant
(02) Contents of a document
(03) Real evidence

Corroboration can be said as facts which tend to render more probable the truth of the testimony of a witness on any material point.

The corroborated evidence and facts must proceed from someone other than the witness to be corroborated.

Lord Morris in *DPP v Hester*, stated the essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened if the conviction is based upon testimony of more than one acceptable witness.

Section 134
Evidence of a single witness is sufficient to prove a fact.
Therefore, there is no legal requirement for corroboration.
In matters of rape and sexual offences courts have held that, as a matter of prudence corroboration is desirable of witness evidence before conviction.

Section 157
Former statement of witness, whether written or verbal, may be proved to corroborate later testimony as to the same facts. Although the section uses the word 'corroboration' it has not been used in the true sense of corroboration. But in fact it refers to establishing of the consistency of the witness.

Although section 157 uses the word 'corroboration' it is not used in its true sense or corroboration contemplated in section 157 is different from 'corroboration' required by rules of law or practice in order to corroborate evidence of witness.

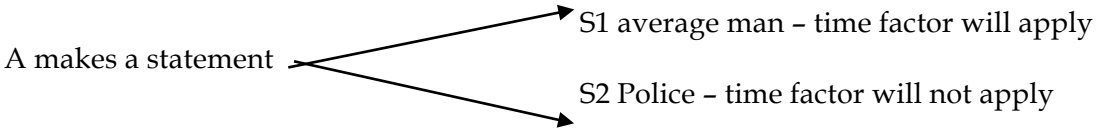
In *Queen v Julis,* statements, even if admissible under section 157 it may be observed that there is ample authority that they are not corroboration in the true sense of the term, for corroboration must be extraneous to the witness who is to be corroborated.

In *Ariyadasa v Queen,* it was held that the corroboration that section 157 contemplates is not corroboration in the conventional sense in which the term is used in courts of law but in a test of consistency in the conduct of a witness tending to render his testimony more acceptable.
Corroboration set out in section 157 is only for the purpose of showing that the witness is consistent.

Section 157 set outs two circumstances as to corroboration by former statement to show consistency

(a) At or about the time when the fact took place or
(b) Before any authority legally competent to investigate the fact may be proved

(a) refers to a person making a statement to a normal average person. In this instant time factor is important.
(b) time factor has no relevance. (ex: police officer is legally competent to investigate the fact)
Therefore court will consider before whom the statement were made at the stage of admitting evidence under section 157.



Before considering S1 court will consider at or about the time when the fact took place.
In S2 court will consider after how much time the situation took place.

Queen v Vellayan

- Case of grievous hurt
- Accused gave evidence but not satisfactory
- Prosecution called 03 witnesses
- Soon after the incident the accused came and told what happened
- Accused was convicted
- Accused evidence was unsatisfactory but the evidence given by other 03 witnesses corroborated it
- In the appeal – the trial judge has misdirected himself under section 157 previous statement made by the witness can be used provided if those statements are consistent with what he has told to the court.

Statements made at/about the time

i.e. the statement had been made immediately/soon after the occurrence of the issue.
When did the person get a reasonable opportunity of making the statement.
Ex: if the incident took place in a crowded place or a jungle – delay
Court must take into account the fact and circumstances of the case and decide whether the witness had made the statement of the first opportunity.
In *King v Wijesinghe*, statement that was sought to be admitted had been made after one year of the incident. Held it is not admissible and does not satisfy section 157.
In a decided case it was held to be inadmissible of the statement even it made after one week.

Statement made to any authority

In a case of rape – prosecution intends producing the statement made to the police by the prosecutrix as evidence in order to corroborate her evidence. Would this permissible
'

Most important feature is that time fact has no application.

Verbal/written statement made under oath/not are applicable.

Before admitting the statement the court has to decide the person to whom the statement had been made is legally competent to investigate the matter.

Queen v Julius

- A particular police sergeant entrusted with holding an identification parade.
- Witness made a statement to him
- Trial judge accepted it
- Appeal – there had been a misdirection on the part of the trial judge. Police sergeant cannot be treated as an authority legally competent to hold an identification parade.

3. PRESUMPTIONS

EL interprets the term very broadly - It denotes an inference of the existence of some fact and the said inference is drawn without evidence but merely from some other fact already proved or assumed to exist.

2 Presumptions under the Evidence Ordinance:

1. Presumptions of law
2. Presumptions of facts

Presumptions of law may either be conclusive or rebuttable.

Examples of presumptions that are conclusive:

(1) A child under 12 years of age cannot commit rape -sec. 113
(2) A child under 8 cannot commit an offence as he lacks the mental element -sec. 75 Penal Code

Examples of presumptions that can be rebutted:

(1) A child between 8-14 has no criminal intention
(2) A person who has not been heard for a period of 1 year is presumed to be dead - sec. 108
(3) A person charged with a crime is presumed innocent until proven guilty
(4) A sane adult intends the consequences of his actions
(5) All public & official acts have been regulariy and properly performed
(6) Presumption of legitimacy - sec.112 .
(7) Presumption of undue influence (where person is placed in a fiduciary capacity as a trustee or as an attorney or solicitor and where it is pointed out that the person so placed has purchased property or received property from a person in relation to whom he stands as trustee)

Difference between Presumption of fact and Presumptions of law

1. Presumption of law derives its force from law while a presumption of fact derives its force from logic.
2. Presumption of law has effect on the burden of proof, whereas presumption of fact has no effect on the burden of proof even though it can effect an evidentiary burden such as res ipsa loquitur.
3. Presumption of law applies to a class with fixed and uninformed conditions whereas a presumption offset applies to cases and non-fluctuating conditions.

Presumption of Legitimacy – section 112

Section 112 provides,

The fact that any person is born during the continuance of a valid marriage between his mother and any man or within 280 days after it's dissolution, the mother remaining unmarried, shall be conclusive proof that such person is legitimate son of that man, unless it can be shown that

(1) Man had no access to the mother at any time when such person could have been begotten or

(2) He was impotent

This section is based on English Law such that the child born in lawful wedlock should be treated as the child of the man who was then the husband of the mother unless it is shown

that he had no access to the mother or is impotent. The initial presumption is in favor of legitimacy that is the made had intercourse with the woman at the time when child could have been conceived. This is a rebuttable presumption.That is on proof of impotency of non-access the man can deny paternity. But once access (not mere opportunity but actual intercourse) is proved no evidence can be allowed to be shown that he is not the father.
It is immaterial how soon after the marriage the child is born, even if the birth occurred so soon after the marriage that the child must have begotten before it or even if the mother was visibly pregnant at the time of marriage.

Jane Nona v Leo : The access in section 112 is used in the sense of actual intercourse and not possibility of access.

Sopi Nona v Marsiyan: If a woman seek to charge her husband with maintenance of her children she should prove a valid marriage and birth of her child during its continuance. Husband may prove either,

- He is impotent or
- Had no possibility of access to his wife

Samarapala v Mary: Held – proof beyond reasonable doubt us necessary to rebut presumption of legitimacy.

SECTION 113
It shall be an irrebuttable presumption of law that a boy under the age of 12 years is incapable of committing rape.

4. PRESUMPTION OF EXISTENCE OF CERTAIN FACTS - SECTION 114

Court may presume the evidence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, public and private business human conduct, in their relation to the case.

<table>
<tr><th>The court may presume:</th><th colspan="2">Court shall also have regard to such facts in considering whether such maxims do apply or not:</th></tr>
<tr><td>(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession</td><td colspan="2">A shopkeeper has in his till a marked currency note. Soon after it was stolen and cannot account for its possession specifically but is continually receiving currency notes in the course of his business</td></tr>
<tr><td>(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars</td><td>A of highest character caused man's death by negligence in arranging machinery, which B also took part in. B describes what happened and admits common carelessness of A and himself.</td><td>A,B,C give separate accounts of the crime they committed implicating D. Accounts corroborate each other in a manner to render previous concert highly improbable.</td></tr>
<tr><td>(c) That a thing or state of things which has been shown to be in existence within a period shorter than it usually ceases to exist – is still in existence</td><td colspan="2">It is proved that a river ran in a certain course 5 years ago, but it is known that floods occurred during that time which might change its course.</td></tr>
<tr><td>(d) That judicial and official acts have been regularly performed</td><td colspan="2">A judicial act, the regularity of which is in question, was performed under exceptional circumstances</td></tr>
<tr><td>(e) That the common course of business has been followed in particular cases</td><td colspan="2">Whether letter was received. Shown to be posted, but was interrupted by disturbances</td></tr>
<tr><td>(f) That evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it</td><td colspan="2">A man refuses to produce a document which would bear a contract of small importance on which he is sued, but which might also injure feelings and reputation of his family</td></tr>
<tr><td>(g) That if a man refuses to answer any question which he is not compelled to answer by law, the answer if given, would be unfavourable to him</td><td colspan="2">Man refuses to answer, not compelled by law to answer, but answer might cause loss to him in matters unconnected with the matter in relation to which it is asked</td></tr>
<tr><td>(h) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged</td><td colspan="2">A bond is in the possession of an obligor, but the circumstances are he may have stolen it</td></tr>
</table>

5. INTERPRETATIONS

Section 2
The evidence ordinance shall apply to **– all judicial proceedings in or before any court** other than Courts martial and Proceedings before an arbitrator

Section 3 – Interpretations

"Fact" means and includes
(a) Any thing, state of things or relation of things capable of being perceived by the senses,
(b) Any mental condition of which any person is conscious

Illustrations –
1) That there are certain objects arranged in a certain order is a fact
2) That a man hear/saw something is a fact
3) That a man said certain words is a fact
4) That a man holds a certain opinion, intention, acts in good faith, uses a particular word in a particular sense etc is a fact
5) That a man has a certain reputation is a fact

"Relevant" – one fact is said to be "relevant" to another when the one is connected with the other, in any of the ways referred to in the provisions of the Evidence Ordinance relating to the relevancy of facts.

"Facts in issue" means and includes
Any fact from which, either by itself or in connection with other facts, the
- Existence,
- Non-existence,
- Nature or
- Extent

of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation – whenever, under the provisions of the law in force relating to civil procedure, any court records an issue of fact, the fact to be asserted or denied, in the answer to such issue – is a fact in issue.

Illustrations –
- A is accused of the murder of B
- At his trial following facts may be in issue
    - That A caused B's death
    - That A intended to cause B's death
    - That A received grave and sudden provocation from B
    - That A, at the time of doing the act which caused B's death was by reason of unsoundness of mind, incapable of knowing its nature.

