further cross-examination of the witnesses. In our opinion, this omission was not material as nothing further appeared from the cross-examination which the court could ask the accused to explain. The accused had given a full statement on all the matters which required explanation in the case. Then it was argued that under the Hyderabad law at least two witnesses are necessary in a murder trial for a conviction in such a case. In this case more than two witnesses were produced who directly or indirectly implicated the appellant with the commission of the murder. The section of the Code referred to does not lay down that there should be two eye-witnesses of the occurrence before a conviction can be reached as regards the offence. Further it was argued that the Special Judge had no jurisdiction because H. E. H. the Nizam had not given his assent to the law as contained in Ordinance X of 1359-F. In our opinion, there is no substance in this contention because the Nizam under a fireman had delegated all his powers of administration including power of legislation to the Military Governor and that being so, no further reference to the Nizam was necessary and the Military Governor was entitled to issue the Ordinance in question. Lastly it was argued that the sanction for the prosecution of the appellant under the provisions of section 207 of the Hyderabad Code of Criminal Procedure (corresponding to section 197 of the Criminal Procedure Code) was given after the Judge had taken cognizance of the case. We see no force in this point as well. Before the trial started the court was fully seized of the case and by then the sanction had been given.

34. Appeal allowed.

35. Conviction set aside.

Agent for the appellant : Rajinder Narain.

Agent for the respondent : G. H. Rajadhyaksha.

MANU/SC/0268/2003

Back to Section 65A of Indian Evidence Act, 1872

Back to Section 65B of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 476 and 477 of 2003

Decided On: 01.04.2003

The State of Maharashtra and P.C. Singh Vs. Praful B. Desai and Ors.,

Hon'ble Judges/Coram:

S.N. Variava and B.N. Agrawal, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Indira Jaising, Sr. Adv., V.B. Joshi, S.S. Shinde and V.N. Raghupathy, Advs. and Party in perso

For Respondents/Defendant: Ashok H. Desai, Sr. Adv., Shridhar Y. Chitale, Rashmi D. Chandrachud, Minakshi Nag and Abhijat P. Medh, Advs.

JUDGMENT

S.N. Variava, J.

1. Leave granted.

2. Heard parties.

3. These Appeals are against a Judgment of the Bombay High Court dated 23rd/24th April 2001. The question for consideration is whether in a criminal trial, evidence can be recorded by video conferencing. The High Court has held, on an interpretation of Section 273, Criminal Procedure Code, that it cannot be done. Criminal Appeal (arising out of SLP (Criminal) No. 6814 of 2001) is filed by the State of Maharashtra. Criminal Appeal (arising out of SLP (Criminal) No. 6815 of 2001 is filed by Mr. P.C. Singh, who was the complainant. As the question of law is common in both these Appeals, they are being disposed of by this common Judgment. In this Judgment parties will be referred to in their capacity in the Criminal Appeal (arising out of SLP (criminal) No. 6814 of 2001). Mr. P.C. Singh will be referred to as the complainant.

4. Briefly stated the facts are as follows:

The complainant's wife was suffering from terminal cancer. It is the case of the prosecution that the complainant's wife was examined by Dr. Ernest Greenberg of Sloan Kettering Memorial Hospital, New York, USA, who opined that she was inoperable and should be treated only with medication. Thereafter the complainant and his wife consulted the Respondent, who is a consulting surgeon practising for the last 40 years. In spite of being made aware of Dr. Greenberg's opinion the Respondent suggested surgery to remove the uterus. It is the case of the prosecution that the complainant and his wife agreed to the operation on the condition that it would be performed by the Respondent. It is the case of the prosecution that on 22nd December 1987 one Dr. A.K. Mukherjee operated on the complainant's wife. It is the case of the prosecution that when the stomach was opened ascetic fluids oozed out of the abdomen. It is the case of the prosecution that Dr. A.K. Mukherjee contacted the Respondent who advised closing up the stomach. It is the case of the prosecution that Dr. A.K. Mukherjee accordingly closed

the stomach and this resulted in intestinal fistula. It is the case of the prosecution that whenever the complainant's wife ate or drank the same would come out of the wound. It is the case of the prosecution that the complainant's wife required 20/25 dressings a day for more than 3 1/2 months in the hospital and thereafter till her death. It is the case of the prosecution that the complainant's wife suffered terrible physical torture and mental agony. It is the case of the prosecution that the Respondent did not once examine the complainant's wife after the operation. It is the case of the prosecution that the Respondent claimed that the complainant's wife was not his patient. It is the case of the prosecution that the bill sent by the Bombay Hospital belied the Respondent case that the complainant's wife was not his patient. The bill sent by the Bombay Hospital showed the fees charged by the Respondent. It is the case of the prosecution that the Maharashtra Medical Council has, in an inquiry, held the Respondent guilty of negligence and strictly warned him.

5. On a complaint by the complainant a case under Section 338 read with sections 109 and 114 of the Indian Penal Code was registered against the Respondent and Dr. A.K. Mukherjee. Process was issued by the Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai. The Respondent challenged the issue of process and carried the challenge right up to this Court. The Special Leave Petitions filed by the Respondent was dismissed by this Court on 8th July, 1996. This Court directed the Respondent to face trial. We are told that evidence of six witnesses, including that of the complainant and the investigating officer, has been recorded.

6. On 29th June 1998 the prosecution made an application to examine Dr. Greenberg through video-conferencing. The trial court allowed that application on 16th August 1999. The Respondent challenged that order in the High Court. The High Court has by the impugned order allowed the Criminal Application filed by the Respondent. Hence these two Appeals.

7. At this stage it is appropriate to mention that Dr. Greenberg has expressed his willingness to give evidence, but has refused to come to India for that purpose. It is an admitted position that, in the Criminal Procedure Code there is no provision by which Dr. Greenberg can be compelled to come to India to give evidence. Before us a passing statement was made that the Respondent did not admit that the evidence of Dr. Greenberg was relevant or essential. However, on above-mentioned facts, it prima-facie appears to us that the evidence of Dr. Greenberg would be relevant and essential to the case of the prosecution.

8. Mr. Jaisingh, senior counsel argued for the State of Maharashtra. The complainant, except for pointing out a few facts, adopted her arguments. On behalf of the respondent submissions were made by Senior Counsels Mr. Sundaram and Mr. Ashok Desai.

9. It is submitted on behalf of the Respondents, that the procedure governing a criminal trial is crucial to the basis right of the Accused under Articles 14 and 21 of the Constitution of India. It was submitted that the procedure for trial of a criminal case is expressly laid down, in India, in the Code of Criminal Procedure. It was submitted that the Code of Criminal Procedure lays down specific and express provisions governing the procedure to be followed in a criminal trial. It was submitted that the procedure laid down in the Code of Criminal Procedure was the "procedure established by law". It was submitted that the Legislature alone had the power to change the procedure by enacting a law amending it, and that when the procedure was so changed, that became "the procedure established by law". It was submitted that any departure from the procedure laid down by law should be contrary to Article 21. In support of this submission reliance was placed on the cases of A.K. Gopalan v. State of Madras reported in MANU/SC/0012/1950 : 1950CriLJ1383 Nazir Ahmed v. Emperor reported in MANU/PR/0020/1936 and Siva

Kumar Chadda v. Municipal Corporation of Delhi. There can be no dispute with these propositions. However if the existing provisions of the Criminal Procedure Code permit recording of evidence by video conferencing then it could not be said that "procedure established by law" has not been followed.

10. This Court was taken through various sections of the Criminal Procedure Code. Emphasis was laid on Section 273, Criminal Procedure Code. It was submitted that Section 273, Criminal Procedure Code does not provide for the taking of evidence by video conferencing. Emphasis was laid on the words "Except as otherwise provided" in Section 273 and it was submitted that unless there is an express provision to the contrary, the procedure laid down in Section 273 has to be followed as it is mandatory. It was submitted that Section 273 mandates that evidence "shall be taken in the presence of the accused". It is submitted that the only exceptions, which come within the ambit of the words "except as otherwise provided" are Sections 284 to 290 (those dealing with issue of Commissions); Section 295 (affidavit in proof of conduct of public servant) and Section 296 (evidence of formal character on affidavit). It is submitted that the term "presence" in Section 273 must be interpreted to mean physical presence in flesh and blood in open Court. It was submitted that the only instances in which evidence may be taken in the absence of the Accused, under the Criminal Procedure Code are Sections 317 (provision for inquiries and trial being held in the absence of accused in certain cases) and 299 (record of evidence in the absence of the accused). it was submitted that as Section 273 is mandatory, the Section is required to be interpreted strictly. It was submitted that Section 273 must be given its contemporary meaning. (Contemporanea exposition est (SIC) fortissimo - The contemporaneous exposition is the best and the strongest in law). It was submitted that video conferencing was not known and did not exist when the Criminal Procedure Code was enacted/amended. It was submitted that presence on a screen and recording of evidence by video conferencing was not contemplated by the Parliament at the time of drafting/amending the Criminal Procedure Code. It was submitted that when

the Legislature intended to permit video conferencing, it has expressly provided for it, as is evident from the Ordinance passed by the State of Andhra Pradesh in December 2000 permitting the use of video conferencing under Section 167(2) Criminal Procedure Code in remand applications. It is pointed out that a similar amendment is being considered in Maharashtra. It is submitted that Section 273 is analogous to the Confrontation Clause set out in the VIth Amendment to the US Constitution. It is submitted that Courts in USA have held that video conferencing does not satisfy the requirements of the Confrontation Clause.

11. This argument found favour with the High Court. The High Court has relied on judgment of various High Courts which have held that Section 273 is mandatory and that evidence must be recorded in the presence of the accused. To this extant no fault can be found with the Judgment of the High Court. The High Court has then considered what Courts in foreign countries, including Courts in USA, have done. The High Court then based its decision on the meaning of the term "presence" in various dictionaries and held that the term "presence" in Section 273 means actual physical presence in Court. We are unable to agree with this. We have to consider whether evidence can be led by way of video-conferencing on the provisions of Criminal Procedure Code and the Indian Evidence Act. Therefore, what view has been taken by Courts in other countries is irrelevant. However, it may only be mentioned that the Supreme Court of USA, in the case of Maryland v. Santra Sun Craig [497 US 836], has held that recording of evidence by video-conferencing was not a violation of the Sixth Amendment (Confrontation Clause).

12. Consideration the question on the basis of Criminal Procedure Code, we are of the view that the High Court has failed to read Section 273 properly. One does not have to

consider dictionary meanings when a plain reading of the provision brings out what was intended. Section 273 reads as follows:

"Section 273 : Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation : In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Thus Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the terms "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the Respondent on the word "presence". One must also take note of the definition of the term 'Evidence' as defined in the Indian Evidence Act. Section 3 of the Indian Evidence Act reads as follows:

"Evidence--Evidence means and includes--

(1) 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.

(2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence"

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing.

13. One needs to set out the approach which a Court must adopt in deciding such questions. It must be remembered that the first duty of the Court is to do justice. As has been held by this Court in the case of Sri Krishna Gobe v. State of Maharashtra MANU/SC/0182/1972 : 1973CriLJ235 Courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course the rights of the Accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights.

14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled "Statutory Interpretation", 2nd Edition page 617:

"It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes sine the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

.....

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. .....That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

.....

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

15. At this stage the words of Justice Bhagwati in the case of National Textile Workers' Union v. P.R. Ramakrishnan, MANU/SC/0025/1982 : (1983)ILLJ45SC , at page 256, need to be set out. They are:

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree. It will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the more adapting itself to the fast changing society and not lag behind.

16. This Court has approved the principle of updating construction as enunciated by Francis Bennion, in a number of decisions. These principles were quoted with approval in the case of Commissioner of Income Tax, Bombay v. Podar Cement Pvt. Ltd. MANU/SC/0649/1997 : [1997]226ITR625(SC) . They were also cited with approval in the case of State v. S.J. Chowdhury : . In this case it was held that the Evidence Act was an ongoing Act and the word "handwriting" in Section 45 of that Act was construed to include "typewriting". These principles were also applied in the case of SIL Import USA

v. Exim Aides Silk Exporters MANU/SC/0312/1999 : 1999CriLJ2276 . In this case the words "notice in writing", in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. On the same principle Courts have interpret, over a period of time, various terms and phrases. To take only a few examples:- "stage carriage" has been interpreted to include "electric tramcar"; "steam tricycle" to include "locomotive"; "telegraph" to include "telephone"; "bankers books" to include "microfilm"; "to take note" to include "use of tape recorder"; "documents" to include "computer database's".

17. These principles have also been applied by this Court whilst considering an analogous provision of the Criminal Procedure Code. In the case of Basavaraj R. Patil v. State of Karnataka MANU/SC/0632/2000 : 2000CriLJ4604 the question was whether an Accused needs to be physically present in Court to answer the questions put to him by Court whilst recording his statement under Section 313. To be remembered that under Section 313 the words are "for the purpose of enabling the accused personality to explain" (emphasis supplied).The term "personally" if given a strict and restrictive interpretation would mean that the Accused had to be physically present in Court. In fact the minority Judgment in this case so holds. It has however been held by the majority that the Section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was held by the majority, that it was not necessary that in all cases the Accused must answer by personally remaining present in Court.

18. Thus the law is well settled. The doctrine "Contemporany exposition est optima et fortissimo" has no application when interpreting a provision of an on-going statute/act like the Criminal Procedure Code.

19. At this stage we must deal with a submission made by Mr. Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the Constitution of India, cannot be subjected to a procedure involving "virtual reality". Such an argument displays ignorance of the concept of virtual reality and also of video conferencing. Virtual reality is a state where one is made to feel, hear or imagine what does not really exists. In virtual reality one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of ocean when one is sitting in the mountains, one can be made to imaging that he is taking part in a Grand Prix race whilst one is relaxing on one sofa etc. Video conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is a sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing-room and watching the match of TV, it cannot be said that he is in presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the person sitting in the stadium and the person in the drawing-room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other. The submissions of Respondents counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the Accused and/or his pleader are present when evidence

is recorded by video conferencing that evidence is being recorded in the "presence" of the accused and would thus fully need the requirements of Section 273, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

Recording the evidence by video conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the Accused. The Accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The Accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to the Accused. Of course, as set out hereinafter, evidence by Video Conferencing has to be on some conditions.

Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that that this would violate the right of the Accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the

requirements of these Sections would be fully met. To this method there is however a draw back. As the witness is now in Court there may be difficulties if he commits Contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable.

20. However even if the equipment cannot be set up in Court the Criminal Procedure Code contains provisions for examination of witnesses on commissions. Section 284 to 289 deal with examination of witnesses on commissions. For our purposes Sections 284 and 285 are relevant. They read as under:

"284. WHEN ATTENDANCE OF WITNESS MAY BE DISPENSED WITH AND COMMISSION ISSUED.

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter;

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

285. COMMISSION TO WHOM TO BE ISSUED.

(1) If the witness is within the territories to which this Code extends the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to, be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf."

Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the witness. As indicated earlier Dr. Greenberg has refused to come to India to give evidence. His evidence appears to be necessary for the ends of Justice. Courts in India cannot procure his attendance. Even otherwise to procure attendance of a witness from a far of country like USA would generally involve delay, expense and/or inconvenience. In such cases commissions could be issued for recording evidence. Normally a commission would involve recording evidence at the place where the witness is. However advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is. Thus in case where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience the Court could consider issuing a commission to record the evidence by way of video conferencing.

21. It was however submitted that India has no arrangement with the Government of United States of America and therefore commission cannot be issued for recording evidence of a witness who is in USA. Reliance was placed on the case of Ratilal Bhanji Mithani v. State of Maharashtra MANU/SC/0219/1972 : 1972CriLJ1055 . In this case a commission was issued for examination of witnesses in Germany. The time for recording evidence on commission had expired. An application for extension of time was made. It was then noticed that India did not have any arrangement with Germany for recording evidence on commission. At page 798 this Court observed as follows:

"25. The provisions contained in Sections 504 and 508-A of the Code of Criminal Procedure contain complimentary provisions for reciprocal arrangements between the

Government of our country and the Government of a foreign country for Commission from Courts in India to specified courts in the foreign country for examination of witnesses in the foreign country and similarly for Commissions from specified courts in the foreign country for examination of witnesses residing in our country. Notifications Nos. SRO 2161, SRO 2162, SRO 2163 and SRO 2164 all, dated November 18, 1953, published in the Gazette of India Part II, Section 3 on November 28, 1953, illustrate the reciprocal arrangements between the Government of India and the Government of the United Kingdom and the Government of Canada for examination of witness in the United Kingdom, Canada and the examination of witnesses residing in India.

26. In the present case, no notification under Section 508-A of the Code of Criminal Procedure has been published specifying the courts in the Federal Republic of West Germany by whom commissions for examination of witnesses residing in India may be issued. The notification, dated September 9, 1969, in the present case under Section 504 of the Code of Criminal Procedure is not based upon any existing complete arrangement between the Government of India and the Government of the Federal Republic of West Germany for examination of witness residing in West Germany . The notification, dated September 9, 1969, is ineffective for two reasons. First, there is no reciprocal arrangement between the Government of India and the Government of the Federal Republic of West Germany as contemplated in Sections 504 and 508-A of the Code of Criminal Procedure. Secondly, the notification under Section 504 is nullified and repelled by the affidavit evidence adduced on behalf of the State that no agreement between the two countries has yet been made.

27. In the present case, extension of time was granted in the past to enable the State for examination of witnesses in West Germany and return of the commission to this country. The State could not obtain the return of the commission. Now, a question has arisen as to

whether any extension of time should be made when it appears that reciprocal arrangements within the contemplation of Sections 504 and 508-A of the Code of Criminal Procedure are not made. The courts do not make orders in vain. When this Court finds that there are no arrangements in existence within the meaning of Sections 504 and 508-A of the Code of Criminal Procedure this Court is not inclined to make any order."

This authority, which is of a Constitution Bench of this Court, does suggest that no commission can be issued if there is no arrangement between the Government of India and the country where the commission is proposed to be issued. This authority would have been binding on this Court if the facts were identical. Ms. Jaising had submitted that notwithstanding this authority a difference would have to be drawn in cases where a witness was not willing to give evidence and in cases where the witness was willing to give evidence. She submitted that in the second class of cases commissions could be issued for recording evidence even in a country where there is no arrangement between the Government of India and that country.

22. In this case we are not required to consider this aspect and therefore express no opinion thereon. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether evidence can be recorded by Video-Conferencing. Normally when a Commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the Commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a Judicial Officer) would be required to record the evidence and to ensure/compel attendance. However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus where a witness

is willing to give evidence an official of the Court can be deported to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The Court in Mumbai would be issuing commission to record evidence by video conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a Judicial Officer) to proceed to the office of VSNL and record the evidence of Dr. Greenberg in the presence of the Respondent. The officer shall ensure that the Respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officers shall also ensure that the Respondent has full opportunity to cross-examine Dr. Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence.

23. It was then submitted that there would be practical difficulties in recording evidence by video conferencing. It was submitted that there is a time difference between India and U.S.A. It was submitted that a question would arise as to how and who would administer the oath to Dr. Greenberg. It was submitted that there could be a video image/audio interruptions/distortions which might make the transmission inaudible/indecipherable. It was submitted that there would be no way of ensuring that the witnesses is not being coached/tutored/prompted whilst evidence was being recorded. It is submitted that the witness sitting in USA would not be subject to any control of the Court in India. It is submitted that the witness may commit perjury with impunity and also insult the Court without fear of punishment since he is not amenable to the jurisdiction of the Court. It is submitted that the witness may not remain present and may also refuse to answer questions. It is submitted that commercial studios place restrictions on the number of people who can remain present and may restrict the volume of papers that may be brought into the studio. It was submitted that it would be difficult to place textbooks and

other materials to the witness for the purpose of cross-examination him. Lastly, it was submitted that the cost of video conferencing, if at all permitted, must be borne by the State.

24. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The Respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has

given evidence in a Court in India and that then gone away abroad. In all such cases Court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the Respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the Respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State.

25. Accordingly the impugned judgment is set aside. The Magistrate will now proceed to have the evidence of Dr. Greenberg recorded by way of video conferencing. As the trial has been pending for a long time the trial court is requested to dispose off the case as early as possible and in any case within one year from today. With these directions the Appeals stand disposed of. The Respondent shall pay to the State and the complainant the costs of these Appeals.

MANU/SC/0521/2020

Neutral Citation: 2020/INSC/453

Back to Section 65B of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 20825-20826 of 2017, 2407 and 3696 of 2018

Decided On: 14.07.2020

Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Ors.

Hon'ble Judges/Coram:

Rohinton Fali Nariman, S. Ravindra Bhat and V. Ramasubramanian, JJ.

Counsels:

For Appearing Parties: Meenakshi Arora, Pravin M. Shah, Sr. Advs., Ravindra Keshavrao Adsure, Haribhau Damodar Zol, Pratik Arvind Bhosle, Prashant R. Katneshwarkar, Ajit B. Kale, Sagar N. Pahune Patil, Shashibhushan P. Adgaonkar, Aditya Sikchi, Jakalwar, Gagan Deep Sharma, Gautam Talukdar, Vikas Upadhyay and Ashwin Kumar Nair, Advs.

JUDGMENT

Authored By : Rohinton Fali Nariman, V. Ramasubramanian

Rohinton Fali Nariman, J.

1. I.A. No. 134044 of 2019 for intervention in C.A. Nos. 20825-20826 of 2017 is allowed.

2. These Civil Appeals have been referred to a Bench of three honourable Judges of this Court by a Division Bench reference order dated 26.07.2019, dealing with the interpretation of Section 65B of the Indian Evidence Act, 1872 ("Evidence Act") by two judgments of this Court. In the reference order, after quoting from Anvar P.V. v. P.K. Basheer and Ors. MANU/SC/0834/2014 : (2014) 10 SCC 473 (a three Judge Bench decision of this Court), it was found that a Division Bench judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad v. State of Himachal Pradesh MANU/SC/0058/2018 : (2018) 2 SCC 801 may need reconsideration by a Bench of a larger strength.

3. The brief facts necessary to appreciate the controversy in the present case, as elucidated in Civil Appeals 20825-20826 of 2017, are as follows:

i. Two election petitions were filed by the present Respondents before the Bombay High Court Under Sections 80 and 81 of the Representation of the People Act, 1951, challenging the election of the present Appellant, namely, Shri Arjun Panditrao Khotkar (who is the Returned Candidate [hereinafter referred to as the "RC"] belonging to the Shiv Sena party from 101-Jalna Legislative Assembly Constituency) to the Maharashtra State Legislative Assembly for the term commencing November, 2014. Election Petition No. 6 of 2014 was filed by the defeated Congress (I) candidate Shri Kailash Kishanrao Gorantyal, whereas Election Petition No. 9 of 2014 was filed by one Shri Vijay Chaudhary, an elector in the

said constituency. The margin of victory for the RC was extremely narrow, namely 296 votes-the RC having secured 45,078 votes, whereas Shri Kailash Kishanrao Gorantyal secured 44,782 votes.

ii. The entirety of the case before the High Court had revolved around four sets of nomination papers that had been filed by the RC. It was the case of the present Respondents that each set of nomination papers suffered from defects of a substantial nature and that, therefore, all four sets of nomination papers, having been improperly accepted by the Returning Officer of the Election Commission, one Smt. Mutha, (hereinafter referred to as the "RO"), the election of the RC be declared void. In particular, it was the contention of the present Respondents that the late presentation of Nomination Form Nos. 43 and 44 by the RC-inasmuch as they were filed by the RC after the stipulated time of 3.00 p.m. on 27.09.2014 - rendered such nomination forms not being filed in accordance with the law, and ought to have been rejected.

iii. In order to buttress this submission, the Respondents sought to rely upon video-camera arrangements that were made both inside and outside the office of the RO. According to the Respondents, the nomination papers were only offered at 3.53 p.m. (i.e. beyond 3.00 p.m.), as a result of which it was clear that they had been filed out of time. A specific complaint making this objection was submitted by Shri Kailash Kishanrao Gorantyal before the RO on 28.09.2014 at 11.00 a.m., in which it was requested that the RO reject the nomination forms that had been improperly accepted. This request was rejected by the RO on the same day, stating that the nomination forms had, in fact, been filed within time.

4. Given the fact that allegations and counter allegations were made as to the time at which the nomination forms were given to the RO, and that videography was available, the High Court, by its order dated 16.03.2016, ordered the Election Commission and the concerned officers to produce the entire record of the election of this Constituency, including the original video recordings. A specific order was made that this electronic record needs to be produced along with the 'necessary certificates'.

5. In compliance with this order, such video recordings were produced by the Election Commission, together with a certificate issued with regard to the CDs/VCDs, which read as follows:

Certificate

This is to certify that the CDs in respect of video recording done on two days of filing nomination forms of date 26.9.2014 and 27.9.2014 which were present in the record are produced.

Sd/-

Asst. Returning Officer

101 Jalna Legislative Assembly

Constituency/Tahsildar

Jalna

Sd/-

Returning Officer

101 Jalna Legislative Assembly

Constituency/Tahsildar

Jalna

6. Transcripts of the contents of these

CDs/VCDs were prepared by the High Court itself. Issue Nos. 6 and 7 as framed by the High Court (and its answers to these issues) are important, and are set out in the impugned judgment dated 24.11.2017, and extracted hereinbelow:

Issues

6. Whether the Petitioner proves that the nomination papers at Sr. Nos. 43 and 44 were not presented by Respondent/Returned candidate before 3.00 p.m. on 27/09/2014?

Findings

Affirmative. (nomination papers at Sr. Nos. 43 and 44 were not presented by RC before 3.00 p.m. of 27.9.2014.)

7. Whether the Petitioner proves that the Respondent/Returned candidate submitted original forms A and B along with nomination paper only on 27/09/2014 after 3.00 p.m. and along with nomination paper at Sr. No. 44?

Affirmative. (A, B forms were presented after 3.00 p.m. of 27.9.2014)

7. In answering issues 6 and 7, the High Court recorded:

60. Many applications were given by the Petitioner of Election Petition No. 6/2014 to get the copies of electronic record in respect of aforesaid incidents with certificate as provided in Section 65-B of the Evidence Act. The correspondence made with them show that even after leaving of the office by Smt. Mutha, the Government machinery, incharge of the record, intentionally avoided to give certificate as mentioned in Section 65-B of the Evidence Act. After production of the record in the Court in this regard, this Court had

allowed to Election Commission by order to give copies of such record to applicants, but after that also the authority avoided to give copies by giving lame excuses. It needs to be kept in mind that the RC is from political party which has alliance with ruling party, BJP, not only in the State, but also at the center. It is unfortunate that the machinery which is expected to be fair did not act fairly in the present matter. The circumstances of the present matter show that the aforesaid two officers tried to cover up their mischief. However the material gives only one inference that nomination forms Nos. 43 and 44 with A, B forms were presented before the RO by RC after 3.00 p.m. of 27.9.2014 and they were not handed over prior to 3.00 p.m. In view of objection of the learned Counsels of the RC to using the information contained in aforesaid VCDs, marked as Article A1 to A6, this Court had made order on 11.7.2017 that the objections will be considered in the judgment itself. This VCDs are already exhibited by this Court as Exhs. 70 to 75. Thus, if the contents of the aforesaid VCDs can be used in the evidence, then the Petitioners are bound to succeed in the present matters.

8. The High Court then set out Sections 65-A and 65-B of the Evidence Act, and referred to this Court's judgment in Anvar P.V. (supra). The Court held in paragraph 65 of the impugned judgment that the CDs that were produced by the Election Commission could not be treated as an original record and would, therefore, have to be proved by means of secondary evidence. Finding that no written certificate as is required by Section 65-B(4) of the Evidence Act was furnished by any of the election officials, and more particularly, the RO, the High Court then held:

69. In substantive evidence, in the cross examination of Smt. Mutha, it is brought on the record that there was no complaint with regard to working of video cameras used by the office. She has admitted that the video cameras were regularly used in the office for recording the aforesaid incidents and daily VCDs were collected of the recording by her

office. This record was created as the record of the activities of the Election Commission. It is brought on the record that on the first floor of the building, arrangement was made by keeping electronic gazettes like VCR players etc. and arrangement was made for viewing the recording. It is already observed that under her instructions, the VCDs were marked of this recording. Thus, on the basis of her substantive evidence, it can be said that the conditions mentioned in Section 65-B of the Evidence Act are fulfilled and she is certifying the electronic record as required by Section 65-B(4) of the Evidence Act. It can be said that Election Commission, the machinery avoided to give certificate in writing as required by Section 65-B(4) of the Evidence Act. But, substantive evidence is brought on record of competent officer in that regard. When the certificate expected is required to be issued on the basis of best of knowledge and belief, there is evidence on oath about it of Smt. Mutha. Thus, there is something more than the contents of certificate mentioned in Section 65-B(4) of the Evidence Act in the present matters. Such evidence is not barred by the provisions of Section 65-B of the Evidence Act as that evidence is only on certification made by the responsible official position like RO. She was incharge of the management of the relevant activities and so her evidence can be used and needs to be used as the compliance of the provision of Section 65-B of the Evidence Act. This Court holds that there is compliance of the provision of Section 65-B of the Evidence Act in the present matter in respect of aforesaid electronic record and so, the information contained in the record can be used in the evidence.

Based, therefore, on "substantial compliance" of the requirement of giving a certificate Under Section 65B of the Evidence Act, it was held that the CDs/VCDs were admissible in evidence, and based upon this evidence it was found that, as a matter of fact, the nomination forms by the RC had been improperly accepted. The election of the RC was therefore was declared void in the impugned judgment.

9. Shri Ravindra Adsure, learned advocate appearing on behalf of the Appellant, submitted that the judgment in Anvar P.V. (supra) covered the case before us. He argued that without the necessary certificate in writing and signed Under Section 65B(4) of the Evidence Act, the CDs/VCDs upon which the entirety of the judgment rested could not have been admitted in evidence. He referred to Tomaso Bruno and Anr. v. State of Uttar Pradesh MANU/SC/0057/2015 : (2015) 7 SCC 178, and argued that the said judgment did not notice either Section 65B or Anvar P.V. (supra), and was therefore per incuriam. He also argued that Shafhi Mohammad (supra), being a two-Judge Bench of this Court, could not have arrived at a finding contrary to Anvar P.V. (supra), which was the judgment of three Hon'ble Judges of this Court. In particular, he argued that it could not have been held in Shafhi Mohammad (supra) that whenever the interest of justice required, the requirement of a certificate could be done away with Under Section 65B(4). Equally, this Court's judgment dated 03.04.2018, reported as MANU/SC/0331/2018 : (2018) 5 SCC 311, which merely followed the law laid down in Shafhi Mohammad (supra), being contrary to the larger bench judgment in Anvar P.V. (supra), should also be held as not having laid down good law. He further argued that the Madras High Court judgment in K. Ramajyam v. Inspector of Police MANU/TN/0112/2016 : (2016) Crl. LJ 1542, being contrary to Anvar P.V. (supra), also does not lay down the law correctly, in that it holds that evidence aliunde, that is outside Section 65B, can be taken in order to make electronic records admissible. In the facts of the present case, he contended that since it was clear that the requisite certificate had not been issued, no theory of "substantial compliance" with the provisions of Section 65B(4), as was held by the impugned judgment, could possibly be sustained in law.

10. Ms. Meenakshi Arora, learned Senior Advocate appearing on behalf of the Respondents, has taken us in copious detail through the facts of this case, and has argued that the High Court has directed the Election Commission to produce before the Court the original CDs/VCDs of the video-recording done at the office of the RO, along with

the necessary certificate. An application dated 16.08.2016 was also made to the District Election Commission and RO as well as the Assistant RO for the requisite certificate Under Section 65B. A reply was given on 14.09.2016, that this certificate could not be furnished since the matter was sub-judice. Despite this, later on, on 26.07.2017 her client wrote to the authorities again requesting for issuance of certificate Under Section 65B, but by replies dated 31.07.2017 and 02.08.2017, no such certificate was forthcoming. Finally, after having run from pillar to post, her client applied on 26.08.2017 to the Chief Election Commissioner, New Delhi, stating that the authorities were refusing to give her client the necessary certificate Under Section 65B and that the Chief Election Commissioner should therefore ensure that it be given to them. To this communication, no reply was forthcoming from the Chief Election Commissioner, New Delhi. Given this, the High Court at several places had observed in the course of the impugned judgment that the authorities deliberately refused, despite being directed, to supply the requisite certificate Under Section 65B, as a result of which the impugned judgment correctly relied upon the oral testimony of the RO herself. According to Ms. Arora, such oral testimony taken down in the form of writing, which witness statement is signed by the RO, would itself amount to the requisite certificate being issued Under Section 65B(4) in the facts of this case, as was correctly held by the High Court. Quite apart from this, Ms. Arora also stated that-independent of the finding given by the High Court by relying upon CDs/VCDs-the High Court also relied upon other documentary and oral evidence to arrive at the finding that the RC had not handed over nomination forms directly to the RO at 2.20 p.m. (i.e. before 3 pm). In fact, it was found on the basis of this evidence that the nomination forms were handed over and accepted by the RO only after 3.00 p.m. and were therefore improperly accepted, as a result of which, the election of the Appellant was correctly set aside.

11. On law, Ms. Arora argued that it must not be forgotten that Section 65B is a procedural provision, and it cannot be the law that even where a certificate is impossible to get, the

absence of such certificate should result in the denial of crucial evidence which would point at the truth or falsehood of a given set of facts. She, therefore, supported the decision in Shafhi Mohammad (supra), stating that Anvar P.V. (supra) could be considered to be good law only in situations where it was possible for the party to produce the requisite certificate. In cases where this becomes difficult or impossible, the interest of justice would require that a procedural provision be not exalted to such a level that vital evidence would be shut out, resulting in manifest injustice.

12. Shri Vikas Upadhyay, appearing on behalf of the Intervenor, took us through the various provisions of the Information Technology Act, 2000 along with Section 65B of the Evidence Act, and argued that Section 65B does not refer to the stage at which the certificate Under Section 65B(4) ought to be furnished. He relied upon a judgment of the High Court of Rajasthan as well as the High Court of Bombay, in addition to Kundan Singh v. State of the Delhi High Court, to argue that the requisite certificate need not necessarily be given at the time of tendering of evidence but could be at a subsequent stage of the proceedings, as in cases where the requisite certificate is not forthcoming due to no fault of the party who tried to produce it, but who had to apply to a Judge for its production. He also argued that Anvar P.V. (supra) required to be clarified to the extent that Sections 65A and 65B being a complete code as to admissibility of electronic records, the "baggage" of Primary and Secondary Evidence contained in Sections 62 and 65 of the Evidence Act should not at all be adverted to, and that the drill of Section 65A and 65B alone be followed when it comes to admissibility of information contained in electronic records.

13. It is now necessary to set out the relevant provisions of the Evidence Act and the Information Technology Act, 2000. Section 3 of the Evidence Act defines "document" as follows:

Document.-- "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

"Evidence" in Section 3 is defined as follows:

"Evidence."-- "Evidence" means and includes--(1) 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;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

The Evidence Act also declares that the expressions "Certifying Authority", "electronic signature", "Electronic Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act.

14. Section 22-A of the Evidence Act, which deals with the relevance of oral admissions as to contents of electronic records, reads as follows:

22A. When oral admission as to contents of electronic records are relevant. -- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

15. Section 45A of the Evidence Act, on the opinion of the Examiner of Electronic Evidence, then states:

45A. Opinion of Examiner of Electronic Evidence.--When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.-- For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

16. Sections 65-A and 65-B of the Evidence Act read as follows:

65A. Special provisions as to evidence relating to electronic record.--The contents of electronic records may be proved in accordance with the provisions of Section 65B.

65B. Admissibility of electronic records.- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper,

stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in Sub-section (1) in respect of a computer output shall be the following, namely:

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Section as constituting a single computer; and references in this Section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this Sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment; --

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. -- For the purposes of this Section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

17. The following definitions as contained in Section 2 of the Information Technology Act, 2000 are also relevant:

(i) "computer" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;

(j) "computer network" means the inter-connection of one or more computers or computer systems or communication device through- (i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the inter-connection is continuously maintained;

(l) "computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

18. Sections 65A and 65B occur in Chapter V of the Evidence Act which is entitled "Of Documentary Evidence". Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act is important, and states that secondary evidence may be given of "the existence, condition or contents of a document in the following cases...".

19. Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved after a document becomes admissible in evidence. Section 65A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65B. Section 65B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65A and 65B.

20. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that "special provisions" as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to "admissibility of electronic records".

21. Section 65B(1) opens with a non-obstante clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records.

22. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in Sub-sections 2(a) to 2(d) must be satisfied cumulatively.

23. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" - whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing any of the following things..." must be read as doing all of the following things, it being well settled that the expression "any" can mean "all" given the context (see, for example, this Court's judgments in Bansilal Agarwalla v. State of Bihar (1962) 1 SCR 331 and Om Parkash v. Union of India

MANU/SC/0092/2010 : (2010) 4 SCC 172). This being the case, the conditions mentioned in Sub-section (4) must also be interpreted as being cumulative.

24. It is now appropriate to examine the manner in which Section 65B was interpreted by this Court. In Anvar P.V. (supra), a three Judge Bench of this Court, after setting out Sections 65A and 65B of the Evidence Act, held:

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

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

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

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

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

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

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

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

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

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

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

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A--opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

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20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed Under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law Under Sections 63 and 65 has to yield.

21. In State (NCT of Delhi) v. Navjot Sandhu a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows: (SCC p. 714)

150. According to Section 63, "secondary evidence" means and includes, among other things, 'copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic

records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in Sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed Under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, Under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in

terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The Appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the Appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act.

25. Shri Upadhyay took exception to the language of paragraph 24 in this judgment. According to the learned Counsel, primary and secondary evidence as to documents,

referred to in Sections 61 to Section 65 of the Evidence Act, should be kept out of admissibility of electronic records, given the fact that Sections 65A and 65B are a complete code on the subject.

26. At this juncture, it is important to note that Section 65B has its genesis in Section 5 of the Civil Evidence Act 1968 (UK), which reads as follows:

Admissibility of statements produced by computers.

(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to Rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in Sub-section (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are--

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Sub-section (2)(a) above was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say--

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and

for the purposes of this Sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act--

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to Sub-section (3) above, in this Part of this Act "computer " means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."

27. It may be noticed that Sub-sections (2) to (5) of Section 65B of the Evidence Act are a reproduction of Sub-sections (2) to (5) of Section 5 of the Civil Evidence Act, 1968, with minor changes3. The definition of "computer" Under Section 5(6) of the Civil Evidence Act, 1968 was not, however, adopted by Section 2(i) of the Information Technology Act, 2000, which as noted above, is a 'means and includes' definition of a much more complex and intricate nature. It is also important to note Section 6(1) and (5) of the Civil Evidence Act, 1968, which state as follows:

(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of Section 2, 4 or 5 of this Act it may, subject to any Rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

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(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of Section 5(4) of this Act wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.

28. Section 6(1), in essence, maintains the dichotomy between proof by 'primary' and 'secondary' evidence-proof by production of the 'document' itself being primary evidence, and proof by production of a copy of that document, as authenticated, being secondary evidence. Section 6(5), which gives teeth to the person granting the certificate

mentioned in Section 5(4) of the Act, by punishing false statements wilfully made in the certificate, has not been included in the Indian Evidence Act. These Sections have since been repealed by the Civil Evidence Act of 1995 (UK), pursuant to a UK Law Commission Report published in September, 1993 (Law Com. No. 216), by which the strict Rule as to hearsay evidence was relaxed, and hearsay evidence was made admissible in the circumstances mentioned by the Civil Evidence Act of 1995. Sections 8, 9 and 13 of this Act are important, and are set out hereinbelow:

8. Proof of statements contained in documents.

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved--

(a) by the production of that document, or

(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

9. Proof of records of business or public authority.

(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong. For this purpose--

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section--

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by anybody (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this Section do not apply in relation to a particular document or record, or description of documents or records.

Section 13 of this Act defines "document" as follows:

"document" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

29. Section 15(2) of this Act repeals enactments mentioned in Schedule II therein; and Schedule II repeals Part I of the Civil Evidence Act, 1968 - of which Sections 5 and 6 were a part. The definition of "records" and "document" in this Act would show that electronic

records are considered to be part of "document" as defined, needing no separate treatment as to admissibility or proof. It is thus clear that in UK law, as at present, no distinction is made between computer generated evidence and other evidence either qua the admissibility of, or the attachment of weight to, such evidence.

30. Coming back to Section 65B of the Indian Evidence Act, Sub-section (1) needs to be analysed. The Sub-section begins with a non-obstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "...without further proof or production of the original..." make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

31. The non-obstante Clause in Sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf-Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document-which would be the original "electronic record" contained in the "computer" in which the original information is first stored-and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates

between the original information contained in the "computer" itself and copies made therefrom - the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in Sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate Under Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act...". This may more appropriately be read without the words "Under Section 62 of the Evidence Act,...". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

33. In fact, in Vikram Singh and Anr. v. State of Punjab and Anr. MANU/SC/0758/2017 : (2017) 8 SCC 518, a three-Judge Bench of this Court followed the law in Anvar P.V. (supra), clearly stating that where primary evidence in electronic form has been produced, no certificate Under Section 65B would be necessary. This was so stated as follows:

25. The learned Counsel contended that the tape-recorded conversation has been relied on without there being any certificate Under Section 65-B of the Evidence Act, 1872. It was contended that audio tapes are recorded on magnetic media, the same could be established through a certificate Under Section 65-B and in the absence of the certificate, the document which constitutes electronic record, cannot be deemed to be a valid evidence and has to be ignored from consideration. Reliance has been placed by the learned Counsel on the judgment of this Court in Anvar P.V. v. P.K. Basheer. The conversation on the landline phone of the complainant situate in a shop was recorded by the complainant. The same cassette containing conversation by which ransom call was made on the landline phone was handed over by the complainant in original to the police. This Court in its judgment dated 25-1-2010 has referred to the aforesaid fact and has noted the said fact to the following effect:

5. The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to SI Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police.

