

Question -1

a. Explain the statement - "Relevancy of facts forming part of same transaction".
Sec-6

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

The essence of this section is that there may have some facts which are not directly related to the fact in issue or they are not fact in issue but part of same transaction. Whether they happen at the same time and place or that of different, there are relevant.

Illustration:

A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

b. Explain the statement - Facts which are the occasion cause or effect of facts in issue.

Sec-7: Facts which are the occasions, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Essence:

The facts are the relevant facts which are the

- ✓ occasions
- ✓ cause
- ✓ effect
- ✓ fact in issue
- ✓ which constitute the state of things
- ✓ which afforded an opportunity for their occurrence

45 DLR 306

The accused husband was not a docile person but a very arrogant and assertive person. This part of his character and conduct is relevant to be considered as to who is capable of doing what.

Illustration:

The question is whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

e. How are the motive, preparation and previous or subsequent conduct relevant?

Sec-8:

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

✓ Any previous or subsequent conduct of any accused of a suit or proceeding is relevant, if such conduct influences or is influenced by any fact.

Illustration:

A is tried for the murder of B by poison. The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

59 DLR 2007

It is well settled that abscondence of an accused is not conclusive proof of his guilt and cannot be the sole basis of his conviction without any corroborative evidence.

* Motive is not relevant where there is direct witness or direct evidence, but it becomes easy to prove the fact if motive can be identified.

Mobarak Hossain vs State - 33 DLR 274:

Accused absconding immediately after the murder and remaining in hiding for a long time - are relevant facts that accuse was concerned in the murder.

d. When Facts necessary to explain or introduce a relevant fact are relevant.

Sec-9: According to this section, the following facts are relevant -

- ① Facts necessary to explain or introduce relevant facts
- ② Facts which support or rebut the fact in issue or relevant facts.

- ③ Facts which establish the identity of anything or person
- ④ Which fix the time or place of fact in issue or relevant fact
- ⑤ Which show the relation of parties.

Illustration:

The question is, whether a given document is the will of A —

The state of A's property and of his family at the date of the alleged will may be relevant facts.

Shahidullah vs state — BLD 1987 AD 27 :

Identification of the accused in TI Parade has no value when it was held after the witness saw the accused in the police station.

Question - 2

a. Who are competent to become a witness before the court?

Who may testify : Section - 118

All persons shall be competent to testify unless

- ✓ the court considers that they are prevented from understanding the question put to them, or
- ✓ From giving rational answer to those questions, because of tender years.
- ✓ extreme old age
- ✓ disease, whether of body or mind.

Explanation :

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

Abdullah Shah vs state — 20 DLR 63,

"The competency of children as witness is regulated not by their age but the degree of understanding of the questions put to them."

Dumb witness: Section-119

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible -

✓ or by writing, or

✓ by signs

But such writing must be written and the signs made in open court.

Evidence so given shall be deemed to be oral evidence.

b. Is the evidence of an accomplice admissible against the co-accused?

evidence of an accomplice: Section-30

When more persons tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other persons as well as against the person who makes such confession.

Illustration: A and B are jointly tried for the murder of C. It is proved that A said - "B and I murdered C". The court may consider this confession against B.

According to Sec-133,

An accomplice shall be a competent witness against an accused person.

✓ Accomplice's evidence needs corroboration as safeguard.

Illustration (b) to section-114, The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

Ramzan Ali vs state - 20 DLR SC 49, The extent and the nature of corroboration required may vary from witness to witness and from case to case but it is not necessary to that there should be corroboration in every particular.

* The confession of an accomplice is very less effective against the co-accused in the same trial.

* 66 DLR (HCD) 386 → Confession of a co-accused is not evidence, it can only lend assurance to other evidence.

* State vs Delwan Hossain - 64 DLR 355, "The confessional statement of co-accused is admissible against other accused persons in the sense that it may be taken into consideration against them along with other evidence."

C. Is it lawful to punish on the basis of the uncorroborated evidence of the co-accused?

* State vs Md. Toheurul Islam - 66 DLR 386,
"Confession of a co-accused is not substantive evidence and such confession cannot be the sole basis of conviction of a co-accused in the absence of independent and corroborative evidence."

* Sec-114, Illustration (b), The court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

* Sec-133: Accomplice: An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

* State vs Badsha Khan: 10 DLR 580 → Confessional statement against a co-accused requires corroboration. It can not be the foundation of a conviction.