"Evidence" means and includes –
a) All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry

- Such statements are called oral evidence

b) All documents produced for the inspection of the court
   - Such documents are called documentary evidence

"Document" means any matter expressed or described upon any substance by
- Letters
- Figures
- Marks

intended to be used for the purpose of recording that matter
Illustrations –
1) A writing
2) Words printed, lithographed or photographed
3) Map or plan
4) Inscription on a metal plate/stone
5) A caricature

are all documents.

6. REAL EVIDENCE

Real evidence means objects or exhibits or productions which do not fall within the definition of "documents" but which are nevertheless produced for the inspection of the court in order to prove the existence or non-existence of a fact in issue.

The Evidence Ordinance does not include "real evidence" within the definition of "Evidence" in section 3 of the ordinance. The only instance of recognition given to real evidence are found in section 165 and in the second proviso to section 60 which states:

> "Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection"

This type of inspection is often indispensable in order that the oral evidence may be understood properly, and it also enables the court to draw inferences as to the truthfulness of the witnesses.
Under section 165 also, the court may order the production of a thing.
The three divergent senses in which the term "real evidence" has been used, as pointed out by Phipson are the following –

(a) Evidence from things as distinct from persons
(b) Material objects produced for the inspection of the court
(c) Perception by the court (or its result) as distinct from the facts perceived.

Modern witness classify the following in the category of real evidence.

(i) Material objects
(ii) Appearance of persons
(iii) Demeanour of witnesses
(iv) View or inspection
(v) Automatic recordings
(vi) Documents put in as chattels and not as statements

7. ESTOPPEL – SECTION 115

A rule of evidence whereby a person is barred from denying the truth of a fact that has already been settled.

Section 115
When one person has, by his
- Declaration
- Act or
- Omission,

Intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, whether him or his representatives shall be allowed in any suit or proceeding between himself/representative and that person, to deny the truth of such thing.

Illustrations –
A intentionally and falsely leads B to believe that a certain land belongs to A, and thereby induces B to buy and pay for it.
The land afterwards becomes property of A and A seeks to set aside the sale on the ground that at the time of sale he had no title.
He must not be allowed to prove his want of title.

Section 116
No tenant can deny that the landlord of the property had title to such property, during the continuance of the tenancy.

Section 117
No bailee, agent or licensee shall be permitted to deny that the bailor, principal or licensor was entitled to the goods which were entrusted in them.

8. BANKERS BOOKS – SECTIONS 90 A,C,D,E

The term "Bankers Books" has been interpreted in Section 90 A of the ordinance as amended by Act No. 29 of 2005 to include:

- Ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank and includes
- Data stored by electronic, magnetic, optical or other means in an information system

Section 90C – Mode of proof of entries in banker's books:

- A certified copy of any entry in a banker's book, shall in all legal proceedings, be received as prima facie evidence of the existence of such entry and shall be admitted as evidence of the matters/transactions/accounts recorded.

Section 90D – bank officers not compellable to produce evidence

- No officer of a bank shall, in any legal proceeding to which the bank is not a party
  (1) Be compellable to produce any banker's book, the contents of which can be proved or
  (2) Be compellable to appear as a witness to prove matters/transactions/accounts
  Unless
    1) By order of court or
    2) By order of a Judge made for special cause

Section 90D has to be read together with section 130(3) which states that:

"No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party except as provided by section 90D"

Section 90E – inspection of books by order of Judge or court

90E(1) – On the application of any party to a legal proceeding, the court or judge may order

1) That such party be at liberty to inspect and take copies of any entries in a bankers book or
2) May order the bank to prepare and produce certified copies of all such entries and

further certifying that there are no other entries in the bank's books relating to the issue in question.

90E(2) – Such order can be made with/without summoning the bank and bank shall be given three days (exclusive of bank holidays) to obey such order.

90E(3) – Bank can before time limited for such obedience,

- Offer to produce their books at the trial or
- Give notice of intention to show cause against such order

"Certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry, and that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in custody of the bank and should be subscribed by the principle accountant or manager of the bank with his name and official title.

"Bank" and "Banker" means

i) Any company carrying on the business of bankers
ii) Any partnership or individual
iii) Any savings bank, national savings bank or money order office

9. REFRESHING MEMORY OF A WITNESS – SECTIONS 159,160,161

Section 159(1): A witness may, while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

Section 159(2): The witness may also refer to any such writing made b any other person, and read by the witness, within the time mentioned in section 159(1) if when he read it, he knew it to be correct.

Section 159(3)
Whenever a witness may refresh his memory by reference to any document, he may, with permission of court, refer to a copy of such document.
Provided, court is satisfied that there is sufficient reason for the non-production of the original.

Section 159(4)
An expert may refresh his memory by reference to professional treastises.

Accordingly, witness can refresh his memory by referring to –

1) His own writings
2) Writings made by another person
3) Any copy of a document
4) Professional treastises

Section 159 (1) and (2) refers to a situation where a witness can refresh his memory by –

- Referring to contemporaneous documents made by such witness or
- By another and
- Read by the witness

Authenticity and contemporaneity are the two main conditions under section 159 (1) and (2)

Section 160
A witness may also testify to facts mentioned in any such documents mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in that document.

Section 161
Any writing referred to in section 159/160 must be produced and shown to the adverse party if he requires it, and such party can cross-examine the witness thereon if he pleases.

Abu Bakr

- Accused charged with using certain words in a public speech given by him to promote ill will and hostility.
- Prosecution adduced the evidence of his speech recorded in a Webster wire recorder and it was reproduced in writing by a witness.
- Held – admissible for the witness to give oral evidence of the words that were reproduced in his hearing, using the writing he made at the time of the reproduction to refresh his memory.

10. PUBLIC DOCUMENTS (SECTIONS 74 – 77)

Section 74
The following documents are public documents:

a) Documents forming the acts or records of the acts
    I) Of the sovereign authority
    II) Of official bodies and tribunals
    III) Of public officers, legislative, executive or judicial, whether of Sri Lanka or a foreign country
b) Public records, kept in Sri Lanka, of private documents
c) Plans. Surveys or maps purporting to be signed by the Surveyor General or officer acting on his behalf.

Section 75 – states that all other documents are private

Section 76
Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand, a copy of it on payment of legal fees, together with a certificate written at the foot of such copy that it is a true copy of such document.
Such certificate shall be subscribed by such officer with his name and official title and sealed.
Such copies so certified shall be called "certified copies"

Section 77
States that such certified copies may be produced in proof of the contents of the public document or part of the public document of which they purport to be copies.
Public documents are exception to the Hearsay Evidence
In *Gunasekara v Gunasekara,* it was stated that bed-head tickets, kept in hospitals, are not public documents, being merely records ,being merely records of observes about patients made by medical officers in the hospitals "an alarmingly application of the section"

In *Kowla Umma v Mohideen* the court held that the judgment of an Indian or other foreign court cannot be regarded by the courts of Sri Lanka as a "public document".
According to *Pedrick Appuhamy v Ekamn singho,* registers kept by a Vel Vidana for his own information and not in pursuance of an official duty imposed on him is not a public document within the meaning of section 74.

11. PRESUMPTION AS TO DOCUMENTS

Section 79(1)
The court shall presume every document purporting to be a:

Certificate,

Certified copy or

Other document declared by law to be admissible as evidence of any particular fact, and which purports to be duly certified by an officer in Sri Lanka to be genuine.
Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

Section 79(2)
The court shall also presume that any officer, by whom such document is signed or certified, held, when he signed it, the official character which he claims in such paper.

Section 80
Court shall presume as genuine, any documents produced before it, purporting to be a record or memorandum of evidence of a witness/prisoner/accused person.

Section 81
Court shall presume the genuineness of every document purporting to be the Gazette of Sri Lanka.

Section 83 – maps or plans made by Surveyor General
Section 84 – collection of laws and reports of decisions
Section 85 – powers of Attorney General
Section 86 – certified copies of foreign judicial records
Section 87 – books and maps
Section 88 – telegraphic messages
Section 89 – due execution and documents
Section 90 – document know to be 30 years

12. ORAL & DOCUMENTARY EVIDENCE

Section 59 – All facts, except the contents of documents, may be proved by oral evidence

Section 60 – Oral evidence must, in all cases, be direct, i.e.

1) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact
2) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard such fact
3) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense/manner
4) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds such opinion or ground

Proviso,

- Where oral evidence refers to a material thing other than a document such material thing may be produced for inspection
- Treatise, where an opinion of experts is expressed in and commonly offered for sale, such treatise may be produced, where the author of the treatise is dead, cannot be found, incapable of giving evidence etc.

Primary Evidence and Secondary Evidence

The division between primary and secondary evidence is relevant to documentary evidence. Section 61 states that contents of documents may be proved either by primary or by secondary evidence.

Primary Evidence

Section 62 – "Primary Evidence" means the document itself produced for the inspection of court

Explanation 01 –
Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against parties executing it.

Explanation 02 –
Where a number of documents are all made by one uniform process (ex: printing, lithography, photography) each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration:
A person is in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary Evidence

Section 63 – Secondary evidence is any permitted evidence of contents of a document, other than the document itself.

Section 63 identifies five kinds of secondary evidence permitted by the Evidence Ordinance:
"Secondary evidence means and includes:

1) Certified copies given under provisions hereinafter contained
2) Copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies
3) Copies made from or compared with the original
4) Counterparts of documents as against the parties who did not execute them
5) Oral accounts of the contents of a document given by some person who has himself seen it."

Illustrations

a) Photograph of an original
b) Copy compared with a copy of a letter made by a copying machine
c) Copy transcribed from a copy and afterwards compared

are secondary evidence of the original one.

The above can be analyzed as follows:

01) Certified copies given under the provisions hereinafter contained.

Certified copies are those signed and certified as true by the officer to whose custody the original is entrusted.
The accuracy of these copies are presumed under section 79 and must be done according to section 76.
Sabaratnam v Kandavanam

- A certified copy of a document would only be secondary evidence of the contents of the original document.

Ponnadurai v Sumanaweera

- A copy of a statement alleged to have certified by a person who is not competent to read the language in which it was recorded is not a certified copy.

02) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies.

There are two parts in this;

i) Copies made from original by mechanical process….
Thus, a photograph of an original is secondary evidence of its content though the two have not been compared if it was proved that the thing photographed was the original.

ii) Copies compared with such copies
Subsequent copies made by a mechanical process will not be admissible unless compared with the copy. Comparison is with the copy and not with the original.