26. The tape-recorded conversation was not secondary evidence which required certificate Under Section 65-B, since it was the original cassette by which ransom call was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65-B is a mandatory condition.4

34. Despite the law so declared in Anvar P.V. (supra), wherein this Court made it clear that the special provisions of Sections 65A and 65B of the Evidence Act are a complete Code in themselves when it comes to admissibility of evidence of information contained in electronic records, and also that a written certificate Under Section 65B(4) is a sine qua

non for admissibility of such evidence, a discordant note was soon struck in Tomaso Bruno (supra). In this judgment, another three Judge Bench dealt with the admissibility of evidence in a criminal case in which CCTV footage was sought to be relied upon in evidence. The Court held:

24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the Accused or the liability of the Defendant. Electronic documents stricto sensu are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in Sub-section (2) of Section 65-B. Secondary evidence of contents of document can also be led Under Section 65 of the Evidence Act. PW 13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

25. The production of scientific and electronic evidence in court as contemplated Under Section 65-B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Amir Kasab v. State of Maharashtra [MANU/SC/0681/2012 : (2012) 9 SCC 1],

wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the Accused. Similarly, in State (NCT of Delhi) v. Navjot Sandhu, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

35. What is clear from this judgment is that the judgment of Anvar P.V. (supra) was not referred to at all. In fact, the judgment in State v. Navjot Sandhu MANU/SC/0465/2005 : (2005) 11 SCC 600 was adverted to, which was a judgment specifically overruled by Anvar P.V. (supra). It may also be stated that Section 65B(4) was also not at all adverted to by this judgment. Hence, the declaration of law in Tomaso Bruno (supra) following Navjot Sandhu (supra) that secondary evidence of the contents of a document can also be led Under Section 65 of the Evidence Act to make CCTV footage admissible would be in the teeth of Anvar P.V., (supra) and cannot be said to be a correct statement of the law. The said view is accordingly overruled.

36. We now come to the decision in Shafhi Mohammad (supra). In this case, by an order dated 30.01.2018 made by two learned Judges of this Court, it was stated:

21. We have been taken through certain decisions which may be referred to. In Ram Singh v. Ram Singh [Ram Singh v. Ram Singh, MANU/SC/0176/1985 : 1985 Supp SCC 611], a three-Judge Bench considered the said issue. English judgments in R. v. Maqsud Ali [R. v. Maqsud Ali, MANU/UKCR/0026/1965 : (1966) 1 QB 688] and R. v. Robson [R. v. Robson, (1972) 1 WLR 651] and American Law as noted in American Jurisprudence 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided

the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording, it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

22. In Tukaram S. Dighole v. Manikrao Shivaji Kokate [MANU/SC/0086/2010 : (2010) 4 SCC 329], the same principle was reiterated. This Court observed that new techniques and devices are the order of the day. Though such devices are susceptible to tampering, no exhaustive Rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

23. In Tomaso Bruno v. State of U.P. [MANU/SC/0057/2015 : (2015) 7 SCC 178], a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra [MANU/SC/0681/2012 : (2012) 9 SCC 1] and State (NCT of Delhi) v. Navjot Sandhu.

24. We may, however, also refer to the judgment of this Court in Anvar P.V. v. P.K. Basheer, delivered by a three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65-B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu that secondary evidence of electronic record could be covered Under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.

25. Though in view of the three-Judge Bench judgments in Tomaso Bruno and Ram Singh [MANU/SC/0176/1985 : 1985 Supp SCC 611], it can be safely held that electronic evidence is admissible and provisions Under Sections 65-A and 65-B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate Under Section 65-B(4).

26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V., this Court in para 24 clarified that primary evidence of electronic record was not covered Under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

27. The term "electronic record" is defined in Section 2(1) (t) of the Information Technology Act, 2000 as follows:

2.(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

28. The expression "data" is defined in Section 2(1)(o) of the Information Technology Act as follows:

2.(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

29. The applicability of procedural requirement Under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of

manner of proving, such document is kept out of consideration by the court in the absence of certificate Under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate Under Section 65-B(4) is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate Under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.

37. It may be noted that the judgments referred to in paragraph 21 of Shafhi Mohammed (supra) are all judgments before the year 2000, when Amendment Act 21 of 2000 first introduced Sections 65A and 65B into the Evidence Act and can, therefore, be of no assistance on interpreting the law as to admissibility into evidence of information contained in electronic records. Likewise, the judgment cited in paragraph 22, namely Tukaram S. Dighole v. Manikrao Shivaji Kokate MANU/SC/0086/2010 : (2010) 4 SCC 329 is also a judgment which does not deal with Section 65B. In fact, paragraph 20 of the said judgment states the issues before the Court as follows:

20. However, in the present case, the dispute is not whether a cassette is a public document but the issues are whether:

(i) the finding by the Tribunal that in the absence of any evidence to show that the VHS cassette was obtained by the Appellant from the Election Commission, the cassette placed on record by the Appellant could not be treated as a public document is perverse; and

(ii) a mere production of an audio cassette, assuming that the same is a certified copy issued by the Election Commission, is per se conclusive of the fact that what is contained in the cassette is the true and correct recording of the speech allegedly delivered by the Respondent or his agent?

The second issue was answered referring to judgments which did not deal with Section 65B at all.

38. Much succour was taken from the three Judge Bench decision in Tomaso Bruno (supra) in paragraph 23, which, as has been stated hereinabove, does not state the law on Section 65B correctly. Anvar P.V. (supra) was referred to in paragraph 24, but surprisingly, in paragraph 26, the Court held that Sections 65A and 65B cannot be held to be a complete Code on the subject, directly contrary to what was stated by a three Judge Bench in Anvar P.V. (supra). It was then "clarified" that the requirement of a certificate Under Section 64B(4), being procedural, can be relaxed by the Court wherever the interest of justice so justifies, and one circumstance in which the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device, as a result of which such party would not be in a position to secure the requisite certificate.

39. Quite apart from the fact that the judgment in Shafhi Mohammad (supra) states the law incorrectly and is in the teeth of the judgment in Anvar P.V. (supra), following the judgment in Tomaso Bruno (supra) - which has been held to be per incuriam hereinabove-the underlying reasoning of the difficulty of producing a certificate by a party who is not in possession of an electronic device is also wholly incorrect.

40. As a matter of fact, Section 165 of the Evidence Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts. Section 165 of the Evidence Act states as follows:

Section 165. Judge's power to put questions or order production.- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce Under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask

any question which it would be improper for any other person to ask Under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

41. Likewise, Under Order XVI of the Code of Civil Procedure, 1908 ("CPC") which deals with 'Summoning and Attendance of Witnesses', the Court can issue the following orders for the production of documents:

6. Summons to produce document.--Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

7. Power to require persons present in Court to give evidence or produce document.--Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

xxx xxx xxx

10. Procedure where witness fails to comply with summons.--(1) Where a person has been issued summons either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court-- (a) shall, if the certificate of the serving officer has not been verified by the affidavit, or if

service of the summons has affected by a party or his agent, or (b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed Under Rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

42. Similarly, in the Code of Criminal Procedure, 1973 ("CrPC"), the Judge conducting a criminal trial is empowered to issue the following orders for production of documents:

91. Summons to produce document or other thing.--

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this Section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this Section shall be deemed-- (a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or (b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

349. Imprisonment or committal of person refusing to answer or produce document.--If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to

simple imprisonment, or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of Section 345 or Section 346.

43. Thus, it is clear that the major premise of Shafhi Mohammad (supra) that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person Under Section 65B(4) in cases in which such person refuses to give it.

44. Resultantly, the judgment dated 03.04.2018 of a Division Bench of this Court reported as MANU/SC/0331/2018 : (2018) 5 SCC 311, in following the law incorrectly laid down in Shafhi Mohammed (supra), must also be, and is hereby, overruled.

45. However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the Respondents, both through the High Court and otherwise, to get the requisite certificate Under Section 65B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the Court for its production under the provisions aforementioned of the Evidence Act, Code of Civil Procedure or Code of Criminal Procedure. Once such application is made to the Court, and the Court then orders or

directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. This was well put by this Court in Re: Presidential Poll MANU/SC/0047/1974 : (1974) 2 SCC 33 as follows:

14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legam is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legam is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities

prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edn. at pp. 162-163 and Craies on Statute Law 6th Edn. at p. 268).

It is important to note that the provision in question in Re Presidential Poll (supra) was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case. These maxims have been applied by this Court in different situations in other election cases - see Chandra Kishore Jha v. Mahavir Prasad and Ors. MANU/SC/0594/1999 : (1999) 8 SCC 266 (at paragraphs 17 and 21); Special Reference 1 of 2002 MANU/SC/0891/2002 : (2002) 8 SCC 237 (at paragraphs 130 and 151) and Raj Kumar Yadav v. Samir Kumar Mahaseth and Ors. MANU/SC/0194/2005 : (2005) 3 SCC 601 (at paragraphs 13 and 14).

46. These Latin maxims have also been applied in several other contexts by this Court. In Cochin State Power and Light Corporation v. State of Kerala MANU/SC/0220/1965 : (1965) 3 SCR 187, a question arose as to the exercise of an option of purchasing an undertaking by the State Electricity Board Under Section 6(4) of the Indian Electricity Act, 1910. The provision required a notice of at least 18 months before the expiry of the relevant period to be given by such State Electricity Board to the State Government. Since this mandatory provision was impossible of compliance, it was held that the State Electricity Board was excused from giving such notice, as follows:

Sub-section (1) of Section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the license. But the State Government claims that Under Sub-section (2) of Section 6 it is now vested with the option. Now, Under Sub-section (2) of Section 6, the State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking". It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of Sub-section (4) of Section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the Sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of Sub-section (4) read with Sub-section (2) of Section 6 is that on failure of the Board to give the notice prescribed by Sub-section (4), the option vested in the Board Under Sub-section (1) of Section 6 was liable to be divested. Sub-section (4) of Section 6 imposed upon the Board the duty of giving after the coming into force of Section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on September 5, 1959, and the relevant period expired on December 3, 1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of December 2, 1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, lex non cogit ad impossibilia (the law does not compel the doing of impossibilities), and Sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must therefore, hold that the State Electricity Board was not required to give the notice Under Sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking Under Sub-section (4) of Section 6. By the notice served upon the Appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years.

Consequently, the State Government never became vested with the option of purchasing the undertaking Under Sub-section (2) of Section 6. The State Government must, therefore, be restrained from taking further action under its notice, Ex. G, dated November 20, 19595.5

47. In Raj Kumar Dubey v. Tarapada Dey and Ors. MANU/SC/0018/1987 : (1987) 4 SCC 398, the maxim non cogit ad impossibilia was applied in the context of the applicability of a mandatory provision of the Registration Act, 1908, as follows:

6. We have to bear in mind two maxims of equity which are well settled, namely, actus curiae neminem gravabit -- An act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th Edn., 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is lex non cogit ad impossibilia (Broom's Legal Maxims -- page 162) -- The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

7. In this case indisputably during the period from 26-7-1978 to December 1982 there was subsisting injunction preventing the arbitrators from taking any steps. Furthermore, as noted before the award was in the custody of the court, that is to say, 28-1-1978 till the return of the award to the arbitrators on 24-11-1983, arbitrators or the parties could not

have presented the award for its registration during that time. The award as we have noted before was made on 28-11-1977 and before the expiry of the four months from 28-11-1977, the award was filed in the court pursuant to the order of the court. It was argued that the order made by the court directing the arbitrators to keep the award in the custody of the court was wrong and without jurisdiction, but no arbitrator could be compelled to disobey the order of the court and if in compliance or obedience with court of doubtful jurisdiction, he could not take back the award from the custody of the court to take any further steps for its registration then it cannot be said that he has failed to get the award registered as the law required. The aforesaid two legal maxims -- the law does not compel a man to do that which he cannot possibly perform and an act of the court shall prejudice no man would, apply with full vigour in the facts of this case and if that is the position then the award as we have noted before was presented before the Sub-Registrar, Arambagh on 25-11-1983 the very next one day of getting possession of the award from the court. The Sub-Registrar pursuant to the order of the High Court on 24-6-1985 found that the award was presented within time as the period during which the judicial proceedings were pending that is to say, from 28-1-1978 to 24-11-1983 should be excluded in view of the principle laid down in Section 15 of the Limitation Act, 1963. The High Court, therefore, in our opinion, was wrong in holding that the only period which should be excluded was from 26-7-1978 till 20-12-1982. We are unable to accept this position. 26-7-1978 was the date of the order of the learned Munsif directing maintenance of status quo and 20-12-1982 was the date when the interim injunction was vacated, but still the award was in the custody of the court and there is ample evidence as it would appear from the narration of events hereinbefore made that the arbitrators had tried to obtain the custody of the award which the court declined to give to them.

48. These maxims have also been applied to tenancy legislation - see M/s. B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmick and Anr. MANU/SC/0783/1987 : (1987) 2 SCC 401 (at paragraph 12), and have also been applied to relieve authorities of fulfilling their

obligation to allot plots when such plots have been found to be un-allottable, owing to the contravention of Central statutes - see Hira Tikoo v. U.T., Chandigarh and Ors. MANU/SC/0337/2004 : (2004) 6 SCC 765 (at paragraphs 23 and 24).

49. On an application of the aforesaid maxims to the present case, it is clear that though Section 65B(4) is mandatory, yet, on the facts of this case, the Respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third-party over whom the Respondents had no control, must be relieved of the mandatory obligation contained in the said Sub-section.

50. We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the Accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant Sections of the Code of Criminal Procedure.

51. In a recent judgment, a Division Bench of this Court in State of Karnataka v. M.R. Hiremath MANU/SC/0807/2019 : (2019) 7 SCC 515, after referring to Anvar P.V. (supra) held:

16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra v. Desai [MANU/SC/0404/2018 : (2018) 16 SCC 273]. The Court emphasised that non-production of a certificate Under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu v. State of Haryana [MANU/SC/0835/2017 : (2017) 8 SCC 570], in which it was held:

32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate Under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

52. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the Accused to stand trial, copies of all documents which are entered in the charge-

sheet/final report have to be given to the Accused. Section 207 of the Code of Criminal Procedure, which reads as follows, is mandatory6. Therefore, the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the Accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the Accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the Accused to prepare for the trial before its commencement.

53. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an Accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in Central Bureau of Investigation v. R.S. Pai MANU/SC/0246/2002 : (2002) 5 SCC 82, the only exception to this general Rule is if the prosecution had 'mistakenly' not filed a document, the said document can be allowed to be placed on record. The Court held as follows:

7. From the aforesaid Sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court.

54. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an Accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the Accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution Under Sections 91 or 311 of the Code of Criminal Procedure or Section 165 of the Evidence Act. Depending on the facts of each case, and the Court exercising discretion after seeing that the Accused is not prejudiced by want of a fair trial, the Court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the Accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case-discretion to be exercised by the Court in accordance with law.

55. The High Court of Rajasthan in Paras Jain v. State of Rajasthan, decided a preliminary objection that was raised on the applicability of Section 65B to the facts of the case. The preliminary objection raised was framed as follows:

3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed alongwith the charge-sheet are not admissible in evidence even at this stage of the proceedings as certificate as required Under Section 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the concerned service provider and it was not produced alongwith charge-sheet in the prescribed form and such certificate cannot be filed subsequently.

After referring to Anvar P.V. (supra), the High Court held:

15. Although, it has been observed by Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced alongwith the charge-sheet and if it is not produced alongwith the charge-sheet, doors of the Court are completely shut and it cannot be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the Court. One of the principal issues arising for consideration in the above case before Hon'ble Court was the nature and manner of admission of electronic records.

16. From the facts of the above case it is revealed that the election of the Respondent to the legislative assembly of the State of Kerala was challenged by the Appellant-Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16.11.2011 by the High Court and that order was challenged by the Appellant before Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the Respondent and in support thereof some CDs were produced alongwith the election petition, but even during the course of trial certificate as required Under Section 65-B of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question of stage at which such electronic record is to be produced was not before the Hon'ble Court.

17. It is to be noted that it has been clarified by Hon'ble Court that observations made by it are in respect of secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act and if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence Act.

18. To consider the issue raised on behalf of the Petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced alongwith the charge-sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can be produced subsequently also as it is well settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

19. Relevant portion of Sub-section (1) of Section 91 Code of Criminal Procedure provides that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such Court, such Court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a wide discretion has been conferred on the Court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the Court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the Court at any stage of the proceedings before judgment is delivered and the Court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the complainant/informer/victim of

the case on whose instance the FIR was registered. In my considered view when under this provision Court has been empowered to issue summons for the producement of document, there can be no bar for the Court to permit a document to be taken on record if it is already before it and the Court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet. I am of the further view that it is the duty of the Court to take all steps necessary for the production of such a document before it.

20. As per Section 311 Code of Criminal Procedure, any Court may, at any stage of any trial under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the Court to exercise its power and paramount consideration is just decision of the case. In my opinion under this provision it is permissible for the Court even to order production of a document before it if it is essential for the just decision of the case.

21. As per Section 173(8) Code of Criminal Procedure carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected by the Police, the same can be produced before the Court in the form of supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected during further investigation cannot be rejected only because it has been filed at the stage of the trial.

22. As per Section 231 Code of Criminal Procedure, the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required Under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced alongwith the charge-sheet but it was not in a proper form but during the course of hearing of these Petitioners, it has been produced on the prescribed form.

56. In Kundan Singh (supra), a Division Bench of the Delhi High Court held:

50. Anwar P.V. (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu (supra), holding that Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate Under Section 65B(4) is mandatory. Anwar P.V. (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court Under Section 311 Code of Criminal Procedure or, at the appellate stage Under Section 391 Code of Criminal Procedure. Evidence Act is a procedural law and in view of the pronouncement in Anwar P.V. (supra) partly overruling Navjot Sandhu (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. of course, it is open to the

court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65B.

57. Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

58. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time).

59. We may reiterate, therefore, that the certificate required Under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D. 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that

secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.

60. In view of the above, the decision of the Madras High Court in K. Ramajyam (supra), which states that evidence aliunde can be given through a person who was in-charge of a computer device in the place of the requisite certificate Under Section 65B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled.

61. While on the subject, it is relevant to note that the Department of Telecommunication's license conditions [i.e. under the 'License for Provision of Unified Access Services' framed in 2007, as also the subsequent 'License Agreement for Unified License' and the 'License Agreement for provision of internet service'] generally oblige internet service providers and providers of mobile telephony to preserve and maintain electronic call records and records of logs of internet users for a limited duration of one year7. Therefore, if the police or other individuals (interested, or party to any form of litigation) fail to secure those records-or secure the records but fail to secure the certificate-within that period, the production of a post-dated certificate (i.e. one issued after commencement of the trial) would in all probability render the data unverifiable. This places the Accused in a perilous position, as, in the event the Accused wishes to challenge the genuineness of this certificate by seeking the opinion of the Examiner of Electronic Evidence Under Section 45A of the Evidence Act, the electronic record (i.e. the data as to call logs in the computer of the service provider) may be missing.

62. To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the concerned period (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a

particular CDR or other record is seized during investigation in the said period. Concerned parties can then summon such records at the stage of defence evidence, or in the event such data is required to cross-examine a particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licenses, or Under Section 67C of the Information Technology Act, which reads as follows:

67C. Preservation and retention of information by intermediaries.- (1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) any intermediary who intentionally or knowingly contravenes the provisions of Sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.

63. It is also useful, in this context, to recollect that on 23 April 2016, the conference of the Chief Justices of the High Courts, chaired by the Chief Justice of India, resolved to create a uniform platform and guidelines governing the reception of electronic evidence. The Chief Justices of Punjab and Haryana and Delhi were required to constitute a committee to "frame Draft Rules to serve as model for adoption by High Courts". A five-Judge Committee was accordingly constituted on 28 July, 20188. After extensive deliberations, and meetings with several police, investigative and other agencies, the Committee finalised its report in November 2018. The report suggested comprehensive guidelines, and recommended their adoption for use in courts, across several categories of proceedings. The report also contained Draft Rules for the Reception, Retrieval, Authentication and Preservation of Electronic Records. In the opinion of the Court, these

Draft Rules should be examined by the concerned authorities, with the object of giving them statutory force, to guide courts in regard to preservation and retrieval of electronic evidence.

64. We turn now to the facts of the case before us. In the present case, by the impugned judgment dated 24.11.2017, Election Petition 6/2014 and Election Petition 9/2014 have been allowed and partly allowed respectively, the election of the RC being declared to be void Under Section 100 of the Representation of the People Act, 1951, inter alia, on the ground that as nomination papers at serial numbers 43 and 44 were not presented by the RC before 3.00 p.m. on 27.09.2014, such nomination papers were improperly accepted.

65. However, by an order dated 08.12.2017, this Court admitted the Election Appeal of the Appellant, and stayed the impugned judgment and order.

66. We have heard this matter after the five year Legislative Assembly term is over in November 2019. This being the case, ordinarily, it would be unnecessary to decide on the merits of the case before us, as the term of the Legislative Assembly is over. However, having read the impugned judgment, it is clear that the learned Single Judge was anguished by the fact that the Election Commission authorities behaved in a partisan manner by openly favouring the Appellant. Despite the fact that the reason given of "substantial compliance" with Section 65B(4) in the absence of the requisite certificate being incorrect in law, yet, considering that the Respondent had done everything in his power to obtain the requisite certificate from the appropriate authorities, including directions from the Court to produce the requisite certificate, no such certificate was forthcoming. The horse was directed to be taken to the water to drink-but it refused to drink, leading to the consequence pointed out in paragraph 49 of this judgment (supra).

67. Even otherwise, apart from evidence contained in electronic form, the High court arrived at the following conclusion:

48. The evidence in cross examination of Smt. Mutha shows that when Labade was sent to the passage for collecting nomination forms, she continued to accept the nomination forms directly from intending candidates and their proposers in her office. Her evidence shows that on 27.9.2014 the last nomination form which was directly presented to her was form No. 38 of Anand Mhaske. The time of receipt of this form was mentioned in the register of nomination forms as 2.55 p.m. In respect of subsequent nomination forms from Sr. Nos. 39 to 64, the time of acceptance is mentioned as 3.00 p.m. Smt. Mutha admits that the candidates of nomination form Nos. 39 to 64 (form No. 64 was the last form filed) were not present before her physically at 3.00 p.m. At the cost of repetition, it needs to be mentioned here that form numbers of RC are 43 and 44. The oral evidence and the record like register of nomination forms does not show that form Nos. 43 and 44 were presented to RO at 2.20 p.m. of 27.9.2014. As per the evidence of Smt. Mutha and the record, one Arvind Chavan, a candidate having form Nos. 33, 34 and 35 was present before her between 2.15 p.m. and 2.30 p.m. In nomination form register, there is no entry showing that any nomination form was received at 2.20 p.m. Form Nos. 36 and 37 of Sunil Khare were entered in the register at 2.40 p.m. Thus, according to Smt. Mutha, form No. 38, which was accepted by her directly from the candidate was tendered to her at 2.55 p.m. of 27.9.2014 and after that she had done preliminary examination of form No. 38 and check list was given by her to that candidate. Thus, it is not possible that form Nos. 43 and 44 were directly handed over to Smt. Mutha by RC at 2.20 p.m. or even at 3.00 p.m. of 27.9.2014.

50. Smt. Mutha (PW 2) did not show the time as 2.20 p.m. of handing over the check list to RC and she showed the time as 3.00 p.m., but this time was shown in respect of all forms starting from Sr. Nos. 39 to 64. Thus, substantive evidence of Smt. Mutha and the aforesaid record falsifies the contention of the RC made in the pleading that he had handed over the nomination forms (form Nos. 43 and 44) directly to RO prior to 3.00 p.m., at 2.20 p.m.

68. Thus, it is clear that apart from the evidence in the form of electronic record, other evidence was also relied upon to arrive at the same conclusion. The High Court's judgment therefore cannot be faulted.

69. Shri Adsure, however, attacked the impugned judgment when it held that the improper acceptance of the nomination form of the RC himself being involved in the matter, no further pleadings and particulars on whether the election is "materially affected" were required, as it can be assumed that if such plea is accepted, the election would be materially affected, as the election would then be set aside. He cited a Division Bench judgment of this Court in Rajendra Kumar Meshram v. Vanshmani Prasad Verma MANU/SC/1163/2016 : (2016) 10 SCC 715, wherein an election petition was filed against the Appellant, inter alia, on the ground that as the Appellant-the returned candidate-was a Government servant, his nomination had been improperly accepted. The Court held that the requirement of Section 100(1)(d) of the Representation of People Act, 1951, being that the election can be set aside only if such improper acceptance of the nomination has "materially affected" the result of the election, and there being no pleading or evidence to this effect, the election petition must fail. This Court stated:

9. As Issues 1 and 2 extracted above, have been answered in favour of the returned candidate and there is no cross-appeal, it is only the remaining issues that survive for consideration. All the said issues centre round the question of improper acceptance of the nomination form of the returned candidate. In this regard, Issue 6 which raises the question of material effect of the improper acceptance of nomination of the returned candidate on the result of the election may be specifically noticed.

10. Under Section 100(1)(d), an election is liable to be declared void on the ground of improper acceptance of a nomination if such improper acceptance of the nomination has materially affected the result of the election. This is in distinction to what is contained in Section 100(1)(c) i.e. improper rejection of a nomination which itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such rejection on the result of the election. The above distinction must be kept in mind. Proceeding on the said basis, we find that the High Court did not endeavour to go into the further question that would be required to be determined even if it is assumed that the Appellant returned candidate had not filed the electoral roll or a certified copy thereof and, therefore, had not complied with the mandatory provisions of Section 33(5) of the 1951 Act.

11. In other words, before setting aside the election on the above ground, the High Court ought to have carried out a further exercise, namely, to find out whether the improper acceptance of the nomination had materially affected the result of the election. This has not been done notwithstanding Issue 6 framed which is specifically to the above effect. The High Court having failed to determine the said issue i.e. Issue 6, naturally, it was not empowered to declare the election of the Appellant returned candidate as void even if we are to assume that the acceptance of the nomination of the returned candidate was improper.

70. On the other hand, Ms. Meenakshi Arora cited a Division Bench judgment in Mairembam Prithviraj v. Pukhrem Sharatchandra Singh MANU/SC/1361/2016 : (2017) 2 SCC 487. In this judgment, several earlier judgments of this Court were cited on the legal effect of not pleading or proving that the election had been "materially affected" by the improper acceptance of a nomination Under Section 100(1)(d)(i) of the Representation of People Act, 1951. After referring to Durai Muthuswami v. N. Nachiappan and Ors. MANU/SC/0246/1973 : 1973(2) SCC 45 and Jagjit Singh v. Dharam Pal Singh MANU/SC/0929/1995 : 1995 Supp (1) SCC 422, this Court then referred to a three-Judge Bench judgment in Vashist Narain Sharma v. Dev Chandra MANU/SC/0101/1954 : 1955 (1) SCR 509 as under:

25. It was held by this Court in Vashist Narain Sharma v. Dev Chandra [MANU/SC/0101/1954 : (1955) 1 SCR 509] as under:

9. The learned Counsel for the Respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the Petitioner but he argues that the question can arise in one of three ways:

(1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,

(2) where the person referred to above secured more votes, and

(3) where the person whose nomination has been improperly accepted is the returned candidate himself.

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. So far as the third case is concerned it may be readily conceded that such would be the conclusion...

This Court then concluded:

26. Mere finding that there has been an improper acceptance of the nomination is not sufficient for a declaration that the election is void Under Section 100(1) (d). There has to be further pleading and proof that the result of the election of the returned candidate was materially affected. But, there would be no necessity of any proof in the event of the nomination of a returned candidate being declared as having been improperly accepted, especially in a case where there are only two candidates in the fray. If the returned candidate's nomination is declared to have been improperly accepted it would mean that he could not have contested the election and that the result of the election of the returned candidate was materially affected need not be proved further...

71. None of the earlier judgments of this Court referred to in Mairembam Prithviraj (supra) have been adverted to in Rajendra Kumar Meshram (supra) cited by Shri Adsure. In particular, the judgment of three learned Judges of this Court in Vashist Narain

Sharma (supra) has specifically held that where the person whose nomination has been improperly accepted is the returned candidate himself, it may be readily conceded that the conclusion has to be that the result of the election would be "materially affected", without there being any necessity to plead and prove the same. The judgment in Rajendra Kumar Meshram (supra), not having referred to these earlier judgments of a larger strength binding upon it, cannot be said to have declared the law correctly. As a result thereof, the impugned judgment of the High Court is right in its conclusion on this point also.

72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as MANU/SC/0331/2018 : (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

(b) The clarification referred to above is that the required certificate Under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1),

together with the requisite certificate Under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act..." is thus clarified; it is to be read without the words "Under Section 62 of the Evidence Act,..." With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

(c) The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till Rules and directions Under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

(d) Appropriate Rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable Rules for the retention of data involved in trial of offences, their segregation, Rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate Rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.

73. These appeals are dismissed with costs of INR One Lakh each to be paid by Shri Arjun Panditrao Khotkar (i.e. the Appellant in C.A. Nos. 20825-20826 of 2017) to both Shri Kailash Kushanrao Gorantyal and Shri Vijay Chaudhary.

V. Ramasubramanian, J.

74. While I am entirely in agreement with the opinion penned by R.F. Nariman, J. I also wish to add a few lines about (i) the reasons for the acrimony behind Section 65B of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") (ii) how even with the existing Rules of procedure, the courts fared well, without any legislative interference, while dealing with evidence in analogue form, and (iii) how after machines in analogue form gave way to machines in electronic form, certain jurisdictions of the world changed their legal landscape, over a period of time, by suitably amending the law, to avoid confusions and conflicts.

I. Reasons for the acrimony behind Section 65B

75. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as (i) admissibility (ii) relevancy and (iii) proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally and theoretically, admissibility depends on relevancy. Under Section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with. Therefore if we go by Section 136, a party should first show relevancy, making it the first check post and admissibility the second one. But some documents, such as those indicated in Section 68 of the Evidence Act, which pass the first check post of relevancy and the second check post of admissibility may be of no value unless the attesting witness is examined. Proof of execution of such documents, in a

manner established by law, thus constitutes the third check post. Here again, proof of execution stands on a different footing than proof of contents.

76. It must also be noted that whatever is relevant may not always be admissible, if the law imposes certain conditions. For instance, a document, whose contents are relevant, may not be admissible, if it is a document requiring stamping and registration, but had not been duly stamped and registered. In other words, if admissibility is the cart, relevancy is the horse, under Section 136. But certain provisions of law place the cart before the horse and Section 65B appears to be one of them.

77. Section 136 which confers a discretion upon the Judge to decide as to the admissibility of evidence reads as follows:

136. Judge to decide as to admissibility of evidence. --

When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

78. There are three parts to Section 136. The first part deals with the discretion of the Judge to admit the evidence, if he thinks that the fact sought to be proved is relevant. The second part of Section 136 states that if the fact proposed to be proved is one, of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned. But this Rule is subject to a small concession, namely, that if the party undertakes to produce proof of the last mentioned fact later and the Court is satisfied about such undertaking, the Court may proceed to admit evidence of the first mentioned fact. The third part of Section 136 deals with the relevancy of one alleged fact, which depends upon another alleged fact being first proved. The third part of Section 136 has no relevance for our present purpose.

79. Illustration (b) Under Section 136 provides an easy example of the second part of Section 136. Illustration (b) reads as follows:

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

80. What is laid down in Section 65B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136. For example, if a fact is sought to be proved through the contents of an electronic record (or information contained in an electronic record), the Judge is first required to see if it is relevant, if the first part of Section 136 is taken to be applicable.

81. But Section 65B makes the admissibility of the information contained in the electronic record subject to certain conditions, including certification. The certification is for the purpose of proving that the information which constitutes the computer output was produced by a computer which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities.

82. In other words, if we go by the requirements of Section 136, the computer output becomes admissible if the fact sought to be proved is relevant. But such a fact is admissible only upon proof of some other fact namely, that it was extracted from a computer used regularly etc. In simple terms, what is contained in the computer output can be equated to the first mentioned fact and the requirement of a certification can be equated to the last mentioned fact, referred to in the second part of Section 136 read with Illustration (b) thereunder.

83. But Section 65B(1) starts with a non-obstante Clause excluding the application of the other provisions and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65A and 65B, if read together, mix-up both proof and admissibility, but not talk about relevancy. Section 65A refers to

the procedure prescribed in Section 65B, for the purpose of proving the contents of electronic records, but Section 65B speaks entirely about the preconditions for admissibility. As a result, Section 65B places admissibility as the first or the outermost check post, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stipulated therein are not fulfilled.

84. The placement by Section 65B, of admissibility as the first or the border check post, coupled with the fact that a number of 'computer systems' (as defined in Section 2(l) of the Information Technology Act, 2000) owned by different individuals, may get involved in the production of an electronic record, with the 'originator' (as defined in Section 2(za) of the Information Technology Act, 2000) being different from the recipients or the sharers, has created lot of acrimony behind Section 65B, which is evident from the judicial opinion swinging like a pendulum.

II. How the courts dealt with evidence in analogue form without legislative interference and the shift

85. It is a matter of fact and record that courts all over the world were quick to adapt themselves to evidence in analogue form, within the framework of archaic, centuries old Rules of evidence. It was not as if evidence in analogue form was incapable of being manipulated. But the courts managed the show well by applying time tested Rules for sifting the actual from the manipulated.

86. It is no doubt true that the felicity with which courts adapted themselves to appreciating evidence in analogue form was primarily due to the fact that in analogue

technology, one is able to see and/or perceive something that is happening. In analogue technology, a wave is recorded or used in its original form. When someone speaks or sings, a signal is taken directly by the microphone and laid onto a tape, if we take the example of an analogue tape recorder. Both, the wave from the microphone and the wave on the tape, are analogue and the wave on the tape can be read, amplified and sent to a speaker to produce the sound. In digital technology, the analogue wave is sampled at some interval and then turned into numbers that are stored in a digital device. Therefore, what are stored, are in terms of numbers and they are, in turn, converted into voltage waves to produce what was stored.

87. The difference between something in analogue form and the same thing in digital form and the reason why digital format throws more challenges, was presented pithily in an Article titled 'Electronic evidence and the meaning of "original"',9 by Stephen Mason (Barrister and recognised authority on electronic signatures and electronic evidence). Taking the example of a photograph in both types of form, the learned author says the following:

For instance, a photograph taken with an analogue camera (that is, a camera with a film) can only remain a single object. It cannot be merged into other photographs, and split off again. It remains a physical object. A photograph taken with a digital camera differs markedly. The digital object, made up of a series of zeros and the number one, can be, and frequently is, manipulated and altered (especially in fashion magazines and for advertisements). Things can be taken out and put in to the image, in the same way the water droplets can merge and form a single, larger droplet. The new, manipulated digital image can also be divided back into its constituent parts.

Herein lies the interesting point: when three droplets of water fuse and then separate into three droplets, it is to be questioned whether the three droplets that merge from the bigger droplet were the identical droplets that existed before they merged. In the same way, consider a digital object that has been manipulated and added to, and the process is then reversed. The original object that was used remains (unless it was never saved independently, and the changes made to the image were saved in the original file), but another object, with the identical image (or near identical, depending on the system software and application software) now exists. Conceptually, it is possible to argue that the two digital images are different: one is the original, the other a copy of the original that was manipulated and returned to its original state (whatever "original" means). But both images are identical, apart from some additional meta data that might, or might not be conclusive. However, it is apparent that the images, if viewed together, are identical - will be identical, and the viewer will not be able to determine which is the original, and which image was manipulated. In this respect, the digital images are no different from the droplets of rain that fall, merge, then divide: there is no telling whether the droplets that split are identical to the droplets that came together to form the larger droplet.

88. That courts did not have a problem with the evidence in analogue form is established by several judicial precedents, in U.K., which were also followed by our courts. A device used to clandestinely record a conversation between two individuals was allowed in Harry Parker v. Mason [1940] 2 KB 590 in proving fraud on the part of the Plaintiff. While Harry Parker was a civil proceeding, the principle laid down therein found acceptance in a criminal trial in R. v. Burr and Sullivan [1956] Crim LR 442. The High Court of Judiciary in Scotland admitted in evidence, the tape record of a conversation between the complainant and a black mailer, in Hopes and Lavery v. H.M. Advocate [1960] Crim LR 566. A conversation recorded in police cell overheard without any deception, beyond setting up a tape recorder without warning, was admitted in evidence in R. v. Mills [1962] 3 All ER 298.

89. Then came R. v. Maqsud Ali MANU/UKCR/0026/1965 : [1965] 2 All ER 464 where Marshall J. drew an analogy between tape-recordings and photographs and held that just as evidence of things seen through telescopes or binoculars have been admitted, despite the fact that those things could not be picked up by the naked eye, the devices used for recording conversations could also be admitted, provided the accuracy of the recording be proved and the voices recorded properly identified.

90. Following the above precedents, this Court also held in S. Pratap Singh v. State of Punjab MANU/SC/0272/1963 : (1964) 4 SCR 753, Yusaffalli Esmail Nagree v. State of Maharashtra MANU/SC/0092/1967 : (1967) 3 SCR 720, N. Sri Rama Reddy v. V.V. Giri MANU/SC/0333/1970 : AIR 1972 SC 1162, R.M. Malkani v. State of Maharashtra MANU/SC/0204/1972 : AIR 1973 SC 157, Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra MANU/SC/0277/1975 : (1976) 2 SCC 17, Ram Singh v. Col. Ram Singh MANU/SC/0176/1985 : AIR 1986 SC 3, Tukaram S. Dighole v. Manikrao Shivaji Kokate MANU/SC/0086/2010 : (2010) 4 SCC 329, that tape records of conversations and speeches are admissible in evidence under the Indian Evidence Act, subject to certain conditions. In Ziyauddin Burhanuddin Bukhari and Tukaram S. Dighole, this Court further held that tape records constitute "document" within the meaning of the expression Under Section 3 of the Evidence Act. Thus, without looking up to the law makers to come up with necessary amendments from time to time, the courts themselves developed certain rules, over a period of time, to test the authenticity of these documents in analogue form and these Rules have in fact, worked well.

91. There was also an important question that bothered the courts while dealing with evidence in analogue form. It was as to whether such evidence was direct or hearsay. In The Statute of Liberty, Sapporo Maru M/S. (Owners) v. Steam Tanker Statute of Liberty

(Owners) [1968] 2 All ER 195, the film recording of a radar set of echoes of ships within its range was held to be real evidence. The court opined that there was no distinction between a photographer operating a camera manually and the observations of a barometer operator or its equivalent operation by a recording mechanism. The Judge rejected the contention that the evidence was hearsay.

92. But when it comes to a computer output, one of the earliest of cases where the Court of Appeal had to deal with evidence in the form of a printout from a computer was in R. v. Pettigrew [1980] 71 Cr. App. R. 39. In that case, the printout from a computer operated by an employee of the Bank of England was held to be hearsay. But the academic opinion about the correctness of the decision was sharply divided. While Professor Smith10 considered the evidence in this case as direct and not hearsay, Professor Tapper11 took the view that the printout was partly hearsay and partly not. Professor Seng12 thought that both views were plausible.

93. But the underlying theory on the basis of which academicians critiqued the above judgment is that wherever the production of the output was made possible without human intervention, the evidence should be taken as direct. This is how the position was explained in Castle v. Cross [1984] 1 WLR 1372, in which the printout from the Intoximeter was held to be direct and not hearsay, on the ground that the breath alcohol value in the printout comprised information produced by the Intoximeter without the data being processed through a human brain.

94. In R v. Robson Mitchell and Richards [1991] Crim LR 360, a printout of telephone calls made on a mobile telephone was taken as evidence of the calls made and received in association with the number. The Court held "where a machine observes a fact and

records it, that record states a fact. It is evidence of what the machine recorded and this was printed out. The record was not the fact but the evidence of the fact".

95. But the facility of operating in anonymity in the cyber space, has made electronic records more prone to manipulation and consequently to a greater degree of suspicion. Therefore, law makers interfered, sometimes making things easy for courts and sometimes creating a lot of confusion. But over a period of time, certain jurisdictions have come up with reasonably good solutions. Let us now take a look at them.

III. Legislative developments in U.S.A., U.K. and Canada on the admissibility of electronic records

POSITION IN USA

96. The Federal Rules of Evidence (FRE) of the United States of America as amended with effect from 01.12.2017 recognise the availability of more than one option to a person seeking to produce an electronic record. Under the amended rules, a person can follow either the traditional route Under Rule 901 or the route of self-authentication Under Rule 902 whereunder a certificate of authenticity will elevate its status. Rules 901 and 902 of FRE read as follows:

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Non expert Opinion About Handwriting. A non expert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on

hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a Rule prescribed by the Supreme Court.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the

Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a

reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a Rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a Rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection --so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or

Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

97. An important decision in the American jurisprudence on this issue was delivered by Chief Magistrate Judge of District of Maryland in Lorraine v. Markel American Insurance Co. 241 FRD 534 (2007). In this case, Paul Grimm, J. while dealing with a challenge to an arbitrator's decision in an insurance dispute, dealt with the issue whether emails discussing the insurance policy in question, were admissible as evidence. The Court, while extending the applicability of Rules 901 and 902 of FRE to electronic evidence, laid down a broad test for admissibility of electronically stored information.13 This decision was rendered in 2007 and the FRE were amended in 2017.