* Ator Ali vs State: 44 DLR 478 → It is dangerous to base a conviction on the statement made by an accomplice.

* Yubani Shadu vs State: 2 DLR 39, The court should show prudence and caution while giving conviction on the basis of the confession of an ~~accused~~ co-accused.

Question - 3

a. What is dying declaration? Why is dying declaration admissible before the court?

* Dying declaration:

The philosophy of the Evidence Act is that witness must be direct. But in some cases, hearsay evidence becomes important to be taken into consideration. Dying declaration is such a hearsay evidence which is relevant under Section-32(1) of this code.

According to this section,

"A statement made by a person as to the cause of his, or as to any of the circumstances of the transaction which resulted in his death and that person's death comes into question, that statement is called dying declaration."

Section-32, FRB-266

Statements, of relevant fact made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, are relevant facts.

According to section-145,

Every witness must be appeared before the court for cross-examination.

But as the person who made dying declaration, is incapable of appearing before court due to his death, his statement is relevant and will be taken, as ~~evidence~~ evidence under section-32(1).

* Lutfun Nahar Begum vs State - 27 DLR (AD) 29,
statement of a dead person is a relevant fact under section 32(1), when it is made by that person as to the cause of his death, or as to any of the circumstances which resulted in his death, when that person's death comes into question.

* Sharad Bindhichand vs State (Maharashtra): AIR 1984 SC 1622,
The distance of time alone in such cases would not make the statement irrelevant.

B. What is the evidential value of dying declaration?

* Shamsur Rahman vs State: 42 DLR (AD) 200,
A dying declaration, although a piece of substantive evidence, has always been viewed with some degree of caution as the matter is not liable to cross-examination.

* State vs Tola Mia: 51 DLR 244,
Unless the dying declaration is compared to other evidence appears to be true, it can not be by itself form the basis of conviction of the accused.

* State vs Moinul Hoque: 60 DLR 2008,

It is now well settled that a dying declaration oral or written, when established as true can form the sole basis of conviction.

* Goni Mollah vs State: 19 BLC 2014 HCD 676,
Declaration made by a victim being incomplete, no one can tell what he was about to add. Alleged dying declaration being an incomplete one. is not a dying declaration within the meaning of section 32(1).

* Bulu vs State: 45 DLR 79,

The value of dying declaration depends in a case on its own facts and the circumstances in which it is made.

* Aimat Ali vs Crown: 7 DLR 356,
There is no rule of law that a dying declaration must be corroborated. If found to be reliable, then it may by itself be basis for conviction even without corroboration.

To Whom it may be made: PRB-266

- ① Magistrate
- ② If magistrate not available then doctor
- ③ If not then police, or
- ④ Any other persons available

* Sahabuddin vs State: 61 DLR (HCD) 54,

A dying declaration may be recorded by any person who is available at the spot. There is no requirement of law that a dying declaration should be recorded by a Magistrate.

• It may be written or verbal, it may also be indicated by signs and gestures, in answer to questions, if the person making it is not in a position to speak. Nurjahan Begum Vs State: 42 DLR (AD) 130

Three elements of dying declaration:

- ① The declarant has to be died after making this
- ② Regarding the cause and circumstance of his death
- ③ This has to be fact or fact in issue in a suit.

c. If the declarant survive, what will be the effect of this declaration?

✓ If the declarant survive, then the declaration may be treated as ^{dying} deposition under Section-161 of Crpe.

✓ The declarant has to be appeared before court for cross-examination under Section-145

✓ The declaration has to be proved to corroborate later testimony as to same fact under section-157.

958 CrLJ 424 → If the declarant survive, the declaration may be considered as statement under 161 of Crpe if it is made before Police.

✓ This shall not be considered as statement under 164 if it is made before Magistrate.

d. What are the distinction between Bangladeshi and English law on considering dying declaration relevant?

English law	Bangladeshi law
1. Relevant only in criminal cases of homicide	Relevant in both civil suit and criminal case.
2. Relevant in only homicide.	This may be relevant in both homicide and suicide.
3. The declarant must be in apprehension of death.	Apprehension of death is not mandatory.
4. The declarant must be competent of being a witness	No rule regarding this.
5. The declarant must be competent to understand the question asked.	This competency is not mandatory.