03) Copies made from or compared with the original

Ex: a copy transcribed from a copy but afterwards compared with the original is secondary evidence

04) Counterparts of a document as against the parties who did not execute them
Counterparts of a document is primary evidence against the party who executes the document but secondary evidence against non-executing party.

05) Oral accounts of the contents of a document; given by some person who has himself seen it.
- To lead secondary evidence it is essential that the witness should have seen and read the document. Merely having it read over to him is insufficient.
- Secondary documentary evidence is more acted upon by courts than secondary oral evidence.

When may secondary evidence be led regarding the content of a document?
Section 64 of the Evidence Ordinance requires that documents must be proved by primary evidence except in cases mentioned after.
These exceptions are provided in section 65.

Section 65 – Secondary evidence may be given of the existence, conditions or contents of a document in the following cases:
65(1) – When the original is shown or appears to be in the possession or power of
i) The person against whom the document is sought to be proved
ii) Any person out of reach of/not subject to the process of the court
iii) Of any person legally bound to produce it and when after notice under section 66 such person does not produce it
65(2) – When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is sought to be proved or by his representative in interest.
65(3) – When the original has been lost or destroyed, or when party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time.
65(4) – When the original is of such a nature that is not easily movable
65(5) – When the original is a public document
65(6) – When the original is a document of which a certified copy is permitted by the Evidence Ordinance or any law in force in Sri Lanka.
65(7) – When the original consist of numerous accounts/other documents which cannot be conveniently examined in court and the fact to be proved is the general result of the whole collection.

Scope of section 66 – Rules as to notice of procedure

Section 66 provides that,
"Secondary evidence of the contents of the documents referred to in section 65(1),shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his proctor, such notice to produce it as is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case."

However such notice is not required in order to render secondary evidence admissible in any of the following cases or where the court thinks fit to dispense with it:

1) When the document to be produced is itself a notice
   No notice is required when the document itself is a notice
   Ex. Notice of dishonor, notice of quit
   This rule applies to notice to produce a document only and nothing else.

2) When from the nature of the case the adverse party must know that he will be required to produce it.
   The rule of prior notice is dispensed when there is proof that the document is with the adverse party and the nature of the case is indicative of the fact that such party knows that it has to be produced.

3) When it appears or is proved that the adverse party has obtained the possession of the original by fraud or by force
   No strict rule of fraud or force is necessary but where it appears it has been done so, it shall be sufficient to dispense with the notice.

4) When the adverse party or his agent has the original in court

5) When the adverse party or his agent has admitted the loss of the document

6) When the person in possession of the document is out of reach or not subject to the process of the court.

Saranadasa v Charles Appuhamy

- Where an accused who was summoned to produce a document in his possession failed to do so, the complainant was held entitled to lead secondary evidence of the contents of such document.
- Section 66 basically identifies the criteria as to lead secondary evidence under section 65(1).

13. WITNESSES

Section 118 - "All persons shall be competent to testify, unless the court considers that they are

1) Prevented from understanding the question put to them or
2) From giving rational answers to those questions by:
    a. Tender years
    b. Extreme old age
    c. Disease, whether of body or mind or
    d. Any other cause of the same kind."

The explanation to section 118 states that

- A person of unsound mind is not incompetent to testify unless he is prevented by his unsoundness of mind from understanding the question put to him and giving rational answers to them.
-

Therefore according to section 118, the governing criteria in regard to capacity to testify depends on:

1) Ability to understand the questions
2) Provide rational answers

Section 119 – Dumb Witnesses

"A witness who is unable to speak, may give evidence in any other manner in which he can make it intelligible, as by writing or signs, but such writing must be written and the signs made, in open court. Evidence so given shall be deemed to be oral evidence."

Somasundaram's case

- Witness was both deaf and dumb
- He was not trained to use sign language by a school
- There was no evidence in regard to the competency of the witness.
- Held the way the evidence was placed was incorrect

Aiya v Peniya

- If accused is deaf and dumb and cannot understand nature of proceedings against him, it is improper for Magistrate to hear evidence against him and convict him.

Competency of Husband or Wife to testify

Section 120(1) – In all "civil" proceedings, the parties to the suit and the Husband and Wife of any party to the suit shall be competent witnesses.

Section 120(2) – In "criminal" proceedings against any person the husband or wife of such person shall be a competent witness, if called by the accused.

But in such case all communications between them shall cease to be privileged.
Section 120(3) – In "criminal" proceedings against a Husband or Wife, for any bodily injury or violence inflicted on the spouse, such Husband or Wife shall be a competent and compellable witness.

Section 120(4) – In "criminal" proceedings against a Husband or Wife for any attempt to cause any bodily injury or violence on his/her spouse, such Husband or Wife is a competent witness.

Section 120(5) – In "criminal" proceedings against a Husband or Wife, for any offence punishable under section 362(b) – bigamy or
section 362(c) – bigamy with concealment of former marriage from the person of the subsequent marriage,
of the Penal Code, such Husband of Wife of the accused is a competent witness.

Other Exceptions

Section 81 – Children and Young Persons Ordinance
Refers to a situation where harm is caused to a child by a parent, spouse is a competent witness if victim is the child of such spouse.

Section 16 – Prevention of Domestic Violence Act
Stipulates that spouse is a competent witness to testify against the partner, relating to acts which fall within domestic violence.

Arumugam v Seethevi: Witness is a competent witness for the prosecution where a Husband is charged for intimidating his wife.

Queen v Mohideen: Former wife is a competent witness

A child is a competent witness

Section 118 of the Evidence Ordinance provides that all persons are competent to testify, unless they are prevented from

- Understanding the question put to them or
- Giving rational answers

by reasons of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind.

A child is a person of tender age.
There is no direct provision in the Evidence Ordinance to state whether a child is competent to testify as a witness or not.

In *Jane Nona v Leo* the court stated that principles of our law with regard to competency of witnesses are now formulated in Chapter XI of the Evidence Ordinance and that formulation is considered exhaustive.
The only test laid down by the Ordinance with regard to the competency of a witness in his capacity to understand and give rational answers to the questions put to him.

If a person of tender years or any advanced age can satisfy these requirements, his competency is established.

A preliminary inquiry will be held to test the intellectual capacity of the child.

Holding such preliminary inquiry is not a legal obligation, but a rule of prudence.

Section 9 - Oaths and Affirmation Ordinance
"no omission to take any oath or make any affirmation and no irregularity in the form of which it is administered, shall render inadmissible any evidence."

R v Hayes
- It was held that what is important is that the judge should be satisfied that the child appreciates the solemnity of the occasion and
- Is sufficiently responsible to understand the taking of an oath involves and obligation to tell the truth.

Section 38 – Children and Young Persons Ordinance
Where a child of tender years is called as a witness, who does not understand the nature of an oath, his evidence may be received, though not given upon oath,
If in the opinion of the court,
- He is possessed of sufficient intelligence to justify the reception of the evidence
- Understands the duty of speaking the truth

However an accused will not be convicted unless such evidence is corroborated with material evidence.

Queen v Buye Appu
- A child between 9-10 years gave her evidence without being sworn or affirmed.
- Court held that a child like any other witness must be sworn or affirmed

King v Dingo
- Court failed to administer the oath
- Held, section 9 of the Oaths and Affirmation Ordinance applies not only to cases where oath has not administered per incuriam (accidental omission) but also where court had deliberately refrained from administering oath.

King v Somasundaram
Child maybe competent even if he doesn't understand the nature and consequence of an oath.

Section 118(1) Act No 32 of 1999

Where a court is satisfied that a child is competent to testify, but is not able to understand the nature of an oath or affirmation, court may receive the evidence of such child, without causing an oath or affirmation to be administered to such child.
Any unsworn testimony given by such child, shall not be deemed to be inadmissible, by reason only of the fact that such testimony was not given on oath or affirmation.

Section 118(2)
The court shall explain to the child that the child is bound to state the truth on all matters to which his testimony relates

Dock Statements – Section 120(6)

In criminal trials the accused shall be a competent witness on his own behalf (section 120(6)).

If the accused exercises his option of giving evidence on his own behalf, he exposes himself to the danger of cross-examination.

However, an alternative remedy is available to an accused person who has a statement to make or explanation to offer to the jury. That is to address them from the dock without entering the witness box at all.

In this event, no opportunity is available to the prosecution to test the accused's statement by cross-examination.

There is no statutory provision either in Evidence Ordinance or Criminal Procedure Code for statements made from the dock.

The law relating to dock statements is found in case law. It was a right recognized in England at a time when the accused was not competent to give evidence on his behalf.

There is no oath or cross-examination when making dock statements.

The accused will not be exposed to a charge of perjury on his dock statement.

The consensus of judicial opinion in Sri Lanka appears to be that an unsworn statement has evidentiary value and must be considered by the jury as such, subject to its infirmities.

King v Vellayan Sittambaram 20 NLR 257
Bertram CJ observed: "The rules of England procedure are plain. The prisoner may still, if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box and on this anology he has the same right in Ceylon". In this case the District Judge refused to allow the accused to make an unsworn statement. It was held in appeal, however, that this irregularity was of such a nature as necessarily to cause the failure of justice.

Kularatne v The Queen 71 NLR 529
The fact that a statement from the dock is unsworn, and the absence of cross-examination, undoubtedly affect the right which could properly be attached to such a statement. Nevertheless, it cannot be disputed that a statement from the dock is a form of evidence.
In this case, the trial judge dealt with the dock statement of the first accused in such a manner that it was likely that the jury thought they were not called upon to pay any attention at all to that statement. The Court of Criminal Appeal strongly deprecated this approach. When an unsworn statement is made by the accused from the dock, the jury must be directed that such statement should be looked upon as evidence, subject to the infirmity that the accused had deliberately refrained from giving sworn testimony.

Piyadasa v The Queen 72 NLR 434

If the jury believe the innocent explanation offered by the accused in his statement from the dock, an acquittal is inevitable; however, acceptance of the unsworn statement is not always necessary for an acquittal.
In this case, T.S. Fernando J. speaking for the Court of Criminal Appeal, stated: "Even if the jury did not consider the accused's unsworn statement to be true or probably true, yet if the statement could have caused them to entertain a reasonable doubt as to the truth of the Crown case, the accused was entitled to claim a verdict of acquittal."