98. Sub-rules (13) and (14) were incorporated in Rule 902 under the amendment of the year 2017. Until then, a person seeking to produce electronic records had to fall back mostly upon Rule 901 (except in few cases covered by sub-rules (11) and (12) of Rule 902). It means that the benefit of self-authentication was not available until then [until the advent of sub-rules (13) and (14), except in cases covered by sub-rules (11) and (12)]. Nevertheless, the introduction of sub-rules (13) and (14) in Rule 902 did not completely exclude the application of the general provisions of Rule 901.

99. Rule 901 applies to all evidence across the board. It is a general provision. But Rule 902 is a special provision dealing with evidence that is self-authenticating. Records generated by an electronic process or system and data copied from an electronic device, storage medium or file, are included in sub-rules (13) and (14) of Rule 902 of the Federal Rules of Evidence.

100. But FRE 902 does not exclude the application of FRE 901. It is only when a party seeks to invoke the benefit of self-authentication that Rule 902 applies. If a party chooses not to claim the benefit of self-authentication, he is free to come Under Rule 901, even if the evidence sought to be adduced is of an electronically stored information (ESI).

101. In an Article titled 'E-Discovery: Authenticating Common Types of ESI Chart', authored by Paul W. Grimm (the Judge who delivered the verdict in Lorraine) and co-authored by Gregory P. Joseph and published by Thomson Reuters (2017), the learned authors have given a snapshot of the different methods of authentication of various types of ESI (electronically stored information). In a subsequent Article (2018) titled 'Admissibility of Electronic Evidence' published under the caption 'Grimm-Brady Chart' (referring to Paul W. Grimm and Kevin F. Brady) on the website

"complexdiscovery.com", a condensed chart is provided which throws light on the different methods of authentication of ESI. The chart is reproduced in the form of a table, with particular reference to the relevant sub-rules of Rules 901 and 902 of the Federal Rules of Evidence as follows:

S. No.

Type of ESI

Potential Authentication Methods

Email, Text Messages, and Instant Messages

- Witness with personal knowledge (901(b)(1))

- Expert testimony or comparison with authenticated examples (901(b)(3))

- Distinctive characteristics including circumstantial evidence (901(b)(4))

- System or process capable of proving reliable and dependable result (901(b)(9))

- Trade inscriptions (902(7))

- Certified copies of business record (902(11))

- Certified records generated by an electronic process or system (902(13))

- Certified data copied from an electronic device, storage medium, or file (902(14))

2.

Chat Room Postings, Blogs, Wikis, and Other Social Media Conversations

- Witness with personal knowledge (901(b)(1))

- Expert testimony or comparison with authenticated examples (901(b)(3))

- Distinctive characteristics including circumstantial evidence (901(b)(4))

- System or process capable of proving reliable and dependable result (901(b)(9))

- Official publications (902(5))

- Newspapers and periodicals (902(6))

- Certified records generated by an electronic process or system (902(13))

- Certified data copied from an electronic device, storage medium, or file (902(14))

3.

Social Media Sites (Facebook, LinkedIn, Twitter, Instagram, and Snapchat)

- Witness with personal knowledge (901(b)(1))

- Expert testimony or comparison with authenticated examples (901(b)(3))

- Distinctive characteristics including circumstantial evidence (901(b)(4))

- Public records (901(b)(7))

- System or process capable of proving reliable and dependable result (901(b)(9))

- Official publications (902(5))

- Certified records generated by an electronic process or system (902(13))

- Certified data copied from an electronic device, storage medium, or file (902(14))

4.

Digitally Stored Data and Internet of Things

- Witness with personal knowledge (901(b)(1))

- Expert testimony or comparison with authenticated examples (901(b)(3))

- Distinctive characteristics including circumstantial evidence (901(b)(4))

- System or process capable of proving reliable and dependable result (901(b)(9))

- Certified records generated by an electronic process or system (902(13))

- Certified data copied from an electronic device, storage medium, or file (902(14))

5.

Computer Processes, Animations, Virtual Reality, and Simulations

- Witness with personal knowledge (901(b)(1))

- Expert testimony or comparison with authenticated examples (901(b)(3))

- System or process capable of proving reliable and dependable result (901(b)(9))

- Certified records generated by an electronic process or system (902(13))

6.

Digital Photographs

- Witness with personal knowledge (901(b)(1))

- System or process capable of providing reliable and dependable result (901(b)(9))

- Official publications (902(5))

- Certified records generated by an electronic process or system (902(13))

- Certified data copied from an electronic device, storage medium, or file (902(14))

102. It is interesting to note that while the Indian Evidence Act is of the year 1872, the Federal Rules of Evidence were adopted by the order of the Supreme Court of the United States exactly 100 years later, in 1972 and they were enacted with amendments made by the Congress to take effect on 01.07.1975. Yet, the Rules were found inadequate to deal with emerging situations and hence, several amendments were made, including the one made in 2017 that incorporated specific provisions relating to electronic records Under Sub-rules (13) and (14) of FRE 902. After this amendment, a lot of options have been made available to litigants seeking to rely upon electronically stored information, one among them being the route provided by sub-rules (13) and (14) of FRE 902. This development

of law in the US demonstrates that, unlike in India, law has kept pace with technology to a great extent.

POSITION IN UK

103. As pointed out in the main opinion, Section 65B, in its present form, is a poor reproduction of Section 5 of the UK Civil Evidence Act, 1968. The language employed in Sub-sections (2), (3), (4) and (5) of Section 65B is almost in pari materia (with minor differences) with Sub-sections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968. However, Sub-section (1) of Section 65B is substantially different from Sub-section (1) of Section 5 of the UK Civil Evidence Act, 1968. But it also contains certain additional words in Sub-section (1) namely "without further proof or production of the original". For easy comparison and appreciation, Sub-section (1) of Section 65B of the Indian Evidence Act and Sub-section (1) of Section 5 of UK Civil Evidence Act, 1968 are presented in a tabular form as follows:

Section 65B(1), Indian Evidence Act, 1872

Section 5(1), Civil Evidence Act, 1968 [UK]

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are

satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in Sub-section (2) below are satisfied in relation to the statement and computer in question.

104. But the abovementioned Section 5 of the U.K. Act of 1968 was repealed by the Civil Evidence Act, 1995. Section 15(2) of the Civil Evidence Act, 1995 repealed the enactments specified in Schedule II therein. Under Schedule II of the 1995 Act, Part I of the 1968 Act containing Sections 1-10 were repealed. The effect is that when Section 65B was incorporated in the Indian Evidence Act, by Act 21 of 2000, by copying Sub-sections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968, Section 5 itself was not there in the U.K. statute book, as a result of its repeal under the 1995 Act.

105. The repeal of Section 5 under the 1995 Act was a sequel to the recommendations made by the Law Commission in September 1993. Part III of the Law Commission's report titled 'The Hearsay Rule in Civil Proceedings' noted the problems with the 1968 Act, one of which concerned computer records. Paragraphs 3.14 to 3.21 in Part III of the Law Commission's report read as follows:

Computer records

3.14 A fundamental mistrust and fear of the potential for error or mechanical failure can be detected in the elaborate precautions governing computer records in Section 5 of the 1968 Act. The Law Reform Committee had not recommended special provisions for such records, and Section 5 would appear to have been something of an afterthought with its many safeguards inserted in order to gain acceptance of what was then a novel form of evidence. Twenty-five years later, technology has developed to an extent where computers and computer-generated documents are relied on in every area of business and have long been accepted in banking and other important record-keeping fields. The conditions have been widely criticised, and it has been said that they are aimed at operations based on the type of mainframe operations common in the mid 1960s, which were primarily intended to process in batches thousands of similar transactions on a daily basis.

3.15 So far as the statutory conditions are concerned, there is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. It is at least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned. In addition, they are capable of operating to exclude wide categories of documents, particularly those which are produced as the result of an original or a "one off" piece of work. Furthermore, they provide no protection against the inaccurate inputting of data.

3.16 We have already referred to the overlap between Sections 4 and 5. If compliance with Section 5 is a prerequisite, then computer-generated documents which pass the

conditions setout in Section 5(2) "shall" be admissible, notwithstanding the fact that they originated from a chain of human sources and that it has not been established that the persons in the chain acted under a duty. In other words, the record provisions of Section 4, which exist to ensure the reliability of the core information, are capable of being disapplied. In the context of our proposed reforms, we do not consider that this apparent discrepancy is of any significance, save that it illustrates the fact that Section 5 was something of an afterthought.

3.17 Computer-generated evidence falls into two categories. First, there is the situation envisaged by the 1968 Act, where the computer is used to file and store information provided to it by human beings. Second, there is the case where the record has itself been produced by the computer, sometimes entirely by itself but possibly with the involvement of some other machine. Examples of this situation are computers which are fed information by monitoring devices. A particular example is automatic stock control systems, which are now in common use and which allow for purchase orders to be automatically produced. Under such systems evidence of contract formation will lie solely in the electronic messages automatically generated by the seller's and buyer's computers. It is easy to see how uncertainty as to how the courts may deal with the proof and enforceability of such contracts is likely to stifle the full development and effective use of such technology. Furthermore, uncertainty may deter parties from agreeing that contracts made in this way are to be governed by English law and litigated in the English courts.

3.18 It is interesting to compare the technical manner in which the admissibility of computer-generated records has developed, compared with cases concerning other forms of sophisticated technologically produced evidence, for example radar records (See Sapporo Maru (Owners) v. Statue of Liberty (Owners) [1968] 1 W.L.R. 739). In the Statue

of Liberty case radar records, produced without human involvement and reproduced in photographic form, were held to be admissible to establish how a collision of two ships had occurred. It was held that this was "real" evidence, no different in kind from a monitored tape recording of a conversation. Furthermore, in these cases, no extra tests of reliability need be met and the common law rebuttable presumption is applied, that the machine was in order at the material time. The same presumption has been applied to intoximeter printouts (Castle v. Cross [1984] 1 W.L.R. 1372).

3.19 There are a number of cases which establish the way in which courts have sought to distinguish between types of computer-generated evidence, by finding in appropriate cases that the special procedures are inapplicable because the evidence is original or direct evidence. As might be expected, case law on computer-generated evidence is more likely to be generated by criminal cases of theft or fraud, where the incidence of such evidence is high and the issue of admissibility is more likely to be crucial to the outcome and hence less liable to be agreed. For example, even in the first category of cases, where human involvement exists, a computer-generated document may not be considered to be hearsay if the computer has been used as a mere tool, to produce calculations from data fed to it by humans, no matter how complex the calculations, or how difficult it may be for humans to reproduce its work, provided the computer was not "contributing its own knowledge" (R v. Wood (1983) 76 Cr. App. R 23).

3.20 There was no disagreement with the view that the provisions relating to computer records were outdated and that there was no good reason for distinguishing between different forms of record keeping or maintaining a different regime for the admission of computer-generated documents. This is the position in Scotland under the 1988 Act. Furthermore, we were informed of fears that uncertainty over the treatment of such

records in civil litigation in the United Kingdom was a significant hindrance to commerce and needed reform.

3.21 Consultees considered that the real issue for concern was authenticity that this was a matter which was best dealt with by a vigilant attitude that concentrated upon the weight to be attached to the evidence, in the circumstances of the individual case, rather than by reformulating complex and inflexible conditions as to admissibility.

106. In Part IV of the 1993 Report, titled 'Recommendations for Reform', Paragraph 4.43 dealt with the recommendations of the Law Commission in relation to computer records. Paragraph 4.43 of the Law Commission's report along with Recommendation Nos. 13, 14 and 15 are reproduced for easy reference:

(b) Computerised records

4.43 In the light of the criticisms of the present provisions and the response on consultation, we have decided to recommend that no special provisions be made in respect of computerised records. This is the position in Scotland under the 1988 Act and reflects the overwhelming view of commentators, practitioners and others. That is not to say that we do not recognise that, as familiarity with and confidence in the inherent reliability of computers has grown, so has concern over the potential for misuse, through the capacity to hack, corrupt, or alter information, in manner which is undetectable. We do not underestimate these dangers. However the current provisions of Section 5 do not afford any protection and it is not possible to legislate protectively. Nothing in our proposals will either encourage abuse, or prevent a proper challenge to the admissibility

of computerised records, where abuse is suspected. Security and authentication are problems that experts in the field are constantly addressing and it is a fast evolving area. The responses from experts in this field, such as the C.B.I., stressed that, whilst computer-generated information should be treated similarly to other records, such evidence should be weighed according to its reliability, with parties being encouraged to provide information as to the security of their systems. We have proposed a wide definition for the word "document". This will cover documents in any form and in particular will be wide enough to cover computer-generated information.

We therefore recommend that:

13. Documents, including those stored by computer, which form part of the records of a business or public authority should be admissible as hearsay evidence under Clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply.

14. The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerized records.

15. The absence of an entry should be capable of being formally proved by affidavit of an officer of the business or authority to which the records belong.

107. The above recommendations of the Law Commission (U.K.) made in 1993, led to the repeal of Section 5 of the 1968 Act, under the 1995 Act. The Rules of evidence in civil cases, in so far as electronic records are concerned, thus got liberated in U.K. in 1995 with the repeal of Section 5 of the U.K. Civil Evidence Act, 1968.

108. But there is a separate enactment in the U.K., containing the Rules of evidence in criminal proceedings and that is the Police and Criminal Evidence Act, 1984. Section 69 of the said Act laid down Rules for determining when a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein. Section 69 of the said Act laid down three conditions (there are too many negatives in the language employed in Section 69). In simple terms, they require that it must be shown (i) that there are no reasonable grounds for believing that the statement is not inaccurate because of improper use of the computer; (ii) that at all material times the computer was operating properly and (iii) that the additional conditions specified in the Rules made by the court are also satisfied.

109. The abovementioned Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. This repeal was also a sequel to the recommendations made by the Law Commission in June 1997 under its report titled "Evidence in Criminal Proceedings: Hearsay and Related Topics". Part 13 of the Law Commission's Report dealt with computer evidence in extenso. The problems with Section 69 of the 1984 Act, the response during the Consultative Process and the eventual recommendations of the U.K. Law Commission are contained in paragraphs 13.1 to 13.23. They are usefully extracted as follows:

13.1 In Minors (MANU/UKCR/0010/1988 : [1989] 1 WLR 441, 443D-E.) Steyn J summed up the major problem posed for the Rules of evidence by computer output:

Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer... If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have "bugs". ...Realistically, therefore, computers must be regarded as imperfect devices.

13.2 The legislature sought to deal with this dilemma by Section 69 of PACE, which imposes important additional requirements that must be satisfied before computer evidence is adduced - whether it is hearsay or not (Shephard [1993] AC 380).

13.3 In practice, a great deal of hearsay evidence is held on computer, and so Section 69 warrants careful attention. It must be examined against the requirement that the use of computer evidence should not be unnecessarily impeded, while giving due weight to the fallibility of computers.

PACE, SECTION 69

13.4 In the consultation paper we dealt in detail with the requirements of Section 69: in essence it provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was

properly operating and was not being improperly used. If there is any dispute as to whether the conditions in Section 69 have been satisfied, the court must hold a trial within the trial to decide whether the party seeking to rely on the document has established the foundation requirements of Section 69.

13.5 In essence, the party relying on computer evidence must first prove that the computer is reliable - or, if the evidence was generated by more than one computer, that each of them is reliable (Cochrane [1993] Crim LR 48). This can be proved by tendering a written certificate, or by calling oral evidence. It is not possible for the party adducing the computer evidence to rely on a presumption that the computer is working correctly (Shephard [1993] AC 380, 384E). It is also necessary for the computer records themselves to be produced to the court (Burr v. DPP [1996] Crim LR 324).

The problems with the present law

13.6 In the consultation paper we came to the conclusion that the present law was unsatisfactory, for five reasons.

13.7 First, Section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out, "most computer error is either immediately detectable or results from error in the data entered into the machine".

13.8 Secondly, advances in computer technology make it increasingly difficult to comply with Section 69: it is becoming "increasingly impractical to examine (and therefore certify)

all the intricacies of computer operation". These problems existed even before networking became common.

13.9 A third problem lies in the difficulties confronting the recipient of a computer-produced document who wishes to tender it in evidence: the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient's opponent is better placed to do this.

13.10 Fourthly, it is illogical that Section 69 applies where the document is tendered in evidence (Shephard [1993] AC 380), but not where it is used by an expert in arriving at his or her conclusions (Golizadeh [1995] Crim LR 232), nor where a witness uses it to refresh his or her memory (Sophocleous v. Ringer [1988] RTR 52). If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.

13.11 At the time of the publication of the consultation paper there was also a problem arising from the interpretation of Section 69. It was held by the Divisional Court in McKeown v. DPP ([1995] Crim LR 69) that computer evidence is inadmissible if it cannot be proved that the computer was functioning properly - even though the malfunctioning of the computer had no effect on the accuracy of the material produced. Thus, in that case, computer evidence could not be relied on because there was a malfunction in the clock part of an Intoximeter machine, although it had no effect on the accuracy of the material part of the printout (the alcohol reading). On appeal, this interpretation has now been rejected by the House of Lords: only malfunctions that affect the way in which a

computer processes, stores or retrieves the information used to generate the statement are relevant to Section 69 (DPP v. McKeown; DPP v. Jones [1997] 1 WLR 295).

13.12 In coming to our conclusion that the present law did not work satisfactorily, we noted that in Scotland, some Australian states, New Zealand, the United States and Canada, there is no separate scheme for computer evidence, and yet no problems appear to arise. Our provisional view was that Section 69 fails to serve any useful purpose, and that other systems operate effectively and efficiently without it.

13.13 We provisionally proposed that Section 69 of PACE be repealed without replacement. Without Section 69, a common law presumption comes into play (Phipson, para 23-14, approved by the Divisional Court in Castle v. Cross [1984] 1 WLR 1372, 1377B):

In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time.

13.14 Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been - in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defence). The principle has been applied to such devices as speedometers (Nicholas v. Penny [1950] 2 KB 466) and traffic lights (Tingle Jacobs & Co. v. Kennedy MANU/UKWA/0088/1964 : [1964] 1 WLR 638), and in the consultation paper we saw no reason why it should not apply to computers.

The response on consultation

13.15 On consultation, the vast majority of those who dealt with this point agreed with us.

A number of those in favour said that Section 69 had caused much trouble with little benefit.

13.16 The most cogent contrary argument against our proposal came from David Ormerod. In his helpful response, he contended that the common law presumption of regularity may not extend to cases in which computer evidence is central. He cites the assertion of the Privy Council in Dillon v. R ([1982] AC 484) that "it is well established that the courts will not presume the existence of facts which are central to an offence". If this were literally true it would be of great importance in cases where computer evidence is central, such as Intoximeter cases (R v. Medway Magistrates' Court, exp Goddard MANU/SCCN/0037/1995 : [1995] RTR 206). But such evidence has often been permitted to satisfy a central element of the prosecution case. Some of these cases were decided before Section 69 was introduced (Castle v. Cross [1984] 1 WLR 1372); others have been decided since its introduction, but on the assumption (now held to be mistaken) (Shephard [1993] AC 380) that it did not apply because the statement produced by the computer was not hearsay (Spiby (1990) 91 Cr App R. 186; Neville [1991] Crim LR 288). The presumption must have been applicable; yet the argument successfully relied upon in Dillon does not appear to have been raised.

13.17 It should also be noted that Dillon was concerned not with the presumption regarding machines but with the presumption of the regularity of official action. This latter presumption was the analogy on which the presumption for machines was originally based; but it is not a particularly close analogy, and the two presumptions are now clearly distinct.

13.18 Even where the presumption applies, it ceases to have any effect once evidence of malfunction has been adduced. The question is, what sort of evidence must the defence adduce, and how realistic is it to suppose that the defence will be able to adduce it without any knowledge of the working of the machine? On the one hand the concept of the evidential burden is a flexible one: a party cannot be required to produce more by way of evidence than one in his or her position could be expected to produce. It could therefore take very little for the presumption to be rebutted, if the party against whom the evidence was adduced could not be expected to produce more. For example, in Cracknell v. Willis ([1988] AC 450) the House of Lords held that a Defendant is entitled to challenge an Intoximeter reading, in the absence of any signs of malfunctioning in the machine itself, by testifying (or calling others to testify) about the amount of alcohol that he or she had drunk.

13.19 On the other hand it may be unrealistic to suppose that in such circumstances the presumption would not prevail. In Cracknell v. Willis Lord Griffiths ([1988] AC 450 at p. 468C-D) said:

If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding

and spell out its intention in clear language. Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible.

But his Lordship went on:

I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few Defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by Hughes v. McConnell (MANU/UKWQ/0038/1985 : [1985] RTR 244) before being persuaded that it is not safe to rely upon the reading that it produces ([1988] AC 450, 468D-E).

13.20 Lord Goff did not share Lord Griffiths' optimism that motorists would not seek to challenge the analysis by spurious evidence of their consumption of alcohol, but did share his confidence in

the good sense of magistrates who, with their attention drawn to the safeguards for Defendants built into the Act ..., will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure ([1988] AC 450 at p. 472B-C).

13.21 These dicta may perhaps be read as implying that evidence which merely contradicts the reading, without directly casting doubt on the reliability of the device, may be technically admissible but should rarely be permitted to succeed. However, it is significant that Lord Goff referred in the passage quoted to the safeguards for Defendants which are built into the legislation creating the drink-driving offences. In the case of other kinds of computer evidence, where (apart from Section 69) no such statutory safeguards exist, we think that the courts can be relied upon to apply the presumption in such a way as to recognise the difficulty faced by a Defendant who seeks to challenge the prosecution's evidence but is not in a position to do so directly. The presumption continues to apply to machines other than computers (and until recently was applied to non-hearsay statements by computers) without the safeguard of Section 69; and we are not aware of any cases where it has caused injustice because the evidential burden cast on the defence was unduly onerous. Bearing in mind that it is a creature of the common law, and a comparatively modern one, we think it is unlikely that it would be permitted to work injustice.

13.22 Finally it should not be forgotten that Section 69 applies equally to computer evidence adduced by the defence. A Rule that prevents a Defendant from adducing relevant and cogent evidence, merely because there is no positive evidence that it is reliable, is in our view unfair.

Our recommendation

13.23 We are satisfied that Section 69 serves no useful purpose. We are not aware of any difficulties encountered in those jurisdictions that have no equivalent. We are satisfied that the presumption of proper functioning would apply to computers, thus throwing an

evidential burden on to the opposing party, but that that burden would be interpreted in such a way as to ensure that the presumption did not result in a conviction merely because the defence had failed to adduce evidence of malfunction which it was in no position to adduce. We believe, as did the vast majority of our Respondents, that such a regime would work fairly. We recommend the repeal of Section 69 of PACE. (Recommendation 50)

110. Based on the above recommendations of the U.K. Law Commission, Section 69 of the PACE, 1984, was declared by Section 60 of the Youth Justice and Criminal Evidence Act, 1999, to have ceased to have effect. Section 60 of the 1999 Act reads as follows:

Section 69 of the Police and Criminal Evidence Act, 1984 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer shown to be satisfied) shall cease to have effect.

111. It will be clear from the above discussion that when our lawmakers passed the Information Technology Bill in the year 2000, adopting the language of Section 5 of the UK Civil Evidence Act, 1968 to a great extent, the said provision had already been repealed by the UK Civil Evidence Act, 1995 and even the Police and Criminal Evidence Act, 1984 was revamped by the 1999 Act to permit hearsay evidence, by repealing Section 69 of PACE, 1984.

POSITION IN CANADA

112. Pursuant to a proposal mooted by the Canadian Bar Association hundred years ago, requesting all Provincial Governments to provide for the appointment of Commissioners to attend conferences organised for the purpose of promoting uniformity of legislation among the provinces, a meeting of the Commissioners took place in Montreal in 1918. In the said meeting, a Conference of Commissioners on Uniformity of Laws throughout Canada was organised. In 1974, its name was changed to Uniform Law Conference of Canada. The objective of the Conference is primarily to achieve uniformity in subjects covered by existing legislations. The said Conference recommended a model law on Uniform Electronic Evidence in September 1998.

113. The above recommendations of the Uniform Law Conference later took shape in the form of amendments to the Canada Evidence Act, 1985. Section 31.1 of the said Act deals with authentication of electronic documents and it reads as follows:

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

114. Section 31.2 deals with the application of 'best evidence rule' in relation to electronic documents and it reads as follows:

Application of best evidence Rule -- electronic documents

31.2(1) The best evidence Rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established Under Section 31.4 applies.

Printouts

(2) Despite Sub-section (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence Rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

115. Section 31.3 indicates the method of proving the integrity of an electronic documents system, by or in which an electronic document is recorded or stored. Section 31.3 reads as follows:

Presumption of integrity

31.3 For the purposes of Sub-section 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

116. Section 31.5 is an interesting provision which permits evidence to be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored. This is for the purpose of determining under any Rule of law whether an electronic document is admissible. Section 31.5 reads as follows:

Standards may be considered

31.5 For the purpose of determining under any Rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

117. Under Section 31.6(1), matters covered by Section 31.2(2), namely the printout of an electronic document, the matters covered by Section 31.3, namely the integrity of an electronic documents system, and matters covered by Section 31.5, namely evidence in respect of any standard, procedure, usage or practice, may be established by affidavit. Section 31.6 reads as follows:

Proof by affidavit

31.6(1) The matters referred to in Sub-section 31.2(2) and Sections 31.3 and 31.5 and in Regulations made Under Section 31.4 may be established by affidavit.

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in Sub-section (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

118. Though a combined reading of Sections 31.3 and 31.6(1) of the Canada Evidence Act, 1985, gives an impression as though a requirement similar to the one Under Section 65B of Indian Evidence Act, 1872 also finds a place in the Canadian law, there is a very important distinction found in the Canadian law. Section 31.3(b) takes care of a contingency where the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to produce it. Similarly, Section 31.3(c) gives leverage for the party relying upon an electronic document to establish that the same was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

IV. Conclusion

119. It will be clear from the above discussion that the major jurisdictions of the world have come to terms with the change of times and the development of technology and fine-tuned their legislations. Therefore, it is the need of the hour that there is a relook at Section 65B of the Indian Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the

other in the past 15 years from Navjot Sandhu14 to Anvar P.V.15 to Tomaso Bruno16 to Sonu17 to Shafhi Mohammad.18

120. With the above note, I respectfully agree with conclusions reached by R.F. Nariman, J. that the appeals are to be dismissed with costs as proposed.

13. The first contention is based on an assumption that the word "any one" in Section 76 means only "one of the directors, and only one of the shareholders". This question as regards the interpretation of the word "any one" in Section 76 was raised in Criminal Appeals Nos. 98 to 106 of 1959 (Chief Inspector of Mines, etc.) and it has been decided there that the word "any one" should be interpreted there as "every one". Thus Under Section 76 everyone of the shareholders of a private company owning the mine, and every one of the directors of a public company owning the mine is liable to prosecution. No question of violation of Article 14 therefore arises.

270. Perusal of the opinion of the Full Bench in B.R. Gupta-I [Balak Ram Gupta v. Union of India MANU/DE/0593/1987 : AIR 1987 Del 239] would clearly indicate with regard to interpretation of the word "any" in Explanation 1 to the first proviso to Section 6 of the Act which expands the scope of stay order granted in one case of landowners to be automatically extended to all those landowners, whose lands are covered under the notifications issued Under Section 4 of the Act, irrespective of the fact whether there was any separate order of stay or not as regards their lands. The logic assigned by the Full Bench, the relevant portions whereof have been reproduced hereinabove, appear to be reasonable, apt, legal and proper.

(emphasis added)

3Section 69 of the UK Police and Criminal Evidence Act, 1984 dealt with evidence from computer records in criminal proceedings. Section 69 read thus:

69.-(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown-

(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of that computer;

(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

(c) that any relevant conditions specified in Rules of court Under Sub-section (2) below are satisfied.

(2) Provision may be made by Rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this Section such information concerning the statement as may be required by the Rules shall be provided in such form and at such time as may be so required.

By Section 70, Sections 68 and 69 of this Act had to be read with Schedule 3 thereof, the provisions of which had the same force in effect as Sections 68 and 69. Part I of Schedule 3 supplemented Section 68. Notwithstanding the importance of Part I of Schedule 3, we propose to refer to only two provisions of it, namely:

1. Section 68(1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.

"6. Any reference in Section 68 above or this Part of this Schedule to a person acting under a duty includes a reference to a person acting in the course of any trade, business,

profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

Part II supplemented Section 69 in important respects. Two provisions of it are relevant, namely-

8. In any proceedings where it is desired to give a statement in evidence in accordance with Section 69 above, a certificate -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters mentioned in Section 69(1) above; and

(d) purporting to be signed by a person occupying a reasonable position in relation to the operation of the computer, shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

9. Notwithstanding paragraph 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph.

4The definition of "data", "electronic form" and "electronic record" under the Information Technology Act, 2000 (as set out hereinabove) makes it clear that "data" and "electronic form" includes "magnetic or optical storage media", which would include the audio tape/cassette discussed in Vikram Singh (supra).

5MANU/SC/0220/1965 : (1965) 3 SCR 187, at 193.

6Section 207. Supply to the Accused of copy of police report and other documents.- In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the Accused, free of costs, a copy of each of the following:

(i) the police report;

(ii) the first information report recorded Under Section 154;

(iii) the statements recorded Under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer Under Sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded Under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report Under Sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the Accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the Accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

7See, Clause 41.17 of the 'License Agreement for Provision of Unified Access Services': "The LICENSEE shall maintain all commercial records with regard to the communications exchanged on the network. Such records shall be archived for at least one year for scrutiny by the Licensor for security reasons and may be destroyed thereafter unless directed otherwise by the licensor"; Clause 39.20 of the 'License Agreement for Unified License': "The Licensee shall maintain all commercial records/Call Detail Record

(CDR)/Exchange Detail Record (EDR)/IP Detail Record (IPDR) with regard to the 39 communications exchanged on the network. Such records shall be archived for at least one year for scrutiny by the Licensor for security reasons and may be destroyed thereafter unless directed otherwise by the Licensor. Licensor may issue directions/instructions from time to time with respect to CDR/IPDR/EDR.

8The Committee comprised of Rajesh Bindal, S. Muralidhar, Rajiv Sahai Endlaw, Rajiv Narain Raina and R.K. Gauba, JJ.

9Stephen Mason, Electronic evidence and the meaning of "original", 79 Amicus Curiae 26 (2009)

10Professor Smith was a well-known authority on criminal law and law of evidence; J.C. Smith, The admissibility of statements by computer, Crim LR 387, 388 (1981).

11Professor Tapper is a well-known authority on law of evidence; Colin Tapper, Reform of the law of evidence in relation to the output from computers, 3 Intl. J L & Info Tech 87 (1995).

12Professor Seng is an Associate Professor at the National University of Singapore; Daniel K B Seng, Computer output as evidence, Sing JLS 139 (1997).

13Paragraph 2: "Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence Rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI

substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.

14State (NCT of Delhi) v. Navjot Sandhu, MANU/SC/0465/2005 : (2005) 11 SCC 600

15Anvar P.V. v. P.K. Basheer, MANU/SC/0834/2014 : (2014) 10 SCC 473

16Tomaso Bruno v. State of UP, MANU/SC/0057/2015 : (2015) 7 SCC 178

17Sonu v. State of Haryana, MANU/SC/0835/2017 : (2017) 8 SCC 570

18Shafhi Mohammad v. The State of Himachal Pradesh, MANU/SC/0058/2018 : (2018) 2 SCC 801

MANU/SC/0834/2014

Neutral Citation: 2014/INSC/645

Back to Section 65B of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4226 of 2012

Decided On: 18.09.2014

Anvar P.V. Vs. P.K. Basheer, MANU/SC/0834/2014

Hon'ble Judges/Coram:

R.M. Lodha, C.J.I., Kurian Joseph and Rohinton Fali Nariman, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Vivek Chib, Asif Ahmed and Neeraj Shekhar, Advs.

For Respondents/Defendant: Kapil Sibal, Sr. Adv., Haris Beeran, Mushtaq Salim and Radha Shyam Jena, Advs.

JUDGMENT

Kurian Joseph, J.

1. Construction by Plaintiff, destruction by Defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or

reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal.

2. In the general election to the Kerala Legislative Assembly held on 13.04.2011, the first Respondent was declared elected to 034 Eranad Legislative Assembly Constituency. He was a candidate supported by United Democratic Front. The Appellant contested the election as an independent candidate, allegedly supported by the Left Democratic Front. Sixth Respondent was the chief election agent of the first Respondent. There were five candidates. Appellant was second in terms of votes; others secured only marginal votes. He sought to set aside the election Under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act') and also sought for a declaration in favour of the Appellant. By order dated 16.11.2011, the High Court held that the election petition to set aside the election on the ground Under Section 123(2)(a)(ii) is not maintainable and that is not pursued before us either. Issues (1) and (2) were on maintainability and those were answered as preliminary, in favour of the Appellant. The contested issues read as follows:

1) xxx

2) xxx

3) Whether Annexure A was published and distributed in the constituency on 12.4.2011 as alleged in paragraphs 4 and 5 of the election petition and if so whether Palliparamban Aboobacker was an agent of the first Respondent?

4) Whether any of the statements in Annexure A publication is in relation to the personal character and conduct of the Petitioner or in relation to the candidature and if so whether its alleged publication will amount to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

xxx

6) Whether the Flex Board and posters mentioned in Annexures D, E and E1 were exhibited on 13.4.2011 as part of the election campaign of the first Respondent as alleged in paragraphs 6 and 7 of the election petition and if so whether the alleged exhibition of Annexures D, E and E1 will amount to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

7) Whether announcements mentioned in paragraph 8 of the election petition were made between 6.4.2011 and 11.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first Respondent and if so whether the alleged announcements mentioned in paragraph 8 will amount to commission of corrupt practice as contemplated Under Section 123(4) of The Representation of the People Act?

8) Whether the songs and announcements alleged in paragraph 9 of the election petition were made on 8.4.2011 as alleged, in the above paragraph, as part of the election propaganda of the first Respondent and if so whether the publication of the alleged announcements and songs will amount to commission of corrupt practice Under Section 123(4) of The Representation of People Act?

9) Whether Mr. Mullan Sulaiman mentioned in paragraph 10 of the election petition did make a speech on 9.4.2011 as alleged in the above paragraph as part of the election propaganda of the first Respondent and if so whether the alleged speech of Mr. Mullan Sulaiman amounts to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

10) Whether the announcements mentioned in paragraph 11 were made on 9.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first Respondent and if so whether the alleged announcements mentioned in paragraph 11 of the election petition amount to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

11) Whether the announcements mentioned in paragraph 12 of the election petition were made, as alleged in the above paragraph, as part of the election propaganda of the first Respondent and if so whether the alleged announcements mentioned in paragraph 12 of the election petition amount to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

12) Whether the alleged announcements mentioned in paragraph 13 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice Under Section 123(4) of The Representation of the People Act?

13) Whether the alleged announcements mentioned in paragraph 14 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice Under Section 123(4) of The Representation of the People Act.

14) Whether the election of the first Respondent is liable to be set aside for any of the grounds mentioned in the election petition?

3. By the impugned judgment dated 13.04.2012, the High Court dismissed the election petition holding that corrupt practices pleaded in the petition are not proved and, hence, the election cannot be set aside Under Section 100(1)(b) of the RP Act; and thus the Appeal.

4. Heard Shri Vivek Chib, learned Counsel appearing for the Appellant and Shri Kapil Sibal, learned Senior Counsel appearing for the first Respondent.

5. The evidence consisted of three parts - (i) electronic records, (ii) documentary evidence other than electronic records, and (iii) oral evidence. As the major thrust in the arguments was on electronic records, we shall first deal with the same.

6. Electronic record produced for the inspection of the court is documentary evidence Under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'). The Evidence Act underwent a major amendment by Act 21 of 2000 [The Information Technology Act, 2000 (hereinafter referred to as 'IT Act')]. Corresponding amendments were also introduced in The Indian Penal Code (45 of 1860), The Bankers Books Evidence Act, 1891, etc.

7. Section 22A of the Evidence Act reads as follows:

22A. When oral admission as to contents of electronic records are relevant.- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

8. Section 45A of the Evidence Act reads as follows:

45A. Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79A of the Information Technology Act, 2000 (21 of 2000)., is a relevant fact.

Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

9. Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

59. Proof of facts by oral evidence.--All facts, except the contents of documents or electronic records, may be proved by oral evidence.

10. Section 65A reads as follows:

65A. Special provisions as to evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of Section 65B.

11. Section 65B reads as follows:

65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in Sub-section (1) in respect of a computer output shall be the following, namely:

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant

activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this Sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

These are the provisions under the Evidence Act relevant to the issue under discussion.

12. In the Statement of Objects and Reasons to the IT Act, it is stated thus:

New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business.

In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed Under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer.

It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned Under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions Under Section 65B(2). Following are the specified conditions Under Section 65B(2) of the Evidence Act:

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

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

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

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

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

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

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

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

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

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

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

18. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

19. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed Under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law Under Sections 63 and 65 has to yield.

20. In State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru MANU/SC/0465/2005 : (2005) 11 SCC 600, a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cell phones, it was held at Paragraph-150 as follows:

150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in Sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

21. It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed Under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, Under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia special bus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The Appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the Appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a

computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

25. Now, we shall deal with the ground on publication of Exhibit-P1-leaflet which is also referred to as Annexure-A. To quote relevant portion of Paragraph-4 of the election petition:

4. On the 12th of April, 2011, the day previous to the election, one Palliparamban Aboobacker, S/o Ahamedkutty, Palliparamban House, Kizhakkechathalloor, Post Chathalloor, who was a member of the Constituency Committee of the UDF and the Convenor of Kizhakkechathalloor Ward Committee of the United Democratic Front, the candidate of which was the first Respondent, falling within the Eranad Mandalam Election Committee and was thereby the agent of the first Respondent, actively involved in the election propaganda of the first Respondent with the consent and knowledge of the first Respondent, had got printed in the District Panchayat Press, Kondotty, at least twenty five thousand copies of a leaflet with the heading "PP Manafinte Rakthasakshidhinam - Nam Marakkathirikkuka April 13" (Martyr Day of P.P. Manaf- let us not forget April 13) and in the leaflet there is a specific reference to the Petitioner who is described as the son of the then President of the Edavanna Panchayat Shri P V. Shaukat Ali and the allegation is that he gave leadership to the murder of Manaf in Cinema style. The name of the Petitioner is specifically mentioned in one part of the leaflet which had

been highlighted with a black circle around it specifically making the allegation that it was the Petitioner under whose leadership the murder was committed. Similarly in another part of the leaflet the name of the Petitioner is specifically mentioned with a black border in square. The leaflet comprises various excerpts from newspaper reports of the year 1995 highlighting the comments in big letters, which are the deliberate contribution of the publishers. The excerpts of various newspaper reports was so printed in the leaflet to expose the Petitioner as a murderer, by intentionally concealing the fact that Petitioner was honourably acquitted by the Honourable Court....

26. The allegation is that at least 25,000 copies of Exhibit-P1-leaflet were printed and published with the consent of the first Respondent. Exhibit-P1, it is submitted, contains a false statement regarding involvement of the Appellant in the murder of one Manaf on 13.04.1995 and the same was made to prejudice the prospects of the Appellant's election. Evidently, Exhibit-P1 was got printed through Haseeb by PW-4-Palliparamban Aboobakar and published by Kudumba Souhrida Samithi (association of the friends of the families), though PW-4 denied the same. The same was printed at District Panchayat Press, Kondotty with the assistance of one V. Hamza.

27. At Paragraph-4 of the election petition, it is further averred as follows:

4...Since both the said Aboobakar and V. Hamza are agents of the first Respondent, who had actively participated in the election campaign, the printing, publication and distribution of annexure-A was made with the consent and knowledge of the first Respondent as it is gathered from Shri P V. Mustafa a worker of the Petitioner that the expenses for printing have been shown in the electoral return of the first Respondent....

At Paragraph-18 of the election petition, it is stated thus:

18...As far as the printing and publication of annexure-A leaflet is concerned, the same was not only done with the knowledge and connivance of the 1st Respondent, it was done with the assistance of the his official account agent Sri V. Hamza, who happened to be the General Manager of the Press in which the said leaflets were printed....

28. PW-4-Palliparamban Aboobakar has completely denied the allegations. Strangely, Shri Mustafa and Shri Hamza, referred to above, have not been examined. Therefore, evidence on printing of the leaflets is of PW-4-Aboobakar and PW-42. According to PW-4, he had not seen Exhibit-P1-leaflet before the date of his examination. He also denied that he was a member of the election committee. According to PW-42, who was examined to prove the printing of Exhibit-P1, the said Hamza was never the Manager of the Press. Exhibit-X4-copy of the order form, based on which the leaflet was printed, shows that the order was placed by one Haseeb only to print 1,000 copies of a supplement and the order was given in the name of PW-4 in whose name Exhibit-P1 was printed, Exhibit-X5-receipt for payment of printing charges shows that the same was made by Haseeb. The said Haseeb also was not examined. Still further, the allegation was that at least 25,000 copies were printed but it has come out in evidence that only 1,000 copies were printed.