Question - 4

a. What is Judicial, Extra-judicial and retracted confession?

* Judicial Confessions

Confessions made before the court or a magistrate during the proceedings of the case under section-164 of CrPc is called Judicial Confession. This type of Confession is defined as a plea of guilty on arrangements. The judicial confession empowers only the judiciary to record the statement and the executive has no authority to record confessions. Section-80 governs the evidentiary value of confessions. This should be voluntary and protected under Article 35(4) of the constitution.

* Extra-Judicial Confession :

Not made before a court or magistrate. Usually considered informal confession. Should be voluntary and free from fear, inducement or any threat. This can be proved as evidence against himself. This has credibility in the court to prove one's guilt. It is a weaker kind of evidence. Corroborating evidence is needed to support the extra-judicial confession.

* Naushan Ali Vs State: 39 DLR (AD) 194,

Extra-judicial confession can form a basis for conviction if found voluntary and true.

* Mobarak Vs State: 55 DLR 325,

Extra-judicial confession can not be relied upon as evidence without any independent corroboration.

* Retracted Confession :

Any confession which is made voluntarily is taken back or revoked, it is known as a retracted confession. The court has the power to decide the credibility of such confession. This should be supported by corroborative evidence.

* State vs Kibria : 4 DLR 512,

It is a rule of prudence that a retracted confession needs corroboration and it is always open to suspicion.

* Abdul Gaiyum vs State : 6 DLR 415,

It is unsafe to base a conviction for murder on the retracted confession unless corroborated by credible independent evidence.

b. When a confession may or may not be relevant ?

Ⓐ Confession when not relevant :

① Confession caused by inducement, threat or promise when irrelevant in criminal proceeding : Sec-24

Section-163 of CrPc, The jury has to consider the question of voluntariness of the of the person who made confession.

② Confession to police officer not to be proved : Sec-25
State vs Ghansel : 13 DLR 62, "Accused in the First information report making a confession - such a confession not admissible."

§ DLR 165 → Confession to a person in the presence of a police officer, admissible if no influence was exercised. Bara Yunus vs State : 59 DLR 2007, No confession made to a police officer shall be proved as against a person accused of any offence under section-25.

③ Confession by accused while in custody of police not to be proved against him : Sec-26

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

* Haji Muhammad vs State: 13 DLR 58, Accused during the period between his arrest and his confession remaining in police custody for a fortnight - confession inadmissible.

* Confession when relevant:

① How much of information received from accused may be proved? Sec-27

Kitab Ali vs State: 22 DLR 472, Confession inadmissible under sections 24, 25 and 26 are admissible when they contain information leading to the discovery of a fact.

② Confession made after removal of impression caused by inducement, threat or promise, relevant. Sec-28

③ Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc: Sec-29

C. An admission may be proved against but not in favour of its maker - Explain the statement. Is there any exception regarding this?

* Proof of admissions, against persons making them, and by or on their behalf: Sec-21

Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they can not be proved by or on behalf of the person who makes them or by his representative in interest.

* Sultan Ahmed vs Islam: 36 DLR 81. A party's previous statement regarding a fact in issue is relevant under section 21 of the Evidence Act and can be used against him.

* Exception: sec-21

Three 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 it were dead, it would be relevant as between third persons under section 32.
- ② When it consists of statement of the existence of any state of mind or body, relevant or in issue.
- ③ If it is relevant otherwise than as an admission.

1986 OLD 161 → Admission is a strong evidence against the maker.

4 BCR 255 → Admissions are relevant and can be used against the person making it, but can not be proved by or on behalf of the person who makes them or by his representative in interest.

Question-5

a. Define direct, Primary and circumstantial Evidence?

- * Direct Evidence ✓ Evidence which directly proves a fact, such as an ^{eyewitness testimony}
- ✓ Direct Evidence is that evidence which directly links a defendant to a crime.
 - ✓ The term direct evidence refers to any piece of evidence that stands alone to prove an assertion.
 - ✓ It provides direct proof of a fact and doesn't require any type of inference.
 - ✓ Some examples of direct evidence include eyewitness testimony and confessions.
 - ✓ It may be defined as evidence that directly proves the existence of a fact or fact in issue.
 - ✓ Direct evidence consist of either —
 - the testimony of witness who perceived the fact or
 - the production of the document which constitutes the fact
- example-

* Primary Evidence

- ✓ When the main copy of evidence is produced before court is called primary evidence.
- ✓ The original document itself is primary evidence.