The Queen v Martin Silva 60 NLR 160
The Court of Criminal Appeal presided over by Basnayake CJ emphasized that a statement made from the dock by an accused person inculpating a co-accused is not evidence against the accused and that the jury should be warned clearly and unmistakably not to take it into account against the co-accused.

Queen v Asra
- Accused pleaded right of private defense in his dock statement. Jury convicted the accused for murder. On appeal conviction was set aside.
- Held dock statement was a matter before the court which could be taken into consideration in deciding the case.

Directions a Judge must give to a Jury, where an accused makes a dock statement
In *Queen v Kularatne*, the court referred to *King v Sittambaram* and to *Queen v Buddharakkita Thero*, and expressed their agreement with the view taken in the latter case that, the unsworn statement must be treated as evidence even though it is not statutorily recognized in Sri Lanka/is not subject to cross-examination and both Judge and Jury cannot question the accused.
The court held that the jury must be directed that,
1) The statement must be looked upon as evidence, subject to the infirmities.
2) If they believe in the unsworn statement, it must be acted upon, i.e. the accused must be acquitted.
3) If the dock statement raises a reasonable doubt in the prosecution case, the defense must succeed and the accused must be acquitted.
4) The dock statement of one accused should not be used against another accused.

Privileges

The law of Sri Lanka concedes the plea of privilege in respect of several categories of matters. A witness who is entitled to claim privilege, may refuse to make disclosures with regard to matters which are held to fall within the plea of privilege.

Types of privileges
1) Communications between Husband and Wife – section 122
2) Affairs of state – section 123,124
3) Professional communication – section 126

01) Communication during marriage – Section 122

"No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication unless the person who made it, or his representative in interest, consents, except in suits between married persons prosecuted for any crime committed against the other and except in cases mentioned in section 120(2)."

Section 120(2)

In criminal proceedings against any person, the husband or wife of such person respectively, shall be a competent witness if called by the accused, but in that case all communications between them shall cease to be privileged.

Limitations to section 122 –

a) The communication must have been during the marriage and not before or after. But it extends even after termination of marriage if made during marriage.
b) The communication must have been made to and not by the witness.
c) Consent of the other party permits disclosure.
d) Hearsay of 3rd parties and documents are admissible. Only the witness is prohibited.

02) Affairs of State

Section 123 –

No person can be allowed to produce any unpublished records relating to any affairs of the state/to give any evidence derived from it except with the permission of the head of the department.

Section 124 –

No public officer can be compelled to disclose communications made to him in official confidence when he considers that the public interest will suffer by the disclosure.

03) Professional Communications – Section 126

No advocate, proctor or Notary shall at any time be permitted, unless with his client's express consent (i) to disclose any communication made to him in the course and for the purpose of his employment as such advocate, proctor or notary by or on behalf of his client, or (ii) to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or (iii) to disclose any advice given by him to his client in the course and for the purpose of such employment.

The proviso is, however, attached that "Nothing in this section shall protect from disclosure:

(a) Any such communication made in furtherance of any illegal purpose;
(b) Any fact observed by any advocate, proctor or notary in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment."

Prohibition can only be waived by client's express consent. This principle is there only to protect the client and not the lawyer.

Privilege extends to the benefit of the client's successors as well.

Ex: Partition case filed by the father, the son is substituted. Communication between father and lawyer is privileged.

Most importantly the obligation stated in section 126 constitutes after the employment has ceased.

Soysa v Soysa - Held: the words "at any time" in section 126 contemplates that the obligation stated in the section continues even after the employment has ceased.

Section 127, 128 and 129 must be considered together with section 126 regarding professional privilege. In terms of section 127, provisions of section 126 shall apply to interpreters and clerks or servants of Attorneys – at – law and Notaries.

Privilege recognized in section 126 is not necessarily waived by volunteering evidence under section 128. So if client discloses at his own instance that does not mean he has consented the lawyer to disclose.

If any party to suit gives evidence at his instance or calls any such Attorney – at – law or notary as a witness, he shall not deemed to have consented to such disclosure as is mentioned in section 126 but for such specific questions.

Special provision is made in respect of confidential communications with legal advisers. According to section 129, no one shall be compelled to disclose to the court any confidential communication which has been taken place between him and his professional adviser, unless he offers him as a witness.

In *Greenough v Gaskell*, it was held that for privilege to arise two factors must be there.

1) Relationships of legal adviser and client must exist or existed
2) Information must have been received by him in his professional capacity

In *Harris v Harris*, husband and wife sought legal advice contemplating a divorce. In the course of the discussion, wife admitted adultery. Later wife sued husband for neglect to maintain and husband alleged that wife has been committed adultery and when wife denied that husband wanted to lead evidence of that through the lawyer. But it was held that the evidence could not be given and he is privileged unless both parties consented.

14. FACTS WHICH NEED NOT BE PROVED

Section 56 – No fact of which the court will take judicial notice need be proved.

Section 57 lays provisions for facts which courts shall take judicial notice of:

a) All laws or rules having the force of law in any part of Sri Lanka
b) Public acts passed by Parliament
   Local and personal acts directed by Parliament to be judicially noticed
c) Articles of war for Sri Lanka Army, Navy or Air Force
d) Course of proceedings of the legislature of Sri Lanka
e) The public seal of the Republic of Sri Lanka
f) Seals of
   - All courts of Sri Lanka
   - Notaries Public
   - Any person authorized by laws of Sri Lanka or foreign country
g) The accession to office, functions, names, signatures, titles of persons holding public office in Sri Lanka
h) The existence, title and national flag of every state or sovereign recognized by Republic of Sri Lanka
i) The ordinary course of nature, natural and artificial divisions of time, geographical divisions of the world, meaning of Sinhala, Tamil and English words and public festivals, fasts and holidays notified in the Gazette.
j) Territorial limits of Sri Lanka and its divisions
k) Commencement, continuation and termination of any hostilities between Sri Lanka and any foreign state or body of persons
l) Names of members and officers of court, deputies and subordinate officers, assistants and attorneys-at-law, persons authorized by law to appear or act
m) Rule of the road on land or at sea
n) Other matters directed by law to take

Section 58 – Facts admitted need not be proved

No fact need be proved in any proceedmg which

- the parties thereto or their agents agree to admit at the hearing,
- or which, before the hearmg, they agree to admit by any writing under their hands,
- or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings

Provided that, the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

15. FORMER JUDICIAL PROCEEDINGS – SECTION 33

One application of the rule against hearsay evidence is that evidence given in other judicial proceedings is irrelevant to the case before court.

However, section 33 of the Evidence Ordinance serves as an exception to this.

Section 33
Evidence given by a witness in a judicial proceeding or before any person authorized by law, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of facts which it states, when the witness is –

1) Dead or
2) Cannot be found or
3) Is incapable of giving evidence or
4) Is kept out of the way by the adverse party or
5) His presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the court considers unreasonable,

Provided,

a) That the proceedings was between the same parties or their representatives in interest.
b) That the adverse party in the first proceeding had the right and opportunity to cross-examine
c) That the questions in issue were substantially the same in the first as in the second proceeding

Explanation:
A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.
However, according to the new amendment, if the witness is not available at the High Court trial, the evidence given in a non-summary inquiry cannot be used.

Section 33 can be analyzed as follows: (ingredients of the section)

1) Judicial proceedings
   Section 2 of Criminal Procedure Code defines the word "proceeding" as any proceeding in the course of which evidence is or may be legally given.

2) When the witness is dead
   This must be established by a death certificate or other firm evidence

3) When the witness cannot be found
   Mere statement by the prosecution that a witness cannot be found is not sufficient. It must be shown that the witness cannot be traced so that it is impossible to serve summons on him. Police/Grama Niladari/family must give evidence that he cannot be found.

   Prem Singh v Emperor
   That where the prosecution knew, where the witness was and the failure to issue summons is not an excuse to prove that a witness cannot be found.

4) When the witness is incapable of giving evidence
If a witness becomes insane or owing to a permanent illness or some other infirmity he will be incapable of giving evidence. The judge will decide if illness is due to a temporary cause or not. Medical evidence/Grama Niladari's evidence should be used to prove this.

Rex v Amarakoon
Fact that the witness is suffering from pneumonia is not sufficient to prove that he is incapable of giving evidence. Must be some kind of permanent illness.

Undue delay: court has discretion to decide

King v Kandappa
Where the attendance of a witness could not be secured due to floods, court held floods was not a good reason.

Rex v Fernando
Presence of a vital witness should not have been disposed merely because he works abroad.

5) Kept out of the way by the adverse party
This prevents adverse party from taking advantage of his own wrong

6) Former proceedings between same parties
Parties must be same in interest but need not be absolutely identical. Plaintiff in one case might be Defendant in another.

Kobbekaduwa v Seneviratne
- Plaintiff in the 2nd proceeding sought to admit evidence given by his father in the 1st proceeding.
- Held that the evidence is admissible. Plaintiff could be considered as a representative in interest of his father.
-

This section covers cases where:
a) The interest of the party to 2nd proceeding is consistent with the interest of the party to the 1st proceeding or
b) The interest of both parties to the 2nd proceeding in the answer to be given to the party question in issue in the 1st proceeding is identical.

7) Right and opportunity to cross-examine
Witness need not have been actually cross-examined in the previous proceeding. What is important is that the opposing party had the right and an opportunity to cross-examine the witness.

Subramaniam v Kankasanthurai
Mere opportunity to cross-examine witness in 1st proceeding is not enough. There must have been a right to cross-examine.

King v Appusinno
Witness given evidence before Magistrate when accused was not present. When accused was arrested, witness disappeared and therefore not available to cross-examine. Held that evidence was inadmissible because lack of opportunity to cross-examine.

Issues need not be identical and character of inquiry also need not be the same.
The test is whether the same evidence is applicable in both proceedings.
Court can come into a conclusion and convict a person purely on substantive evidence.
But the court has to be satisfied that it is safe to act upon such evidence.

Code of Criminal Procedure Act No 2 of 2013 has been enacted to dispense with the conduct of the NSI in certain cases.

According to section 6(3)(b), 6(5)(b), 6(a) the Magistrate shall not permit any cross examination of the witness by the accused or the pleader or any cross examination of expert witnesses or police officer by the accused/pleader except in the circumstances where having considered the nature of the material contained in the statement of a witness made to the police the prosecution may tender the witness for cross examination by the accused.

However, a statement made by an expert witness or police officer and deposition made by a witness tendered for cross examination, under section 6 of the Act, shall be deemed to be admissible in evidence, in terms of section 33 of the Evidence Ordinance as per section 6(10) of the act.