29. It is further contended that Exhibit-P1 was printed and published with the knowledge and consent of the first Respondent. Mere knowledge by itself will not imply consent, though, the vice-versa may be true. The requirement Under Section 123(4) of the RP Act is not knowledge but consent. For the purpose of easy reference, we may quote the relevant provision:

123. Corrupt practices.--The following shall be deemed to be corrupt practices for the purposes of this Act:

(1) xxx

(2) xxx

(3) xxx

(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

30. In the grounds for declaring election to be void Under Section 100(1)(b), the court must form an opinion "that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent". In other words, the corrupt practice must be committed by (i) returned candidate, (ii) or his election agent (iii) or any other person acting with the consent of the returned candidate or his election agent. There are further requirements as well. But we do not think it necessary to deal with the same since there is no evidence to prove that the printing and publication of Exhibit-P1-leaflet was made with the consent of the first Respondent or his election agent, the sixth Respondent. Though it was vehemently contended by the Appellant that the printing and publication was made with the connivance of the first Respondent and hence consent should be inferred, we are afraid, the same cannot be appreciated. 'Connivance' is different from 'consent'.

According to the Concise Oxford English Dictionary, 'connive' means to secretly allow a wrong doing where as 'consent' is permission. The proof required is of consent for the publication and not connivance on publication. In Charan Lal Sahu v. Giani Zail Singh and Anr. MANU/SC/0204/1983 : (1984) 1 SCC 390, this Court held as under:

30...'Connivance' may in certain situations amount to consent, which explains why the dictionaries give 'consent' as one of the meanings of the word 'connivance'. But it is not true to say that 'connivance' invariably and necessarily means or amounts to consent, that is to say, irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are ad idem. Connivance does not necessarily imply that parties are of one mind. They may or may not be, depending upon the facts of the situation....

31. Learned Counsel for the Appellant vehemently contends that consent needs to be inferred from the circumstances. No doubt, on charges relating to commission of corrupt practices, direct proof on consent is very difficult. Consent is to be inferred from the circumstances as held by this Court in Sheopat Singh v. Harish Chandra and Anr. MANU/SC/0161/1958 : AIR 1960 SC 1217. The said view has been consistently followed thereafter. However, if an inference on consent from the circumstances is to be drawn, the circumstances put together should form a chain which should lead to a reasonable conclusion that the candidate or his agent has given the consent for publication of the objectionable material. Question is whether such clear, cogent and credible evidence is available so as to lead to a reasonable conclusion on the consent of the first Respondent on the alleged publication of Exhibit-P1-leaflet. As we have also discussed above, there is no evidence at all to prove that Exhibit-P1-leaflet was printed at the instance of the first Respondent. One Haseeb, who placed the order for printing of Exhibit-P1 is not examined. Shri Hamza, who is said to be the Manager of the Press at the relevant time, was not examined. Shri Mustafa, who is said to have told the Appellant that the expenses

for the printing of Exhibit-P1 were borne by the first Respondent and the same have been shown in the electoral return of the first Respondent is also not examined. No evidence of the electoral returns pertaining to the expenditure on printing of Exhibit-P1 by the first Respondent is available. The allegation in the election petition is on printing of 25,000 copies of Exhibit-P1. The evidence available on record is only with regard to printing of 1,000 copies. According to PW-24-Sajid, 21 bundles of Exhibit-P1 were kept in the house of first Respondent as directed by wife of the first Respondent. She is also not examined. It is significant to note that Sajid's version, as above, is not the case pleaded in the petition; it is an improvement in the examination. There is further allegation that PW-7-Arjun and PW-9-Faizal had seen bundles of Exhibit-P1 being taken in two jeeps bearing registration Nos. KL 13B 3159 and KL 10J 5992 from the residence of first Respondent. For one thing, it has to be seen that PW-7-Arjun was an election worker of the Appellant and Panchayat Secretary of DYFI, the youth wing of CPI(M) and the member of the local committee of the said party of Edavanna and Faizal is his friend. PW-29 is one Joy, driver of jeep bearing registration No. KL 10J 5992. He has completely denied of any such material like Exhibit-P1 being transported by him in the jeep. It is also significant to note that neither PW-7-Arjun nor PW-9-Faizal has a case that the copies of Exhibit-P1 were taken from the house of the first Respondent. Their only case is that the vehicles were coming from the house of the first Respondent and PW-4- Palliparamban Aboobakar gave them the copies. PW-4 has denied it. It is also interesting to note that PW-9-Faizal has stated in evidence that he was disclosing the same for the first time in court regarding the receipt of notice from PW-4. It is also relevant to note that in Annexure-P3-complaint filed by the chief electoral agent of the Appellant on 13.04.2011, there is no reference to the number of copies of Exhibit-P1-leaflet, days when the same were distributed and the people who distributed the same, etc., and most importantly, there is no allegation at all in Annexure-P3 that the said leaflet was printed by the first Respondent or with his consent. The only allegation is on knowledge and connivance on the part of the first Respondent. We have already held that knowledge and connivance is different from consent. Consent is the requirement for constituting corrupt practice Under Section 123(4) of the RP Act. In such

circumstances, it cannot be said that there is a complete chain of circumstances which would lead to a reasonable inference on consent by the first Respondent with regard to printing of Exhibit-P1-leaflet. Not only that there are missing links, the evidence available is also not cogent and credible on the consent aspect of first Respondent.

32. Now, we shall deal with distribution of Exhibit-P1-leaflet. Learned Counsel for the Appellant contends that consent has to be inferred from the circumstances pertaining to distribution of Exhibit-P1. Strong reliance is placed on the evidence of one Arjun and Faizal. According to them, bundles of Exhibit-P1-leaflet were taken in two jeeps and distributed throughout the constituency at around 08.00 p.m. on 12.04.2011. To quote the relevant portion from Paragraph-5 of the election petition:

5...Both the first Respondent and all his election agents and other persons who were working for him knew that the contents of Annexure A which was got printed in the manner stated above are false and false to their knowledge and though the Petitioner was falsely implicated in the Manaf murder case he has been honourably acquitted in the case and declared not guilty. True copy of the judgment in S.C. No. 453 of 2001 of the Additional Sessions Court (Ad hoc No. 2), Manjeri, dated 24.9.2009 is produced herewith and marked as Annexure B. Though this fact is within the knowledge of the first Respondent, his agents referred to above and other persons who were working for him in the election on the 12th of April, 2011 at about 8 AM bundles of Annexure A which were kept in the house of the first Respondent at Pathapiriyam, within the constituency were taken out from that house in two jeeps bearing Nos. KL13-B 3159 and KL10-J 5992 which were seen by two electors, Sri V. Arjun aged 31 years, Kottoor House, S/o Narayana Menon, Pathapiriyam Post, Edavanna and C.P. Faizal aged 34 years, S/o Muhammed Cheeniyampurathu Pathapiriyam P.O., who are residing in the very same locality of the first Respondent and the jeeps were taken around in various parts of the

Eranad Assembly Constituency and Annexure A distributed throughout the constituency from the aforesaid jeeps by the workers and agents of the first Respondent at about 8 PM that night. The aforesaid publication also amounted to undue influence as the said expression is understood in Section 123(2)(a)(ii) of The Representation of the People Act, in that it amounted to direct or indirect interference or attempt to interfere on the part of the first Respondent or his agent and other persons who were his agents referred to below with the consent of the first Respondent, the free exercise of the electoral right of the voters of the Eranad Constituency and is also a corrupt practice falling Under Section 123(4) of The Representation of the People Act, 1951....

33. The allegation is on distribution of Exhibit-P1 at about 08.00 p.m. on 12.04.2011. But the evidence is on distribution of Exhibit-P1 at various places at 08.00 a.m., 02.00 p.m., 05.00 p.m., 06.30 p.m., etc. by the UDF workers. No doubt, the details on distribution are given at Paragraph-5 (extracted above) of the election petition at different places, at various timings. The Appellant as PW-1 stated that copies of Exhibit-P1 were distributed until 08.00 p.m. Though the evidence is on printing of 1,000 copies of Exhibit-P1, the evidence on distribution is of many thousands. In one panchayat itself, according to PW-22-KV Muhammed around 5,000 copies were distributed near Areakode bus stand. Another allegation is that two bundles were entrusted with one Sarafulla at Areakode but he is not examined. All this would show that there is no consistent case with regard to the distribution of Exhibit-P1 making it difficult for the Court to hold that there is credible evidence in that regard.

34. All that apart, the definite case of the Appellant is that the election is to be declared void on the ground of Section 100(1)(b) of the RP Act and that too on corrupt practice committed by the returned candidate, viz., the first Respondent and with his consent. We have already found that on the evidence available on record, it is not possible to infer consent on the part of the first Respondent in the matter of printing and publication of

Exhibit-P1-leaflet. There is also no evidence that the distribution of Exhibit-P1 was with the consent of first Respondent. The allegation in the election petition that bundles of Exhibit-P1 were kept in the house of the first Respondent is not even attempted to be proved. The only connecting link is of the two jeeps which were used by the UDF workers and not exclusively by the first Respondent. It is significant to note that there is no case for the Appellant that any corrupt practice has been committed in the interest of the returned candidate by an agent other than his election agent, as per the ground Under Section 100(1)(d)(ii) of the RP Act. The definite case is only of Section 100(1)(b) of the RP Act.

35. In Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and Ors. MANU/SC/0164/1984 : (1984) 4 SCC 649, a two-Judge Bench of this Court while dealing with the issue on appreciation of evidence, held as under:

9. By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations:

(1) the nature, character, respectability and credibility of the evidence,

(2) the surrounding circumstances and the improbabilities appearing in the case,

(3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and

(4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged.

On the evidence available on record, it is unsafe if not difficult to connect the first Respondent with the distribution of Exhibit-P1, even assuming that the allegation on distribution of Exhibit-P1 at various places is true.

36. Now, we shall deal with the last ground on announcements. The attack on this ground is based on Exhibit-P10-CD. We have already held that the CD is inadmissible in evidence. Since the very foundation is shaken, there is no point in discussing the evidence of those who heard the announcements. Same is the fate of the speech of PW-4-Palliparamban Aboobakar and PW-30-Mullan Sulaiman.

37. We do not think it necessary to deal with the aspect of oral evidence since the main allegation of corrupt practice is of publication of Exhibit-P1-leaflet apart from other evidence based on CDs. Since there is no reliable evidence to reach the irresistible inference that Exhibit-P1-leaflet was published with the consent of the first Respondent or his election agent, the election cannot be set aside on the ground of corrupt practice Under Section 123(4) of the RP Act.

38. The ground of undue influence Under Section 123(2) of the RP Act has been given up, so also the ground on publication of flex boards.

39. It is now the settled law that a charge of corrupt practice is substantially akin to a criminal charge. A two-Judge Bench of this Court while dealing with the said issue in Razik Ram v. Jaswant Singh Chouhan and Ors. MANU/SC/0284/1975 : (1975) 4 SCC 769, held as follows:

15...The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt -- not being the doubt of a timid, fickle or vacillating mind -- as to the veracity of the charge, it must hold the same as not proved.

The same view was followed by this Court P.C. Thomas v. P.M. Ismail and Ors. MANU/SC/1606/2009 : (2009) 10 SCC 239, wherein it was held as follows:

42. As regards the decision of this Court in Razik Ram and other decisions on the issue, relied upon on behalf of the Appellant, there is no quarrel with the legal position that the charge of corrupt practice is to be equated with criminal charge and the proof required in support thereof would be as in a criminal charge and not preponderance of probabilities, as in a civil action but proof "beyond reasonable doubt". It is well settled that if after balancing the evidence adduced there still remains little doubt in proving the charge, its benefit must go to the returned candidate. However, it is equally well settled that while insisting upon the standard of proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such an approach would

defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process. (please see S. Harcharan Singh v. S. Sajjan Singh)

40. Having regard to the admissible evidence available on record, though for different reasons, we find it extremely difficult to hold that the Appellant has founded and proved corrupt practice Under Section 100(1)(b) read with Section 123(4) of the RP Act against the first Respondent. In the result, there is no merit in the appeal and the same is accordingly dismissed.

41. There is no order as to costs.

MANU/UP/0260/1980

Back to Section 90 of Indian Evidence Act, 1872

Back to Section 90A of Indian Evidence Act, 1872

IN THE HIGH COURT OF ALLAHABAD (LUCKNOW BENCH)

FULL BENCH

First Civil Appeal No. 30 of 1966

Decided On: 28.01.1980

Ram Jas and Ors. Vs. Surendra Nath and Ors., MANU/UP/0260/1980

Hon'ble Judges/Coram:

Hari Swarup, K.N. Goyal and S.C. Mathur, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: H.N. Tilbari, Adv.

For Respondents/Defendant: S.D. Misra and K.N. Misra, Advs.

JUDGMENT

Hari Swarup, J.

1. The following question of law has been referred to us for our opinion :--

"Whether Sub-section (2) of Section 90-A of the Evidence Act as amended by the U. P. Civil Laws (Reforms and Amendment) Act controls the operation of Section 90(1) and (2) of the Evidence Act as amended by the said U. P. Civil Laws (Reforms and Amendment) Act, 1954."

The question arose in the following circumstances :--

A certified copy of a registered will was pressed in evidence in the case and a presumption about its execution, attestation and writing was sought to be raised by reason of Section 90(2) of the Evidence Act. The Civil Judge did not accept the plea on the ground that the provisions of Section 90 were not attracted. The learned single Judge before whom the appeal came up for hearing was of the opinion that in the circumstances of the case the presumption could be raised, meaning thereby that the conditions contemplated by Section 90 of the Act were present. The other objection which was taken before learned single Judge was that because the document was the basis of the suit no presumption about its due execution could be raised by reason of Sub-section (2) of Section 90-A of the Evidence Act. As a Division Bench in Om Prakash v. Bhagwan, MANU/UP/0093/1974 : AIR1974All389 had taken a different view the learned single Judge referred the question to a Division Bench. The Division Bench, finding that the decision in Om Prakash's case (supra) needed reconsideration and the question was of general importance, referred the question for the opinion of a larger Bench. It is how the question has come before us.

2. Section 90 of the Evidence Act was amended by the U. P. Civil Laws (Reforms and Amendment) Act 34 of 1954, in two ways. The existing section was renumbered as Section 90(1) and for the words "thirty years" the words "twenty years" were substituted and Sub-section (2) was added which was in the following terms:--

"(2) Where any such document as is referred to in Sub-section (.1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested."

3. After Section 90 Section 90-A was added which runs as under:--

"90-A (1) Where any registered document or a duly certified copy thereof or any certified copy of any document which is part of the record of a court of justice, is produced from any custody which the court in the particular case considers proper, the court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to Sub-section (1) of Section 90 will also apply to this section."

4. The controversy has arisen because this particular document can fall both under Sub-section (2) of Section 90 and Sub-section (1) of Section 90-A, it being a duly certified copy of a registered document. Section 90(2) deals with documents more than 20 years old.

Section 90-A. makes no such distinction between the documents. It is urged that because Section 90-A makes no distinction between an old and new document it will cover even the documents more than 20 years old and if such a document falls in the exception contained in Sub-section (2) of Section 90-A the presumption either under Section 90(2) or 90-A(1) will not be available. The contention of the other side is that Sub-section (2) does not apply to documents falling under Section 90 and that the presumption available in Section 90 being independent of the presumption under Section 90-A would not be nullified by Sub-section (2) of Section 90-A.

5. Sub-section (2) opens with the words "this presumption" which normally would mean the presumption permitted by Section 90-A and not the presumption available in any other section including Section 90. The further provision in Section 90-A to the effect that the explanation to Sub-section (1) of Section 90 will also apply to this section, makes it further clear that Section 90-A is a section independent of Section 90 of the Act.

6. In Om Prakash v. Bhagwan MANU/UP/0093/1974 : AIR1974All389 the document produced was more than 20 years old but it formed the basis of the defence. Considering Ss. 90 and 90-A of the Evidence Act the Court observed:--

"It is not disputed by the learned counsel for the defendants-appellants that the sale deed in question was the basis of the defence and was relied upon by the defendants in their written statement. Nothing therefore in Section 90 or Section 90-A of the Evidence Act as amended by the U. P. Civil Laws (Amendment) Act 1954 will come to the assistance of the defendants-appellants and the Courts will not draw a legal presumption in favour of the defendants-appellants that it was executed by Smt. Reoti Devi.

7. Except for this conclusion contained in the judgment there is no discussion from which we may benefit for making an interpretation of Sections 90 and 90-A of the Evidence Act.

8. It may be relevant to quote the objects and reasons as contained in the Report of the U. P. Judicial Reforms Committee 1950-51, on the basis of which Section 90 was amended and Section 90-A was introduced. It runs as under:--

"As it has been held by the Privy Council in 1935 ALJ 847 that the presumption of Section 90 of the Evidence Act does not apply to certified copies of documents which are over thirty years old and considerable difficulty is experienced by parties to a suit to prove such old, documents as witnesses in such cases are either dead or cannot be found it is proposed that the presumption of Section 90 may be extended to certified copies of registered documents, the originals of which are over thirty years old. It is necessary to rely on copies when the originals are not traceable or are lost. Section 90 may, therefore be amended by adding the words "or a duly certified copy of registered document purporting to be thirty years old" after the words 'thirty years old" and before the words "is produced".

It is felt that a good deal of the time of courts is wasted in recording evidence called to prove formally registered documents ana other documents of which duly certified copies have been filed, even if there is no real contest with regard to the execution of these documents e. g., in suits based on custom quite a number of transfer deeds have to be filed to establish a custom and formal proof of these documents has to be adduced before the documents are admitted into evidence. It is, therefore, desired that courts may be empowered to apply the presumption mentioned in Section 90 to such documents to a limited extent, i.e., formal execution of these documents may be presumed and need not be proved. A new section as Section 90-A may be added in the following form or in some other words carrying out the intention referred to above." In Dalsingar v. Sita Ram (1969

AWR (HC) 188) a learned single Judge considered the matter and held that the two sections were independent of each other and Section 90 was not controlled by Section 90-A and accordingly Sub-section (2) of Section 90-A could not bar the raising of the presumption if the case was covered by Section 90. The reason given by the learned single Judge was as under:--

"Before considering the section it would not be improper to see the purpose for which the U. P. Act 24 of 1954 was enacted. Under Section 90 of the Evidence Act a document which was more than thirty years old was not required to be proved. In order to extend the presumption available under Section 90, the committee which was appointed to enquire into the system of administration of justice in the State recommended that the presumption should be extended to a certified copy of the document as well. If the purpose of the committee was to enlarge the presumption in respect of certified copies, Section 90-A(2) would have the effect of curtailing the presumption in cases where the document is the basis of the suit or of defence."

9. The principle which has been applied by the learned single Judge in this case also becomes evident from the following example. If a document optionally registrable under Section 18 of the Registration Act and so registered, which is more than 20 years old is produced in original it may be hit by Sub-section (2) of Section 90-A, but if the same document was unregistered then it will not be hit by Sub-section (2) of Section 90-A. This could not be the intention of law as that will make the Court raise presumptions in respect of an unregistered document and not to raise the same presumptions if the document is registered. Registration of a document gives it greater authenticity and it would not be reasonable to expect that the legislature will place a registered document at a lower level than a similar unregistered document when it comes for proof in a Court.

10. In Risal v. Deputy Director of Consolidation, U. P., Lucknow (1970 AWR (HC) 634) another learned Judge took the view that Sections 90 and 90-A are independent provisions, and the document which is more than 20 years old cannot be hit by Sub-section (2) of Section 90-A. The same view was taken by another learned Judge in Deo Chand v. Deputy Director of Consolidation (1971 ALJ 992).

11. The interpretation of law has to take into consideration the purpose of law, and if it is a law relating to procedure then also the impact it is calculated to have on the course of litigation and decision making.

"Law is commonly divided into substantive law, which defines rights, duties and liabilities; and adjective law, which defines the procedure, pleading and proof by which the substantive law is applied in practice.

The rules of procedure regulate the general conduct of litigation; the object of pleading is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; proof is the establishment of such facts by proper legal means to the satisfaction of the court, and in this sense includes disproof. The first mentioned term is, however, often used to include the other two.

'The province of the law of evidence is therefore twofold, viz. to lay down rules as to what matter is or is not admissible for the purpose of establishing facts in dispute and as to the manner in which such matter may be placed before the court. Whether any proof is required or not is a question of law, (Phipson on Evidence, Twelfth Edn. Para 1)". The law of evidence does not affect substantive rights of parties, but only lays down the law

for facilitating the course of justice. The Evidence Act lays down the rules of evidence for purposes of the guidance of the Court. It is procedural law which provides, inter alia, how a fact is to be proved.

12. Section 4 of the Evidence Act deals with presumption.

"Section 4 -- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved, When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it".

13. Part I of the Evidence Act deals with relevancy of facts and Part II deals with proof. Chapter V of Part II deals with documentary evidence and one of its sub-chapters concerns presumptions as to documents. It contains Sections 79 to 90-A. Sections 79 to 90-A deal with different conditions and circumstances in which a particular type of presumption can be raised. If the circumstances exist for the raising of a presumption under any of the provisions of the Evidence Act the Court becomes entitled or bound to raise that presumption.

"Presumptions are either of law or fact. Presumptions of law are arbitrary consequences expressly annexed by law to particular facts; and may be either conclusive, as that a child under a certain age is incapable of committing any crime; or rebuttable, as that a person not heard of for seven years is dead or that a bill of exchange has been given for value.

"Presumptions of fact are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. Not only are they always rebuttable, but the trier of fact may refuse to make the usual or natural inference notwithstanding that there is no rebutting evidence."

(Phipson on Evidence, Twelfth Edition Para 9),

14. The presumptions under the Evidence Act are only the inferences which a logical and reasonable mind normally draws. Facts and circumstances (from) which certain inferences follow are indicated in various provisions of the Evidence Act running from Sections 79 to 90-A. As already seen the sections of the Evidence Act Lay down different circumstances in which a presumption is to be raised. Whenever the law permits the raising of a presumption the Court can by reason of Section 4 of the Evidence Act raise the presumption for purpose of proof of a fact. If the presumption is available in one section it can raise it under that section. If it is not available in one section and is available in another section, then the Court can raise presumption under that section. It all depends upon the circumstances available in the case as applicable to a particular document. Hence, even if the case falls under Section 90-A and sub-section (2) thereof is applicable and no presumption can be drawn under Section 90-A(1) it will not exclude the Court from drawing the presumption, if the circumstances permit it to be drawn, under any other provision of the Evidence Act including Section 90 of the Act. The presumption, if

available under Section 90, can, therefore, be raised by the Court even after coming to the conclusion that a presumption under Section 90-A is not available.

15. The presumptions available under Sections 90 and 90-A are also not similar. Section 90(2) permits the raising of the presumption in respect of the signature, handwriting, execution and attestation, while Section 90 permits a presumption only in respect of execution. Section 90 deals with documents which are more than 20 years old while Section 90-A places no such restriction and includes also documents from judicial record Neither of the two sections, therefore, can be said to be occupying a field which the other exclusively occupies. They deal with different fields and different circumstances and permit different types of presumptions to be raised.

16. For the reasons given above it is not possible to hold that Sub-section (2) of Section 90-A will override and nullify Section 90 if the document, though more than twenty years old, is the basis of the suit or the defence or is relied upon in the plaint or written statement. We are, therefore, of opinion that Om Prakash v. Bhagwan MANU/UP/0093/1974 : AIR1974All389 does not lay down the correct law.

17. For the reasons given above we answer the question in the negative. Let this opinion be laid before the learned single Judge dealing with the appeal.

MANU/SC/0276/2003

Back to Section 91 of Indian Evidence Act, 1872

Back to Section 92 of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 2631 of 2003

Decided On: 02.04.2003

Roop Kumar Vs. Mohan Thedani

Hon'ble Judges/Coram:

Shivaraj V. Patil and Dr. Arijit Pasayat, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Yogeshwar Prasad, Sr. Adv., Anuvrat Sharma and Rachna Gupta, Advs

For Respondents/Defendant: K.R. Nagaraja and Anand P. Jain, Advs.

JUDGMENT

Arijit Pasayat, J.

1. Leave granted.

2. This case is a classic example of a just cause getting defeated by a sitting up dubious pleas and depriving a party of what is legally due to him. It is one of those innumerable cases where course of justice has been attempted to be deflected by factual and legal red herrings.

3. Appellant is the defendant in a suit filed by respondent-plaintiff No. 1 for recovery of consolidated and expected commission/rendition of accounts and possession of Premises No. 15A/16-I, Ajmal Khan Road, Karol Bagh, New Delhi.

4. As per suit averments respondent-plaintiff No. 1 was a tenant in respect of the aforesaid premises on a monthly rent w.e.f. 15.8.1962. The shop was registered under the Shops and Commercial Establishments Act, (in short the 'Establishment Act') in the name of M/s. Esquire, of which respondent-plaintiff No. 1 was the proprietor. Later on, the name of the concern was changed to M/s. Purshotams. For all intents and purposes there was no change of proprietorship. Plaintiff No. 2, Tahil Ram is the father of respondent-plaintiff No. 1 and his power of attorney holder. Tahil Ram entered into an agency-cum-deed of licence with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licence agreement was incorporated in an agreement dated 15.5.1975. Earlier, the appellant-defendant was having his business as tailors and drapers at A-7. Prahlad Market, Deshbandhu Gupta Road, New Delhi. He had approached respondent-plaintiff No. 1 for use of his premises in question under his tenancy as a show room on license-cum-agency basis. As per the agreement, plaintiffs were to receive their commission @ 12% on tailoring business and @ 3% commission on the sale of materials of all kinds as conducted by the appellant-defendant. Possession of the shop continued with the

plaintiffs along with the tenancy rights. The agreement was initially for a period of five years, with option of extension by mutual consent. The agreement expired on 14.5.1980 and was never renewed thereafter. In terms of Clause 5 of the agreement, the appellant-defendant was to keep separate accounts of the tailoring and cloth materials; and therefore, he was an accounting party. The agreement was duly acted upon and at no point of time possession was delivered to the defendant and as noted above, remained with the plaintiffs. Later on, for his own convenience, defendant brought his tailors for tailoring business. Defendant has trespassed by destroying all traces of evidence of possession and has started displaying the signboards and other advertisement materials, as if M/s. Roop Tailors and Drapers are conducting business in the suit premises. Accounts were rendered up to 30.6.1976. Payments were made by cheques and by other modes. Accounts were also rendered up to 31.3.1978 by the defendant under his own hand and signatures. After that date, defendant neither rendered accounts nor made any payment in spite of repeated reminders and requests. Legal notice was served through registered post for payment of commission, and a demand was made for true and faithful rendition of accounts. After 14.5.1980, defendant was asked to vacate the premises, but he forcibly continued to occupy the premises. This led to initiation of proceedings under Section 145 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'). Defendant to frustrate the legal demands of the plaintiffs filed a suit for injunction. Though, the period of the agency-cum-licence deed expired on 15.5.1975, the defendant continued to remain in possession. On the ground of limitation, the plaintiffs claimed what is due from 1.10.1977 to 31.3.1978 which came to be Rs. 7,000/- and from 1.4.1978 to 14.5.1980 the commission was estimated to be about Rs. 70,000/-. Claim of damages at Rs. 6,000/- from 14.5.1980 to 14.10.1980 was made for a period of five months. Plaintiffs also claimed a decree for possession of the shop along with a decree for damages and for payment of the commission and rendition of accounts.

5. Primary stand of the defendant in reply was that he was in lawful occupation and possession as tenant under the plaintiffs. Some documents on false representation had been obtained from his giving the wrong impression that they were to be produced for fixing of standard rent in a case of eviction, and these documents were never intended to be acted upon otherwise. The purported agreement was not acted upon, and was a sham document and there was no agreement relating to commission and, therefore, the question of rendition of any accounts did not arise. It was further stated that due to litigation between plaintiff No. 1 and his landlords, the defendant was made a victim though with a spirit of good faith and to help the plaintiffs, he had signed some documents which were not intended to be acted upon, but have been maliciously relied upon to his disadvantage. There was no relationship of principal and agent as claimed. A suit for injunction had been filed and the same is pending adjudication. Additional plea was taken that as per averments in the plaint, defendant is alleged to have committed act of criminal trespass on 2.5.1980 after surrendering possession to the plaintiffs, so the suit on the basis of agreement dated 15.5.1975 or on the basis of termination of agency-cum-licence deed is not maintainable.

6. Initially 11 issues were framed on 17.2.1981. Subsequently, an additional issue was framed on 6.4.1993. Nine witnesses were examined to further the plaintiffs' case, while defendant examined seven witnesses. Several documents were exhibited and proved. Some other documents were marked, but were not proved.

7. The Trial court decreed the suit in favour of the plaintiffs and against the appellant-defendant. The judgment and decree came to be assailed in Regular First Appeal before the Delhi High Court.

8. Before the High Court the parties agreed that the basic question which required consideration was whether relationship between the respondent and the appellant was that of licensor and licensee or it was that of lessor or lessee. The Trial Judge had been held that the transaction between the respondent and appellant evidenced by an agreement dated 15.5.1975 amounts to licence and nor sub- letting. There was a finding recorded by the Trial Court to the effect that the appellant was a party to earlier ejectment proceedings which was not factually correct. Since the Trial Court nurtured this wrong notion which runs through the entire judgment, it was held that the reasoning given by the Trial Court in support of its findings on various issues and particularly issues Nos. 1, 6, 7 and 10 cannot be sustained. The High Court with consent of parties exercised powers conferred by Order 41 Rules 30, 32 and 33 of the Code of Civil Procedure, 1908 (in short the 'Code'). Arguments were heard on the merit of the issues framed in the suit. On consideration of the rival stands, the High Court came to hold that the conclusions arrived at by the Trial Court were correct, though the reasoning in support of the conclusions were different. That being the position, reasoning were recorded in support of the conclusions by the High Court. On consideration of the rival stands, it held that the agreement dated 15.5.1975 was entered into between them with mutual consent and the appellant-defendant signed the same voluntarily and out of his free will; it was not a sham document; was in fact acted upon; the appellant- defendant was an accounting party in terms of the agreement referred to above; in terms of that agreement accounts had been rendered up to March 1978 and payment of commission was made up to June 1976: the appellant-defendant did not criminally trespass in the disputed shop; he was in unlawful possession of the shop as the licence came to end on expiry of the period as contained in the agreement dated 15.5.1975; the appellant-defendant was only a licensee and not the lessee and, therefore, the Civil Court i.e. the Trial Judge had jurisdiction to entertain the suit. The commission charges for the period from 14.10.1977 to 31.3.1978 fixed at Rs. 7,000/- was affirmed. For the period from 1.4.1978 and 1.4.1980 the appellant-defendant had not rendered accounts and, therefore, taking into account the average monthly commission for which the accounts were rendered, a decree for Rs. 25,500/- was

passed in favour of the plaintiffs and against the defendant in respect of the commission charges for the period from 1.4.1978 to 14.5.1980 and subject to payment of court fees by the plaintiffs. As the appellant-defendant was in unauthorised occupation of the premises in question at the rate of Rs. 1200/- p.m., the Trial Court was not justified in fixing at the rate of Rs. 500/-. The commission for the period for which accounts were rendered was more than Rs. 1200/- in the normal course and, therefore, the appellant would have paid Rs. 1200/- p.m. even if he was continuing in possession in terms of the agreement. The rentals in the area have increased by leaps and bounds after 1980 and the claim of Rs. 1200/- p.m. was very reasonable. Therefore, respondent-plaintiff No. 1 would be entitled to damages for use and occupation of the premises by the appellant-defendant at the rate of Rs. 1200/- p.m. A decree of Rs. 6,000/- was accordingly passed for the period from 15.5.1980 to 14.10.1980 subject to payment of court fees by the respondent-plaintiff No. 1. Decree for possession was passed. The respondent-plaintiff No. 1 was entitled to damages for use and occupation of the premises at the rate of Rs. 1200/- p.m. from the date of suit till delivery of possession subject to payment of proper court fee. Costs were awarded. The appeal was dismissed with costs.

9. In appeal, learned counsel for the appellant has taken various pleas. Essentially they are as follows: The High Court was not justified in hearing the appeal as if it was the Trial Court having come to the conclusion that the premises on which the Trial Court proceeded were erroneous. That amounts to denial of a forum of appeal which was statutorily provided and in essence amounted to deprivation of such a right. Reliance was placed on a decision of this Court in A.R. Antulay v. R.S. Nayak and Ors. MANU/SC/0002/1988 : AIR 1988 SC 1531. The High Court has not considered the true import of Sections 91 and 92 of the Indian Evidence Act. 1872 (in short the 'Evidence Act') in its proper perspective. It is not as if a party is not entitled to lead oral evidence to show that the agreement was not intended to be acted upon and the terms were really not reflective of intention of the parties. In fact, the agreement was not acted upon. The High

Court proceeded on an erroneous basis as if some of the issues were not pressed before the Trial Court and the High Court. The clauses of the agreement on which the Trial Court and the High Court placed reliance do not prove the essence of the transactions and/or intention and should not have been given undue importance. Some of the basic issues like Issue No. 12 were not adjudicated by the Trial Court and the High Court. Though reference was placed on the objections filed to the application under Section 145 of the Cr.P.C. stand of the appellant was not taken note of. In fact, an application had been filed for taking note of the objections which unfortunately the High Court treated to have become infructuous as it was listed on the day the judgment was delivered. While considering a plea that the agreement was not intended to be acted upon, veil has to be lifted by considering the evidence and the surrounding circumstances in their proper perspective. Though the Trial Court had granted Rs. 500/- p.m. as damages, the High Court suo moto without even any challenge thereto by the respondent raised the same to Rs. 1200/- p.m. The specific stand of the appellant was that the agreement was executed as a devise to protect the plaintiffs in the suit for ejectment or/and that relating to fixation of standard rent in the disputes between the plaintiffs and their landlords. The High Court erroneously came to hold that payments were made as commissions for various periods. As the Trial Court proceeded on the basis as if the appellant was a party in proceedings earlier, the foundation of its conclusions was shaken. The High Court should have remitted the matter back to it for fresh adjudication after having found that the conclusions were contrary to records and materials; instead it adjudicated the matter acting as a Trial Court which is not permissible. The High Court erroneously proceeded to do so as if the appellant had conceded to such a course being adopted while in reality there was no concession.

10. Per contra, learned counsel for the respondent submitted that after having agreed before the High Court that it may take up the whole matter for adjudication on merits, on consideration of the evidence on record, it is not open to the appellant to take a stand

that there was no such concession when in fact the High Court has specifically recorded about such concession in detail. The stand that the appellant was a sub-tenant, being a tenant under the plaintiffs is clearly untenable in view of the documentary evidence to which the High Court has referred in detail. The scope and ambit of Sections 91 and 92 of the Evidence Act have been rightly considered by the High Court. The stand that the agreement was intended to be a protection of the plaintiffs in proceedings between plaintiffs and their landlords is falsified because of the fact that the suit for eviction was filed after about 7 months of the execution of the agreement. There is no dispute that the agreement was executed. Therefore, the appellant was bound by it. In any event, there is no question of sub-tenancy in view of the clear bar provided under Section 16 of the Delhi Rent Control Act, 1958 (in short the 'Rent Control Act') which prohibits sub-tenancy without a consent of the original landlord. It has not been shown that the original landlord had consented to the sub-tenancy. The High Court has rightly therefore discarded the plea. Not only issue No. 12 but also several other issues were given up before the Trial Court and the High Court and it is not open to the appellant to make a grievance that these issues were not considered. So far as enhancement of the damages is concerned, the High Court had exercised powers under Order 41 Rule 33 with the consent of the parties and when the claim was for damages, it was open for the High Court to accept the claim as made by the respondent-plaintiff No. 1 in the Trial Court by fixing damages at Rs. 1200/- p.m.

11. It would be logical to first deal with the plea relating to absence of forum of appeal. It is to be noted that the parties agreed before the High Court that instead of remanding the matter of trial Court, it should consider materials on record and render a verdict. After having done so, it is not open to the appellant to turn round or take a plea that no concession was given. This is clearly a case of sitting on the fence, and is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas

Shrinivas Nayak and Anr. MANU/SC/0117/1982 : 1982 (2) SCC 463. In a recent decision Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd. and Ors. MANU/SC/1092/2002 : 2002 AIR SCW 4939 the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that he happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary.

12. Before we deal with the factual aspects, it would be proper to deal with the plea relating to scope and ambit of Sections 91 and 92 of the Evidence Act.

13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in really declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thaver's Preliminary Law on Evidence p. 397 and p. 398; Phipson Evidence 7th Edn. p. 546; Wigmore's Evidence p. 2406.) It has been best described by Wigmore stating that the rule is no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental

process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of providing it is merely the dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

(a) the enaction or creation of the act.

(b) its integration or embodiment in a single memorial when desired;

(c) its solemnization on fulfilment of the prescribed form, if any; and

(d) the interpretation or application of the act to the external objects affected by it.

14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.

15. The enaction or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial commonly, of course, a written one. This process of integration may be required by law,

or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their former and inchoate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the Courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (see Mc Kelvey's Evidence p. 294). As observed in Greenlea's Evidence page 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law or by the contract of the parties, to be the

repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Strake on Evidence p. 648).

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

20. The two sections are, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 91 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only to bilateral documents. (See: Bai Hira Devi and Ors. v. Official Assignee of Bombay MANU/SC/0001/1958 : AIR 1958 SC 448). Both these provisions are based on "best evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account with matter of averment which is of inferior account in law". It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slipper memory.

21. The grounds of exclusion of extrinsic evidence are (1) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be paced beyond the reach of future controversy, bad faith and treacherous memory.

22. This Court in Smt. Gangabai v. Smt. Chhabibai MANU/SC/0385/1981 : AIR 1982 SC 20 and Ishwar Dass Jain (dead) thr. Lrs. v. Sohan Lal (dead) by Lrs. MANU/SC/0747/1999 : AIR 2000 SC 426 with reference to Section 92(1) held that it is permissible to a party to a dead to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that

some other agreement altogether, not recorded in the document, was entered into between the parties.

23. But the question is whether on the facts of the present case, the reasons given by the defendant-appellant in his evidence for claiming the agreements as sham document can be accepted.

24. As noticed by the High Court, the respondent-plaintiff No. 1 had proved on record that the appellant-defendant had acted upon the agreement by himself, submitting the statements giving the account of tailoring and sale of materials as well as payment of commission on the basis of statements as per the terms of an agreement.

25. The High Court also referred to certain exhibited documents to hold that the appellant was paying commission at the rate of 12% on the tailoring business, and 3% on the sale of materials of all kinds. Reference has been made to Exhibits PWs 6/4, 6/5, 6/6, 6/9. It was noted that cheque dated 12th August, 1975 for Rs. 963.43 has been paid which corresponds to the commission for the month of July 1975 payable on the sale of cloth as well as tailoring. The cheque is exhibited as PW 2/3.

26. On a reference to Exhibit PW 6/4 and Ex. PW6/5, it appears that in respect of the sale of cloth and on commission of tailoring the amounts payable for the month of July 1975 are Rs. 454.95 and Rs. 513.48 respectively. Adding up, the total comes to Rs. 968.43 for which cheque dated 12.8.1975 has been issued. Similarly, for the month of August 1975, the amounts are Rs. 401.85 and Rs. 513.72, and cheque dated 19.9.1975 is for an amount of Rs. 915.57, which tallies with the commission of Rs. 401.85 and Rs. 513.72 respectively.

Some instances were also noticed by the High Court. It was highlighted that in many instances amounts in round figures have been paid. It does not help in furthering his case. No explanation has been offered as to why cheques for amounts tallying with commissions, upto even paise were issued.

27. It is to be noticed that though no label attached to the agreement, it does not specify any monthly amount to be paid by the appellant to respondent. Therefore, the question of any fixed monthly rent does not arise. The High Court has also taken note of several other instances to conclude that the agreement was one of licence and not of lease. That being the position, the conclusions of the High Court are in order and do not warrant interference.

28. Admittedly, there was no consent of the original landlord to create sub-tenancy in terms of Section 16(2) of the Rent Control Act as noted above. Since there is no consent of the landlord, something which is forbidden by law could not be pleaded. That being the position, the High Court was justified in rejecting the plea of sub-tenancy.

29. In almost similar situation, this Court in Waman Shriniwas Kini v. Ratilal Bhagwandas and Co. MANU/SC/0171/1959 : AIR 1959 SC 689 while considering corresponding provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 held that subletting without previous consent is unlawful and if such plea of subletting is accepted, it would be enforcing an illegal agreement.

30. In Delta International Ltd. v. Shyam Sundar Ganeriwalla and Anr. MANU/SC/0258/1999 : AIR 1999 SC 2607 several principles were culled put by this

Court in relation to disputes on the issue whether the agreement was for one lease or licence in a particular case. Six conclusions are recorded in paragraph 15. Conclusion No. 5 reads as follows:

"Prima facie, in absence of a sufficient title or interest to carve out or to create a similar tendency by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour, because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter."

31. In the background of Section 16(2) of the Rent Control Act, the principles set out above clearly negate the appellant's case.

32. One plea which is urged with some amount of emphasis was increase of the damages from Rs. 500/- p.m. to Rs. 1200/- p.m. As noted supra, with the consent of the parties, the High Court had exercised powers under Order 41, Rule 30, 32 and 33. It took note of the ground realities which are not disputed before us. High Court recorded a positive finding that to the normal course the appellant would have paid as least Rs. 1200/- p.m. though the amount payable was more than, even for the period for which accounts were rendered or were to be rendered. It was fairly accepted by learned counsel for the appellant before that the rentals in the area have increased lease and bounds after 1980. That being so, the specious plea that there was no scope for enhancement of the quantum of damages fixed by the trial Court is indefensible. Judge from any angle, the appeal is devoid of merit and deserves dismissal with costs which we direct. In a case of this nature, waiver of costs would be acting with leniency on a person who deserves none. Costs fixed at Rs. 25,000/-.