Sec-62

- ✓ Primary evidence means the document itself produced for the inspection of the court.

Explanation-1: Where a document is executed in several parts each part is primary evidence of the document.

* Afzal Meah vs Bazal Ahmed : 45 DLR 15

"Primary evidence of document means document itself and it is produced for the inspection of the court."

Example-

* Circumstantial Evidence : see-8

✓ Circumstantial evidence is a kind of indirect evidence that does not directly prove the fact on fact in issue but plays vital role to prove the existence or non existence of the fact on fact in issue.

✓ Circumstantial evidences are not themselves in issue but create reasonable ground for the existence or non existence of the fact on fact in issue.

✓ Circumstantial evidence refers to evidence that indirectly support a conclusion by suggesting it through a series of related facts or circumstances, rather than proving it directly.

✓ Circumstantial evidences are the evidences of collateral facts and circumstances for which a reasonable conclusion about the fact in issue may be drawn.

b. Witness may lie but circumstances may not?

✓ All judicial evidence is either direct or circumstantial. By direct evidence is meant when the principle fact is attested directly by witness, things or documents. To all other forms of evidence are called circumstantial evidence, which may be defined that modification of indirect evidence.

AIR 1981 SC 1388 (1989) → "It is well settled that while witness may lie, circumstances do not."

✓ A witness may be -

✓ Interested

✓ partisan

✓ Adverse.

✓ convinced through bribery or inducement

✓ Trapped

✓ Habitual

✓ Retracted

✓ Hostile

✓ deceit

✓ While witness testimony can be influenced by various factors including bias, falsehood, poor recollection etc, circumstantial evidence is generally seen as objective.

Q. What is hearsay evidence? Why it is not accepted?

- ✓ The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say and sometimes whatever a person declares information given by someone else. [AIR 1982 SC 675]
- ✓ Hearsay evidence is information that a witness heard from another person, rather than having personal knowledge about that.
- ✓ The information is derived from other persons and has no personal knowledge of that fact, then his evidence is said to be hearsay evidence.

* Why not admissible?

- ✓ Hearsay evidence is generally inadmissible in court because it is considered to be unreliable.
- ✓ It may be misleading because it is based on someone else's recollection of events.

59 DLR 2007 → The main reason for excluding hearsay evidence is that the person who is said to have made the statement is not sub. before the court and cannot be subjected to cross examination.

- ✓ It may be admissible in that situation under Sec-32 when, the person who made the statement is dead, can't be found, became incapable of giving evidence,

Question-6

a. What is character under the Evidence Act, 1872?

* Character:

According to section-55 (Explanation),
The word "character" includes both reputation and disposition.

According to Carter, "character sometimes denotes general reputation, sometimes general disposition, sometimes both." [Ref: Law of Evidence, Page-579]

b. When is the character relevant and when not in the civil suit and criminal case?

* Character in civil suit: sec-52, 55

In civil cases character to prove conduct imputed, irrelevant.

① the character of any person imputed to him is irrelevant when it is questioned that any conduct is probable or improbable by that person.

✓ But it is relevant in so far as such character appears from facts otherwise.

② Character as affecting damages: sec-55

Relevant when the character of a person affects the amount of damages he ought to receive.

* character in criminal cases: sec-53, 54

① In criminal cases, previous good character relevant:

✓ The accused person's good character is relevant.

② Previous bad character is not relevant, except in reply:

✓ The accused has a bad character is irrelevant.

✓ Relevant when evidence has been given that he has a good character.

✓ This section is not applicable where bad character is fact in issue.

c. Is Previous conviction relevant as evidence of bad character?

* According to Explanation-2 of section-54,

A previous conviction is relevant as evidence of bad character.

Question - 8

a. What is burden of proof?

b. On whom burden of proof lie ?

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

Illustrations :

A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession,

Therefore the burden of proof is on A.

c. State the rules of determining burden of proof in suit or proceeding.

chapter-7, section 101 to 114

① Burden of proof : Sec-101

Question - 9

a. What is presumption?

b. What kinds of presumptions are there in the Evidence Act, 1872?

According to section - 4, There are three kinds of presumptions in the Evidence Act, 1872.

① May presume:

Court may presume a fact as proved, unless and until it is disproved. Court may call for proof of it. It is the discretionary power of court to presume a fact as proved or disproved. If it presumes as proved, court may call for evidence to disproved.