16. ADMISSIBILITY OF DYING DECLARATIONS

In terms of section 32 of Evidence Ordinance, statements made by persons who cannot be called as witnesses becomes relevant under certain circumstances.

Section 32 provides that any statements written or verbal of relevant facts made by a person who is dead is relevant.

Section 32(1) – "When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question"

Such statements are relevant whether the person who made them was or was not, at the time they were made, under the expectation of death, and whether may be the nature of the proceedings in which the cause of his death comes into question.

There are some conditions for admissibility under section 32(1)

1. Death of declarant before the court proceedings.
2. The statement must relate to the cause of death or any circumstances relating to transactions which resulted in his death.

   King v Muddalihamy
   - M the accused was charged with murder of W who lived with Mary Nona in the same estate line as M.
   - On the day of the murder when Mary Nona met W, W said he is going to meet M in the jungle.
   - W was not heard thereafter and dead body was found later.
   - Statement to Mary Nona was admitted under section 32(1).

   King v Marshall Appuhamy
   Held the statement which is admissible under section 32(1) maybe one which was made before the cause of death arose or the deceased had any reason to expect to be killed.
   Followed Privy Council decision in *Pakala Narayana Swami v Emperor*

   Pakala Narayana Swami v Emperor
   Privy Council held:
   Words in section 32(1) cannot be restricted to statements made after the act which resulted in death had occurred and that if a statement forms part of the transaction which results in death, it would be admissible even though it was made before the cause of death had arisen or before the deceased had any reason to anticipate being killed. Indication of fear and suspicion that death will be caused is not admissible.

3. The case must be such that the cause of the declarant's death must come into question.

   Livera v Abeywickrama
   A watcher was found dead at a store. He left a letter addressed to his master stating that accused had forcibly removed five drums of oil and he was unable to prevent it.

The letter cannot be admitted as the statement in the letter was not as to the cause of death.

4. The competency of the declarant to testify may have to be established, depending upon the circumstances of each case, but strict rules of competency do not apply.

   Palaniyadi v State
   The 4 year old dying boy uttered appellant's name Palaniyadi when father questioned as to who the assailant was. It was held that the availability of the boy at the trial competent to testify as a witness would not affect the admissibility under section 32(1).

5. The statement must be a complete verbal statement though it may take the form of question and answer or appropriate gesture.

   Alisandari v King
   The court held that a nod of assent given by a dying woman when asked whether it was accused the person who was responsible for her condition was a verbal statement and admissible under section 32(1).

6. Where the death of more than one person is caused during the same transaction, a dying declaration by any of the victims constitute admissible evidence in respect of circumstances attendant on the death of the other/s.

Significance of decisions

- There should be a proven connection between the alleged cause of death and actual cause of death.

Rex v Hershamy

- Deceased suffered injuries due to the assault of the accused. However died later due to a different cause of death.
- Held that a statement by the deceased as to the fracture caused by accused us not admissible as it was not in connection to the cause of death.

However when interpreting section 32(1) following must be taken into consideration:

- Statement may have been made before the cause of death arose.

  Rex v Arnolis Perera
  The court held that section 32(1) is limited to statements made by persons after sustaining fatal injuries which subsequently caused his death.

- Transactions contemplated by section cannot be restricted to physical cause of death and will include the connected events culminating in death.

- There should be a proven connection between the alleged cause of death and the immediate cause of death.

- Dying declarations made to answer leading questions are admissible though their weight as evidence may be affected.

There are two defects in Dying Declarations.

(1) The statement is not made under oath
(2) The absence of cross examination of statement

In a case where there is only dying declaration available to the prosecution to establish a murder, the prosecution need not necessarily corroborate it with various other evidence.

Dying declaration is considered as substantive evidence and a case can be determined based on dying declarations.

A dying declaration of a child of tender years would depend on the circumstances of each case when deciding the weight to be attached to such a declaration.

17. OPINION OF EXPERTS

Law of evidence contains a general rule excluding the testimony as to opinions.

However, **section 45** of the Evidence Ordinance recognizes that the opinions of experts are admissible in certain circumstances:

> "When the court has to form an opinion as to
> 1. foreign law
> 2. science
> 3. art or
> 4. identity or genuineness of handwriting,
> finger impressions,
> palm impressions or
> foot impressions,
>
> the opinions of persons specially skilled in the above areas are relevant facts. Such persons are called experts."

Duty of an expert as a witness is NOT to arrive at a conclusion as to the facts in issue of a case. He has to furnish the judge or the jury with the necessary scientific criteria so that the judges can form their own independent judgment by the opinion placed by the expert before the court.

The basis of this exception is that the opinion is expressed by a person having special qualifications, the benefit of which is not available to the judge or jury of the court.

Therefore, the inference drawn by the expert is reliable and thus of special value to the court.

Illustrations to section 45:

a. The question is whether A's death was caused by poison. Opinion of expert about symptoms produced by the poison on A are relevant.

b. Opinions of experts on the question as to whether two documents were written by the same person or by different persons are relevant.

c. Opinion of experts as to a person of unsound mind - whether such person was capable of knowing the nature of an act or not.

Expert evidence must be evaluated as any other evidence. Nothing will place expert evidence above the place of other evidence.

Mithradasa Fernando v. *S.I Police Kalubowila*
The accused was charged under Excise Ordinance for possession of unlawfully manufactured liquor. The prosecution sought to produce the evidence of a SI who claimed to be an expert. The SI had undergone a special training at Excise Department and had given evidence in more than 250 cases of this nature.
The court held that his opinion is not relevant as he did not come within the class of specially skilled persons contemplated in section 45.

US Shipping Bond v. *St. Albans*
For persons to fall in the category of experts, the witnesses must have made a special study of the subject or acquired a special knowledge therein.

Solicitor General v. *Fernando*
The precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent witness.

The practical knowledge of a witness may be sufficient in certain cases to qualify him as a competent expert. So the question whether a witness is specially skilled is a question of fact.

Priyani Soysa v. *Arsakularathne*
The testimony of experienced members of profession is of greatest value, but the decision of what is reasonable under the circumstances is for the courts to decide. Court is not bound to accept views of the professionals.

Rex v. *Pinhamy*
Expert evidence is relevant, but not conclusive.

The training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him a 'specially skilled'.

Solicitor General v. *Victoria Fernando*
Issue was whether the liquid claimed to have been found in the possession of the accused was fermented toddy.

Held, the opinion of an Excise Inspector who had more than 10 years' experience in the detection of excise offences is relevant.

However, a contrary decision was given in *Mithradasa Fernando* v. *S.I Police Kalubowila.*

But view of *Solicitor General* v. *Victoria Fernando* is preferred by judges.

Solicitor General v. *Podisira*
There is a duty on court to satisfy itself that the witness is specially skilled in the subject in which he is invited to testify. Court can ask questions such as his experiences, number of instances in which he has given opinion etc.

Section 46
Facts not otherwise relevant are relevant, if they support or are inconsistent with the opinion of experts, when such opinions are relevant.

This section means that where the opinion of an expert is relevant and led as evidence, then any other fact supporting or contradicting the opinion are also relevant.

Accordingly, where an expert gives evidence the rival party may also produce other expert evidence contradicting the position taken up by experts.

Rex v. *Palmer*
Palmer murdered cook by using Strychnine. The dead body showed symptoms of Strychnine poisoning. Evidence was led showing same symptoms in other deaths resulting from same poison. The court held that supporting facts are relevant propositions.

Illustrations:
a. The question is whether A was poisoned by a certain poison.

The fact that other persons who were poisoned by that poison exhibited certain symptoms which experts affirm or deny being the symptoms of that poison is relevant.

b. Obstruction to a harbour whether caused by a sea-wall?
The fact that other harbours similarly situated, but no such sea-walls, began to be obstructed at about the same time is relevant.

Section 51
Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

That is, an expert may give an account of experiments performed by him as the base of his opinion.

Sathasivam's case
Dr. Peiris' experiment with prisoners to be executed in order to analyse the position of digested food in Mrs. Sathasivam's body was considered relevant.

Solicitor General v. *Podisira*
On a charge of selling gov arrack without a license, the prosecution led the evidence of a preventive officer who identified the arrack saying "I examined the contents of the bottle. I'm of the opinion that it contained gov arrack". No question was put to him by magistrate or in cross examination.

Magistrate acquitted the accused on the ground that the witness did not give reasons as to how he came by his opinion.

Section 47 - opinion as to handwriting
When the court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it was supposed to be written or signed or that it was not written or signed by that person is a relevant fact.

Accordingly, a person is said to be acquainted with the handwriting of another person:

1. when he has seen such person write

2. when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person

3. when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Testimony as to handwriting under section 47 is better than expert testimony, because there is no question of bias or suspicion of partiality since the knowledge was acquired incidentally and unintentionally and not for the purpose of litigation.

The opinion of a non-expert is admissible under section 47.

Further, the frequency, number of accusations and attention paid to writings by witness will affect the value and not the admissibility of evidence.

Illustration:

The question is whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Colombo who has written letters addressed to A and received letters purporting to be written by him.

C is B's clerk, whose duty was to examine and file B's correspondence.

D is B's brother to whom B habitually submitted the letters written by A for advising him.

The opinion of B, C and D are relevant on the question whether A wrote in his own handwriting, though neither B, C nor D ever saw A write.

Nadarajah v. *Thillarirajeswari*
Proving a signature of a person bu a person acquainted with the handwriting of such person is admissible.

Section 48 - opinion as to existence of right or custom
When the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.

The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration:
The rights of inhabitants of a particular village to use the water of a particular well is a general right within the meaning of this section.

Section 49
When the court has to form an opinion as to
a. usage and tenants of any body of men or family
b. constitution and government of any religious or charitable foundation
c. meaning of words or terms used by people in a particular district or classes of people

the opinions of persons having special means of knowledge of such are relevant.

Section 50 - Opinion on relationship
When court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to such relationship, by a member of the family or otherwise has special means of knowledge is a relevant fact.

However, not sufficient to prove a marriage in a divorce action, or
section 24 of the Kandyan Marriage Ordinance or
section 362 b, c and d of Penal Code.

Illustrations:
1. The question is whether A and B were married.
   The fact that they were usually received and treated by their friends as husband and wife are relevant.

2. The question is whether A was the legitimate son of B.
   The fact that A was always treated as such by members of the family is relevant.