MANU/SC/0343/2021

Neutral Citation: 2021/INSC/288

Back to Section 92 of Indian Evidence Act, 1872

Back to Section 95 of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 10827 of 2010

Decided On: 07.05.2021

Mangala Waman Karandikar (D) tr. L.Rs. Vs. Prakash Damodar Ranade,
MANU/SC/0343/2021

Hon'ble Judges/Coram:

N.V. Ramana, C.J.I., Surya Kant and Aniruddha Bose, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Abha R. Sharma, AOR

For Respondents/Defendant: Rajendra V. Pai, Sr. Adv., Bina R. Pai, Aloukik R. Pai, Akshay R. Pai, Nikita K. Dharamshi, Apurva Bhat, Vitthal Devkhile, Advs. and Anand Dilip Landge, AOR

JUDGMENT

N.V. Ramana, C.J.I.

1. This appeal is filed against the judgment of the Bombay High Court, in Second Appeal No. 537 of 1991, wherein the second appeal was allowed in favour of the Respondent and the decree in favour of the Appellant herein was set aside.

2. This case arises out of a contract entered into between the Appellant (since deceased represented through Legal Heirs) and the Respondent. Initially Appellant's husband was running a business of stationary in the name of "Karandikar Brothers" before his untimely demise in the year 1962. After his demise, she continued the business for some time. After a while, she was unable to run the business and accordingly decided to let the Respondent run the same for some time. She entered into an agreement dated 07.02.1963, wherein following terms were reduced in writing:

2. For the last about 24 to 25 years, a stationary shop by the name Karandikar Brothers belonging to you of the stationary, note books and books is being run in the premises situated in City Survey No. 196/66 (New House No. 1643) at Sadashiv Peth, Pune. I request to you to give the said shop to me for running the same. Accordingly, you agreed for the same. Accordingly, an agreement was reached between us. The terms and conditions whereof are as follows:

A. The stationary shop by name "Karandikar Brothers" belonging to you of the stationary materials which is situated in the premises described in Para 1(a) above and in which the furniture etc. as described in Para 1(b) above belonging to you is existing is being taken by me for conducting by an agreement for a period of two years beginning from 1st February 1963 to 31st January 1965.

B. The rent of the shop described in Para 1(a) above is to be given by you only to the owner and I am not responsible therefor. I am to pay a royalty amount of Rs. 90/- (Rupees Ninety only) for taking the said shop for conducting, for every month which is to be paid before the 5th day of every month.

3. Time after time, the contract was duly extended. In 1980s, desiring to start her husband's business again, Appellant herein issued a notice dated 20.12.1980 requesting the Respondent herein to vacate the suit premises by 31.01.1981. The Respondent replied to the aforesaid notice claiming that the sale of business was incidental rather the contract was a rent agreement stricto sensu. Aggrieved by the Respondent's reply, the Appellant herein filed a civil suit being RCS. No. 764 of 1981 before the Court of Joint Civil Judge, Junior Division, Pune. During the course of the trial, one of the important questions that the Trial Court framed, which is relevant for our purpose can be observed hereunder:

Does the Defendant prove that from the year 1963 he is licensee in the said suit premises as contended in para 7 of the plaint? And thereby on the date of suit he became tenant of the suit premises Under Section 15A of the Bombay Rent Act?

The Trial Court by judgment dated 30.08.1988, decreed the Suit in favor of the Appellant herein and held that the purport of the Agreement was to create a transaction for sale of business rather than to rent the aforesaid premises to the Respondent herein. The Court while negating the contention of the Respondent, that the shop premises was given to him on license basis held as under:

8. The Defendant does not deny the fact that originally the husband of deceased Mangala Karandikar namely Waman Karandikar used to conduct the business of the suit shop. The business of stationary, books and notebooks was being run by him. Same business has been handed over to him. ... The suit shop and the said business came to deceased Mangala Karandikar after the death of her husband. It has come in the evidence 50 that because of death of her husband and after the death of her husband, she was unable to continue the business. In the meantime, the Defendant approached to her. Thereupon she agreed to hand over the running business to the Defendant. This fact has been denied by the Defendant. The Defendant raises the contention that the Plaintiff never had the shop of stationary, but she had the grocery shop. After the death of her husband, it was lying closed for years together. In the year 1963 the Defendant approached the Plaintiff and thereupon the Plaintiff agreed to give the suit shop. On licence basis to him. This plea of the Defendant is negativated by the terms and conditions of the agreement deed itself. The heavy burden was lying on the Defendant to prove that there was licence agreement. He has not discharged the same. Therefore, the document became much relevant, and it has got material importance. If the conditions as enumerated in this document Exh. 33 are carefully scrutinized, it will become significant that the deceased Plaintiff had the sole intention to hand over' the running business of the suit shop to the Defendant. There had been no intention to create the leave and licence in respect of the suit premises. The deceased Plaintiff had very specifically and by taking at most case and precaution excluded the word premises of shop in the agreement. But all the while the word ù "shop" was used with reference to business only. Nextly she has also excluded the word rent to be used. She had specifically made the recital of imposing the royalty on the Defendant. The word licence, for the purpose of Bombay Rent Act always refers to premises. The Defendant has to seek the benefit under the provisions of Bombay Rent Act. Here the Plaintiff had never intended to create the leave and licence in respect of the suit shop. The Defendant has relied upon the receipt Exhibit-40. This is the document produced by the Plaintiff. It discloses that the word "rent" has been shown in this respect. The Defendant is taking benefit of this fact and alleging that the rent was being recovered and not the

royalty. Here it is worth to be noted that the Plaintiff had at all no intention to recover the rent. All the while, it has been the case of the Plaintiff that the royalty was being recovered. Therefore, I am unable to hold that the rent was being recovered by the Plaintiff. ...

14. Issue Nos. 5 and 6.-The Defendant has alleged that he is the tenant in the suit shop. Initially, the premises were given to him on licence basis but by virtue of amendment to Bombay Rent Act and by virtue of insertion of Section 15(A) all the licensees have become the tenants. Learned advocate appearing on behalf of the Defendant places his reliance on Case Law reported in MANU/SC/0531/1986 : A.I.R. 1987 Supreme Court page 117. No doubt there can be no dispute regarding the principles of law. In the instant suit, the Defendant has utterly failed to prove that the shop premises were given to him on licence basis. Therefore, no question of his tenancy can arise at any time. ...

(emphasis supplied)

4. Accordingly, the Trial Court ordered the Respondent to hand over the suit property to the Appellant herein including the furniture and other articles.

5. Aggrieved by the Trial Court judgment, the Respondent filed an Appeal before the Court of Additional District Judge, Pune in Civil Appeal No. 979 of 1988. On 29.07.1991, the Additional District Judge rendered a judgment dismissing the appeal filed by the Respondent herein. Aggrieved by the dismissal the Respondent herein filed a Second Appeal before the High Court of Bombay in Second Appeal No. 537 of 1991.

6. By impugned order dated 07.11.2009 the High Court of Bombay allowed the Second Appeal and set aside the Trial Court's Order as well as the First Appellate Court's Order and held that the Respondent had entered into a license agreement which is covered Under Section 15A of the Bombay Rent Act. Further the Court held that the Trial Court did not have the Jurisdiction to try the cases under the Bombay Rent Act, the appropriate Court should have been Small Causes Court established under the Provincial Small Causes Court Act. The Second Appellate Court also observed on the merits of the case and held as under.

22. Thus, considering the entirety of the case, in my view, both the Courts below have incorrectly interpreted the document and the surrounding circumstances which, in my view, indicate that the parties had in fact agreed that the premises were transferred to the Appellant on a leave and license basis.

7. Aggrieved by the same, the Appellant herein filed this appeal.

8. The counsel for the Appellant contended that the impugned order of the High Court erred in appreciating the language of the contract, which clearly points towards the intention of the parties to create a license for continuing existing business, which was run by late husband of the Appellant. On the other hand, the counsel for the Respondent has supported the judgment by stating that there is extrinsic evidence which shows that the contract entered into between the parties was a license to use the shop, which is covered under Bombay Rent Act. In this light, he supports the impugned order to state that the trial court did not have jurisdiction in the first place.

9. Having heard both the parties at some length, at the outset before we analyse this case, we need to observe some principles on contractual interpretation. Unlike a statutory interpretation, which is even more difficult due to assimilation of individual intention of law makers, contractual interpretation depends on the intentions expressed by the parties and dredging out the true meaning is an 'iterative process' for the Courts. In any case, the first tool for interpreting, whether it be a law or contract is to read the same.

10. It is usual that businessmen often do not sit over nitty-gritty in a contract. In a document the language used by the parties may have more than one meaning. It is ultimately the responsibility of the Courts to decipher the meaning of the words used in a contract, having regards to a meaning reasonable in the line of trade as understood by parties.1 It may not be out of context to state that the development of Rules of contractual interpretation has been gradual and has taken place over century. Without going into extensive study of precedents, in short, we may only state that the path and development of law of interpretation has been a progress from a stiff formulism to a strict rationalism.2

11. It is clear from the reading of the contract that the parties had intended to transfer business from Appellant to Respondent during the contractual period. This agreement was not meant as a lease or license for the Respondent to conduct business. However, the Respondent contends that the meaning of the document should not be culled solely with reference to the language used in the document, rather extrinsic evidence needs to be utilized before adducing proper meaning to the contract. In this regard he submits that on consideration of all the extrinsic evidence, the contract should be read as a leave and license agreement, which is covered under the Bombay Rent Act. He draws his support from Section 95 of the Indian Evidence Act to state that the document needs to be interpreted having regard to external evidence such as receipts of payment under the contract addressed as rent receipts etc.

12. It may be noticed that the High Court had appropriately identified the question of law in the following manner:

15. The debate therefore revolves around the question as to whether the agreement of 7th February, 1963 was a license to conduct a business in the premises or was a license to run the existing business which was being run by the Respondents in the suit premises. Does the document create an interest in the premises or in the business?

13. The High Court in order to answer the question utilized Section 95 of the Evidence Act, which reads as under:

95. Evidence as to document unmeaning in reference to existing facts.--When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration A sells to B, by deed, "my house in Calcutta". A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house of Howrah.

Aforesaid Section is part of Chapter VI, which deals with 'Of the exclusion of Oral by documentary evidence' containing Section 91 to 100. Section 92 reads as under:

92. Exclusion of evidence of oral agreement.--When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:...

Proviso (6).--Any fact may be proved which shows in what manner the language of a document is related to existing facts.

14. It is manifest from these two Sections that it is only in cases where the terms of the document leave the question in doubt, then resort could be had to the proviso. But when a document is a straightforward one and presents no difficulty in construing it, the proviso does not apply. In this regard, we may state that Section 95 only builds on the proviso 6 of Section 92.

15. If the contrary view is adopted as correct it would render Section 92 of the Evidence Act, otiose and also enlarge the ambit of proviso 6 beyond the main Section itself. Such interpretation, provided by the High Court violates basic tenants of legal interpretation.3 Section 92 specifically prohibits evidence of any oral agreement or statement which would contradict, vary, add to or subtract from its terms. If, as stated by the learned Judge, oral evidence could be received to show that the terms of the document were really different from those expressed therein, it would amount to according permission to give evidence to contradict or vary those terms and as such it comes within the inhibitions of

Section 92. It could not be postulated that the legislature intended to nullify the object of Section 92 by enacting exceptions to that section.

16. In line with the law laid down, it is clear that the contract mandated continuation of the business in the name of 'Karandikar Brothers' by paying royalties of Rs. 90 per month. Once the parties have accepted the recitals and the contract, the Respondent could not have adduced contrary extrinsic parole evidence, unless he portrayed ambiguity in the language. It may not be out of context to note that the extension of the contract was on same conditions.

17. On consideration of the matter, the High Court erred in appreciating the ambit of Section 95, which led to consideration of evidence which only indicates breach rather than ambiguity in the language of contract. The evidence also points that the license was created for continuation of existing business, rather than license/lease of shop premises. If the meaning provided by the High Court is accepted, then it would amount to Courts substituting the bargain by the parties. The counsel for Respondent has emphasized much on the receipt of payment, which mentions the term 'rent received'. However, in line with the clear unambiguous language of the contract, such evidence cannot be considered in the eyes of law.

18. Moreover, the contention that the aforesaid situation is covered by the Bombay Rent Act is misplaced. Once we have determined that the impugned agreement was a license for continuing existing business, Bombay Rent Act does not cover such arrangements. Therefore, the jurisdiction of the trial court is accordingly not ousted.

19. In light of the above, the impugned order of the High Court cannot be sustained, and is accordingly, set aside. The decree of the trial court is restored. The appeal is allowed in the above terms and there shall be no order as to costs.

1 Investors Compensation Scheme v. West Bromwich Building Society, MANU/UKHL/0054/1997 : [1998] 1 WLR 896

2 Wigmore JH, "Wigmore on Evidence, Vol. 4" (1915) 25 The Yale Law Journal 163.

3 Rohitash Kumar v. Om Prakash Sharma, MANU/SC/0936/2012 : (2013) 11 SCC 451 at pg. 459

MANU/SC/0060/1960

Back to Section 101 of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1 of 1960

Decided On: 06.05.1960

State of U.P. Vs. Deoman Upadhyaya

Hon'ble Judges/Coram:

J.C. Shah, J.L. Kapur, K. Subba Rao, M. Hidayatullah and S.K. Das, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: H.N. Sanyal, Additional Solicitor-General of India, G.G. Mathur and C.P. Lal, Advs.

For Respondents/Defendant: H.J. Umrigar, O.P. Rana and D. Goburdhan, Advs., C.K. Daphtary, Solicitor-General of India and H.N. Sanyal, Additional Solicitor-General of India, B.R.L. Iyengar and T.M. Sen, Advs. for Intervener

JUDGMENT

Authored By : J.C. Shah, K. Subba Rao, M. Hidayatullah

J.C. Shah, J.

1. The Civil and Sessions Judge, Gyanpur, convicted Deoman Upadhyaya - respondent to this appeal - of intentionally causing the death of one Sukhdei in the early hours of June 19, 1958, at village Anandadih, District Varanasi, and sentenced him to death subject to confirmation by the High Court. The order of conviction and sentence was set aside by the High Court of Judicature at Allahabad. Against that order of acquittal, the State of Uttar Pradesh has appealed to this court with a certificate granted by the High Court.

2. Deoman was married to one Dulari. Dulari's parents had died in her infancy and she was brought up by Sukhdei, her cousin. Sukhdei gifted certain agricultural lands inherited by her from her father to Dulari. The lands gifted to Dulari and the lands of Sukhdei were cultivated by Mahabir, uncle of Deoman. Mahabir and Deoman entered into negotiations for the sale of some of these lands situated at village Anandadih, but Sukhdei refused to agree to the proposed sale. According to the case of the prosecution, in the evening of June 18, 1958, there was an altercation between Deoman and Sukhdei. Deoman slapped Sukhdei on her face and threatened that he would smash her face. Early in the morning of June 19, Deoman made a murderous assault with a gandasa (which was borrowed by him from one Mahesh) upon Sukhdei who was sleeping in the courtyard near her house and killed her on the spot and thereafter, he threw the gandasa into the village tank, washed himself and absconded from the village. He was arrested in the afternoon of the 20th near the village Manapur. On June 21, he offered to hand over the gandasa which he said, he had thrown in the village tank, and in the presence of the investigating officer and certain witnesses, he waded into the tank and took out a gandasa, which, on examination by the Serologist, was found to be stained with human blood.

3. Deoman was tried for the murder of Sukhdei before the Court of Session at Gyanpur. The trial Judge, on a consideration of the evidence led by the prosecution, held the following facts proved :-

(a) In the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman over the proposed transfer of lands in village Anandadih and in the course of the altercation, Deoman slapped Sukhdei and threatened her that he would smash her "mouth" (face).

(b) In the evening of June 18, 1958, Deoman borrowed a gandasa (Ex. 1) from one Mahesh.

(c) Before day-break on June 19, 1958, Deoman was seen by a witness for the prosecution hurrying towards the tank and shortly thereafter he was seen by another witness taking his bath in the tank.

(d) Deoman absconded immediately thereafter and was not to be found at Anandadih on June 19, 1958.

(e) That on June 21, 1958, Deoman, in the presence of the investigating officer and two witnesses, offered to hand over the gandasa which he said he had thrown into a tank, and thereafter he led the officer and the witnesses to the tank at Anandadih and in their presence waded into the tank and fetched the gandasa (Ex. 1) out of the water. This gandasa was found by the Chemical Examiner and Serologist to be stained with human blood.

4. In the view of the Sessions Judge, on the facts found, the 'only irresistible conclusion' was that Deoman had committed the murder of Sukhdei early in the morning of June 19, 1958, at Anandadih. He observed,

"The conduct of the accused (Deoman) as appearing from the movements disclosed by him, when taken in conjunction with the recovery at his instance of the gandasa stained with human blood, which gandasa had been borrowed only in the evening preceding the brutal hacking of Sukhdei, leaves no room for doubt that Deoman and no other person was responsible for this calculated and cold-blooded murder".

At the hearing of the reference made by the court of Session for confirmation of sentence and the appeal filed by Deoman before the High Court at Allahabad, it was contended that the evidence that Deoman made a statement before the police and two witnesses on June 21, 1958, that he had thrown the gandasa into the tank and that he would take it out and hand it over, was inadmissible in evidence, because s. 27 of the Indian Evidence Act which rendered such a statement admissible, discriminated between persons in custody and persons not in custody and was therefore void as violative of Art. 14 of the Constitution. The Division Bench hearing the appeal referred the following two questions for opinion of a Full Bench of the court :-

1. Whether s. 27 of the Indian Evidence Act is void because it offends against the provisions of Art. 14 of the Constitution ? and

2. Whether sub-s. (2) of s. 162 of the Code of Criminal Procedure in so far as it relates to s. 27 of the Indian Evidence Act is void ?

5. The reference was heard by M. C. Desai, B. Mukherjee and A. P. Srivastava, JJ. Mukherjee, J., and Srivastava, J., opined on the first question, that "s. 27 of the Indian Evidence Act creates an unjustifiable discrimination between "persons in custody" and "persons out of custody", and in that it offends against Art. 14 of the Constitution and is unenforceable in its present form", and on the second question, they held that sub-s. (2) of s. 162 of the Code of Criminal Procedure "in so far as it relates to s. 27 of the Indian Evidence Act is void". Desai, J., answered the two questions in the negative.

6. The reference for confirmation of the death sentence and the appeal filed by Deoman were then Heard by another Division Bench. In the light of the opinion of the Full Bench, the learned Judges excluded from consideration the statement made by Deoman in the presence of the police officer and the witnesses offering to point out the gandasa which he had thrown in the village tank. They held that the story that Deoman had borrowed a gandasa in the evening of June 18, 1958, from Mahesh was unreliable. They accepted the conclusions of the Sessions Judge on points (a), (c) and (d) and also on point (e) in so far as it related to the production by Deoman in the presence of the police officer and search witnesses of the gandasa after wading into the tank, but as in their view, the evidence was insufficient to prove the guilt of Deoman beyond reasonable doubt, they acquitted him of the offence of murder. At the instance of the State of Uttar Pradesh, the High Court granted a certificate that "having regard to the general importance of the question as to the constitutional validity of s. 27 of the Indian Evidence Act", the case was fit for appeal to this court.

7. Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a

person stating or suggesting that he has committed a crime. By s. 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By s. 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under s. 24 and complete under s. 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in s. 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding.

As observed in Pakala Narayan Swamy v. Emperor (1939) L.R. 66 IndAp 66 by the Judicial Committee of the Privy Council, "s. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides "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 a person accused of any offence." By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas s. 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, s. 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in form

of a proviso states "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." The expression, "accused of any offence" in s. 27, as in s. 25, is also descriptive of the person concerned, i.e., against a person who is accused of an offence, s. 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered.

Even though s. 27 is in the form of a proviso to s. 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by s. 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By s. 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By s. 26, a confession made in the presence of a Magistrate is made provable in its entirety.

8. Section 162 of the Code of Criminal Procedure also enacts a rule of evidence. This section in so far as it is material for purposes of this case, prohibits, but not so as to affect the admissibility of information to the extent permissible under s. 27 of the Evidence Act, use of statements by any person to a police officer in the course of an investigation under Ch. XIV of the Code, in any enquiry or trial in which such person is charged for any offence, under investigation at the time when the statement was made.

9. On an analysis of Sections 24 to 27 of the Indian Evidence Act, and s. 162 of the Code of Criminal Procedure, the following material propositions emerge :-

(a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(c) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement whether it amounts to a confession or not made by a person when he is not in custody, to another person such latter person not being a police officer may be proved if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an investigation of an offence under Ch. XIV of the Code of Criminal Procedure, cannot except to the extent permitted by s. 27 of the Indian Evidence Act, be used for any purpose at any enquiry or

trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.

10. A confession made by a person not in custody is therefore admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in s. 24, or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered is made provable, by s. 162 of the Code of Criminal Procedure, such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. It is manifest that the class of persons who needed protection most where those in the custody of the police and persons not in the custody of police did not need the same degree of protection. But by the combined operation of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

11. Are persons in custody, by this distinction deprived of "equality before the law, or the equal protection of the laws" within the meaning of Art. 14 of the Constitution ? By the

equal protection of the laws guaranteed by Art. 14 of the Constitution, it is not predicated that all laws must be uniform and universally applicable; the guarantee merely forbids improper or invidious distinctions by conferring rights or privileges upon a class of persons arbitrarily selected from out of a larger group who are similarly circumstanced, and between whom and others not so favoured, no distinction reasonably justifying different treatment exists : it does not give a guarantee of the same or similar treatment to all persons without reference to the relevant differences. The State has a wide discretion in the selection of classes amongst persons, things or transactions for purposes of legislation. Between persons in custody and persons not in custody, distinction has evidently been made by the Evidence Act in some matters and they are differently treated. Persons who were, at the time when the statements sought to be proved were made, in custody have been given in some matters greater protection compared to persons not in custody. Confessional or other statements made by persons not in custody may be admitted in evidence, unless such statements fall within Sections 24 and 25 whereas all confessional statements made by persons in custody except those in the presence of a Magistrate are not provable. This distinction between persons in custody and persons not in custody, in the context of admissibility of statements made by them concerning the offence charged cannot be called arbitrary, artificial or evasive : the legislature had made a real distinction between these two classes, and has enacted distinct rules about admissibility of statements confessional or otherwise made by them.

12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the

matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person in sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of s. 27 of the Indian Evidence Act : Legal Remembrancer v. Lalit Mohan Singh I.L.R. (1921) Cal.167 Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241 Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has given equal treatment to all persons similarly circumstanced, it must be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided. A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offence. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the police officer investigating the offence has not been able to get at any evidence against him giving

information to the police officer without surrendering himself to the police, which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself. Cases like Deonandan Dusadh v. King Emperor I.L.R. (1928) Pat.411 Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241 Durlav Namasudra v. Emperor I.L.R. (1932) Cal. 1040 In re Mottai Thevar MANU/TN/0235/1952 : AIR1952Mad586 , In re Peria Guruswami I.L.R. 1942 Mad. 77 Bharosa Ramdayal v. Emperor I.L.R. 1940 Nag. 679 and Jalla v. Emperor A.I.R. 1931 Lah. 278 and others to which our attention was invited are all cases in which the accused persons who made statements leading to discovery of facts were either in the actual custody of police officers or had surrendered themselves to the police at the time of, or before making the statements attributed to them, and do not illustrate the existence of a real and substantial class of persons not in custody giving information to police officers in the course of investigation leading to discovery of facts which may be used as evidence against those persons.

13. In that premise and considered in the background that "persons in custody" and "persons not in custody" do not stand on the same footing nor require identical protection, is the mere theoretical possibility of some degree of inequality of the protection of the laws relating to the admissibility of evidence between persons in custody and persons not in custody by itself a ground of striking down a salutary provision of the law of evidence ?

14. Article 14 of the Constitution of India is adopted from the last clause of s. 1 of the 14th Amendment of the Constitution of the United States of America, and it may reasonably

be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior courts in the United States, we would not therefore be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differs from ours. In West Coast Hotel Company v. Parrish (1937) 300 U.S. 379 : 81 L. Ed. 703 in dealing with the content of the guarantee of the equal protection of the laws, Hughes, C.J., observed at p. 400 :-

"This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognise degree of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest". If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied". There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms".

15. Holmes, J., in Weaver v. Palmer Bros. Co. (1926) 270 U.S. 402 : 70 L. Ed. 654, in his dissenting judgment observed :-

"A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit of or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. "if the law presumably hits the evil, where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." Miller v. Wilson (1915) 236 U.S. 373; 59 L. Ed. 628

16. McKenna, J., in Health and Milligan Mfg. Co. v. Worst (1907) 207 U.S. 338; 52 L. Ed. 236 observed :

"Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in ' ill-advised unequal, and oppressive legislation'.... Exact wisdom and nice adoption of remedies are not required by the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

17. Section 25 and 26 are manifestly intended to hit at an evil, viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing offences as it is concerned with protecting persons who may be compelled to give confessional statements. If s. 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases.

18. Counsel for the defence contended that in any event Deoman was not at the time when he made the statement, attributed to him, accused of any offence and on that account also apart from the constitutional plea the statement was not provable. This contention is unsound. As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by s. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

19. In that view, the High Court was in error in holding that s. 27 of the Indian Evidence Act and s. 162, sub-s. (2), of the Code of Criminal Procedure in so far as 'that section relates to s. 27 of the Indian Evidence Act' are void as offending Art. 14 of the Constitution.

20. The High Court acquitted Deoman on the ground that his statement which led to the discovery of the gandasa is inadmissible. As we differ from the High Court on that question, we must proceed to review the evidence in the light of that statement in so far as it distinctly relates to the fact thereby discovered being admissible.

21. The evidence discloses that Deoman and his uncle, Mahabir, were anxious to dispose of the property of Sukhdei and of Dulari and Sukhdei obstructed such disposal. In the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman over the proposed disposal of the property, in the presence of witnesses, Shobhnath and Mahesh, and Deoman slapped Sukhdei and threatened that he would "smash her mouth". In the morning of June 19, 1958, the dead body of Sukhdei with several incised injuries caused by a gandasa was found lying in her court-yard. Deoman was seen in the village on that

day early in the morning hurrying towards the village tank and 'taking a bath', but thereafter he absconded from the village and was not found till sometime in the afternoon of the 20th. In his examination by the court, he has stated that he had left Anandadih early in the morning of June 19, on business and that he was not absconding, but there is no evidence in support of that plea. The evidence discloses that in the presence of witnesses, Shobhnath and Raj Bahadur Singh, Deoman waded into the village tank and "fetched the gandasa" which was lying hidden in the mud at the bottom of the tank and that gandasa was found by the Serologist on examination to be stained with human blood. The High Court has agreed with the findings of the Trial Court on this evidence. The evidence that Deoman had in the presence of the witnesses, Shobhnath and Raj Bahadur Singh offered to point out the gandasa which he said he had thrown into tank was accepted by the Trial Court and the High Court has not disagreed with that view of the Trial Court, though it differed from the Trial Court as to its admissibility. The evidence relating to the borrowing of the gandasa from witness, Mahesh, in the evening of June 18, 1958, by Deoman has not been accepted by the High Court and according to the settled practice of this Court, that evidence, may be discarded. It was urged that Deoman would not have murdered Sukhdei, because by murdering her, he stood to gain nothing as the properties which belonged to Sukhdei could not devolve upon his wife Dulari in the normal course of inheritance. But the quarrels between Deoman and Sukhdei arose not because the former was claiming that Dulari was heir presumptive to Sukhdei's estate, but because Sukhdei resisted attempts on Deoman's part to dispose of the property belonging to her and to Dulari. The evidence that Deoman slapped Sukhdei and threatened her that he would "smash her face" coupled with the circumstances that on the morning of the murder of Sukhdei, Deoman absconded from the village after washing himself in the village tank and after his arrest made a statement in the presence of witnesses that he had thrown the gandasa in the village tank and produced the same, establishes a strong chain of circumstances leading to the irresistible inference that Deoman killed Sukhdei early in the morning of June 19, 1958. The learned trial Judge held on the evidence that Deoman was proved to be the offender. That conclusion is, in our

view, not weakened because the evidence relating to the borrowing of the gandasa from witness Mahesh in the evening of June 18, 1958, may not be used against him. The High Court was of the view that the mere fetching of the gandasa from its hiding place did not establish that Deoman himself had put it in the tank, and an inference could legitimately be raised that somebody else had placed it in the tank, or that Deoman had seen someone placing that gandasa in the tank or that someone had told him about the gandasa lying in the tank. But for reasons already set out the information given by Deoman is provable in so far as it distinctly relates to the fact thereby discovered : and his statement that he had thrown the gandasa in the tank is information which distinctly relates to the discovery of the gandasa. Discovery from its place of hiding, at the instance of Deoman of the gandasa stained with human blood in the light of the admission by him that he had thrown it in the tank in which it was found therefore acquires significance, and destroys the theories suggested by the High Court.

22. The quarrel between Deoman and Sukhdei and the threat uttered by him that he would smash Sukhdei's "mouth" (face) and his absconding immediately after the death of Sukhdei by violence, lend very strong support to the case for the prosecution. The evidence, it is true, is purely circumstantial but the facts proved establish a chain which is consistent only with his guilt and not with his innocence. In our opinion therefore the Sessions Judge was right in his view that Deoman had caused the death of Sukhdei by striking her with the gandasa produced before the court.

23. On the evidence of the medical officer who examined the dead body of Sukhdei, there can be no doubt that the offence committed by accused Deoman is one of murder. The Trial Judge convicted the accused of the offence of murder and in our view, he was right in so doing. Counsel for Deoman has contended that in any event, the sentence of death should not be imposed upon his client. But the offence appears to have been brutal,

conceived and executed with deliberation and not in a moment of passion, upon a defenceless old woman who was the benefactress of his wife. The assault with a dangerous weapon was made only because the unfortunate victim did not agree to the sale of property belonging to her and to her foster child. Having carefully considered the circumstances in which the offence is proved to have been committed, we do not think that any case is made out for not restoring the order imposing the death sentence. We accordingly set aside the order passed by the High Court and restore the order passed by the Court of Session.

24. It may be observed that the sentence of death cannot be executed unless it is confirmed by the High Court. The High Court has not confirmed the sentence, but in exercise of our powers under Art. 136 of the Constitution, we may pass the same order of confirmation of sentence as the High Court is, by the Code of Criminal Procedure, competent to pass. We accordingly confirm the sentence of death.

K. Subba Rao, J.

25. I have had the advantage of, perusing the judgment of my learned brother, Shah, J. I regret my inability to agree with his reasoning or conclusion in respect of the application of Art. 14 of the Constitution to the facts of the case. The facts have been fully stated in the judgment of my learned brother and they need not be restated here.

26. Article 14 of the Constitution reads :

"The State shall not deny to any person equality before the law or equal protection of the laws within the territories of India."

27. Das, C.J., in Basheshar Nath v. The Commissioner Income-tax MANU/SC/0064/1958 : (1959) Supp. (1) S.C.R. 528 explains the scope of the equality clause in the following terms :

"The underlying object of this Article is undoubtedly to secure to all persons, citizen or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States ..... The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy."

28. This subject has been so frequently and recently before this Court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows : All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the

persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made.

29. Das C.J., in Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar MANU/SC/0024/1958 : [1959]1SCR279 culled out the rules of construction of the equality clause in the context of the principle of classification from the various decisions of this Court and those of the Supreme Court of the United States of America and restated the settled law in the form of the following propositions at pp. 297-298 :

"(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

30. In view of this clear statement of law, it would be unnecessary to cover the ground over again except to add the following caution administered by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis [1897] 165 U.S. 150; 41 L. Ed. 666 :

"While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or Corporations to hostile and discriminating Legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

31. It will be seen from the said rules that a weightage is given to the State as against an individual and a heavy burden is thrown on the latter to establish his fundamental right. If the caution administered by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis [1897] 165 U.S. 150; 41 L. Ed. 666 and restated by Das, C.J., in Shri Ram Krishna Dalmia's case MANU/SC/0024/1958 : [1959]1SCR279 were to be ignored, the burden upon a citizen would be an impossible one, the rules intended to elucidate the doctrine of equality would tend to exhaust the right itself, and in the words of Brewer, J., the said concept becomes "a mere rope of sand, in no manner restraining state action". While the Court may be justified to assume certain facts to sustain a reasonable classification, it is not permissible to rest its decision on some undisclosed and unknown reasons; in that event, a Court would not be enforcing a fundamental right but would be finding out some excuse to support the infringement of that right.

32. It will be convenient at the outset to refer to the relevant sections. Under s. 25 of the Evidence Act, no confession made to a police-officer shall be proved as against a person accused of an offence. Section 26 says that no confession made by any person while he is in the custody of a police-officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27, which is in the form of a proviso, enacts that "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Section 162 of the Code of Criminal Procedure lays down that no statement made by any person to a police-officer in the course of an investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Sub-s. (2) of s. 162 of the said Code which was amended by s. 2 of the Code of Criminal procedure (Second Amendment) Act, 1941 (Act XV of 1941), provides that the said section shall not effect the provisions of s. 27 of the Indian Evidence Act.

33. A combined effect of the said provisions relevant to the present enquiry may be stated thus : (1) No confession made to a police-officer by an accused can be proved against him; (2) no statement made by any person to a police-officer during investigation can be used for any purpose at any inquiry or trial; (3) a confession made by any person while he is in the police custody to whomsoever made, such as a fellow-prisoner, a doctor or a visitor, can be proved against him if it is made in the presence of a Magistrate; and (4) if a person accused of an offence is in the custody of a police-officer, any information given by him, whether it is a statement or a confession, so much of it as relates distinctly to the fact thereby discovered may be proved. Shortly stated, the section divided the accused making confessions or statements before the police into two groups : (i) accused not in custody of the police, and (ii) accused who are in the custody of the police. In the case of the former there is a general bar against the admissibility of any confessions or statements made by them from being used as evidence against them; in the case of the latter, so much of such statements or confessions as relates distinctly to the fact thereby discovered is made admissible.

34. Shorn of the verbiage, let us look at the result brought about by the combined application of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure. A and B stabbed C with knives and hid them in a specified place. The evidence against both of them is circumstantial. One of the pieces of circumstantial evidence is that both of them gave information to the police that each of them stabbed C with a knife and hid it in the said place. They showed to the police the place where they had hidden the knives and brought them out and handed them over to the police; and both the knives were stained with human blood. Excluding this piece of evidence, other pieces of circumstantial evidence do not form a complete chain. If it was excluded, both the accused would be acquitted; if included, both of them would be convicted for murder. But A, when he gave

the information was in the custody of police, but B was not so. The result is that on the same evidence A would be convicted for murder but B would be acquitted : one would lose his life or liberty and the other would be set free. This illustration establishes that prima facie the provisions of s. 27 of the Evidence Act accord unequal and uneven treatment to persons under like circumstances.

35. Learned Additional Solicitor General tries to efface this apparent vice in the sections by attempting to forge a reasonable basis to sustain the different treatment given to the two groups of accused. His argument may be summarized thus : Accused are put in two categories, namely, (1) accused in custody; and (2) accused not in custody. There are intelligible differentia between these two categories which have reasonable relation to the objects sought to be achieved by the legislature in enacting the said provisions. The legislature has two objects, viz., (i) to make available to the Court important evidence in the nature of confessions to enable it to ascertain the truth; and (ii) to protect the accused in the interest of justice against coercive methods that may be adopted by the police. The differences between the two categories relating to the objects sought to be achieved are the following : (a) while extra-judicial confessions in the case of an accused not in custody are admissible in evidence, they are excluded from evidence in the case of accused in custody; (b) compared with the number of accused in the custody of the police who make confessions or give information to them, the number of accused not in custody giving such information or making confessions would be insignificant; (c) in the case of confession to a police-officer by an accused not in custody, no caution is given to him before the confession is recorded, whereas in the case of an accused in custody, the factum of custody itself amounts to a caution to the accused and puts him on his guard; and (d) protection by the imposition of a condition for the admissibility of confessions is necessary in the case of accused in custody; whereas no such protection for accused not in custody is called for. Because of these differences between the two categories, the

argument proceeds, the classification made by the legislature is justified and takes the present case out of the operation of Art. 14 the Constitution.

I shall now analyse each of the alleged differences between the two categories of accused to ascertain whether they afford a reasonable and factual basis for the classification.

Re. (a) : Whether the accused is in custody or not in custody, the prosecution is not prevented from collecting the necessary evidence to bring home the guilt to the accused. Indeed, as it often happens, if the accused is not in custody and if he happens to be an influential person there is a greater likelihood of his retarding and obstructing the progress of investigation and the collection of evidence. Nor all the extra-judicial confessions are excluded during the trial after a person is put in custody. The extra-judicial confession made by an accused before he is arrested or after he is released on bail is certainly relevant evidence to the case. Even after a person is taken into custody by a police-officer, nothing prevents that person from making a confession to a third-party and the only limitation imposed by s. 26 of the Evidence Act is that he shall make it only in the presence of a Magistrate. The confession made before a Magistrate after compliance with all the formalities prescribed has certainly greater probative force than that made before outsiders. On the other hand, though extra judicial confessions are relevant evidence, they are received by Courts with great caution. That apart, it is a pure surmise that the legislature should have thought that the confession of an accused in custody to a police-officer with a condition attached would be a substitute for an extra-judicial confession that he might have made if he was free. Broadly speaking, therefore, there is no justification for the suggestion that the prosecution is in a better position in the matter of establishing its case when the accused is out of custody than when he is in custody. Moreover, this circumstance has not been relied upon by the State in the High Court but is relied upon for the first time by learned counsel during his arguments. In my view,

there is no practical difference at all in the matter of collecting evidence between the two categories of persons and that the alleged difference cannot reasonably sustain a classification.

Re. (b) : The second circumstance relied upon by the learned counsel leads us to realms of fancy and imagination. It is said that the number of persons not in custody making confessions to the police is insignificant compared with those in custody and, therefore, the legislature may have left that category out of consideration. We are asked to draw from out experience and accept the said argument. No such basis was suggested in the High Court. The constitutional validity has to be tested on the facts existing at the time the section or its predecessor was enacted but not on the consequences flowing from its operation. When a statement made by accused not in the custody of police is statutorily made inadmissible in evidence, how can it be expected that many such instances will fall within the ken of Courts. If the ban be removed for a short time it will be realized how many such instances will be pouring in the same way as confessions of admissible type have become the common feature of almost every criminal case involving grave offence. That apart, it is also not correct to state that such confessions are not brought to the notice of Courts.

36. In re Mottai Thevar MANU/TN/0235/1952 : AIR1952Mad586 deals with a case where the accused immediately after killing the deceased goes to the police station and makes a clear breast of the offence. In Durlav Namasudra v. King Emperor I.L.R. (1932) Cal. 1040 the information received from an accused not in the custody of a police-officer which led to the discovery of the dead-body was sought to be put in evidence. Before a division bench of the Patna High Court in Deonandan Dusadh v. King Emperor I.L.R. (1928) Pat. 411 the information given to the Sub-Inspector of Police by a husband who had fatally assaulted his wife which led to the discovery of the corpse of the woman was

sought to be admitted in evidence. In Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241 a full bench of the Patna High Court was considering whether one of the pieces of evidence which led to the discovery of blood-stained knife and other articles by the Sub-Inspector of Police at the instance of the accused was admissible against the informant. A statement made by an accused to a responsible police-officer voluntarily confessing that he had committed an act of crime was considered by a division bench of the Nagpur High Court in Bharosa Ramdayal v. Emperor A.I.R. 1941 Nag. 86 The Lahore High Court in Jalla v. Emperor A.I.R. 1931 Lah. 278 had before it a statement made by an accused to the police which led to the discovery of the dead-body. In re Peria Guruswamy and Another A.I.R. 1941 Mad. 765 is a decision of a division bench of the Madras High Court wherein the question of admissibility of a confession made by a person to a police-officer before he came into his custody was considered.

37. I have cited the cases not for considering the validity of the questions decided therein, namely, when a person can be described as an accused and when he can be considered to have come into the custody of the police, but only to controvert the argument that such confessions are in practice non-existent. I have given only the representative decisions of various High Courts and I am sure if a research is made further instances will be forthcoming.

38. The historical background of s. 27 also does not warrant any assumption that the legislature thought that cases of persons not in custody of a police-officer making confessions before him would be very few and, therefore, need not be provided for. Sections 25, 26, and 27 of the Indian Evidence Act correspond to Sections 148, 149 and 150 of the Code of Criminal Procedure of 1861. Section 148 of the Code prohibited the use as evidence of confessions or admissions of guilt made to a police-officer. Section 149 provided :

"No confession or admission of guilt made by any person while he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate shall be used as evidence against such person."