② Shall presume:

Whenever it is directed by this Act, the court shall presume a fact as proved, unless and until it is disproved. Shall presume means the fact is proved, until or unless it is disproved. No discretionary power.

③ Conclusive proof:

When one fact is declared by this Act to be conclusive proof, the court shall regard the fact as proved. The court shall not allow evidence to be given for the purpose of disproving it. There is no scope to disprove, the fact is already proved.

Sayed Akbar vs State: 1979 AIR (SC) 1848,

This code provides three types of presumptions. May presume, shall presume and conclusive proof. Conclusive proof is ineluctable.

C. When the court presume certain facts?

* May presume - sec- 86-88, 90, 114

① Presumption as to certified copies of foreign judicial record: sec-86

The court may presume that certified copy of any document of any judicial record of any country, not part of Bangladesh, is genuine and accurate, if the document is certified by any representative of the government of that country in such manner, commonly used in that country for the certification.

21 DLR 257 → The documents are inadmissible in evidence unless certified to be genuine by a representative of the Government of Pakistan in India.

② Presumption as to books, maps and charts: sec-87

The court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statement of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom it was written or published.

This section tells, the court may presume that any book, map and charts, produced before it for the collection of information or gathering knowledge relating to the relevant facts, was written and published by the person and at the time and place by whom it purports to be so.

③ Presumption as to telegraphic message: sec-88

This section tells about the presumption about telegraphic message. The court may presume that the message, received by a person, corresponds with the message forwarded from a telegraphic office. But the court shall not make any presumption as to the person by whom such message was delivered for transmission.

④ Presumption as to documents thirty years old: sec-90

The court may presume that the signature, handwriting and any other parts of any document, proved to be thirty years old, was duly executed if it was produced and kept under proper custody.

59 CLR 2007 → It is a general rule that an instrument thirty years old proves itself, provided it be produced from a proper custody.

(1) Court may presume existence of certain facts: Sec-114

The court may presume the existence of any fact which it thinks likely to have happened in common course of natural events, human conduct, public and private business.

* Shall presume & Sec-79-85, 89, 105

(1) Presumption as to genuineness of certified copies: 79

The court shall presume that certified copy of any document to be genuine which is by law declared to be admissible as evidence and which is duly certified by any officer of the Government.

(2) Presumption as to documents produced as record of evidence: Sec-80

The court shall presume any document as genuine which is a record or memorandum of the evidence, or of any part of the evidence, statement of a witness in a judicial proceeding, or confession by any prisoner or accused before judge or magistrate and signed by such officer.

46 DLR 212 → Section 80 provides that even without production of the Magistrate such statement may be taken into consideration and presumed to be genuine.

(3) Presumption as to document admissible in England
Proof of seal or signature: Sec-82

The court shall presume any documents, produced before any court which would be admissible in any court in England and Ireland without proof of the seal or stamp or signature authenticating it, seal, stamp or signature is genuine.

(4) Presumption as to maps or plans made by authority of Government: Sec-83

The court shall presume that maps or plans, made by the authority of the Government were duly made and are accurate. But maps or plans made for the purposes of any cause must be proved to be accurate.

(5) Presumption as to collections of laws and reports of decisions. 84

The court shall presume the genuineness of every book or Gazette, which is printed or published under the authority of the Government of any country.

(6) ~~Power~~ Presumption as to powers-of-attorney: Sec-85

The court shall presume that every document of power-of-attorney, which has been executed before a notary public, or any court, judge, magistrate, Bangladesh Consul or Vice-Consul, or representative of the Government, was so executed and authenticated.

⑥ Presumption as to due execution, etc, of documents not produced : Sec-89

If any document is not produced before the court after being noticed so, the court shall presume that documents were attested, stamped and executed according to law.

* Conclusive proof : Sec-41, 112

① Judgement, order or decree is conclusive proof: 41

~~The court~~ A final judgement, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction is conclusive proof to a court.

② Birth during marriage conclusive proof of legitimacy : 112

Any person was born during the continuance of a valid marriage between his mother^{and} any man, or within two hundred and eighty days after its dissolution, this fact shall be conclusive proof that he is the legitimate son of that man if the mother remaining unmarried. But exception may fall when the parties had no access to each other at any other time which may result this birth.