18. IMPEACHING THE CREDIBILITY OF A WITNESS

There are two ways in which a witness's credibility can be impeached:

1. By asking questions from the witness to discredit him
2. By evidence of other witnesses

1. Impeaching the credibility by asking questions from the witness to discredit him
A witness can be cross-examined for credibility.

Section 146 provides that a when a witness is cross-examined, he may be asked any question which tend to

a. test his accuracy, credibility or veracity
b. discover who he is and what is his position in life or
c. shake his credit by injuring his character

although answers to such questions might

- tend to directly or indirectly criminate such witness or
- expose him directly or indirectly to a penalty or forfeiture

Section 148 provides that when a question is asked affecting the credit of the witness by injuring his character, the court must decide whether the witness must be compelled to answer such question.

In exercising the discretion, court must consider whether the truth imputed would seriously affect the opinion of the court as to the credibility of the witness on the matter he testifies.

However, there is a limitation on questioning as posed by **section 153:**

"When a witness has been asked and has answered any question relevant to the inquiry, only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may afterwards be charged with giving false evidence".

2. Impeaching the credibility of a witness by other persons / other evidence

Section 155 provides that:
The credit of a witness may be impeached in the following ways by the adverse party or with the consent of court by the party who calls him:

a. by the evidence of persons who testify, that they from their knowledge of the witness believe him to be unworthy of credit.

b. by proof that the witness
   - has been bribed or
   - has accepted the offer of a bribe or
   - received any other corrupt inducement to give his evidence

c. by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

d. when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

It has been held in cases that an imputation that the woman had sexual experiences with other men is material and relevant to render her evidence unworthy of credit.

Darbey v. *Ousley*
A witness cannot be cross examined as to his religious beliefs merely for the purpose of discrediting him.

Illustrations:
1. A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B. Evidence is shown that on a previous occasion he said that he had not delivered the goods to B. The evidence is admissible.

2. A is indicted for the murder of B.
   C says that when B was dying, A had given B the wound of which he died.
   Evidence is shown that on a previous occasion c said that the wound was not given by A or in his presence.
   The evidence is admissible.

Contradictions and Omissions

A contradiction arises when there is an inconsistency with the previous statement.

Credibility of a witness can be impeached by proof of former statements that are inconsistent with any part of his evidence which is liable to be contradicted.

Section 145(1) provides that:
> A witness can be cross-examined as to a previous statement made by him in writing or reduced to writing which are relevant to the maters in question, without the written statement being shown to him.
>
> But, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are used to contradict him.

Tennakoon v. *Tennakoon*
Section 145 of the Evidence Ordinance requires that it is intended to rely on a previous statement to contradict a witness. A witness's attention must be called to those parts of the statement which are to be used to contradict him.

The witness must be afforded every opportunity to address his mind to the relevant portions of the statement to enable him to explain or reconcile the statement.

Rasiah v. *Suppiah*
In a summary trial before Magistrate's Court, if a witness gives evidence which differ materially from a previous statement made by him to the police, police can prove the police statement.

The above section infers that mere asking of questions of previous statements is not enough, witness must be asked about the former statements and if he denies having made such a statement, then contradiction can be marked and shown.

Section 145(2)
Where the witness is cross-examined, his previous oral statements are inconsistent with the present testimony, and the witness does not distinctly admit that he made such statement, proof may be given that he in fact made it.

But before such proof is given, circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he made such a statement.

Following rules can be followed:

1. Identify the areas of evidence where different versions are stated

2. Ensure the contradictions which seek to be marked - have a bearing on the case

3. Draw the attention of the witness to previous statements and ask whether he made such statements

4. If he denies, suggest it to him by repeating
   - exact words in the previous statement and
   - mark it a contradiction

Omissions
An omission arises where a witness makes a statement for the first time in court without having referred to it in his statement to the police or previous statement.

In a case of an omission, it must first draw the attention of the witness to the missing portion and draw the attention of omission to the court.
e.g. - in a statement made to the police by witness, he states that he saw accused wearing a blue shirt and green hat. But at the witness box he gave evidence that he saw the accused wearing a shirt and a hat.

Muthubanda's case
Where the witness omits to mention in the police statement a material fact and subsequently narrated by him in evidence, the statement to the police can be utilized as aid to discredit him.

19. STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES – SEC 32

Statements, written or verbal, of relevant facts made by a person who is:

1. dead
2. cannot be found
3. incapable of giving evidence
4. whose attendance cannot be procured without an amount of delay or expense which court considers unreasonable,

are themselves relevant facts in the following cases -

- **Section 32(1)**
  When it relates to cause of death

- **Section 32(2)**
  When it is made in ordinary course of business -
  when it consists of any entry or memorandum, acknowledgement written or signed in receipt of money, goods, securities, property or documents / letter

- **Section 32(3)**
  When the statement is against the interest of the maker -
  pecuniary or proprietary interest of the maker and if true it would expose him to a criminal prosecution or suit for damages

- **Section 32(4)**
  When statement gives opinion as to a public right or matters of general interest

- **Section 32(5)**
  When it relates to existence of any relationship -
  relationship by blood or marriage or adoption where person making the statement had special means of knowledge

- **Section 32(6)**
  When it is made in any will or deed relating to family affairs-
  existence of relationship by blood or marriage or adoption in any will or deed relating to family affairs or family pedigree, tombstone or family portrait
- **Section 32(7)**
  When statement is in a document relating to transaction in section 13(a)

- **Section 32(8)**
  When statement is made by a number of persons and expressed feelings or impressions on their part relevant to the matter in question

20. EXAMINATION STAGES

Witnesses may be examined in 3 stages, namely:

1. Examination in chief
2. Cross Examination
3. Re-examination

1. Examination in chief

Section 137(1)

The examination of a witness, by the party who calls him, shall be called his examination in chief.

The object of examination in chief is to obtain evidence in support of the version of the fact in issue or relevant to the issue which the party calling the witness seeks to establish.

Section 138(1)

Witnesses shall be first examined in chief.

Rules regarding examination in chief:

a. The examination in chief must relate to the relevant facts - **section 138(2)**

b. The witness may depose generally from personal knowledge and knowledge
   - In terms of section 60 of the Evidence Ordinance, the fact must be evidence of a witness which he himself has seen, heard or otherwise perceived. Basically hearsay and opinion evidence is exempted.

c. In examination in chief, the party who examined cannot elicit facts of his case by asking leading questions.

   Section 141

   Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

   Section 142

   Leading questions must not be asked in examination in chief except with the permission of the court, if an objection is raised by the adverse party.

d. Generally, a part may not discredit his own witness.

2. Cross examination

Section 137(2)

The examination of a witness by the adverse party shall be called his cross examination.

Once the examination in chief is concluded, the adverse party has the right to cross examine the witness.

Section 138(1)

Adverse party may, if so desires, cross examine the witness.

The principal object of cross examination is to cast doubt upon the accuracy of the examination in chief given against the cross examining party. To establish one's case, one must weaken the case of the opponent.

Rules of cross examination:

a. **Section 138(2)**
The cross examination must relate to the relevant facts, but the cross examination need not be confined to the facts to which the witness testified on his examination in chief.

b. **Section 143(1)**
Leading questions may be asked in cross examination, subject to the following qualifications:
   i. the question must not put into the mouth of the witness the very words which he is to echo back again; and

   ii. the question must not assume that facts have been proved which have not been proved or that particular answers have been given contrary to the fact.

c. **Section 143(2)**
The court in its discretion may prohibit leading questions from being put to a witness, who shows a strong interest or bias in favour of the cross examining party.

d. **Section 146**
When a witness is cross examined, he may be asked any question which tend:
   i. To test his accuracy, veracity or credibility

   ii. To discover who he is and what is his position in life

   iii. To shake his credit by injuring his character

e. **Section 139**
A person summoned to produce a document cannot be cross examined unless and until he is called as a witness.

f. **Section 145**
A witness may be cross examined as to previous statements made by him in writing or reduced to writing.

3. <u>Re-examination</u>
Section 137(3)
The examination of a witness, subsequent to the cross examination by the party who called him shall be called re-examination.

Section 138(1)
Witnesses shall be re-examined if the party calling him so desires.

Rules governing re-examination:

a. **Section 138(3)**
The re-examination shall be directed to the explanation of matters referred to in cross examination and if any new matter is introduced in re-examination, by permission of court, the adverse party may further cross examine upon that matter.

b. A re-examination must be confined to relevant facts.

c. Leading questions must not be asked except with permission of court in re-examination - **section 142**

d. It must be confined to matters arising out of cross examination or explanatory of such matters.

The purpose of re-examination is to reconcile any discrepancies that may exist between evidence given in examination in chief and cross examination and to remove any suspicion that cross examination may have cast on the examination in chief.

Recalling witnesses who have testified

Section 138(4)
The court may in all cases permit a witness to be recalled either:
1. for further examination in chief
2. for further cross examination

and if it does so, parties have the right of further cross examination and re-examination respectively.

The court is not bound to permit the recalling of witnesses unless satisfactory reasons are given.

Rex v. *Pinhamy*
Held, section 138(4) vests discretion in the court and that discretion is one that must be exercised on the material before it.

A party asking for the recall of a witness must indicate to the trial judge why he wants such witness recalled and satisfy him that it is necessary for a just decision of the case.

21. BURDEN OF PROOF

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

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations:
1. A says B committed a crime and that court must give judgment to B punishing him.
   A must prove that B committed the crime.

2. A says he is entitled to land B possesses. B denies it.
   A must prove existence of facts on which he is entitled to it.

Balakiriya: A rape case -Held, it is for the prosecution to prove the absence of consent on the part of the woman.

Costa v. *Gordon:* The burden of proof that the woman consented is on the defence.

Erik Batcho: Grave and sudden provocation -Prosecution has to prove under section 103 that accused instituted the provocation.

Section 102
The burden of proof in a suit or proceeding lies on the person who would fail, if no evidence at all were given on either side.

Illustration:
A sues B for land which B possesses.
A says land was left to A by C, B's father. If no evidence is given by either side, B is entitled to retain the land. Therefore, burden of proof is on A.

Section 103
The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on a particular person.

Illustration:
A sues B for theft and wishes the court to believe that B admitted the theft to C.
A must prove the admission. If B wishes to prove to court that he was elsewhere at the time, he must prove it.

Section 104
The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations:
1. A wishes to prove a dying declaration by B.
   A must prove B's death.
2. A wishes to prove contents of a lost document by secondary evidence.
   A must prove document was lost.