39. Section 150 stated :

"When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

40. Section 150 of the Code of 1861 was amended by Act VIII of 1869 and the amended section read as follows :

"Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt, or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

41. It would be seen from the foregoing sections that there was an absolute bar against the admissibility of confessions or admissions made by any person to a police-officer and that the said bar was partially lifted in a case where such information, whether it amounted to a confession or admission of guilt, related distinctly to the fact discovered. The proviso introduced by Act VIII of 1869 was in pari materia with the provisions of s. 27 of the Evidence Act with the difference that in the earlier section the phrase "a person accused of any offence" and the phrase "in the custody of a police officer" were connected

by the disjunctive "or". The result was that no discrimination was made between a person in custody or out of custody making a confession to a police-officer. Section 150 of the Code before amendment also, though it was couched in different terms, was similar in effect. It follows that, at any rate till the year 1872, the intention of the legislature was to provide for all confessions made by persons to the police whether in custody of the police or not. Can it be said that in 1872 the legislature excluded confessions or admissions made by a person not in custody to a police-officer from the operation of s. 27 of the Evidence Act on the ground that such cases would be rare ? Nothing has been placed before us to indicate the reasons for the omission of the word "or" in s. 27 of the Evidence Act. If that be the intention of the legislature, why did it enact s. 25 of the Evidence Act imposing a general ban on the admissibility of all confessions made by accused to a police-officer ? Section 27 alone would have served its purpose. On the other hand, s. 25 in express terms provides for the genus, i.e., accused in general, and s. 27 provides for the species out of the genus, namely, accused who are in custody. A general ban is imposed by one section and it is lifted only in favour of a section of accused of the same class. The omission appears to be rather by accident than by design. In the circumstances it is not right to speculate and hold that the legislature consciously excluded from the operation of s. 27 of the Act accused not in custody on the ground that they were a few in number.

42. During the course of the arguments of the learned counsel for the respondent, to the question put from the Bench whether an accused who makes a confession of his guilt to a police-officer would not by the act of confession submit himself to his custody, the learned counsel answered that the finding of the High Court was in his favour, namely, that such a confession would not bring about that result. Learned Additional Solicitor-General in his reply pursued this line of thought and contended that in that event all possible cases of confession to a police-officer would be covered by s. 27 of the Indian Evidence Act. The governing section is s. 46 of the Code of Criminal Procedure, which reads :

"(1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. ...".

43. It has been held in some decisions that "when a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and if he makes the statement to a police-officer, as much, he submits to the custody of the officer within the meaning of clause (1) of this section, and is then in the custody of a police-officer within the meaning of s. 27 of the Indian Evidence Act". But other cases took a contrary view. It is not possible to state as a proposition of law what words or what kind of action bring about submission to custody; that can only be decided on the facts of each case. It may depend upon the nature of the information, the circumstances under, the manner in, and the object for, which it is made, the attitude of the police-officer concerned and such other facts. It is not, therefore, possible to predicate that every confession of guilt or statement made to a police-officer automatically brings him into his custody. I find it very difficult to hold that in fact that there would not be any appreciable number of accused making confessions or statements outside the custody of a police-officer. Giving full credit to all the suggestions thrown out during the argument, the hard core of the matter remains, namely, that the same class, i.e., accused making confessions to a police-officer, is divided into two groups - one may be larger than the other - on the basis of a distinction without difference.

44. Let me now consider whether there is any textual or decided authority in support of the contention that the legislature can exclude from the operation of s. 27 accused not in custody on the ground that they are a few in number.

45. In support of this contention learned counsel for the appellant cited a decision of this Court and some decisions of the Supreme Court of the United States of America. The decision of this Court relied upon is that in Sakhawat Ali v. The State of Orissa MANU/SC/0093/1954 : [1955]1SCR1004 . In that case, Bhagwati, J., observed at p. 1010 thus :

"The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by article 14 of the Constitution."

46. These observations, though at first sight appear to support the appellant, if understood in the context of the facts and the points decided in that case, would not in any way help him. By the provisions of s. 16(1)(x) of the Orissa Municipal Act, 1950, a paid legal practitioner on behalf of or against the Municipality is disqualified for election to a seat in such Municipality. One of the question raised was that the said section violates the fundamental right of the appellant under Art. 14 of the Constitution. The basis of that argument was that the classification made between legal practitioners who are employed on payments on behalf of the Municipality or who act against the Municipality and those legal practitioners who are not so employed was not reasonable. Bhagwati, J., speaking for the Court, stated the well-settled principles of classification and gave reasons justifying the classification in the context of the object sought to be achieved thereby. But it was further argued in that case that the legislature should have also disqualified other persons, like clients, as even in their case there would be conflict between interest and duty. Repelling that contention the learned Judge made the aforesaid observations. The

said observations could only mean that, if there was intelligible differentia between the species carved out of the genus for the purpose of legislation, in the context of the object sought to be achieved, the mere fact that the legislation could have been extended to some other persons would not make the legislation constitutionally void. On the other hand, if the passage be construed in the manner suggested by learned counsel for the appellant, it would be destructive of not only the principle of classification but also of the doctrine of equality.

47. Nor do the American decisions lay down any such wide proposition. In John A. Watson v. State of Maryland (1910) 218 U.S. 173; 54 L. Ed. 987 the constitutional validity of Maryland Code of 1904 which made it a misdemeanor for any doctor to practise medicine without registration, was challenged. The said Code exempted from its operation physicians who were then practising in that State and had so practised prior to January 1, 1898, and could prove that within one year of the said date they had treated at least twelve persons in their professional capacity. The Supreme Court of America affirmed the validity of the provision. The reason for the classification is stated at p. 989 thus :

"Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties."

48. Then the learned Judge proceeded to state :

"Such exceptions proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the

qualifications which others are required to manifest as a result of an examination before a board of medical experts."

49. The classification is, therefore, not sustained upon any mathematical calculation but upon the circumstance that the groups excluded were experienced doctors whereas those included were not. In Jeffrey Manufacturing Company v. Harry O. Blagg (1915) 235 U.S. 571 : 59 L. Ed. 364 the Supreme Court of America justified a classification under Ohio Workmen's compensation Act which made a distinction between employers of shops with five or more employees and employers of shops having a lesser number of employees. Employers of the former class had to pay certain premiums for the purpose of establishing a fund to provide for compensation payable under the said Act. If an employer did not pay the premium, he would be deprived of certain defences in a suit filed by his employee for compensation. It was contended that this discrimination offended the provisions of the 14th Amendment of the Constitution. Day, J., sustained the classification on the ground that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, than in smaller ones. It was also conceded that the State legislature was not guilty of arbitrary classification. It is, therefore, manifest that the classification was not based upon numerical strength but on the circumstance that the negligence of a fellow servant is more likely to happen in the case of larger establishments. The passage at p. 369 must be understood in the light of the facts and the concession made in that case. The passage runs thus :

"..... having regard to local conditions, of which they (State legislature) must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it, and embraced all the establishments of the state of any size, and that those so small as to employ only four or less might be regarded

as a negligible quantity, and need not be assessed to make up the guaranty fund, or covered by the methods of compensation which are provided by this legislation."

50. The passage presupposes the existence of a classification and cannot, in my view, support the argument that an arbitrary classification shall be sustained on the ground that the legislature in its wisdom covered the field where the protection, in its wisdom covered the field where the protection, in its view, was needed. Nor the observations of McKenna, J., in St. Louis, Iron Mountain & Southern Railway Company v. State of Arkansas (1916) 240 U.S. 518; 60 L. Ed. 776 advance the case of the appellant. The learned Judge says at p. 779 thus :

"We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may exceptions in which the evil aimed at is deemed not so flagrant."

51. In that case the State legislature made an exemption in favour of railways less than 100 miles in length from the operation of the statute forbidding railway companies with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers. McKenna, J., sustained its constitutional validity holding that the classification was not arbitrary. The observations cited do not in any way detract from the well-established doctrine of classification, but only lay down that the validity of a classification must be judged not on abstract theories but on practical considerations. Where the legislature prohibited the use of shoddy, new or old, even when sterilized, in the manufacture of comfortable for beds, the Supreme Court of America held in Weaver v. Palmer Brothers Co. (1976) 270 U.S. 402; 70 L. Ed. 654 that the prohibition was not reasonable. It was held that constitutional guaranties may

not be made to yield to mere convenience. Holmes, J., in his dissenting judgment observed at p. 659 thus :

"A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm."

52. Even this dissenting opinion says nothing more than that, in ascertaining the reasonableness of a classification, it shall be tested on practical grounds and not on theoretical considerations. In West Coast Hotel Company v. Parrish (1937) 300 U.S. 379; 81 L. Ed. 703 a state statute authorized the fixing of reasonable minimum wages for women and minors by state authority, but did not extend it to men. In that context, Hughes, C.J., observed at p. 713 thus :

"This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach."

53. These observations assume a valid classification and on that basis state that a legislation is not bound to cover all which it might possibly reach.

54. A neat summary of the American law on the subject is given in "The Constitution of the United States of America", prepared by the Legislative Reference Service, Library of Congress (1952 Edn.) at p. 1146 thus :

"The legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied. The State may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rules laid down were made mathematically exact. Exceptions of specified classes will not render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted classes."

55. These observations do not cut across the doctrine of classification, but only afford a practical basis to sustain it. The prevalence of an evil in one field loudly calling for urgent mitigation may distinguish it from other field where the evil is incipient. So too, the deleterious effect of a law on the public, if it is extended to the excluded group, marks it off from the included group. Different combination of facts with otherwise apparently identical groups may so accentuate the difference as to sustain a classification. But if the argument of the learned counsel, namely, that the legislature can in its discretion exclude some and include others from the operation of the Act in spite of their identical characteristics on the ground only of numbers be accepted, it will be destructive of the doctrine of equality itself.

56. Therefore, the said and similar decisions do not justify classification on the basis of numbers or enable the legislature to include the many in and exclude the few from the operation of law without there being an intelligible differentia between them. Nor do they support the broad contention that a legislature in its absolute discretion may exclude some instances of identical characteristics from an Act on alleged practical considerations. Even to exclude one arbitrarily out of a class is to offend against Art. 14 of the Constitution.

57. Let us now apply the said principles to the facts of the present case. Assuming for a moment that the ratio between the accused in the context of confessions is 1000 in custody and 5 out of custody, how could that be conceivably an intelligible ground for classification ? Assuming again that the legislature thought - such an exemption is unwarranted - that such cases would not arise at all and need not be provided for, could that be a reasonable assumption having regard to the historical background of s. 27 of the Evidence Act and factual existence of such instances disclosed by decisions cited supra ? As I have already stated that such an exemption is an unwarranted flight into the realms of imagination in the teeth of expressed caution administered by Das, C. J., in Shri Ram Krishna Dalmia's Case MANU/SC/0024/1958 : [1959]1SCR279 and by Brewer, J., in Gulf, Colorada and Santa Fe Rly. Co. v. Ellis [1897] 165 U.S. 150; 41 Ed. 666

Re. (c) : Nor can I find any intelligible differentia in the caution alleged to be implied by accused being taken into custody. The argument is that under s. 163 of the Code of Criminal Procedure

"no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will,"

and as an accused is allowed to make any statement he chooses without his being placed on guard by timely caution, no statement made by him is permitted to be proved; whereas by the accused being taken into custody, the argument proceeds, by the said act itself the accused gets sufficient warning that his statement may be used in evidence and that this difference affords a sufficient basis for the classification. I am not satisfied that taking into custody amounts to a statutory or implied caution. If that be the basis for the distinction, there is no justification that an accused once taken into custody but later

released on bail should not be brought in within the meaning of s. 27 of the Indian Evidence Act.

Re. (d) : The fourth item of differentia furnishes an ironical commentary on the argument advanced. The contention is that an accused in custody needs protection in the matter of his confession and therefore a condition is imposed before the confession is made admissible. There is an obvious fallacy underlying this argument. The classification is made between accused not in custody making a confession and accused in custody making a confession to a police-officer : the former is inadmissible and the latter is admissible subject to a condition. The point raised is why should there be this discrimination between these two categories of accused ? It is no answer to this question to point out that in the case of an accused in custody a condition has been imposed on the admissibility of his confession. The condition imposed may be to some extent affording a guarantee for the truth of the statement, but it does not efface the clear distinction made between the same class of confessions. The vice lies not in the condition imposed, but in the distinction made between these two in the matter of admissibility of a confession. The distinction can be wiped out only when confessions made by all accused are made admissible subject to the protective condition imposed.

58. Not only the alleged differentia are not intelligible or germane to the object sought to be achieved, the basis for the distinction is also extremely arbitrary. There is no acceptable reason why a confession made by an accused in custody to a police-officer is to be admitted when that made by an accused not in custody has to be rejected. The condition imposed in the case of the former may, to some extent, soften the rigour of the rule, but it is irrelevant in considering the question of reasonableness of the classification. Rankin, J., in Durlav Namasudra v. Emperor (1932) 59 Cal. 1040 in a strongly worded passage criticised the anomaly underlying s. 27 thus at p. 1045 :

"..... in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it ..... It cannot be admitted in evidence, because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that, if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody."

59. In the present case, the self-same paradox is sought to be supported as affording a reasonable basis for the classification.

60. The only solution is for the legislature to amend the section suitably and not for this Court to discover some imaginary ground and sustain the classification. I, therefore, hold that s. 27 of the Indian Evidence Act is void as violative of Art. 14 of the Constitution.

61. If so, the question is whether there is any scope for interference with the finding of the High Court. The High Court considered the entire evidence and found the following circumstances to have been proved in the case :

(a) "that in the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman, accused, over the proposed transfer of property in Anandadih, in the presence of Shobh Nath (P. W. 5) and Mahesh (P.W. 7), and that in the course of this altercation Deoman slapped her and threatened that he would smash her mouth";

(b) "that at about dawn on June 19, 1958, the accused was seen by Khusai (P.W. 8) hurrying towards a tank, and shortly afterwards was seen by Mata Dihal (P.W. 11) actually bathing in that tank, before it was fully light";

(c) "that the accused absconded immediately afterwards and was not to be found at Anandadih on June 19, 1958"; and

(d) "that on June 21, 1958, the accused in the presence of the investigating officer (P.W. 14), Shobh Nath (P.W. 5) and Raj Bahadur Singh (P.W. 6) stated that he could hand over the "gandasa" which he had thrown into a tank; that he was then taken to that tank and in the presence of the same witnesses waded in and fetched the "gandasa" Ex. 1 out of the water; and that this "gandasa" was found by the Chemical Examiner and Serologist to be stained with human blood".

The High Court held that the said circumstances are by no means sufficient to prove the guilt of the accused-appellant beyond reasonable doubt. On that finding, the High Court gave the benefit of doubt to the accused and acquitted him of the offence. The finding is purely one of fact and there are no exceptional circumstances in the case to disturb the same.

62. In the result, the appeal fails and is dismissed.

M. Hidayatullah, J.

63. The facts of the case have been stated in full by Shah, J., in the judgment which he has delivered, and which I had the advantage of reading. I have also had the advantage of reading the judgment of Subba Rao, J. I respectfully agree generally with the conclusions and the reasons, therefore of Shah, J. I wish, however, to make a few observations.

64. Section 27 of the Indian Evidence Act is in the Chapter on admissions, and forms part of a group of sections which are numbered 24 to 30, and these sections deal with confessions of persons accused of an offence. They have to be read with Sections 46 and 161-164 of the Code of Criminal Procedure.

65. Section 24 makes a confession irrelevant if the making of it appears to the Court to have been caused by inducement, threat or promise having reference to the charge against the accused person, from a person in authority and by which the accused person hopes that he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. Section 25 makes a confession to a police officer inadmissible against a person accused of any offence. Section 26 says that no confession made by a person whilst he is the custody of a police-officer shall be proved unless it be made in the immediate presence of a Magistrate. Section 27 then provides :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

66. Section 161 of the Code of Criminal Procedure empowers a police officer of stated rank to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person is bound to answer all questions relating to the

case but not questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police officer may make a written record of the statement. Section 163 of the Code then lays down the rule that no police officer or other person in authority shall offer or make, or cause to be offered or made, any inducement, threat or promise as is mentioned in the Indian Evidence Act, s. 24 and further that no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation any statement which he may be disposed to make of his own free will. Section 162 of the Code then makes statements reduced into writing inadmissible for any purpose except those indicated, but leaves the door open for the operation of s. 27 of the Indian Evidence Act. Section 164 confers the power of record confessions, on Magistrates of stated rank during investigation or at any time afterwards before the commencement of the enquiry or trial. Such confessions are to be recorded after due caution to the person making the confession and only if there is reason to believe that they are voluntary. Section 46 of the Code provides that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

67. When an offence is committed and investigation starts, the police have two objects in view. The first is the collection of information, and the second is the finding of the offender. In this process, the police question a number of persons, some of whom may be only witnesses and some who may later figure as the person or persons charged. While questioning such persons, the police may not caution them and the police must leave the persons free to make whatever statements they wish to make. There are two checks at this stage. What the witnesses or the suspects say is not be used at the trial, and a person cannot be compelled to answer a question, which answer may incriminate him. It is to be noticed that at that stage though the police may have suspicion against the offender, there is no difference between him and other witnesses, who are questioned. Those who turn

out to be witnesses and not accused are expected to give evidence at the trial and their former statements are not evidence. In so far as those ultimately charged are concerned, they cannot be witnesses, save exceptionally, and their statements are barred under s. 162 of the Code and their confessions, under s. 24 of the Indian Evidence Act. Their confessions are only relevant and admissible, if they are recorded as laid down in s. 164 of the Code of Criminal Procedure after due caution by the Magistrate and it is made clear that they are voluntary. These rules are based upon the maxim : Nemo tenetur prodere seipsum (no one should be compelled to incriminate himself). In an address to Police Constables on their duties, Hawkins, J., (later, Lord Brampton), observed :

"Neither Judge, magistrate nor juryman, can interrogate an accused person ..... or require him to answer the questions tending to incriminate himself. Much less, then ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody."

68. In English law, the statement of an accused person can be tendered in evidence, provided he has been cautioned and the exact words of the accused are deposed to. Says Lord Brampton :

"There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence, nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him, that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim with respect to an accused person is 'Keep your ears and eyes open, and your mouth shut'".

69. See Sir Howard Vincent's "Police Code".

70. In Ibrahim v. Emperor [1914] A.C. 599 Lord Sumner gave the history of rules of common law relating to confessions, and pointed out that they were "as old as Lord Hale". Lord Sumner observed that in Reg. v. Thompson [1893] 2 Q.B. 12 and earlier in The King v. Jane Warrickshall (1783) 1 Leach 263; 168 E.R. 234 it was ruled (to quote from the second case) :

"A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it."

Lord Sumner added :

"It is not that the law presumes such statements to be untrue but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice : Reg. v. Baldry (1852) 5 Cox C.C. 523 Accordingly when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance, and subject to strong warnings as to their weight."

71. Even so, in the judgment referred to by Lord Sumner, Parke, B., bewailed that the rule had been carried too far out of "too much tenderness towards prisoners in this matter", and observed :

"I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence ..... Justice and commonsense have too frequently been sacrificed at the shrine of mercy."

72. Whatever the views of Parke, B., Lord Sumner points out that "when Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law."

73. Lord Sumner has then traced the history of the law in subsequent years. In 1905, Channel, J., in Reg v. Knight and Thavre (1905) 20 Cox C.C. 711 referred to the position of an accused in custody thus :

"When he has taken any one into custody ..... he ought not to question the prisoner ..... I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the Judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

74. Five years later, the same learned Judge in Rex v. Booth and Jones (1910) 5 Cr. App. Rep. 177 observed :

"The moment you have decided to charge him and practically got him into custody, then, inasmuch as a Judge cannot ask a question or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet, that if a policeman does ask a question it is inadmissible; what happens is that the Judge says it is not advisable to press the matter."

75. It is to be noticed that Lord Sumner noted the difference of approach to the question by different Judges, and observed that :

"Logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight ..... Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope in authority, is a rule of policy."

76. The Judicial Committee did not express any opinion as to what the law should be. The state of English law in 1861 when these rules became a part of the Indian law in a statutory form was thus that the police could question any person including a suspect. The statements of persons who turned out to be mere witnesses were entirely inadmissible, they being supposed to say what they could, on oath, in Court. Statements of suspects after caution were admissible but not before the caution was administered or they were taken in custody; but confessions were, as a rule, excluded if they were induced by hope, fear, threat, etc.

77. When the Indian law was enacted in 1861, it is commonplace that the statute was drafted in England. Two departures were made, and they were (1) that no statement made to a police officer by any person was provable at the trial which included the accused person, and (2) that no caution was to be given to a person making a statement.

78. In so far as the accused was concerned, he was protected from his own folly in confessing to a charge both after and before his custody unless he respectively did so in the immediate presence of a Magistrate, or his confession was recorded by a Magistrate.

In either event, the confession had to be voluntary and free from taint of threat, promise, fear, etc. The law was framed to protect a suspect against too much garrulity before he knew that he was in danger which sense would dawn on his when arrested and yet left the door open to voluntary statements which might clear him if made but which might not be made if a caution was administered. Without the caution an innocent suspect is not a position to know his danger, while a person arrested knows his position only too well. Without the caution, the line of distinction ceased, and the law very sensibly left out the statements altogether. Thus, before arrest all suspects, whether rightly suspected or wrongly, were on par. Neither the statements of the one nor of the other were provable, and there was no caution at all.

79. The English law then was taken as a model for accused in custody. Section 27 which is framed as an exception has rightly been held as an exception to Sections 24 to 26 and not only to s. 26. The words of the section were taken bodily from The King v. Lockhart (1785) 1 Leach 386 : 168 E.R. 295 and footnote to (1783) I Leach 263 where it was said :

"But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true."

80. That case followed immediately after Warrickshall's case (1783) I Leach 263 : 168 E.R. 234 and summarised the law laid down in the earlier case. The accused in that case had made a confession which was not receivable, as it was due to promise of favour. As a result of the confession, the goods stolen were found concealed in a mattress. It was contended that the evidence of the finding of the articles should not be admitted. Nares. J., with Mr. Baron Eyre observed :

"It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit ..... This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true of false."

81. Another case is noted in the footnote in the English Report Series. In February Session, 1784, Dorothy Mosey was tried for shop-lifting and a confession had been made by her and goods found in consequence of it, as in the above case. Buller, J., (present Mr. Baron Perryn, who agreed), said :

"A prisoner was tried before me (Buller, J.) where the evidence was just as it is here. I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any facts arising afterwards may be given in evidence, though they were done in consequence of the confession. This point, though it did not affect the prisoner at the bar, was stated to all the Judges; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, though they were done in consequence of the confession."

82. Where, however, no fact was discovered, the statement was not held admissible. See Rex v. Richard Griffin (1809) Rus. & Ry. 151 : 168 E.R. 732 and Rex v. Francis Jones (1809) Russ. & Ry. 152

83. In Rex v. David Jenkins (1822) Russ. & Ry. 492 : 168 E.R. 914 the prisoner was convicted before Bayley, J., (present Park, J.), of stealing certain gowns and other articles. He was induced by a promise from the prosecutor to confess his guilt, and after that confession, he carried the officer to a particular house, but the property was not found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as abovementioned was. But Bayley, J., referred the point for consideration of the Judges. The Judges were of opinion that,

"the evidence was not admissible and the conviction was therefore wrong. The confession was excluded, being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce a groundless conduct."

84. It would appear from this that s. 27 of the Indian Evidence Act has been taken bodily from the English law. In both the laws there is greater solicitude for a person who makes a statement at a stage when the danger in which he stands has not been brought home to him than for one who knows of the danger. In English law, the caution gives him the necessary warning, and in India the fact of his being in custody takes the place of caution which is not to be given. There is, thus, a clear distinction made between a person not accused of an offence nor in the custody of a police officer and one who is.

85. It remains to point out that in 1912 the Judges of the King's Bench Division framed rules for the guidance of the police. These rules, though they had no force of law, laid down the procedure to be followed. At first, four rules were framed, but later, five more were added. They are reproduced in Halsbury's Laws of England, 3rd Edn., Vol. 10 p. 470, para. 865. These rules also clearly divide persons suspected of crime into those who are in police custody and those who are not. It is assumed that a person in the former category knows his danger while the person in the latter may not. The law is tender towards the person who may not know of his danger, because in his cases there is less chance of fairplay than in the case of one who has been warned.

86. It is to be noticed that in the Royal Commission on Police Powers and Procedure 1928-29) CMD 3297 nothing is said to show that there is anything invidious in making statements leading to the discovery of a relevant fact admissible in evidence, when such statements are made by persons in custody. The suggestions and recommendations of the Commission are only designed to protect questioning of persons not yet taken in custody or taken in custody on a minor charge and the use of statements obtained in those circumstances.

87. The law has thus made a classification of accused persons into two : (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the second category the law has ruled that their statements are not admissible, and in the case of the first category, only that portion of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says; "I pushed him down such and such

mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft.

88. It is argued that there is denial of equal protection of the law, because if the statement were made before custody began, it would be inadmissible. Of course, the making of the statement as also the stage at which it is made, depends upon the person making it. The law is concerned in seeing fairplay, and this is achieved by insisting that an unguarded statement should not be receivable. The need for caution is there, and this caution is very forcefully brought home to an accused, when he is accused of an offence and is in the custody of the police. There is thus a classification which is reasonable as well as intelligible, and it subserves a purpose recognised now for over two centuries. When such an old and time-worn rule is challenged by modern notions, the basis of the rule must be found. When this is done, as I have attempted to do, there is no doubt left that the rule is for advancement of justice with protection both to a suspect not yet arrested and to an accused in custody. There is ample protection to an accused, because only that portion of the statement is made admissible against him which has resulted in the discovery of a material fact otherwise unknown to the police. I do not, therefore, regard this as evidence of unequal treatment.

89. Before leaving the subject, I may point out that the recommendation of the Royal Commission was :

"(xlviii) A rigid instruction should be issued to the Police that no questioning of a prisoner, or a 'person in custody', about any crime or offence with which he is, or may be charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements, under No. (7) of the Judges' Rules but the

prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial."

90. This is a matter for the legislature to consider.

91. In view of what I have said above and the reasons given by Shah, J., I agree that the appeal be allowed, as proposed by him.

92. BY COURT : In accordance with the opinion of the majority the appeal is allowed. Section 27 of the Indian Evidence Act and s. 162, sub-s. (2), of the Code of Criminal Procedure in so far as "that section relates to s. 27 of the Indian Evidence Act", are intra vires and do not offend Art. 14 of the Constitution. The order of the High Court acquitting the respondent is also set aside and the order of the Court of Sessions convicting the accused (respondent) under s. 302 of the Indian Penal Code and sentencing him to death is restored.

93. Appeal allowed.

MANU/SC/0147/1961

Back to Section 105 of Indian Evidence Act, 1872

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 195 of 1960

Decided On: 24.11.1961

K.M. Nanavati Vs. State of Maharashtra

Hon'ble Judges/Coram:

K. Subba Rao, Raghubar Dayal and S.K. Das, JJ.

JUDGMENT

K. Subba Rao, J.

1. This appeal by special leave arises out of the judgment of the Bombay High Court sentencing Nanavati, the appellant, to life imprisonment for the murder of Prem Bhagwandas Ahuja, a businessman of Bombay.

2. This appeal presents the commonplace problem of an alleged murder by an enraged husband of a paramour of his wife : but it aroused considerable interest in the public mind by reason of the publication it received and the important constitutional point it had given rise to at the time of its admission.

3. The appellant was charged under s. 302 as well as under s. 304, Part I, of the Indian Penal Code and was tried by the Sessions Judge, Greater Bombay, with the aid of special jury. The jury brought in a verdict of "not guilty" by 8 : 1 under both the sections; but the Sessions Judge did not agree with the verdict of the jury, as in his view the majority verdict of the jury was such that no reasonable body of men could, having regard to the evidence, bring in such a verdict. The learned Sessions Judge submitted the case under s. 307 of the Code of Criminal Procedure to the Bombay High Court after recording the grounds for his opinion. The said reference was heard by a division bench of the said High Court consisting of Shelat and Naik, JJ. The two learned Judges gave separate judgments, but agreed in holding that the accused was guilty of the offence of murder under s. 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life. Shelat, J., having held that there were misdirections to the jury, reviewed the entire evidence and came to the conclusion that the accused was clearly guilty of the offence of murder, alternatively, he expressed the view that the verdict of the jury was perverse, unreasonable and, in any event, contrary to the weight of evidence. Naik, J., preferred to base his conclusion on the alternative ground, namely, that no reasonable body of persons could have come to the conclusion arrived at by the jury. Both the learned Judges agreed that no case had been made out to reduce the offence from murder to culpable homicide not amounting to murder. The present appeal has been preferred against the said conviction and sentence.

4. The case of the prosecution may be stated thus : This accused, at the time of the alleged murder, was second in command of the Indian Naval Ship "Mysore". He married Sylvia in 1949 in the registry office at Portsmouth, England. They have three children by the marriage, a boy aged 9 1/2 years a girl aged 5 1/2 years and another boy aged 3 years. Since the time of marriage, the couple were living at different places having regard to the exigencies of service of Nanavati. Finally, they shifted to Bombay. In the same city the deceased Ahuja was doing business in automobiles and was residing, along with his

sister, in a building called "Shreyas" till 1957 and thereafter in another building called "Jivan Jyot" in Setalvad Road. In the year 1956, Agniks, who were common friends of Nanavatis and Ahujas, introduced Ahuja and his sister to Nanavatis. Ahuja was unmarried and was about 34 years of age at the time of his death, Nanavati, as a Naval Officer, was frequently going away from Bombay in his ship, leaving his wife and children in Bombay. Gradually, friendship developed between Ahuja and Sylvia, which culminated in illicit intimacy between them. On April 27, 1959, Sylvia confessed to Nanavati of her illicit intimacy with Ahuja. Enraged at the conduct of Ahuja, Nanavati went to his ship, took from the stores of the ship a semi-automatic revolver and six cartridges on a false pretext, loaded the same, went to the flat of Ahuja entered his bed-room and shot him dead. Thereafter, the accused surrendered himself to the police. He was put under arrest and in due course he was committed to the Sessions for facing a charge under s. 302 of the Indian Penal code.

5. The defence version, as disclosed in the statement made by the accused before the Sessions Court under s. 342 of the Code of Criminal Procedure and his deposition in the said Court, may be briefly stated : The accused was away with his ship from April 6, 1959, to April 18, 1959. Immediately after returning to Bombay, he and his wife went to Ahmednagar for about three days in the company of his younger brother and his wife. Thereafter, they returned to Bombay and after a few days his brother and his wife left them. After they had left, the accused noticed that his wife was behaving strangely and was not responsive or affectionate to him. When questioned, she used to evade the issue. At noon on April 27, 1959, when they were sitting in the sitting-room for the lunch to be served, the accused put his arm round his wife affectionately, when she seemed to go tense and unresponsive. After lunch, when he questioned her about her fidelity, she shook her head to indicate that she was unfaithful to him. He guessed that her paramour was Ahuja. As she did not even indicate clearly whether Ahuja would marry her and look after the children, he decided to settle the matter with him. Sylvia pleaded with him

not go to Ahuja's house, as he might shoot him. Thereafter, he drove his wife, two of his children and a neighbour's child in his car to a cinema, dropped them there and promised to come and pick them up at 6 P.M. when the show ended. He then drove his car to his ship, as he wanted to get medicine for his sick dog, he represented to the authorities in the ship, that he wanted to draw a revolver and six rounds from the stores of the ship as he was going to drive alone to Ahmednagar by night, though the real purpose was to shoot himself. On receiving the revolver and six cartridges, and put it inside a brown envelope. Then he drove his car to Ahuja's office, and not finding him there, he drove to Ahuja's flat, range the door bell, and, when it was opened by a servant, walked to Ahuja's bed-room, went into the bed-room and shut the door behind him. He also carried with him the envelope containing the revolver. The accused saw the deceased inside the bed-room, called him a filthy swine and asked him whether he would marry Sylvia and look after the children. The deceased retorted, "Am I to marry every woman I sleep with ?" The accused became enraged, put the envelope containing the revolver on a cabnit nearby, and threatened to thrash the deceased. The deceased made a sudden move to grasp at the envelope, when the accused whipped out his revolver and told him to get back. A struggle ensued between the two and during that struggle two shots went off accidentally and hit Ahuja resulting in his death. After the shooting the accused went back to his car and drove it to the police station where he surrendered himself. This is broadly, omitting the details, the case of the defence.

6. It would be convenient to dispose of at the outset the questions of law raised in this case.

7. Mr. G. S. Pathak, learned counsel for the accused, raised before us the following points : (1) Under s. 307 of the Code of Criminal Procedure, the High Court should decide whether a reference made by a Sessions Judge was competent only on a perusal of the

order of reference made to it and it had no jurisdiction to consider the evidence and come to a conclusion whether the reference was competent or not. (2) Under s. 307(3) of the said Code, the High Court had no power to set aside the verdict of a jury on the ground that there were misdirections in the charge made by the Sessions Judge. (3) There were no misdirections at all in the charge made by the Sessions Judge; and indeed his charge was fair to the prosecution as well to the accused. (4) The verdict of the jury was not perverse and it was such that a reasonable body of persons could arrive at it on the evidence placed before them. (5) In any view, the accused shot at the deceased under grave and sudden provocation, and therefore even if he had committed an offence, it would not be murder but only culpable homicide not amounting to murder.

8. Mr. Pathak elaborates his point under the first heading thus : Under s. 307 of the Code of Criminal Procedure, the High Court deals with the reference in two stages. In the first stage, the High Court has to consider, on the basis of the referring order, whether a reasonable body of persons could not have reached the conclusion arrived at by the jury; and, if it is of the view that such a body could have come to that opinion the reference shall be rejected as incompetent. At this stage, the High Court cannot travel beyond the order of reference, but shall confine itself only to the reasons given by the Sessions Judge. If, on a consideration of the said reasons, it is of the view that no reasonable body of persons could have come to that conclusion, it will then have to consider the entire evidence to ascertain whether the verdict of the jury is unreasonable. If the High Court holds that the verdict of the jury is not unreasonable, in the case of a verdict of "not guilty", the High Court acquits the accused, and in the case where the verdict is one of "guilty" it convicts the accused. In case the High Court holds that the verdict of "not guilty", is unreasonable, it refers back the case to the Sessions Judge, who convicts the accused; thereafter the accused will have a right of appeal wherein he can attack the validity of his conviction on the ground that there were misdirections in the charge of the jury. So too, in the case of a verdict of "guilty" by the jury, the High Court, if it holds that

the verdict is unreasonable, remits the matter to the Sessions Judge, who acquits the accused, and the State, in an appeal against that acquittal, may question the correctness of the said acquittal on the ground that the charge to the jury was vitiated by misdirections. In short, the argument may be put in three propositions, namely, (i) the High Court rejects the reference as incompetent, if on the face of the reference the verdict of the jury does not appear to be unreasonable, (ii) if the reference is competent, the High Court can consider the evidence to come to a definite conclusion whether the verdict is unreasonable or not, and (iii) the High Court has no power under s. 307 of the Code of Criminal Procedure to set aside the verdict of the jury on the ground that it is vitiated by misdirections in the charge to the jury.

9. The question raised turns upon the construction of the relevant provisions of the Code of Criminal Procedure. The said Code contains two fascicule of sections dealing with two different situations. Under s. 268 of the Code, "All trials before a Court of Session shall be either by jury, or by the Judge himself." Under s. 297 thereof :

"In cases tried by jury, when the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided....."

10. Section 298 among other imposes a duty on a judge to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to be proved, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and to decide upon all matters of fact which it is necessary to prove in order to enable evidence of particular matter to be given. It is the duty of the jury "to decide which view of the facts is true and then to return the verdict which under such view ought, according to the directions of the Judges, to be returned."

After charge to the jury, the jury retire to consider their verdict and, after due consideration, the foreman of the jury informs the Judge what is their verdict or what is the verdict of the majority of the jurors.

11. Where the Judge does not think it necessary to disagree with the verdict of the jurors or of the majority of them, he gives judgment accordingly. If the accused is acquitted, the Judge shall record a verdict of acquittal; if the accused is convicted, the Judge shall pass sentence on him according to law. In the case of conviction, there is a right of appeal under s. 410 of the Code, and in a case of acquittal, under s. 417 of the Code, to the High Court. But s. 418 of the Code provides :

"(1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only."

12. Sub-section (2) thereof provides for a case of a person sentenced to death, with which we are not now concerned. Section 423 confers certain powers on an appellate Court in the matter of disposing of an appeal, such as calling for the record, hearing of the pleaders, and passing appropriate orders therein. But sub-s. (2) of s. 423 says :

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owning to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

13. It may be noticed at this stage, as it will be relevant in considering one of the arguments raised in this case, that sub-s. (2) does not confer any power on an appellate court, but only saves the limitation on the jurisdiction of an appellate court imposed

under s. 418 of the Code. It is, therefore, clear that in an appeal against conviction or acquittal in a jury trial, the said appeal is confined only to a matter of law.

14. The Code of Criminal Procedure also provides for a different situation. The Sessions Judge may not agree with the verdict of the jurors or the majority of them; and in that event s. 307 provides for a machinery to meet that situation. As the argument mainly turns upon the interpretation of the provisions of this section, it will be convenient to read the relevant clauses thereof.

15. Section 307 : (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

16. (3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

17. This section is a clear departure from the English law. There are good reasons for its enactment. Trial by jury outside the Presidency Towns was first introduced in the Code of Criminal Procedure of 1861, and the verdict of the jury was, subject to re-trial on certain events, final and conclusive. This led to miscarriage of justice through jurors returning erroneous verdicts due to ignorance and inexperience. The working of the system was reviewed in 1872, by a Committee appointed for that purpose and on the basis of the report of the said Committee, s. 262 was introduced in the Code of 1872. Under that section, where there was difference of view between the jurors and the judge, the Judge was empowered to refer the case to the High Court in the ends of justice, and the High Court dealt with the matter as an appeal. But in 1882 the section was amended and under the amended section the condition for reference was that the High Court should differ from the jury completely; but in the Code of 1893 the section was amended practically in terms as it now appears in the Code. The history of the legislation shows that the section was intended as a safeguard against erroneous verdicts of inexperienced jurors and also indicates the clear intention of the Legislature to confer on a High Court a separate jurisdiction, which for convenience may be described as "reference jurisdiction". Section 307 of the Code of Criminal Procedure, while continuing the benefits of the jury system to persons tride by a Court of Session, also guards against any possible injustice, having regard to the conditions obtaining in India. It is, therefore clear that there is an essential difference between the scope of the jurisdiction of the High Court in disposing of an appeal against a conviction or acquittal, as the case may be, in a jury trial, and that in a case submitted by the Sessions Judge when he differs from the verdict of the jury : in the former the acceptance of the verdict of the jury by the Sessions Judge is considered to be sufficient guarantee against its perversity and therefore an appeal is provided only on questions of law, whereas in the latter the absence of such agreement necessitated the conferment of a larger power on the High Court in the matter of interfering with the verdict of the jury.

18. Under s. 307(1) of the Code, the obligation cast upon the Sessions Judge to submit the case to the High Court is made subject to two conditions, namely, (1) the Judge shall disagree with the verdict of the jurors, and (2) he is clearly of the opinion that it is necessary in the ends of justice to submit the case to the High Court. If the two conditions are complied with, he shall submit the case, recording the grounds of his opinion. The words "for the ends of justice" are comprehensive, and coupled with the words "is clearly of opinion", they give the Judge a discretion to enable him to exercise his power under different situations, the only criterion being his clear opinion that the reference is in the ends of justice. But the Judicial Committee, in Ramanugrah Singh v. King Emperor (1946) L.R. 173, IndAp 174, construed the words "necessary for the ends of justice" and laid down that the words mean that the Judge shall be of the opinion that the verdict of the jury is one which no reasonable body of men could have reached on the evidence. Having regard to that interpretation, it may be held that the second condition for reference is that the Judge shall be clearly of the opinion that the verdict is one which no reasonable body of men could have reached on the evidence. It follows that if a Judge differs from the jury and is clearly of such an opinion, he shall submit the case to the High Court recording the grounds of his opinion. In that event, the said reference is clearly competent. If on the other hand, the case submitted to the High Court does not ex facie show that the said two conditions have been complied with by the Judge, it is incompetent. The question of competency of the reference does not depend upon the question whether the Judge is justified in differing from the jury or forming such an opinion on the verdict of the jury. The argument that though the Sessions Judge has complied with the conditions necessary for making a reference, the High Court shall reject the reference as incompetent without going into the evidence if the reasons given do not sustain the view expressed by the Sessions Judge, is not supported by the provisions of sub-s. (1) of s. 307 of the Code. But it is said that it is borne out of the decision of the Judicial Committee in Ramanugrah Singh's case [(1946) L.R. 73, I.A. 174, 182, 186]. In that case the Judicial Committee relied upon the words "ends of justice" and held that the verdict was one which no reasonable body of men could have reached on the evidence and further laid down that the

requirements of the ends of justice must be the determining factor both for the Sessions Judge in making the reference and for the High Court in disposing of it. The Judicial Committee observed :

"In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that on the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded."

19. The Judicial Committee proceeded to state :

"In their Lordships' opinion had the High Court approached the reference on the right lines and given due weight to the opinion of the jury they would have been bound to hold that the reference was not justified and that the ends of justice did not require any interference with the verdict of the jury."

20. Emphasis is laid on the word "justified", and it is argued that the High Court should reject the reference as incompetent if the reasons given by the Sessions Judge in the statement of case do not support his view that it is necessary in the ends of the justice to refer the case to the High Court. The Judicial Committee does not lay down any such proposition. There, the jury brought in a verdict of not "guilty" under s. 302, Indian Penal Code. The Sessions Judge differed from the jury and made a reference to the High Court. The High Court accepted the reference and convicted the accused and sentenced him to transportation for life. The Judicial Committee held, on the facts of that case, that the High

Court was not justified in the ends of justice to interfere with the verdict of the jury. They were not dealing with the question of competency of a reference but only with that of the justification of the Sessions Judge in making the reference, and the High Court in accepting it. It was also not considering a case of any disposal of the reference by the High Court on the basis of the reasons given in the reference, but were dealing with a case where the High Court on a consideration of the entire evidence accepted the reference and the Judicial Committee held on the evidence that there was no justification for the ends of justice to accept it. This decision, therefore, has no bearing on the competency of a reference under s. 307(1) of the Code of Criminal Procedure.