Section 105

When a person is accused of any offence, the burden of proving the existence of circumstances which bring the case within any of

a. the general exceptions of the Penal Code; or
b. any special exception / proviso in any other part of the Penal Code; or
c. in any law defining the offence

is upon him.

Illustration:
A accused of murder.
A alleges that due to unsoundness of mind or grave and sudden provocation, he did not know the nature of the act. The burden of proof is on A.

Daniel v. *Lewis*
Interpretation section under Motor Traffic Act
Held, in a prosecution for breach of duty imposed by the section, the burden is on the prosecution to establish that at the area of the intersection, traffic was not regulated by a police officer or traffic lights or notices.

James Chandrasekara: Burden is on the accused to establish affirmatively the existence of circumstances rendering the exception applicable.

Section 106
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration:
A charged for travelling on a railway without a ticket.
The burden of proving that he had a ticket is on him.

Sanitary Inspector, Mirigama v. *Thangamani Nadar*
Accused charged under Quarantine and Prevention of Diseases Ordinance.
Held, failure to inform disease to proper authorities, being part of essential elements of liability had to be proved by the prosecution.

Attygalle: Burden of proving that no criminal operation took place passed to the accused.

Mohamed Auf: A fact can be said to be especially within the knowledge of one party, only if it is apparent that the same fact is not or is probably not within the knowledge of the other party.

Section 107
When the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it.

Section 108
When a person has not been heard of for one year by persons who would have naturally heard of him had he been alive, the burden of proving that he is alive is shifted to the person who affirms it.

22. EVIDENCE OF CHARACTER

The relevancy of evidence of character is dealt with in sections 52 - 55 of the Evidence Ordinance.

Character includes,
1. Reputation
2. Disposition

Civil cases (sections 52, 55)	**Criminal cases (sections 53, 54)**
Section 52 - character irrelevant the fact that the character of any person concerned is such ↓ as to render probable or improbable any conduct imputed to him ↓ is irrelevant. except when such character appears from facts otherwise relevant. Section 55 In civil cases the fact that the character of any person ↓ is such as to affect the amount of damages which he ought to receive ↓ is relevant	Good character → relevant Bad character → irrelevant Section 53 In criminal proceedings the fact that the accused person is of good character ↓ is relevant Section 54 In criminal proceedings the fact that the accused person has a bad character ↓ is irrelevant unless evidence has been given that he has a good character ↓ in which case it becomes relevant Explanation - Does not apply to 1. where bad character is the fact in issue of a case 2. previous conviction is relevant as evidence of bad character in such a case

Evidence of character in Civil cases

Section 52 means that the character of a party would provide nothing on the matters in issue. The question of character is raised only to create prejudice in the mind of the court.

Fullaloom v. *Casim*
It is not possible to tender in evidence of previous records of litigation, with the view of showing that he is of such character.

Section 55 states that character of a party is relevant where compensation payable would depend largely on the character of the accused. Therefore, although character may not apply for a car accident, it will apply, for example in seduction, breach of marriage promise etc.

Evidence of character in Criminal cases

Section 53 would permit an accused to have the benefit of the previous good records to strengthen the presumption of innocence in his favour. This does not mean that a man with good habits cannot commit an offence. The objective is to merely create a doubt that it is improbable that such person would have committed an offence.

According to section 54, the prosecution cannot bring out evidence of bad character of the accused. The rationale behind this is that a criminal action has to be tried upon the merits of a particular case, not on account of the previous conduct or character of the accused.

However, if evidence of good character is led, then prosecution has the opportunity to lead evidence of bad character.

One exception to the rule of character evidence is system evidence found in sections 14 and 15 of the Evidence Ordinance.

Rex v. *Thompson*
Previous bad conduct was led not to show that he has committed crimes in past and therefore is likely to commit this one, but to show intention, knowledge and other state of mind of the accused.

Rex v. *Pauline de Croos*
Evidence of bad character can be led where:

1. when evidence of good character has already been offered
2. when bad character is a fact in issue
3. when previous convictions are made admissible by operation of law

Good character

1. *Somapala*
   Trial for murder, the accused gave evidence of good character regarding him. This evidence of good character, although unchallenged by the prosecution, was not dealt with in any way in the charge to the jury.

   On appeal, it was held such omission as a substantial irregularity. Held, when an accused gives evidence of his good character, the trial judge has a duty to give some direction to the jury concerning such evidence.

2. *Peter Singho* v. *Werapitiya*
   Accused was charged of cheating.

   Held, accused was entitled to put his good character in issue and to have the matter taken into account by the jury.

3. *Gunathilake*
   Accused was charged for murder.

   The accused's headmaster was called as a witness to give evidence of the accused's good character. However, upon summing up, the judge directed the jury that as a matter of law, they should not pay the slightest attention to such evidence. Accused was convicted by the jury.

On appeal it was held that this constituted a grave misdirection which vitiated the conviction. Evidence of accused's good character may in the facts of a particular case carry little or no weight, but cannot properly be declared to be totally irrelevant.

Modes by which an accused may introduce evidence of his good character:
1. He may offer testimony himself
2. He may call other persons acquainted with his good character
3. Elicit evidence of good character by cross-examining witnesses

Bad character

Where questions of bad character are put to a witness, it is the duty of the judge to prevent such questions being asked.

1. *Kotalawela*
   Evidence was led stating accused was a quarrelsome man who lost his temper over trivial matters.
   Held, such evidence could create prejudice in the mind of the jury. Conviction was set aside.

2. *H.A Fernando*
   If evidence of bad character has been improperly introduced, with the result that a miscarriage of justice is probable, a fresh trial should be ordered.

3. *Sugathadasa*
   Article in a newspaper report containing prejudicial evidence was read by a juryman.
   On appeal, a fresh trial was ordered.

The test is whether there was a prejudice to the accused.
The likelihood of prejudice is the primary ground for exclusion of bad character evidence.

Kotalawela case
The admission of evidence relating to bad character gravely impairs the fairness of the trial.

H.A. Fernando
Duty of the trial judge is to prevent questions relating to bad character to be put to witness.

Where bad character evidence is led, judge should ask jury to disregard such evidence.

Where bad character evidence is led and a result of miscarriage of justice is probable, afresh trial should be ordered.

The accused is entitled to make an application to discharge the jury and commence fresh proceedings where evidence of bad character is received improperly.
Sugathadasa
Pauline de Croos

Where a reasonable doubt exists whether bias created by improper reception of evidence of bad character has influenced the jury's verdict or not, a conviction must be vitiated and a new trial must be ordered.

Bad character evidence must not be led since they can lead the minds of the jury astray into false issues and tend to distract the jury from the true issue.

Jayawardane
Evidence of a previous conviction can be given if it throws light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter which forms the subject matter of the charge.

Nikapota v. *Gunasekara*
Supreme Court accepted that nothing in law which prohibited a court from receiving before passing sentence, evidence regarding the character of an accused person who has been convicted.

23. ADMISSIBILITY OF VIDEO RECORDINGS

Evidence (Special Provisions) Act No. 14 of 1995 provides for the admissibility of two types of evidence:

1. Audio visual recordings
2. Information contained in statements produced by computers

This evidence can be applied in both civil and criminal proceedings equally.

Part I of the Act deals with contemporaneous recordings made by the use of electronic or mechanical methods.

Section 4(1) states that:

> "Where direct oral evidence of a fact would be admissible, any contemporaneous recording tending to establish that fact can be produced"

Therefore, video recordings are admissible under section 4(1).

The contemporaneous recordings are admissible on the basis that it constitutes a species of real evidence as opposed to oral or documentary evidence.

However, despite the non-inclusion of real evidence within the definition of 'evidence' in section 3 of the Evidence Ordinance, our courts have admitted in evidence, contemporaneous recordings of public speeches and telephone conversations preserved through wire or tape record.

Abu Bakr v. *The Queen*
A speech made at a public meeting was recorded by a police officer using a Webster wire recorder.
Not only the police officer, who recorded the statement, but also the police officer who replayed the sound and made the transcript and another officer who was present on both occasions were testified to establish the identity of the person who made the speech.

Karunarathne v. *The Queen*
The admission of wire recorded speech is not repugnant to our law of evidence.

R v. *Dodson Williams*
The recording by means of CCTV camera is admissible as real evidence.

- Requirements / conditions

  Section 4 of Evidence (Special Provisions) Act No. 14 of 1995
  In any proceeding where direct oral evidence of a fact would be admissible, a contemporaneous recording / reproduction of a contemporaneous recording that tends to establish the fact is admissible as evidence of that fact if
  a. The recording / reproduction was made using electronic / mechanical means

  b. The recording / reproduction is capable of being played / replayed / displayed / reproduced in such a manner as to make it capable of being perceived by the senses

c. At the making of the recording / reproduction, the machine used to record / reproduce was operating properly, or if not, the fault was not one which would affect the accuracy of the recording / reproduction

d. The recording / reproduction was not altered or tampered with during / after its making and was safe kept in safe custody at all material times, during / after the making and sufficient precautions were taken to prevent the possibility of such recording / reproduction being altered / tampered with while being in that custody.

Above provisions would enable the admission of any audio or video recording such as images recorded by CCTV cameras.

The focus being the contemporaneous nature of the recording rather than on the means of recording.

- Procedure

Section 7(1)

a. A party proposing to tender the evidence must file a list of the evidence he is proposing to tender. Notice must be given to the opposing party 45 days before the date fixed for trial together with a copy of the list and particulars which is sufficient to enable the opposing party to understand the nature of the evidence proposing to be tendered.

b. The opposing party who receives notice can apply to the party proposing to tender the evidence for permission to access and inspect
   i. the evidence sought to be produced
   ii. the machine / device / computer used to produce the evidence
   iii. records relating / to the production of the evidence or system used to produce the evidence.

   Application must be made within 15 days of receiving the notice.

c. The party proposing to tender the evidence must comply with the application of the opposing party to inspect and must provide a reasonable opportunity to have access to and inspect. The opportunity must be provided within reasonable time - within 15 days.

d. If the party proposing to tender the evidence is unable to provide an opportunity for inspection / does not provide an opportunity / if parties are unable on any matter relating to the notice or application for inspection - parties can apply to court and court can make an order as the interests of justice require.

Section 7(2)

If a party proposing to tender evidence fails to give notice under section 7 or fails to provide a reasonable opportunity for the opposing party to inspect - court must not permit the evidence to be led.