21. Now, coming to sub-s. (3) of s. 307 of the Code, it is in two parts. The first part says that the High Court may exercise any of the powers which it may exercise in an appeal. Under the second part, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, the High Court shall acquit or convict the accused. These parts are combined by the expression "and subject thereto". The words "subject thereto" were added to the section by an amendment in 1896. This expression gave rise to conflict of opinion and it is conceded that it lacks clarity. That may be due to the fact that piecemeal amendments have been made to the section from time to time to meet certain difficulties. But we cannot ignore the expression, but we must give it a reasonable construction consistent with the intention of the Legislature in enacting the said section. Under the second part of the section, special jurisdiction to decide a case referred to it is conferred on the High Court. It also defines the scope of its jurisdiction and its limitations. The High Court can acquit or convict an accused of an offence of which the jury could have convicted him, and also pass such sentence as might have been passed by the Court of Session. But before doing so, it shall consider the entire evidence and give due weight to the opinions of the Sessions Judge and the jury. The second part does not confer on the High Court any incidental procedural powers necessary to exercise the said jurisdiction in a case submitted to it, for it is neither an appeal nor a revision. The

procedural powers are conferred on the High Court under the first part. The first part enables the High Court to exercise any of the powers which it may exercise in appeal, for without such powers it cannot exercise its jurisdiction effectively. But the expression "subject to" indicates that in exercise of its jurisdiction in the manner indicated by the second part, it can call in aid only any of the powers of an appellate court, but cannot invoke a power other than that conferred on an appellate court. The limitation on the second part implied in the expression "subject thereto" must be confined to the area of the procedural powers conferred on a appellate court. If that be the construction, the question arises, how to reconcile the provisions of s. 423(2) with those of s. 307 of the Code ? Under sub-s. (2) of s. 423 :

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

22. It may be argued that, as an appellate court cannot alter or reverse the verdict of a jury unless such a verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him, the High Court, in exercise of its jurisdiction under s. 307 of the Code, likewise could not do so except for the said reasons. Sub-section (2) of s. 423 of the Code does not confer any power of the High Court; it only restates the scope of the limited jurisdiction conferred on the court under s. 418 of the Code, and that could not have any application to the special jurisdiction conferred on the High Court under s. 307. That apart, a perusal of the provisions of s. 423(1) indicates that there are powers conferred on an appellate court which cannot possibly be exercised by courts disposing of a reference under s. 307 of the Code, namely, the power to order commitment etc. Further s. 423(1)(a) and (b) speak of conviction, acquittal, finding and sentence, which are wholly inappropriate to verdict of a jury. Therefore, a reasonable construction will be that the High Court can exercise any

of the powers conferred on an appellate court under s. 423 or under other sections of the Code which are appropriate to the disposal of a reference under s. 307. The object is to prevent miscarriage of the justice by the jurors returning erroneous or perverse verdict. The opposite construction defeats this purpose, for it equates the jurisdiction conferred under s. 307 with that of an appellate court in a jury trial. That construction would enable the High Court to correct an erroneous verdict of a jury only in a case of misdirection by the Judge but not in a case of fair and good charge. This result effaces the distinction between the two types of jurisdiction. Indeed, learned counsel for the appellant has taken a contrary position. He would say that the High Court under s. 307(3) could not interfere with the verdict of the jury on the ground that there were misdirections in the charge to the jury. This argument is built upon the hypothesis that under the Code of Criminal Procedure there is a clear demarcation of the functions of the jury and the Judge, the jury dealing with facts and the Judge with law, and therefore the High Court could set aside a verdict on the ground of misdirection only when an appeal comes to it under s. 418 and could only interfere with the verdict of the jury for the ends of justice, as interpreted by the Privy Council, when the matter comes to it under s. 307(3). If this interpretation be accepted, we would be attributing to the Legislature an intention to introduce a circuitous method and confusion in the disposal of criminal cases. The following illustration will demonstrate the illogical result of the argument. The jury brings in a verdict of "guilty" on the basis of a charge replete with misdirections; the Judge disagrees with that verdict and states the case to the High Court; the High Court holds that the said verdict is not erroneous on the basis of the charge, but is of the opinion that the verdict is erroneous because of the misdirections in the charge; even so, it shall hold that the verdict of the jury is good and reject the reference thereafter, the Judge has to accept the verdict and acquit the accused; the prosecution then will have to prefer an appeal under s. 417 of the Code on the ground that the verdict was induced by the misdirections in the charge. This could not have been the intention of the Legislature. Take the converse case. On similar facts, the jury brings in a verdict of "guilty"; the Judge disagrees with the jury and makes a reference to the High Court; even though it finds misdirections in the charge to the jury,

the High Court cannot set aside the conviction but must reject the reference; and after the conviction, the accused may prefer an appeal to the High Court. This procedure will introduce confusion in jury trials, introduce multiplicity of proceedings, and attribute ineptitude to the Legislature. What is more, this construction is not supported by the express provisions of s. 307(3) of the Code. The said sub-section enables the High Court to consider the entire evidence, to give due weight to the opinions of the Sessions Judge and the jury, and to acquit or convict the accused. The key words in the sub-section are "giving due weight to the opinions of the Sessions Judge and the jury". The High Court shall give weight to the verdict of the jury; but the weight to be given to a verdict depends upon many circumstances - it may be one that no reasonable body of persons could come to; it may be a perverse verdict; it may be a divided verdict and may not carry the same weight as the united one does; it may be vitiated by misdirections or non-directions. How can a Judge give any weight to a verdict if it is induced and vitiated by grave misdirections in the charge ? That apart, the High Court has to give due weight to the opinion of the Sessions Judge. The reasons for the opinion of the Sessions Judge are disclosed in the case submitted by him to the High Court. If the case stated by the Sessions Judge discloses that there must have been misdirections in the charge, how can the High Court ignore them in giving due weight to his opinion ? What is more, the jurisdiction of the High Court is couched in very wide terms in sub-s. (3) of s. 307 of the Code : it can acquit or convict an accused. It shall take into consideration the entire evidence in the case; it shall give due weight to the opinions of the Judge and the jury; it combines in itself the functions of the Judge and jury; and it is entitled to come to its independent opinion. Tee phraseology used does not admit of an expressed or implied limitation on the jurisdiction of the High Court.

23. It appears to us that the Legislature designedly conferred a larger power on the High Court under s. 307(3) of the Code than that conferred under s. 418 thereof, as in the former case the Sessions Judge differs from the jury while in the latter he agrees with the jury.

24. The decisions cited at the Bar do not in any way sustain in narrow construction sought to be placed by learned counsel on s. 307 of the Code. In Ramanugrah Singh's case [(1945-46) L.R. 73 I.A. 174, 182], which has been referred to earlier, the Judicial Committee described the wide amplitude of the power of the High Court in the following terms :

"The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and jury, and then acquit or convict the accused."

25. The Judicial Committee took care to observe :

".....the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably."

26. This passage indicates that the Judicial Committee did not purport to lay down exhaustively the circumstances under which the High Court could interfere under the said sub-section with the verdict of the jury. This Court in Akhlakali Hayatalli v. The State of Bombay MANU/SC/0137/1953 : 1954CriLJ451 accepted the view of the Judicial Committee on the construction of s. 307 of the Code of Criminal Procedure, and applied it to the facts of that case. But the following passage of this Court indicates that it also does not consider the test of reasonableness as the only guide in interfering with the verdict of the jury :

"The charge was not attacked before the High Court nor before us as containing any misdirections or non-directions to the jury such as to vitiate the verdict."

27. This passage recognizes the possibility of interference by the High Court with the verdict of the jury under the said sub-section if the verdict is vitiated by misdirections or non-directions. So too, the decision of this Court in Ratan Rai v. State of Bihar [1957] S.C.R. 273 assumes that such an interference is permissible if the verdict of the jury was vitiated by misdirections. In that case, the appellants were charged under Sections 435 and 436 of the Indian Penal Code and were tried by a jury, who returned a majority verdict of "guilty". The Assistant Sessions Judge disagreed with the said verdict and made a reference to the High Court. At the hearing of the reference the counsel for the appellants contended that the charge to the jury was defective, and did not place the entire evidence before the Judges. The learned Judges of the High Court considered the objections as such and nothing more, and found the appellants guilty and convicted them. This Court, observing that it was incumbent on the High Court to consider the entire evidence and the charge as framed and placed before the jury and to come to its own conclusion whether the evidence was such that could properly support the verdict of guilty against the appellants, allowed the appeal and remanded the matter to the High Court for disposal in accordance with the provisions of s. 307 of the Code of Criminal Procedure. This decision also assumes that a High Court could under s. 307(3) of the Code of Criminal Procedure interfere with the verdict of the jury, if there are misdirections in the charge and holds that in such a case it is incumbent on the court to consider the entire evidence and to come to its own conclusion, after giving due weight to the opinions of the Sessions Judge, and the verdict of the jury. This Court again in Sashi Mohan Debnath v. The State of West Bengal [1958] S.C.R. 960, held that where the Sessions Judge disagreed with the verdict of the jury and was of the opinion that the case should be submitted to the High Court, he should submit the whole case and not a part of it. There, the jury returned a verdict of "guilty" in respect of some charges and "not guilty" in respect of others. But the Sessions Judge recorded his judgment of acquittal in respect of

the latter charges in agreement with the jury and referred the case to the High Court only in respect of the former. This Court held that the said procedure violated sub-s. (2) of s. 307 of the Code of Criminal Procedure and also had the effect of preventing the High Court from considering the entire evidence against the accused and exercising its jurisdiction under sub-s. (3) of s. 307 of the said Code. Imam, J., observed that the reference in that case was incompetent and that the High Court could not proceed to exercise any of the powers conferred upon it under sub-s. (3) of s. 307 of the Code, because the very foundation of the exercise of that power was lacking, the reference being incompetent. This Court held that the reference was incompetent because the Sessions Judge contravened the express provisions of sub-s. (2) of s. 307 of the Code, for under that sub-section whenever a Judge submits a case under that section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail. As in that case the reference was made in contravention of the express provisions of sub-s. (2) of s. 307 of the Code and therefore the use of the word 'incompetent' may not be inappropriate. The decision of a division bench of the Patna High Court in Emperor v. Ramadhar Kurmi A.I.R. 1948 Pat. 79 may usefully be referred to as it throws some light on the question whether the High Court can interfere with the verdict of the jury when it is vitiated by serious misdirections and non-directions. Das, J., observed :

"Where, however, there is misdirection, the principle embodied in s. 537 would apply and if the verdict is erroneous owing to the misdirection, it can have no weight on a reference under s. 307 as on an appeal."

28. It is not necessary to multiply decisions. The foregoing discussion may be summarized in the form of the following propositions : (1) The competency of a reference made by a Sessions Judge depends upon the existence of two conditions, namely, (i) that he disagrees with the verdict of the jurors, and (ii) that he is clearly of the opinion that

the verdict is one which no reasonable body of men could have reached on the evidence, after reaching that opinion, in the case submitted by him he shall record the grounds of his opinion. (2) If the case submitted shows that the conditions have not been complied with or that the reasons for the opinion are not recorded, the High Court may reject the reference as incompetent : the High Court can also reject it if the Sessions Judge has contravened sub-s. (2) of s. 307. (3) If the case submitted shows that the Sessions Judge has disagreed with the verdict of the jury and that he is clearly of the opinion that no reasonable body of men could have reached the conclusion arrived at by the jury, and he discloses his reasons for the opinion, sub-s. (3) of s. 307 of the Code comes into play, and thereafter the High Court has an obligation to discharge its duty imposed thereunder. (4) Under sub-s. (3) of s. 307 of the Code, the High Court has to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused. (5) The High Court may deal with the reference in two ways, namely, (i) if there are misdirections vitiating the verdict, it may, after going into the entire evidence, disregard the verdict of the jury and come to its own conclusion, and (ii) even if there are no misdirections, the High Court can interfere with the verdict of the jury if it finds the verdict "perverse in the sense of being unreasonable", "manifestly wrong", or "against the weight of evidence", or, in other words, if the verdict is such that no reasonable body of men could have reached on the evidence. (6) In the disposal of the said reference, the High Court can exercise any of the procedural powers appropriate to the occasion, such as, issuing of notice, calling for records, remanding the case, ordering a retrial, etc. We therefore, reject the first contention of learned counsel for the appellant.

29. The next question is whether the High Court was right in holding that there were misdirections in the charge to the jury. Misdirection is something which a judge in his charge tells the jury and is wrong or in a wrong manner tending to mislead them. Even an omission to mention matters which are essential to the prosecution or the defence case in order to help the jury to come to a correct verdict may also in certain circumstances

amount to a misdirection. But, in either case, every misdirection or non-direction is not in itself sufficient to set aside a verdict, but it must be such that it has occasioned a failure of justice.

30. In Mushtak Hussein v. The State of Bombay MANU/SC/0026/1953 : [1953]4SCR809 , this Court laid down :

"Unless therefore it is established in a case that there has been a serious misdirection by the judge in charging the jury which has occasioned a failure of justice and has misled the jury in giving its verdict, the verdict of the jury cannot be set aside."

31. This view has been restated by this Court in a recent decision, viz., Smt. Nagindra Bala Mitra v. Sunil Chandra Roy MANU/SC/0074/1960 : 1960CriLJ1020 .

32. The High Court in its judgment referred to as many as six misdirections in the charge to the jury which in its view vitiated the verdict, and it also stated that there were many others. Learned counsel for the appellant had taken each of the said alleged misdirections and attempted to demonstrate that they were either no misdirections at all, or even if they were, they did not in any way affect the correctness of the verdict.

33. We shall now take the first and the third misdirections pointed out by Shelat, J., as they are intimately connected with each other. They are really omissions. The first omission is that throughout the entire charge there is no reference to s. 105 of the Evidence Act or to the statutory presumption laid down in that section. The second omission is that the Sessions Judge failed to explain to the jury the legal ingredients of s. 80 of the Indian Penal code, and also failed to direct them that in law the said section was not applicable

to the facts of the case. To appreciate the scope of the alleged omissions, it is necessary to read the relevant provisions.

34. Section 80 of the Indian Penal Code.

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. "

35. Evidence Act.

36. 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 that fact shall lie on any particular person. "

37. Section 105 : "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XLV of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. "

38. Section 3 : "In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

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

40. Section 4 : ..... "Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

41. The legal impact of the said provisions on the question of burden of proof may be stated thus : In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, s. 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved.

An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in s. 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of

circumstances bringing the case within the provisions of s. 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged : that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under s. 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations : (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused : (see Sections 4 and 5 of the Prevention of Corruption Act). (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients : (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence : (see s. 80 of the Indian Penal Code). In the first case the burden of proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the exception lies on the accused. In the third case, though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of s. 300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any

intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a presumption is drawn under s. 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in s. 80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of s. 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of s. 300, Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder. In that event though the accused failed to bring his case within the terms of s. 80 of the Indian Penal Code, the Court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.

42. The English decisions relied upon by Mr. Pathak, learned counsel for the accused, may not be of much help in construing the provisions of s. 105 of the Indian Evidence Act. We would, therefore, prefer not to refer to them, except to one of the leading decisions on the subject, namely, Woolmington v. The Director of Public Prosecutions L.R. (1935) A.C. 462. The headnote in that decision gives its gist, and it read :

"In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given,

the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. "

43. In the course of the judgment Viscount Sankey, L.C., speaking for the House, made the following observations :

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence..... Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."

44. These passages are not in conflict with the opinion expressed by us earlier. As in England so in India, the prosecution must prove the guilt of the accused, i.e., it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt. In India if an accused pleads an exception within the meaning of s. 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him.

In England there is no provision similar to s. 80 of the Indian Penal Code, but Viscount Sankey, L.C., makes it clear that such a burden lies upon the accused if his defence is one of insanity and in a case where there is a statutory exception to the general rule of burden of proof. Such an exception we find in s. 105 of the Indian Evidence Act. Reliance is placed by learned counsel for the accused on the decision of the Privy Council in Attygalle v. Emperor A.I.R. 1936 P.C. 169 in support of the contention that notwithstanding s. 105 of the Evidence Act, the burden of establishing the absence of accident within the meaning of s. 80 of the Indian Penal Code is on the prosecution. In that case, two persons were prosecuted, one for performing an illegal operation and the other for abetting him in that crime. Under s. 106 of the Ordinance 14 of 1895 in the Ceylon Code, which corresponds to s. 106 of the Indian Evidence Act, it was enacted that when any fact was especially within the knowledge of any person, the burden of proving that fact was upon him. Relying upon that section, the Judge in his charge to the jury said :

"Miss Maye - that is the person upon whom the operation was alleged to have been performed - was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says, is upon him, namely that no criminal operation took place but what took place was this and this speculum examination."

45. The Judicial Committee pointed out :

"It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge. The summing-up goes on to explain the presumption of innocence in favour of accused

persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there."

46. The said observations do not support the contention of learned counsel. Section 106 of Ordinance 14 of 1895 of the Ceylon Code did not cast upon the accused a burden to prove that he had not committed any crime; nor did it deal with any exception similar to that provided under s. 80 of the Indian Penal Code. It has no bearing on the construction of s. 105 of the Indian Evidence Act. The decisions of this Court in The State of Madras v. A. Vaidyanatha Iyer MANU/SC/0108/1957 : 1958CriLJ232 , which deals with s. 4 of the Prevention of Corruption Act, 1947, and C.S.D. Swami v. The State MANU/SC/0025/1959 : 1960CriLJ131 , which considers the scope of s. 5(3) of the said Act, are examples of a statute throwing the burden of proving and even of establishing the absence of some of the ingredients of the offence on the accused; and this Court held that notwithstanding the general burden on the prosecution to prove the offence, the burden of proving the absence of the ingredients of the offence under certain circumstances was on the accused. Further citations are unnecessary as, in our view, the terms of s. 105 of the Evidence Act are clear and unambiguous.

47. Mr. Pathak contends that the accused did not rely upon any exception within the meaning of s. 80 of the Indian Penal Code and that his plea all through has been only that the prosecution has failed to establish intentional killing on his part. Alternatively, he argues that as the entire evidence has been adduced both by the prosecution and by the accused, the burden of proof became only academic and the jury was in a position to come to one conclusion or other on the evidence irrespective of the burden of proof. Before the Sessions Judge the accused certainly relied upon s. 80 of the Indian Penal Code, and the Sessions Judge dealt with the defence case in his charge to the jury. In paragraph 6 of the charge, the learned Sessions Judge stated :

"Before I proceed further I have to point out another section which is section 80. You know by now that the defence of the accused is that the firing of the revolver was a matter of accident during a struggle for possession of the revolver. A struggle or a fight by itself does not exempt a person. It is the accident which exempts a person from criminal liability because there may be a fight, there may be a struggle and in the fight and in the struggle the assailant may over-power the victim and kill the deceased so that a struggle or a fight by itself does not exempt an assailant. It is only an accident, whether it is in struggle or a fight or otherwise which can exempt an assailant. It is only an accident, whether it is in a struggle or a fight of otherwise which can exempt a prisoner from criminal liability. I shall draw your attention to section 80 which says : ..... (section 80 read). You know that there are several provisions which are to be satisfied before the benefit of this exception can be claimed by an accused person and it should be that the act itself must be an accident or misfortune, there should be no criminal intention or knowledge in the doing of that act, that act itself must be done in a lawful manner and it must be done by lawful means and further in the doing of it, you must do it with proper care and caution. In this connection, therefore, even while considering the case of accident, you will have to consider all the factors, which might emerge from the evidence before you, whether it was proper care and caution to take a loaded revolver without a safety catch to the residence of the person with whom you were going to talk and if you do not get an honourable answer you were prepared to thrash him. You have also to consider this further circumstance whether it is an act with proper care and caution to keep that loaded revolver in the hand and thereafter put it aside, whether that is taking proper care and caution. This is again a question of fact and you have to determine as Judges of fact, whether the act of the accused in this case can be said to be an act which was lawfully done in a lawful manner and with proper care and caution. If it is so, then and only then can you call it accident or misfortune. This is a section which you will bear in mind when you consider the evidence in this case."

48. In this paragraph the learned Sessions Judge mixed up the ingredients of the offence with those of the exception. He did not place before the jury the distinction in the matter of burden of proof between the ingredients of the offence and those of the exception. He did not tell the jury that where the accused relied upon the exception embodied in s. 80 of the Indian Penal Code, there was a statutory presumption against him and the burden of proof was on him to rebut that presumption. What is more, he told the jury that it was for them to decide whether the act of the accused in the case could be said to be an act which was lawfully done in a lawful manner with proper care and caution. This was in effect abdicating his functions in favour of the jury. He should have explained to them the implications of the terms "lawful act", "lawful manner", "lawful means" and "with proper care and caution" and pointed out to them the application of the said legal terminology to the facts of the case. On such a charge as in the present case, it was not possible for the jury, who were laymen, to know the exact scope of the defence and also the circumstances under which the plea under s. 80 of the Indian Penal Code was made out. They would not have also known that if s. 80 of the Indian Penal Code applied, there was a presumption against the accused and the burden of proof to rebut the presumption was on him. In such circumstances, we cannot predicate that the jury understood the legal implications of s. 80 of the Indian Penal Code and the scope of the burden of proof under s. 105 of the Evidence Act, and gave their verdict correctly. Nor can we say that the jury understood the distinction between the ingredients of the offence and the circumstances that attract s. 80 of the Indian Penal Code and the impact of the proof of some of the said circumstances on the proof of the ingredients of the offence. The said omissions therefore are very grave omissions which certainly vitiated the verdict of the jury.

49. The next misdirection relates to the question of grave and sudden provocation. On this question, Shelat, J., made the following remarks :

"Thus the question whether a confession of adultery by the wife of accused to him amounts to grave and sudden provocation or not was a question of law. In my view, the learned Session Judge was in error in telling the jury that the entire question was one of fact for them to decide. It was for the learned Judge to decide as a question of law whether the sudden confession by the wife of the accused amounted to grave and sudden provocation as against the deceased Ahuja which on the authorities referred to hereinabove it was not. He was therefore in error in placing this alternative case to the jury for their determination instead of deciding it himself."

50. The misdirection according to the learned Judge was that the Sessions Judge in his charge did not tell the jury that the sudden confession of the wife to the accused did not in law amount to sudden and grave provocation by the deceased, and instead he left the entire question to be decided by the jury. The learned judge relied upon certain English decisions and textbooks in support of his conclusion that the said question was one of law and that it was for the Judge to express his view thereon. Mr. Pathak contends that there is an essential difference between the law of England and that of India in the matter of the charge to the jury in respect of grave and sudden provocation. The House of Lords in Holmes v. Director of Public Prosecution L.R. (1946) A.C. 588 laid down the law in England thus :

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence

with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

51. Viscount Simon brought out the distinction between the respective duties of the judge and the jury succinctly by formulating the following questions :

"The distinction, therefore, is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did ?' (which is for the judge to rule), and, assuming that the judge's ruling is in affirmative, asking the jury : 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did ?' and, if so, 'Did the accused act under the stress of such provocation' ?"

52. So far as England is concerned the judgment of the House of Lords is the last word on the subject till it is statutorily changed or modified by the House of Lords. It is not, therefore, necessary to consider the opinions of learned authors on the subject cited before us to show that the said observations did not receive their approval.

53. But Mr. Pathak contends that whatever might be the law in England, in India we are governed by the statutory provisions, and that under the explanation to Exception I to s. 300 of the Indian Penal Code, the question "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is one of fact", and therefore, unlike in England, in India both the aforesaid questions fall entirely within the scope of the jury and they are for them to decide. To put it in other words, whether a reasonable person in the circumstances of a particular case committed the offence under provocation which was grave and sudden is a question of fact for the jury to decide. There is force in this argument, but it is not necessary to express our final opinion thereon, as

the learned Attorney-General has conceded that there was no misdirection in regard to this matter.

54. The fourth misdirection found by the High Court is that the learned Sessions Judge told the jury that the prosecution relied on the circumstantial evidence and asked them to apply the stringent rule of burden of proof applicable to such cases, whereas in fact there was direct evidence of Puransingh in the shape of extra-judicial confession. In paragraph 8 of the charge the Sessions Judge said :

"In this case the prosecution relies on what is called circumstantial evidence that is to say there is no witness who can say that he saw the accused actually shooting and killing deceased. There are no direct witnesses, direct witnesses as they are called, of the event in question. Prosecution relies on certain circumstances from which they ask you to deduce an inference that it must be the accused and only the accused who must have committed this crime. That is called circumstantial evidence. It is not that prosecution cannot rely on circumstantial evidence because it is not always the case or generally the case that people who go out to commit crime will also take witnesses with them. So that it may be that in some cases the prosecution may have to rely on circumstantial evidence. Now when you are dealing with circumstantial evidence you will bear in mind certain principles, namely, that the facts on which the prosecution relies must be fully established. They must be fully and firmly established. These facts must lead to one conclusion and one only namely the guilt of the accused and lastly it must exclude all reasonable hypothesis consistent with the innocence of the accused, all reasonable hypothesis consistent with the innocence of the accused should be excluded. In other words you must come to the conclusion by all the human probability, it must be the accused and the accused only who must have committed this crime. That is the standard of proof in a case resting on circumstantial evidence."

55. Again in paragraph 11 the learned Sessions Judge observed that the jury were dealing with circumstantial evidence and graphically stated :

"It is like this, take a word, split it up into letters, the letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the circumstances together and judge for yourself whether the prosecution have established their case."

56. In paragraph 18 of the charge, the learned Sessions Judge dealt with the evidence of Puransingh separately and told the jury that if his evidence was believed, it was one of the best forms of evidence against the man who made the admission and that if thy accepted that evidence, then the story of the defence that it was an accident would become untenable. Finally he summarized all the circumstances on which the prosecution relied in paragraph 34 and one of the circumstances mentioned was the extra-judicial confession made to Puransingh. In that paragraph the learned Sessions Judge observed as follows :

"I will now summarize the circumstances on which the prosecution relies in this case. Consider whether the circumstances are established beyond all reasonable doubt. In this case you are dealing with circumstantial evidence and therefore consider whether they are fully and firmly established and consider whether they lead to one conclusion and only one conclusion that it is the accused alone who must have shot the deceased and further consider that it leaves no room for any reasonable hypothesis consistent with the innocence of the accused regard being had to all the circumstances in the case and the conclusion that you have to come to should be of this nature and by all human probability it must be the accused and the accused alone who must have committed this crime."

57. Finally the learned Sessions Judge told them :

"If on the other hand you think that the circumstances on which the prosecution relies are fully and firmly established, that they lead to one and the only conclusion and one only, of the guilt of the accused and that they exclude all reasonable hypothesis of the innocence of the accused then and in that case it will be your duty which you are bound by the oath to bring verdict accordingly without any fear or any favour and without regard being had to any consequence that this verdict might lead to."

58. Mr. Pathak contends that the learned Sessions Judge dealt with the evidence in two parts, in one part he explained to the jury the well settled rule of approach to circumstantial evidence, whereas in another part he clearly and definitely pointed to the jury the great evidentiary value of the extra-judicial confession of guilt by the accused made to Puransingh, if that was believed by them. He therefore, argues that there was no scope for any confusion in the minds of the jurors in regard to their approach to the evidence or in regard to the evidentiary value of the extra-judicial confession. The argument proceeds that even if there was a misdirection, it was not such as to vitiate the verdict of the jury. It is not possible to accept this argument. We have got to look at the question from the standpoint of the possible effect of the said misdirection in the charge on the jury, who are laymen. In more than one place the learned Sessions Judge pointed out that the case depended upon circumstantial evidence and that the jury should apply the rule of circumstantial evidence settled by decisions. Though at one place he emphasized upon evidentiary value of a confession he later on included that confession also as one of the circumstances and again directed the jury to apply the rule of circumstantial evidence. It is not disputed that the extra-judicial confession made to Puransingh is direct piece of evidence and that the stringent rule of approach to circumstantial evidence does not apply to it. If that confession was true, it cannot be disputed that the approach of the jury to the evidence would be different from that if that

was excluded. It is not possible to predicate that the jury did not accept that confession and therefore applied the rule of circumstantial evidence. It may well have been that the jury accepted it and still were guided by the rule of circumstantial evidence as pointed out by the learned Sessions Judge. In these circumstances we must hold, agreeing with the High Court, that this is a grave misdirection affecting the correctness of the verdict.

59. The next misdirection relied upon by the High Court is the circumstance that the three letters written by Sylvia were not read to the jury by the learned Sessions Judge in his charge and that the jury were not told of their effect on the credibility of the evidence of Sylvia and Nanavati. Shelat, J., observed in regard to this circumstance thus :

"It cannot be gainsaid that these letters were important documents disclosing the state of mind of Mrs. Nanavati and the deceased to a certain extent. If these letters had been read in juxtaposition of Mrs. Nanavati's evidence they would have shown that her statement that she felt that Ahuja had asked her not to see him for a month for the purpose of backing out of the intended marriage was not correct and that they had agreed not to see each other for the purpose of giving her and also to him an opportunity to coolly think out the implications of such a marriage and then to make up her own mind on her own. The letters would also show that when the accused asked her, as he said in his evidence, whether Ahuja would marry her, it was not probable that she would fence that question. On the other hand, she would, in all probability, have told him that they had already decided to marry. In my view, the omission to refer even once to these letters in the charge especially in view of Mrs. Nanavati's evidence was a non-direction amounting to misdirection."

60. Mr. Pathak contends that these letters were read to the jury by counsel on both sides and a reference was also made to them in the evidence of Sylvia and, therefore the jury clearly knew the contents of the letters, and that in the circumstances the non-mention of

the contents of the letters by the Sessions Judge was not a misdirection and even if it was it did not affect the verdict of the jury. In this context reliance is placed upon two English decisions, namely, R. v. Roberts [1942] 1 All. E.R. 187 and R. v. Attfield [1961] 3 All. E.R. 243. In the former case the appellant was prosecuted for the murder of a girl by shooting her with a service rifle and he pleaded accident as his defence. The Judge in his summing-up, among other defects, omitted to refer to the evidence of certain witnesses; the jury returned a verdict of "guilty" not the charge of murder and it was accepted by the judge, it was contended that the omission to refer to the evidence of certain witnesses was a misdirection. Rejecting that plea, Humphreys, J., observed :

"The jury had the Dagduas before them. They had the whole of the evidence before them, and they had, just before the summing up, comments upon those matters from counsel for the defence, and from counsel for the prosecution. It is incredible that they could have forgotten them or that they could have misunderstood the matter in any way, or thought, by reason of the fact that the judge did not think it necessary to refer to them, that they were not to pay attention to them. We do not think there is anything in that point at all. A judge, in summing-up, is not obliged to refer to every witness in the case, unless he thinks it necessary to do so. In saying this, the court is by no means saying that it might not have been more satisfactory if the judge had referred to the evidence of the two witnesses, seeing that he did not think it necessary to refer to some of the Dagduas made by the accused after the occurrence. No doubt it would have been more satisfactory from the point of view of the accused. All we are saying is that we are satisfied that there was no misdirection in law on the part of judge in omitting those statements, and it was within his discretion."

61. This passage does not lay down as a proposition of law that however important certain documents or pieces of evidence may be from the standpoint of the accused or the prosecution, the judge need not refer to or explain them in his summing-up to the jury,

and, if he did not, it would not amount to misdirection under any circumstances. In that case some Dagduas made by witnesses were not specifically brought to the notice of the jury and the Court held in the circumstances of that case that there was no misdirection. In the latter case the facts were simple and the evidence was short; the judge summed up the case directing the jury as to the law but did not deal with evidence except in regard to the appellant's character. The jury convicted the appellant. The court held that, "although in a complicated and lengthy case it was incumbent on the court to deal with the evidence in summing-up, yet where, as in the present case, the issues could be simply and clearly stated, it was not fatal defect for the evidence not to be reviewed in the summing-up." This is also a decision on the facts of that case. That apart, we are not concerned with a simple case here but with a complicated one. This decision does not help us in deciding the point raised. Whether a particular omission by a judge to place before the jury certain evidence amounts to a misdirection or not falls to be decided on the facts of each case.

62. These letters show the exact position of Sylvia in the context of her intended marriage with Ahuja, and help to test the truthfulness or otherwise of some of the assertions made by her to Nanavati. A perusal of these letters indicates that Sylvia and Ahuja were on intimate terms, that Ahuja was willing to marry her, that they had made up their minds to marry, but agreed to keep apart for a month to consider coolly whether they really wanted to marry in view of the serious consequences involved in taking such a step. Both Nanavati and Sylvia gave evidence giving an impression that Ahuja was backing out of his promise to marry Sylvia and that was the main reason for Nanavati going to Ahuja's flat for an explanation. If the Judge had read these letters in his charge and explained the implication of the contents thereof in relation to the evidence given by Nanavati and Sylvia, it would not have been possible to predicate whether the jury would have believed the evidence of Nanavati and Sylvia. If the marriage between them was a settled affair and if the only obstruction in the way was Nanavati, and if Nanavati had expressed

his willingness to be out of the way and even to help them to marry, their evidence that Sylvia did not answer the direct question about the intentions of Ahuja to marry her, and the evidence of Nanavati that it became necessary for him to go to Ahuja's flat to ascertain the latter's intentions might not have been believed by the jury. It is no answer to say that the letters were read to the jury at different stages of the trial or that they might have read the letters themselves for in a jury trial, especially where innumerable documents are filed, it is difficult for a lay jury, unless properly directed, to realise the relative importance of specified documents in the context of different aspects of a case. That is why the Code of Criminal Procedure, under s. 297 thereof, imposes a duty on the Sessions Judge to charge the jury after the entire evidence is given, and after counsel appearing for the accused and counsel appearing for the prosecution have addressed them. The object of the charge to the jury by the Judge is clearly to enable him to explain the law and also to place before them the facts and circumstances of the case both for and against the prosecution in order to help them in arriving at a right decision. The fact that the letters were read to the jury by prosecution or by the counsel for the defence is not of much relevance, for they would place the evidence before the jury from different angles to induce them to accept their respective versions. That fact in itself cannot absolve the Judge from his clear duty to put the contents of the letters before the jury from the correct perspective. We are in agreement with the High Court that this was a clear misdirection which might have affected the verdict of the jury.

63. The next defect pointed out by the High Court is that the Sessions Judge allowed the counsel for the accused to elicit from the police officer, Phansalkar, what Puransingh is alleged to have stated to him orally, in order to contradict the evidence of Puransingh in the court, and the Judge also dealt with the evidence so elicited in paragraph 18 of his charge to the jury. This contention cannot be fully appreciated unless some relevant facts are stated. Puransingh was examined for the prosecution as P.W. 12. He was a watchman of "Jivan Jyot". He deposed that when the accused was leaving the compound of the said

building, he asked him why he had killed Ahuja, and the accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. At about 5-5 P.M. on April 27, 1959, this witness reported this incident to Gamdevi Police Station. On that day Phansalkar (P.W. 13) was the Station House Duty Officer at that station from 2 to 8 P.M. On the basis of the statement of Puransingh, Phansalkar went in a jeep with Puransingh to the place of the alleged offence. Puransingh said in his evidence that he told Phansalkar in the jeep what the accused had told him when he was leaving the compound of "Jivan Jyot". After reaching the place of the alleged offence, Phansalkar learnt from a doctor that Ahuja was dead and he also made enquiries from Miss Mammie, the sister of the deceased. He did not record the statement made by Puransingh. But latter on between 10 and 10-30 P.M. on the same day, Phansalkar made a statement to Inspector Mokashi what Puransingh had told him and that statement was recorded by Mokashi. In the statement taken by Mokashi it was not recorded that Puransingh told Phansalkar that the accused told him why he had killed Ahuja. When Phansalkar was in the witness-box to a question put to him in cross-examination he answered that Puransingh did not tell him that he had asked Nanavati whey he killed Ahuja and that the accused replied that he had a quarrel with the deceased as the latter had "connections" with his wife and that he had killed him. The learned Sessions Judge not only allowed the evidence to go in but also, in paragraph 18 of his charge to the jury, referred to that statement. After giving the summary of the evidence given by Puransingh, the learned Sessions Judge proceeded to state in his charge to the jury :

"Now the conversation between him and Phansalkar (Sub-Inspector) was brought on record in which what the chowkidar told Sub-Inspector Phansalkar was, the servants of the flat of Miss Ahuja had informed him that a Naval Officer was going away in the car. He and the servants had tried to stop him but the said officer drove away in the car saying that he was going to the Police Station and to Sub-Inspector Phansalkar he did not state about the admission made by Mr. Nanavati to him that he killed the deceased as the

deceased had connections with his wife. The chowkidar said that he had told this also to sub-Inspector Phansalkar. Sub-Inspector Phansalkar said the Puransingh had not made this statement to him. You will remember that this chowkidar went to the police station at Gamdevi to give information about this crime and while coming back he was with Sub-Inspector Phansalkar and Sub-Inspector Phansalkar in his own statement to Mr. Mokashi has referred to the conversation which he had between him and this witness Puransingh and that had been brought on record as a contradiction."

64. The learned Sessions Judge then proceeded to state other circumstances and observed, "Consider whether you will accept the evidence of Puransingh or not." It is manifest from the summing-up that the learned Sessions Judge not only read to the jury the evidence of Phansalkar wherein he stated that Puransingh did not tell him that the accused told him why he killed Ahuja but also did not tell the jury that the evidence of Phansalkar was not admissible to contradict the evidence of Puransingh. It is not possible to predicate what was the effect of the alleged contradiction on the mind of the jury and whether they had not rejected the evidence of Puransingh because of that contradiction. If the said evidence was not admissible, the placing of that evidence before the jury was certainly a grave misdirection which must have affected their verdict. The question is whether such evidence is legally admissible. The alleged omission was brought on record in the cross-examination of Phansalkar, and, after having brought it in, it was sought to be used to contradict the evidence of Puransingh. Learned Attorney-General contends that the statement made by Phansalkar to Inspector Mokashi could be used only to contradict the evidence of Phansalkar and not that of Puransingh under s. 162 of the Code of Criminal Procedure; and the statement made by Puransingh to Phansalkar, it not having been recorded, could not be used at all to contradict the evidence of Puransingh under the said section. He further argues that the alleged omission not being a contradiction, it could in no event be used to contradict Puransingh. Learned counsel for the accused, on the other hand, contends that the alleged statement was made to a police officer before the investigation commenced and, therefore, it was not hit by s. 162 of the Code of Criminal

Procedure, and it could be used to contradict the evidence of Puransingh. Section 162 of the Code of Criminal Procedure reads :

(1) No statement made by any person to a Police officer in the course of an investigation under this Chapter shall, if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872), and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

65. The preliminary condition for the application of s. 162 of the Code is that the statement should have been made to a police-officer in the course of an investigation under Chapter XIV of the Code. If it was not made in the course of such investigation, the admissibility of such statement would not be governed by s. 162 of the Code. The question, therefore, is whether Puransingh made the statement to Phansalkar in the course of investigation. Section 154 of the Code says that every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station shall be reduced to writing by him or under his direction; and section 156(1) is to the effect that any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits

of such station would have power to inquire into or try under the provisions of Chapter XIV relating to the place of inquiry or trial. The evidence in the case clearly establishes that Phansalkar, being the Station House Duty Officer at Gamdevi Police-station on April 27, 1959, from 2 to 8 P.M., was an officer in charge of the Police-station within the meaning of the said sections. Puransingh in his evidence says that he went to Gamdevi Police-station and gave the information of the shooting incident to the Gamdevi Police. Phansalkar in his evidence says that on the basis of the information he went along with Puransingh to the place of the alleged offence. His evidence also discloses that he had questioned Puransingh, the doctor and also Miss Mammie in regard to the said incident. On this uncontradicted evidence there cannot be any doubt that the investigation of the offence had commenced and Puransingh made the statement to the police officer in the course of the said investigation. But it is said that, as the information given by Puransingh was not recorded by Police Officer Phansalkar as he should do under s. 154 of the Code of Criminal Procedure, no investigation in law could have commenced with the meaning of s. 156 of the Code. The question whether investigation had commenced or not is a question of fact and it does not depend upon any irregularity committed in the matter of recording the first information report by the concerned police officer. If so, s. 162 of the Code is immediately attracted. Under s. 162(1) of the Code, no statement made by any person to a Police-officer in the course of an investigation can be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. But the proviso lifts the ban and says that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing, any part of his statement, if duly proved, may be used by the accused to contradict such witness. The proviso cannot be invoked to bring in the statement made by Phansalkar to Inspector Mokashi in the cross-examination of Phansalkar, for the statement made by him was not used to contradict the evidence of Phansalkar. The proviso cannot obviously apply to the oral statement made by Puransingh to Phansalkar, for the said statement of Puransingh has not been reduced into writing. The faint argument of learned counsel for the accused that the statement of Phansalkar recorded

by Inspector Mokashi can be treated as a recorded statement of Puransingh himself is to be stated only to be rejected, for it is impossible to treat the recorded statement of Phansalkar as the recorded statement of Puransingh by a police-officer. If so, the question whether the alleged omission of what the accused told Puransingh in Puransingh's oral statement to Phansalkar could be used to contradict Puransingh, in view of the decision of this Court in Tahsildar Singh's case MANU/SC/0053/1959 : [[1959] Supp. (2) S.C.R. 875], does not arise for consideration. We are, therefore, clearly of the opinion that not only the learned Sessions Judge acted illegally in admitting the alleged omission in evidence to contradict the evidence of Puransingh, but also clearly misdirected himself in placing the said evidence before the jury for their consideration.