24. COMPUTER EVIDENCE

Section 5(1)
Where direct oral evidence of fact is admissible, information contained in any statement produced by a computer tending to establish that fact is admissible, where

1. the statement produced by the computer is capable of being perceived by the senses
2. the computer was operating properly at all material times. If not, any such defect did not affect the accuracy of the statement.
3. information supplied to the computer was accurate.

Provided that, the statement has been produced over a period during which, the computer was used to store and process information for the purpose of any activity carried on regularly over that period,

a. information was regularly supplied to the computer in the ordinary course of such activity
b. information in statement was reproduced or was derived from information supplied in the ordinary course of such activity

it shall be sufficient proof to admit the statement.

Section 5(2)
Where any statement

1. cannot be played, displayed or reproduced in a manner capable of being perceived by senses or
2. unintelligible to a person who is not conversant in a specific sense or
3. not convenient to perceive and receive evidence in its original form,

the court may admit a transcript / translation / conversion / transformation of such statement as evidence.

Section 5(3)
Where evidence is admissible, a duplicate of such evidence shall also be admissible.

Section 5(4)

a. where several computers / combination is used to produce a statement, it shall be treated as constituting a single computer
b. a statement is taken to have been produced by a computer if it was produced by a computer with or without human intervention; or by means of any appropriate equipment
c. information is taken to have been supplied to the computer if:
    i. it is supplied in any appropriate form
    ii. with or without human intervention
    iii. by means of any appropriate equipment
d. information is taken to be derived or reproduced from a computer, if such information is derived / reproduced by calculation / comparison or any other process the computer is capable of.
e. where information is supplied with the view of storing and processing information of such activity, although the computer is not used for such act in normal course, if duly supplied, shall be considered as normal course activities.

Section 6 - affidavit evidence
Where a party proposes to tender any evidence under section 4 or 5 of the Act in any proceeding, it shall be done so by way of an affidavit.

25. ELECTRONIC TRANSACTIONS ACT NO 19 OF 2006

Preamble
To recognize and facilitate the formation of contracts, creation and exchange of data messages, electronic communications and records in Sri Lanka.

Section 2

a. to facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty

b. to encourage the use of reliable forms of electronic commerce

c. to facilitate electronic filling of documents with Government and to promote efficient delivery of Government services by means of reliable forms of electronic communications

d. to promote public confidence in the authenticity, integrity and reliability of data messages, electronic documents, electronic records or other communications

Section 3

No data message,
electronic document,
electronic record or other communication
shall be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form.

Section 4

Notwithstanding the fact that the provisions of written laws for the time being in force in Sri Lanka attach legal validity to certain instruments,

↓

only if such instruments have been reduced to writing,

↓

such requirement shall be deemed to be satisfied by a data message, electronic document, electronic record or other communication in electronic form

↓

if the information contained therein is accessible so as to be usable for subsequent reference.

Section 5

Where the law requires information to be presented or retained in its original form, that requirement shall be deemed to be satisfied

↓

by a data message, electronic document, electronic record or other communication in electronic form

↓

if there exists a reliable assurance as to the integrity of the information from the time when it was made available in electronic form and the information contained in the data message, electronic document, electronic record or other communication is available and can be used for subsequent reference

Section 7

Where any Act or enactment provides that any information or communication shall be authenticated by affixing the signature,

or

that any document should be signed or bear the signature of any person,

↓

then, notwithstanding anything contained in such law, such requirement shall be deemed to be satisfied, if such information or matter is authenticated by means of an electronic signature

Applicability of rules governing evidence

Section 21(2)
Any information contained in a data message, electronic document, electronic record or other communication:

a. touching any fact in issue or relevant fact and

b. compiled, received or obtained during the course of any business, trade, profession or other regularly conducted activity,

shall be admissible in any proceedings.

provided that,
direct oral evidence of such fact in issue or relevant fact if available, shall be admissible; and there is no reason to believe that the information contained in a data message, electronic document, electronic record or other communication is unreadable or inaccurate.

provided further that,
if any information contained in a data message, electronic document, electronic record or other communication made by a person

i. who is dead / unfit to attend as witness due to bodily or mental condition

ii. who is outside Sri Lanka and where reasonable steps have been taken to find him and cannot be found

iii. who does not wish to give oral evidence through fear

iv. who is prevented from giving evidence

evidence relating to such information shall if available be admissible.

Section 21(3)
The courts shall, unless the contrary is proved,

1. presume the truth of such information contained in any data message, electronic document, electronic record or other communication, and

2. where such was made by a person, such information was made by the person who is purported to have made it, and

3. shall presume the genuineness of any electronic signature or distinctive identification mark therein.

Section 22
Provisions in Evidence (Special Provisions) Act No. 14 of 1995 shall not apply to any data message, electronic document, electronic record or other communication to which this Act applies. Therefore, this Act is supreme.

26. ADMISSIONS

Section 17 (1) - defines admissions

"An admission is a statement oral or documentary which suggests any inference as to any fact in issue or any relevant fact and which is made by any of the persons and under the circumstances mentioned in the Evidence Ordinance."

Section 17 (2) - defines confessions

"A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed the offence."

Accordingly, all confessions are admissions, but all admissions are not confessions.

Anandagoda v. *The Queen*

The court held that the test whether a statement is a confession within section 17(2) is an objective one.

The test is whether the mind of a reasonable person reading the statement at time and in the circumstances in which it was made, is said to amount to a statement that the accused committed an offence or suggest the inference that the accused committed the offence. If it is so, the admission is a confession.

Cooray

The term 'admission' is the genus of which 'confession' is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference, but the inference that he committed that offence.

Section 18(1) recognizes two parties whose statements can be considered as admissions. They are:

1. Statement made by any party to proceeding

2. An agent to any party to proceeding by who court regards as expressly or impliedly authorized by him to make them.

'Various admissions' are those that are made by certain persons other than the party to the proceedings, but which are deemed by law to be binding on the party.

Section 18(2)

Statements made by parties to suits, suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

Accordingly, statements by following persons can be held as various admissions:

1. **Section 18(1)**
   Statements made by an *agent* to any party to proceedings are admissions.

2. **Section 18(3)(a)**
   Statements made by *persons who have any proprietary or pecuniary interest* in the subject matter of the proceeding and who made the statement in character of persons so interested are admissions, if made during the continuance of the interest of the person making the statements.

3. **Section 18(3)(b)**
   Statements made by *persons from whom the parties to the suit have derived their interest* in the subject matter of the suit are admissions, if made during the continuance of the interest of the person making the statements.

4. **Section 19**
   Statements made by *persons whose position or liability must be proved* as against the party to suit are admissions, if such statements would be relevant as against such person in a suit by or against him.

5. **Section 20**
   Statements made by *persons to whom a party to the suit has expressly referred for information* in reference to a matter in dispute are admissions.

The King v. *Appuhamy*
Interpretation by a witness of the signs made by a deaf and dumb person is not admissible evidence.
Signs do not amount to an oral statement in terms of section 17(1).

Rex v. *Sodige Singho Appu*
If the statement sought to be put in as an admission does not suggest an inference as to a fact in issue or relevant fact, it will not be received as an admission.

Alisandri v. *Queen*
A dying person made a nod of assent to question addressed to him.
Held not to be an admission, should be spoken out. A verbal statement is not an oral statement.

Wiede-mann v. *Walpole*
A sued B for breach of promise of marriage
A letter written by A to B, saying B promised to marry A. B did not reply. Not admissible.

Rex v. *Edward*
In certain circumstances, court may admit as evidence of admission, letters or oral statements which were not denied.

<u>Rule governing proof of admissions</u>
The general rule regarding admissions is found in **section 21:**

> "Admissions are relevant and may be proved as against the person who makes them or his representatives in interest,
>
> but, they cannot be proved by or on behalf of the person who makes them or by his representative in interest."

Thus, the general rule is that an admission is provable against a party who makes it, but not in favour of him.

This principle is there to prevent fabrication of evidence.

Exceptions

1. An admission may be proved by or on behalf of the person making it, when it is of such a nature that if the person making were dead, it would be relevant as between third persons under section 32.

2. An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable.

3. An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

27. CONFESSION

Section 24
A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession, appears to court to have been caused by any

a. inducement
b. threat or
c. promise

having reference to the charge against the accused person proceeding from

1. a person in authority
2. another person in the presence of a person in authority and with his sanction

and which inducement, threat or promise is sufficient in the opinion of the court to give accused person grounds which would appear reasonable to him, that by making it, he would

1. gain any advantage or
2. avoid any evil of a temporal nature

in reference to the proceedings against him.

Weerasamy
Held, the burden lay on the state to establish the relevancy of a confession by leading some evidence to show that it was made voluntarily.

Perera v. *Inspector of Police, Galagedara*
Held, the applicability of section 24 has to be decided on the basis that the burden is on the prosecution to satisfy the court that the confession was not made under the influence of any inducement, threat or promise.

Queen v. *Kalimuttu*
Held, the prosecution should prove the voluntary nature of the confession beyond reasonable doubt.

Hawadiya
Sub-inspector said "tell the truth without fear. One need not be afraid to speak the truth". Then the accused made statement and ran away and was captured again. On being asked why he ran away, he said, he ran away through fear of going to jail. Then SI asked "why should you fear if you are speaking the truth?" on this, the accused confessed.
Held, the statement was obnoxious to section 24.

Karaly Muttiah
When accused made confession to magistrate, a police officer was present in the vicinity, but only in the capacity of a chauffeur.
Held, it is a voluntary confession.

Inspector of Police v. *Kanapathypillai*
M wen to station and asked the accused where the bags of cement were. He then left the station. Accused made a confession to M. Held to be a voluntary confession.

Arthur Perera
Argued that accused was virtually in custody of the police at the time he made the confession, because police officers were about the place and were constantly using the telephone in the passage which gave access to the room the accused was kept, until he was called by a Magistrate to give evidence.

Jayanetti v. *Mitrasena*
Charged under Income Tax Ordinance for making false return income
Confession was made to Deputy Commissioner of Inland Revenue
Held, confession was admissible as there was no offer of a settlement or inducement to settle.

Section 25(1)
No confession made to a police officer shall be proved as against a person accused of any offence, i.e. confession made to a police officer is not admissible.

Section 25(2)
No confession made to a
1. forest officer with respect to an act punishable under the Forest Ordinance or
2. excise officer with respect to an act punishable under the Excise Ordinance

shall be proved as against any person making such confession.

Section 26
No confession made by any person while in police custody, unless made in immediate presence of a magistrate, shall be proved as against such person.

Same as above for confession made while in custody of forest officer or excise officer

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