66. In addition to the misdirections pointed out by the High Court, the learned Attorney-General relied upon another alleged misdirection by the learned Sessions Judge in his charge. In paragraph 28 of the charge, the learned Sessions Judge stated thus :

"No one challenges the marksmanship of the accused but Commodore Nanda had come to tell you that he is a good shot and Mr. Kandalawala said that here was a man and good marksman, would have shot him, riddled him with bullets perpendicularly and not that way and he further said that as it is not done in this case it shows that the accused is a good marksman and a good shot and he would not have done this thing, this is the argument."

67. The learned Attorney-General points out that the learned Sessions Judge was wrong in saying that no one challenged the marksmanship of the accused, for Commodore Nanda was examined at length on the competency of the accused as a marksman. Though this is a misdirection, we do not think that the said passage, having regard to the other circumstances of the case, could have in any way affected the verdict of the jury. It is, therefore, clear that there were grave misdirections in this case, affecting the verdict of

the jury, and the High Court was certainly within its rights to consider the evidence and come to its own conclusion thereon.

68. The learned Attorney-General contends that if he was right in his contention that the High Court could consider the evidence afresh and come to its own conclusion, in view of the said misdirection, this Court should not, in exercise of its discretionary jurisdiction under Art. 136 of the Constitutions interfere with the findings of the High Court. There is force in this argument. But, as we have heard counsel at great length, we propose to discuss the evidence.

69. We shall now proceed to consider the evidence in the case. The evidence can be divided into three parts, namely, (i) evidence relating to the conduct of the accused before the shooting incident, (ii) evidence in regard to the conduct of the accused after the incident, and (iii) evidence in regard to the actual shooting in the bed-room of Ahuja.

70. We may start with the evidence of the accused wherein he gives the circumstances under which he came to know of the illicit intimacy of his wife Sylvia with the deceased Ahuja, and the reasons for which he went to the flat of Ahuja in the evening of April 27, 1959. After his brother and his brother's wife, who stayed with him for a few days, had left, he found his wife behaving strangely and without affection towards him. Though on that ground he was unhappy and worried, he did not suspect of her unfaithfulness to him. On the morning of April 27, 1959, he and his wife took out their sick dog to the Parel Animal Hospital. On their way back, they stopped at the Metro Cinema and his wife bought some tickets for the 3-30 show. After coming home, they were sitting in the room for the lunch to be served when he put his arm around his wife affectionately and she seemed to go tense and was very unresponsive. After lunch, when his wife was reading

in the sitting room, he told her "Look, we must get these things straight" or something like that, and "Do you still love me ?" As she did not answer, he asked her "Are you in love with some one else ?", but she gave no answer. At that time he remembered that she had not been to a party given by his brother when he was away on the sea and when asked why she did not go, she told him that she had a previous dinner engagement with Miss Ahuja. On the basis of this incident, he asked her "Is it Ahuja ?" and she said "Yes." When he asked her "Have you been faithful to me ?", she shook her head to indicate "No." Sylvia in her evidence, as D.W. 10, broadly supported this version. It appears to us that this is clearly a made-up conversation and an unnatural one too. Is it likely that Nanavati, who says in his evidence that prior to April 27, 1959, he did not think that his wife was unfaithful to him, would have suddenly thought that she had a lover on the basis of a trivial circumstance of her being unresponsive when he put his arm around her affectionately ? Her coldness towards him might have been due to many reasons. Unless he had a suspicion earlier or was informed by somebody that she was unfaithful to him, this conduct of Nanavati in suspecting his wife on the basis of the said circumstance does not appear to be the natural reaction of a husband. The recollection of her preference to attend the dinner given by Miss Mammie to that of his brother, in the absence of an earlier suspicion or information, could not have flashed on his mind the image of Ahuja as a possible lover of his wife. There was nothing extraordinary in his wife keeping a previous engagement with Mis Mammie and particularly when she could rely upon her close relations not to misunderstand her. The circumstances under which the confession of unfaithfulness is alleged to have been made do not appear to be natural. This inference is also reinforced by the fact that soon after the confession, which is alleged to have upset him so much, he is said to have driven his wife and children to the cinema. If the confession of illicit intimacy between Sylvia and Ahuja was made so suddenly at lunch time, even if she had purchased the tickets, it is not likely that he would have taken her and the children to the cinema. Nanavati then proceeds to say in his evidence : on his wife admitting her illicit intimacy with Ahuja, he was absolutely stunned; he then got up and said that he must go and settle the matter with the swine; he asked her what were

the intentions of Ahuja and whether Ahuja was prepared to marry her and look after the children; he wanted an explanation from Ahuja for his caddish conduct. In the cross-examination he further elaborated on his intentions thus : He thought of having the matters settled with Ahuja; he would find out from him whether he would take an honourable way out of the situation; and he would thrash him if he refused to do so. The honourable course which he expected of the deceased was to marry his wife and look after the children. He made it clear further that when he went to see Ahuja the main thing in his mind was to find out what Ahuja's intentions were towards his wife and children and to find out the explanation for his conduct. Sylvia in her evidence says that when she confessed her unfaithfulness to Nanavati, the latter suddenly got up rather excitedly and said that he wanted to go to Ahuja's flat and square up the things. Briefly stated, Nanavati, according to him, went to Ahuja's flat to ask for an explanation for seducing his wife and to find out whether he would marry Sylvia and take care of the children. Is it likely that a person, situated as Nanavati was, would have reacted in the manner stated by him ? It is true that different persons react, under similar circumstances, differently. A husband to whom his wife confessed of infidelity may kill his wife, another may kill his wife as well as her paramour, the third, who is more sentimental, may commit suicide, and the more sophisticated one may give divorce to her and marry another. But it is most improbable, even impossible, that a husband who has been deceived by his wife would voluntarily go to the house of his wife's paramour to ascertain his intentions, and, what is more, to ask him to take charge of his children. What was the explanation Nanavati wanted to get from Ahuja ? His wife confessed that she had illicit intimacy with Ahuja. She is not a young girl, but a woman with three children. There was no question of Ahuja seducing an innocent girl, but both Ahuja and Sylvia must have been willing parties to the illicit intimacy between them. That apart, it is clear from the evidence that Ahuja and Sylvia had decided to marry and, therefore, no further elucidation of the intention of Ahuja by Nanavati was necessary at all. It is true that Nanavati says in his evidence that when he asked her whether Ahuja was prepared to marry her and look after the children, she did not give any proper rely; and Sylvia also in her evidence says that when her

husband asked her whether Ahuja was willing to marry her and look after the children she avoided answering that question as she was too ashamed to admit that Ahuja was trying to back out from the promise to marry her. That this version is not true is amply borne out by the letters written by Sylvia to Ahuja. The first letter written by Sylvia is dated May 24, 1958, but that was sent to him only on March 19, 1959, along with another letter. In that letter dated May 24, 1958, she stated :

"Last night when you spoke about your need to marry and about the various girls you may marry, something inside me snapped and I know that I could not bear the thought of your loving or being close to someone else."

71. Reliance is placed upon these words by learned counsel for the accused in support of his contention that Ahuja intended to marry another girl. But this letter is of May 1958 and by that time it does not appear that there was any arrangement between Sylvia and Ahuja to marry. It may well have been that Ahuja was telling Sylvia about his intentions to marry another girl to make her jealous and to fall in for him. But as days passed by, the relationship between them had became very intimate and they began to love each other. In the letter dated March 19, 1959, she said : "Take a chance on our happiness, my love. I will do my best to make you happy; I love you, I want you so much that everything is bound to work out well." The last sentence indicates that they had planned to marry. Whatever ambiguity there may be in these words, the letter dated April 17, 1959, written ten days prior to the shooting incident, dispels it; therein she writes.

"In any case nothing is going to stop my coming to you. My decision is made and I do not change my mind. I am taking this month so that we may afterwards say we gave ourselves every chance and we know what we are doing. I am torturing myself in every possible way as you asked, so that, there will be no surprise afterwards."

72. This letter clearly demonstrates that she agreed not to see Ahuja for a month, not because that Ahuja refused to marry her, but because it was settled that they should marry, and that in view of the far-reaching effects of the separation from her husband on her future life and that of her children, the lovers wanted to live separately to judge for themselves whether they really loved each other so much as to marry. In the cross-examination she tried to wriggle out of these letters and sought to explain them away; but the clear phraseology of the last letter speaks for itself, and her oral evidence, contrary to the contents of the letters, must be rejected. We have no doubt that her evidence, not only in regard to the question of marriage but also in regard to other matters, indicates that having lost her lover, out of necessity or out of deep penitence for her past misbehavior, she is out to help her husband in his defence. This correspondence belies the entire story that Sylvia did not reply to Nanavati when the latter asked her whether Ahuja was willing to marry her and that that was the reason why Nanavati wanted to visit Ahuja to ask him about his intentions. We cannot visualize Nanavati as a romantic lover determined to immolate himself to give opportunity to his unfaithful wife to start a new life of happiness and love with her paramour after convincing him that the only honourable course open to him was to marry her and take over his children. Nanavati was not ignorant of the ways of life or so gullible as to expect any chivalry or honour in a man like Ahuja. He is an experienced Naval Officer and not a sentimental hero of a novel. The reason therefore for Nanavati going to Ahuja's flat must be something other than asking him for an explanation and to ascertain his intention about marrying his wife and looking after the children.

73. Then, according to Nanavati, he drove his wife and children to cinema, and promising them to come and pick them up at the end of the show at about 6 P.M., he drove straight to his ship. He would say that he went to his ship to get medicine for his sick dog. Though ordinarily this statement would be insignificant, in the context of the conduct of Nanavati, it acquires significance. In the beginning of his evidence, he says that on the

morning of the day of the incident he and his wife took out their sick dog to the Parel Animal Hospital. It is not his evidence that after going to the hospital he went to his ship before returning home. It is not even suggested that in the ship there was a dispensary catering medicine for animals. This statement, therefore, is not true and he did not go to the ship for getting medicine for his dog but for some other purpose, and that purpose is clear from his subsequent evidence. He met Captain Kolhi and asked for his permission to draw a revolver and six rounds because he was going to drive to Ahmednagar by night. Captain Kolhi gave him the revolver and six rounds, he immediately loaded the revolver with all the six rounds and put the revolver inside an envelope which was lying in his cabin. It is not the case of the accused that he really wanted to go to Ahmednagar and he wanted the revolver for his safety. Then why did he take the revolver ? According to him, he wanted to shoot himself after driving far away from his children. But he did not shoot himself either before or after Ahuja was shot dead. The taking of the revolver on a false pretext and loading it with six cartridges indicate the intention on his part to shoot somebody with it.

74. Then the accused proceeded to state that he put the envelope containing the revolver in his car and found himself driving to Ahuja's office. At Ahuja's office he went in keeping the revolver in the car, and asked Talaja, the Sales Manager of Universal Motors of which Ahuja was the proprietor whether Ahuja was inside. He was told that Ahuja was not there. Before leaving Ahuja's office, the accused looked for Ahuja in the Show Room, but Ahuja was not there. In the cross-examination no question was put to Nanavati in regard to his statement that he kept the revolver in the car when he entered Ahuja's office. On the basis of this statement, it is contended that if Nanavati had intended to shoot Ahuja he would have taken the revolver inside Ahuja's office. From this circumstance it is not possible to say that Nanavati's intention was not to shoot Ahuja. Even if his statement were true, it might well have been that he would have gone to Ahuja's office not to shoot him there but to ascertain whether he had left the office for his flat. Whatever it may be,

from Ahuja's office he straightway drove to the flat of Ahuja. His conduct at the flat is particularly significant. His version is that he parked his car in the house compound near the steps, went up the steps, but remembered that his wife had told him that Ahuja might shoot him and so he went back to his car, took the envelope containing the revolver, and went up to the flat. He rang the doorbell; when a servant opened the door, he asked him whether Ahuja was in. Having ascertained that Ahuja was in the house, he walked to his bedroom, opened the door and went in shutting the door behind him. This conduct is only consistent with his intention to shoot Ahuja. A person, who wants to seek an interview with another in order to get an explanation for his conduct or to ascertain his intentions in regard to his wife and children, would go and sit in the drawing-room and ask the servant to inform his master that he had come to see him. He would not have gone straight into the bed-room of another with a loaded revolver in hand and closed the door behind. This was the conduct of an enraged man who had gone to wreak vengeance on a person who did him a grievous wrong. But it is said that he had taken the loaded revolver with him as his wife had told him that Ahuja might shoot him. Earlier in his cross-examination he said that when he told her that he must go and settle the matter with the "swine" she put her hand upon his arm and said, "No, No, you must not go there, don't go there, he may shoot you." Sylvia in her evidence corroborates his evidence in this respect : But Sylvia has been cross-examined and she said that she knew that Ahuja had a gun and she had seen it in Ashoka Hotel in New Delhi and that she had not seen any revolver at the residence of Ahuja at any time. It is also in evidence that Ahuja had not licence for a revolver and no revolver of his was found in his bed-room. In the circumstances, we must say that Sylvia was only attempting to help Nanavati in his defence. We think that the evidence of Nanavati supported by that of Sylvia was a collusive attempt on their part to explain away the otherwise serious implication of Nanavati carrying the loaded revolver into the bed-room of Ahuja. That part of the version of the accused in regard to the manner of his entry into the bed-room of Ahuja, was also supported by the evidence of Anjani (P.W. 8), the bearer, and Deepak, the Cook. Anjani opened the door of the flat to Nanavati at about 4-20 P.M. He served tea to his

master at about 4-15 P.M. Ahuja then telephoned to ascertain the correct time and then went to his bed-room. About five minutes thereafter this witness went to the bed-room of his master to bring back the tea-tray from there, and at that time his master went into the bathroom for his bath. Thereafter, Anjani went to the kitchen and was preparing tea when he heard the door-bell. He then opened the door to Nanavati. This evidence shows that at about 4-20 P.M. Ahuja was taking his bath in the bathroom and immediately thereafter Nanavati entered the bed-room. Deepak, the cook of Ahuja, also heard the ringing of the door-bell. He saw the accused opening the door of the bed-room with a brown envelope in his hand and calling the accused by his name "Prem"; he also saw his master having a towel wrapped around his waist and combing his hair standing before the dressing-table, when the accused entered the room and closed the door behind him. These two witnesses are natural witnesses and they have been examined by the police on the same day and nothing has been elicited against them to discredit their evidence. The small discrepancies in their evidence do not in any way affect their credibility. A few seconds thereafter, Mammie, the sister of the deceased, heard the crack of the window pane. The time that elapsed between Nanavati entering the bed-room of Ahuja and her hearing the noise was about 15 to 20 seconds. She describes the time that elapsed between the two events as the time taken by her to take up her saree from the door of her dressing-room and her coming to the bed-room door. Nanavati in his evidence says that he was in the bed-room of Ahuja for about 30 to 60 seconds. Whether it was 20 seconds, as Miss Mammie says, or 30 to 60 seconds, as Nanavati deposes, the entire incident of shooting took place in a few seconds.

75. Immediately after the sounds were heard, Anjani and Miss Mammie entered the bed-room and saw the accused.

76. The evidence discussed so far discloses clearly that Sylvia confessed to Nanavati of her illicit intimacy with Ahuja; that Nanavati went to his ship at about 3.30 P.M. and took a revolver and six rounds on a false pretext and loaded the revolver with six rounds; that thereafter he went to the office of Ahuja to ascertain his whereabouts, but was told that Ahuja had left for his house; that the accused then went to the flat of the deceased at about 4-20 P.M.; that he entered the flat and then the bed-room unceremoniously with the loaded revolver, closed the door behind him and a few seconds thereafter sounds were heard by Miss Mammie, the sister of the deceased, and Anjani, a servant; that when Miss Mammie and Anjani entered the bed-room, they saw the accused with the revolver in his hand, and found Ahuja lying on the floor of the bathroom. This conduct of the accused to say the least, is very damaging for the defence and indeed in itself ordinarily sufficient to implicate him in the murder of Ahuja.

77. Now we shall scrutinize the evidence to ascertain the conduct of the accused from the time he was found in the bed-room of Ahuja till he surrendered himself to the police. Immediately after the shooting, Anjani and Miss Mammie went into the bed-room of the deceased. Anjani says in his evidence that he saw the accused facing the direction of his master who was lying in the bathroom.; that at that time the accused was having a "pistol" in his hand; that when he opened the door, the accused turned his face towards this witness and saying that nobody should come in his way or else he would shoot at them, he brought his "pistol" near the chest of the witness; and that in the meantime Miss Mammie came there, and said that the accused had killed her brother.

78. Miss Mammie in her evidence says that on hearing the sounds, she went into the bed-room of her brother, and there she saw the accused nearer to the radiogram than to the door with a gun in his hand; that she asked the accused "what is this ?" but she did not hear the accused saying anything.

79. It is pointed out that there are material contradictions between what was stated by Miss Mammie and what was stated by Anjani. We do not see any material contradictions. Miss Mammie might not have heard what the accused said either because she came there after the aforesaid words were uttered or because in her anxiety and worry she did not hear the words. The different versions given by the two witnesses in regard to what Miss Mammie said to the accused is not of any importance as the import of what both of them said is practically the same. Anjani opened the door to admit Nanavati into the flat and when he heard the noise he must have entered the room. Nanavati himself admitted that he saw a servant in the room, though he did not know him by name; he also saw Miss Mammie in the room. These small discrepancies, therefore, do not really affect their credibility. In effect and substance both saw Nanavati with a fire-arm in his hand - though one said pistol and the other gun - going away from the room without explaining to Miss Mammie his conduct and even threatening Anjani. This could only be the conduct of a person who had committed a deliberate murder and not of one who had shot the deceased by accident. If the accused had shot the diseased by accident, he would have been in a depressed and apologetic mood and would have tried to explain his conduct to Miss Mammie or would have phoned for a doctor or asked her to send for one or at any rate he would not have been in a belligerent mood and threatened Anjani with his revolver. Learned counsel for the accused argues that in the circumstances in which the accused was placed soon after the accidental shooting he could not have convinced Miss Mammie with any amount of explanation and therefore there was no point in seeking to explain his conduct to her. But whether Miss Mammie would have been convinced by his explanation or not, if Nanavati had shot the deceased by accident, he would certainly have told her particularly when he knew her before and when she happened to be the sister of the man shot at. Assuming that the suddenness of the accidental shooting had so benumbed his senses that he failed to explain the circumstances of the shooting to her, the same cannot be said when he met others at the gate. After the accused had come out

of the flat of Ahuja, he got into his car and took a turn in the compound. He was stopped near the gate by Puransingh, P.W. 12, the watchman of the building. As Anjani had told him that the accused had killed Ahuja the watchman asked him why he had killed his master. The accused told him that he had a quarrel with Ahuja as the latter had "connections" with his wife and therefore he killed him. The watchman told the accused that he should not go away from the place before the police arrived, but the accused told him that he was going to the police and that if he wanted he could also come with him in the car. At that time Anjani was standing in front of the car and Deepak was a few feet away. Nanavati says in his evidence that it was not true that he told Puransingh that he had killed the deceased as the latter had "connection" with his wife and that the whole idea was quite absurd. Puransingh is not shaken in his cross-examination. He is an independent witness; though he is a watchman of Jivan Jyot, he was not an employee of the deceased. After the accused left the place, this witness, at the instance of Miss Mammie, went to Gamdevi Police Station and reported the incident to the police officer Phansalkar, who was in charge of the police-station at that time, at about 5-5 P.M. and came along with the said police-officer in the jeep to Jivan Jyot at about 7 P.M. he went along with the police-officer to the police station where his statement was recorded by Inspector Mokashi late in the night. It is suggested that this witness had conspired with Deepak and Anjani and that he was giving false evidence. We do not see any force in this contention. His statement was regarded on the night of the incident itself. It is impossible to conceive that Miss Mammie, who must have had a shock, would have been in a position to coach him up to give a false statement. Indeed, her evidence discloses that she was drugged to sleep that night. Can it be said that these two illiterate witnesses, Anjani and Deepak, would have persuaded him to make false statement that night. Though both of them were present when Puransingh questioned the accused, they deposed that they were at a distance and therefore they did not hear what the accused told Puransingh. If they had all colluded together and were prepared to speak to a false case, they could have easily supported Puransingh by stating that they also heard what the accused told Puransingh. We also do not think that these two witnesses are so intelligent as to visualize

the possible defence and beforehand coached Puransingh to make a false statement on the very night of the incident. Nor do we find any inherent improbability in his evidence if really Nanavati had committed the murder. Having shot Ahuja he was going to surrender himself to the police; he knew that he had committed a crime; he was not a hardened criminal and must have had a moral conviction that he was justified in doing what he did. It was quite natural, therefore, for him to confess his guilt and justify his act to the watchman who stopped him and asked him to wait there till the police came. In the mood in which Nanavati was soon after the shooting, artificial standards of status or position would not have weighed in his mind if he was going to confess and surrender to the police. We have gone through the evidence of Puransingh and we do not see any justification to reject his evidence.

80. Leaving Jivan Jyot the accused drove his car and came to Raj Bhavan Gate. There he met a police constable and asked him for the location of the nearest police station. The direction given by the police constable were not clear and, therefore, the accused requested him to go along with him to the police station, but the constable told him that as he was on duty, he could not follow him. This is a small incident in itself, but it only shows that the accused was anxious to surrender himself to the police. This would not have been the conduct of the accused, if he had shot another by accident, for in that event he would have approached a lawyer or a friend for advice before reporting the incident to the police. As the police constable was not able to give him clear directions in regard to the location of the nearest police station, the accused went to the house of Commander Samuel, the Naval Provost Marshal. What happened between the accused and Samuel is stated by Samuel in his evidence as P.W. 10. According to his evidence, on April 27, 1959, at about 4.45 P.M., he was standing at the window of his study in his flat on the ground floor at New Queen's Road. His window opens out on the road near the band stand. The accused came up to the window and he was in a dazed condition. The witness asked him what had happened, and the accused told him, "I do not quite know what happened, but

I think I have shot a man." The witness asked him how it happened, and the accused told him that the man had seduced his wife and he would not stand it. When the witness asked him to come inside and explain everything calmly, the accused said "No, thank you, I must go", "please tell me where I should go and report." Though he asked him again to come in, the accused did not go inside and, therefore, this witness instructed him to go to the C.I.D. Office and report to the Deputy Commissioner Lobo. The accused asked him to phone to Lobo and he telephoned to Lobo and told him that an officer by name Commander Nanavati was involved in an affair and that he was on the way to report to him. Nanavati in his evidence practically corroborates the evidence of Samuel. Nanavati's version in regard to this incident is as follows :

"I told him that something terrible had happened, that I did not know quite what had happened but I thought I had shot a man. He asked me where this had happened. I told him at Nepean Sea Road. He asked me why I had been there. I told him I went there because a fellow there had seduced my wife and I would not stand for it. He asked me many times to go inside his room. But I was not willing to do so. I was anxious to go to the police station. I told Commander Samuel that there had been a fight over a revolver. Commander Samuel asked to report to Deputy Commissioner Lobo."

81. The difference between the two versions lies in the fact that while Nanavati said that he told Samuel that something terrible had happened, Samuel did not say that; while Nanavati said that he told Samuel that there had been a fight over a revolver, Samuel did not say that. But substantially both of them say that though Samuel asked Nanavati more than once to get inside the house and explain to him everything calmly, Nanavati did not do so; both of them also deposed that the accused told Samuel, "I do not quite know what happened but I think I have shot a man." It may be mentioned that Samuel is a Provost Marshal of the Indian navy, and he and the accused are of the same rank though the accused is senior to Samuel as Commander. As Provost Marshal, Samuel discharges

police duties in the navy. It is probable that if the deceased was shot by accident, the accused would not have stated that fact to this witness ? Is it likely that he would not have stepped into his house, particularly when he requested him more than once to come in and explain to him how the accident had taken place ? Would he not have taken his advice as a colleague before he proceeded to the police station to surrender himself ? The only explanation for this unusual conduct on the part of the accused is that, having committed the murder, he wanted to surrender himself to the police and to make a clean breast of everything. What is more, when he was asked directly what had happened he told him "I do not quite know what happened but I think I have shot a man". When he was further asked how it happened, that is, how he shot the man he said that the man had seduced his wife and that he would not stand for it. In the context his two answers read along with the questions put to him by Samuel only mean that, as the deceased had seduced his wife, the accused shot him as he would not stand for it. If really the accused shot the deceased by accident, why did he not say that fact to his colleague, particularly when it would not only be his defence, if prosecuted, but it would put a different complexion to his act in the eyes of his colleague. But strong reliance is placed on what this witness stated in the cross-examination viz., "I heard the word fight from the accused", "I heard some other words from the accused but I could not make out a sense out of these words". Learned counsel for the accused contends that this statement shows that the accused mentioned to Samuel that the shooting of the deceased was in a fight. It is not possible to build upon such slender foundation that the accused explained to Samuel that he shot the deceased by accident in a struggle. The statement in the cross-examination appears to us to be an attempt on the part of this witness to help his colleague by saying something which may fit in the scheme of his defence, though at the same time he is not willing to lie deliberately in the witness-box, for he clearly says that he could not make out the sense of the words spoken along with the word "fight". This vague statement of this witness, without particulars, cannot detract from the clear evidence given by him in the examination-in-chief.

82. What Nanavati said to the question put by the Sessions Judge under s. 342 of the Code of Criminal Procedure supports Samuel's version. The following question was put to him by the learned Sessions Judge :

Q. - It is alleged against you that thereafter as aforesaid you went to Commander Samuel at about 4.45 P.M. and told him that something terrible had happened and that you did not quite know but you thought that you shot a man as he had seduced your wife which you could not stand and that on the advice of Commander Samuel you then went to Deputy Commissioner Lobo at the Head Crime Investigation Department Office. Do you wish to say anything about this ?

83. A. - This is correct.

84. Here Nanavati admits that he told Commander Samuel that he shot the man as he had seduced his wife. Learned counsel for the accused contends that the question framed was rather involved and, therefore, Nanavati might not have understood its implication. But it appears from the statement that, after the questions were answered, Nanavati read his answers and admitted that they were correctly recorded. The answer is also consistent with what Samuel said in his evidence as to what Nanavati told him. This corroborates the evidence of Samuel that Nanavati told him that, as the man had seduced his wife, he thought that he had shot him. Anyhow, the accused did not tell the Court that he told Samuel that he shot the deceased in a fight.

85. Then the accused, leaving Samuel, went to the office of the Deputy Commissioner Lobo. There, he made a statement to Lobo. At that time, Superintendent Korde and

Inspector Mokashi were also present. On the information given by him, Lobo directed Inspector Mokashi to take the accused into custody and to take charge of the articles and to investigate the case.

86. Lobo says in his evidence that he received a telephone call from Commander Samuel to the effect that he had directed Commander Nanavati to surrender himself to him as he had stated that he had shot a man. This evidence obviously cannot be used to corroborate what Nanavati told Samuel, but it would only be a corroboration of the evidence of Samuel that he telephoned to Lobo to that effect. It is not denied that the accused set up the defence of accident for the first time in the Sessions Court. This conduct of the accused from the time of the shooting of Ahuja to the moment he surrendered himself to the police is inconsistent with the defence that the deceased was shot by accident. Though the accused had many opportunities to explain himself, he did not do so; and he exhibited the attitude of a man who wreaked out his vengeance in the manner planned by him and was only anxious to make a clean breast of everything to the police.

87. Now we will consider what had happened in the bed-room and bathroom of the deceased. But before considering the evidence on this question, we shall try to describe the scene of the incident and other relevant particulars regarding the things found therein.

88. The building "Jivan Jyot" is situate in Setalvad Road, Bombay. Ahuja was staying on the first floor of that building. As one goes up the stairs, there is a door leading into the hall; as one enters the hall and walks a few feet towards the north he reaches a door leading into the bed-room of Ahuja. In the bed-room, abutting the southern wall there is a radiogram; just after the radiogram there is a door on the southern wall leading to the

bathroom, on the eastern side of the door abutting the wall there is a cupboard with a mirror thereon; in the bathroom, which is of the dimensions 9 feet x 6 feet, there is a commode in the front along the wall, above the commode there is a window with glass panes overlooking the chowk, on the east of the commode there is a bath-tub, on the western side of the bathroom there is a door leading into the hall; on the southern side of the said door there is a wash-basin adjacent to the wall.

89. After the incident the corpse of Ahuja was found in the bathroom; the head of the deceased was towards the bed-room and his legs were towards the commode. He was lying with his head on his right hand. This is the evidence of Miss Mammie, and she has not been cross-examined on it. It is also not contradicted by any witness. The top glass pane of the window in the bathroom was broken. Pieces of glass were found on the floor of the bathroom between the commode and the wash-basin. Between the bath-tub and the commode a pair of spectacles was lying on the floor and there were also two spent bullets. One chappal was found between the commode and the wash basin, and the other was found in the bedroom. A towel was found wrapped around the waist of the deceased. The floor of the bathroom was bloodstained. There was white handkerchief and bath-towel, which was bloodstained lying on the floor. The western wall was found to be bloodstained and drops of blood were trickling down. The handle of the door leading to the bathroom from the bed-room and a portion of the door adjacent to the handle were bloodstained from the inner side. The blood on the wall was little over three feet from the floor. On the floor of the bed-room there was an empty brown envelope with the words "Lt. Commander K.M. Nanavati" written on it. There was no mark showing that the bullets had hit any surface. (See the evidence of Rashmikant, P.W. 16)

90. On the dead-body the following injuries were found :

(1) A punctured would 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound.

(2) A lacerated punctured wound in the web between the ring finger and the little finger of the left hand 1/4" x 1/4" communicating with a punctured would 1/4" x 1/4" on the palmar aspect of the left hand at knuckle level between the left little and the ring finger. Both the wounds were communicating.

(3) A lacerated ellipsoid would oblique in the left parietal region with dimensions 1 1/8" x 1/4" x skull deep.

(4) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the distal end of the proximal interphalangeal joint of the left index finger dorsal aspect. That means at the first joint of the crease of the index finger on its dorsal aspect, i.e., back aspect.

(5) A lacerated abrasion with carbonaceous tattooing 1/4" x 1/6" at the joint level of the left middle finger dorsal aspect.

(6) Vertical abrasion inside the right shoulder blade 3" x 1" just outside the spine.

91. On internal examination the following wounds were found by Dr. Jhala, who performed the autopsy on the dead-body. Under the first injury there was :

"A small ellipsoid wound oblique in the front of the piece of the breast bone (Sternum) upper portion right side center with dimensions 1/4" x 1/3" and at the back of the bone there was a lacerated wound accompanied by irregular chip fracture corresponding to external injury No. 1, i.e., the punctured wound chest cavity deep. Same wound continued in the contusion in area 3" x 1 1/4" in the right lung upper lobe front border middle portion front and back. Extensive clots were seen in the middle compartment upper and front part surrounding the laceration impregnated pieces of fractured bone. There was extensive echymosis and contusion around the root of the right lung in the diameter of 2 1/2" involving also the inner surface of the upper lobe. There were extensive clots of blood around the aorta. The left lung was markedly pale and showed a through and through wound in the lower lobe beginning at the inner surface just above the root opening out in the lacerated wound in the back region outer aspect at the level between 6th and 7th ribs left side not injuring the rib and injuring the space between the 6th and 7th rib left side 2" outside the junction of the spine obliquely downward and outward. Bullet was recovered from tissues behind the left shoulder blade. The wound was lacerated in the whole tract and was surrounded by contusion of softer tissues."

92. The doctor says that the bullet, after entering "the inner end, went backward, downward and then to the left" and therefore he describes the wound as "ellipsoid and oblique". He also points out that the abrasion collar was missing on the left side. Corresponding to the external injury No. 3, the doctor found on internal examination that the skull showed a haematoma under the scalp, i.e., on the left parietal region; the dimension was 2" x 2". The skull cap showed a gutter fracture of the outer table and a fracture of the inner table. The brain showed sub-arachnoid haemorrhage over the left parieto-occipital region accompanying the fracture of the vault of the skull.

93. A description of the revolver with which Ahuja was shot and the manner of its working would be necessary to appreciate the relevant evidence in that regard.

Bhanagay, the Government Criminologist, who was examined as P.W. 4, describes the revolver and the manner of its working. The revolver is a semi-automatic one and it is six-chambered. To load the revolver one has to release the chamber; when the chamber is released, it comes out on the left side. Six cartridges can be inserted in the holes of the chamber and then the chamber is pressed to the revolver. After the revolver is thus loaded, for the purpose of firing one has to pull the trigger of the revolver; when the trigger is pulled the cartridge gets cocked and the revolver being semi-automatic the hammer strikes the percussion cap of the cartridge and the cartridge explodes and the bullet goes off. For firing the second shot, the trigger has to be pulled again and the same process will have to be repeated each time it is fired. As it is not an automatic revolver, each time it is fired, the trigger has to be pulled and released. If the trigger is pulled but not released, the second round will not come in its position of firing. Pulling of the trigger has a double action - one is the rotating of the chamber and cocking, and the other, releasing of the hammer. Because of this double action, the pull must be fairly strong. A pressure of about 20 pounds is required for pulling the trigger. There is controversy on the question of pressure, and we shall deal with this at the appropriate place.

94. Of the three bullets fired from the said revolver, two bullets were found in the bathroom, and the third was extracted from the back of the left shoulder blade. Exs. F-2 and F-2a are the bullets found in the bathroom. These two bullets are flattened and the copper jacket of one of the bullets, Ex. F-2a, has been turn off. The third bullet is marked as Ex. F-3.

95. With this background let us now consider the evidence to ascertain whether the shooting was intentional, as the prosecution avers, or only accidental, as the defence suggests. Excepting Nanavati, the accused, and Ahuja, the deceased, no other person was present in the latter's bed-room when the shooting took place. Hence the only person

who can speak to the said incident is the accused Nanavati. The version of Nanavati, as given in his evidence may be stated thus : He walked into Ahuja's bed-room, shutting the door behind him. Ahuja was standing in front of the dressing-table. The accused walked towards Ahuja and said, "You are a filthy swine", and asked him, "Are you going to marry Sylvia and look after the kids ?" Ahuja became enraged and said in a nasty manner, "Do I have to marry every woman that I sleep with ?" Then the deceased said, "Get the hell out of here, otherwise, I will have you thrown out." The accused became angry, put the packet containing the revolver down on a cabinet which was near him and told him, "By God I am going to thrash you for this." The accused had his hands up to fight the deceased, but the latter made a sudden grab towards the packet containing the revolver. The accused grappled the revolver himself and prevented the deceased from getting it. He then whipped out the revolver and told the deceased to get back. The deceased was very close to him and suddenly caught with his right hand the right hand of the accused at the wrist and tried to twist it and take the revolver off it. The accused "banged" the deceased towards the door of the bathroom, but Ahuja would not let go of his grip and tried to kick the accused with his knee in the groin. The accused pushed Ahuja again into the bathroom, trying at the same time desperately to free his hand from the grip of the accused by jerking it around. The deceased had a very strong grip and he did not let go the grip. During the struggle, the accused thought that two shots went off : one went first and within a few seconds another. At the first shot the deceased just kept hanging on to the hand of the accused, but suddenly he let go his hand and slumped down. When the deceased slumped down, the accused immediately came out of the bathroom and walked down to report to the police.

96. By this description the accused seeks to raise the image that he and the deceased were face to face struggling for the possession of the revolver, the accused trying to keep it and the deceased trying to snatch it, the deceased catching hold of the wrist of the right hand of the accused and twisting it, and the accused desperately trying to free his hand from

his grip; and in the struggle two shots went off accidentally - he does not know about the third shot - and hit the deceased and caused his death. But in the cross-examination he gave negative answers to most of the relevant questions put to him to test the truthfulness of his version. The following answers illustrate his unhelpful attitude in the court :

(1) I do not remember whether the deceased had the towel on him till I left the place.

(2) I had no idea where the shots went because we were shuffling during the struggle in the tiny bathroom.

(3) I have no impression from where and how the shots were fired.

(4) I do not know anything about the rebound of shots or how the shots went off.

(5) I do not even know whether the spectacles of the deceased fell off.

(6) I do not know whether I heard the third shot. My impression is that I heard two shots.

(7) I do not remember the details of the struggle.

(8) I do not give any thought whether the shooting was an accident or not, because I wished to go to the police and report to the police.

(9) I gave no thought to this matter. I thought that something serious had happened.

(10) I cannot say how close we were to each other, we might be very close and we might be at arm's length during the struggle.

(11) I cannot say how the deceased had his grip on my wrist.

(12) I do not remember feeling any blows from the deceased by his free hand during the struggle; but he may have hit me.

97. He gives only a vague outline of the alleged struggle between him and the deceased. Broadly looked at, the version given by the accused appears to be highly improbable. Admittedly he had entered the bed-room of the deceased unceremoniously with a fully loaded revolver; within half a minute he cannot out of the room leaving Ahuja dead with bullet wounds. The story of his keeping the revolver on the cabinet is very unnatural. Even if he had kept it there, how did Ahuja come to know that it was a revolver for admittedly it was put in an envelope. Assuming that Ahuja had suspected that it might be a revolver, how could he have caught the wrist of Nanavati who had by that time the revolver in his hand with his finger on the trigger ? Even if he was able to do so, how did Nanavati accidentally pull the trigger three times and release it three times when already Ahuja was holding his wrist and when he was jerking his hand to release it from the grip of Ahuja ? It also appears to be rather curious that both the combatants did not use their left hands in the struggle. If, as he has said, there was a struggle between them and he pushed Ahuja into the bathroom, how was it that the towel wrapped around the waist of

Ahuja was intact ? So too, if there was a struggle, why there was no bruise on the body of the accused ? Though Nanavati says that there were some "roughings" on his wrist, he had not mentioned that fact till he gave his evidence in the court, nor is there any evidence to indicate such "roughings". It is not suggested that the clothes worn by the accused were torn or even soiled. Though there was blood up to three feet on the wall of the bathroom, there was not a drop of blood on the clothes of the accused. Another improbability in the version of the accused is, while he say that in the struggle two shots went off, we find three spent bullets - two of them were found in the bathroom and the other in the body of the deceased. What is more, how could Ahuja have continued to struggle after he had received either the chest injury or the head injury, for both of them were serious ones. After the deceased received either the first or the third injury there was no possibility of further struggling or pulling of the trigger by reflex action. Dr. Jhala says that the injury on the head of the victim was such that the victim could not have been able to keep standing and would have dropped unconscious immediately and that injury No. 1 was also so serious that he could not stand for more than one or two minutes. Even Dr. Baliga admits that the deceased would have slumped down after the infliction of injury No. 1 or injury No. 3 and that either of them individually would be sufficient to cause the victim to slump down. It is, therefore, impossible that after either of the said two injuries was inflicted, the deceased could have still kept on struggling with the accused. Indeed, Nanavati says in his evidence that at the first shot the deceased just kept on hanging to his hand, but suddenly he let go his grip and slumped down.

98. The only circumstance that could be relied upon to indicate a struggle is that one of the chappals of the deceased was found in the bed-room while the other was in the bathroom. But that is consistent with both intentional and accidental shooting, for in his anxiety to escape from the line of firing the deceased might have in hurry left his one chappal in the bed-room and fled with the other to the bathroom. The situation of the spectacles near the commode is more consistent with intentional shooting than with

accidental shooting, for if there had been a struggle it was more likely that the spectacles would have fallen off and broken instead of their being intact by the side of the dead-body. The condition of the bed-room as well as of the bathroom, as described by Rashmikant, the police-officer who made the inquiry, does not show any indication of struggle or fight in that place. The version of the accused, therefore, is brimming with improbabilities and is not such that any court can reasonably accept it.

99. It is said that if the accused went to the bed-room of Ahuja to shoot him he would not have addressed him by his first name "Prem" as deposed by Deepak. But Nanavati says in his evidence that he would be the last person to address the deceased as Prem. This must have been as embellishment on the part of Deepak. Assuming he said it, it does not indicate any sentiment of affection or goodwill towards the deceased - admittedly he had none towards him - but only an involuntary and habitual expression.

100. It is argued that Nanavati is a good shot - Nanda, D.W. 6, a Commodore in the Indian Navy, certifies that he is a good shot in regard to both moving and stationary targets - and therefore if he had intended to shoot Ahuja, he would have shot him perpendicularly hitting the chest and not in a haphazard way as the injuries indicate. Assuming that accused is a good shot, this argument ignores that he was not shooting at an inanimate target for practice but was shooting to commit murder; and it also ignores the desperate attempts the deceased must have made to escape. The first shot might have been fired and aimed at the chest as soon as the accused entered the room, and the other two presumably when the deceased was trying to escape to or through the bathroom.

101. Now on the question whether three shots would have gone off the revolver accidentally, there is the evidence of Bhanagay, P.W. 4, who is a Government

Criminologist. The Deputy Commissioner of Police, Bombay, through Inspector Rangnekar sent to him the revolver, three empty cartridge cases, three bullets and three live rounds for his inspection. He has examined the revolver and the bullets which are marked as Exs. F-2, F-2a and F-3. He is of the opinion that the said three empties were fired from the said revolver. He speaks to the fact that for pulling the trigger a pressure of 28 pounds is required and that for each shot the trigger has to be pulled and for another shot to be fired it must be released and pulled again. He also says that the charring around the wound could occur with the weapon of the type we are now concerned within about 2 to 3 inches of the muzzle of the weapon and the blackening around the would described as carbonaceous tattooing could be caused from such a revolver up to about 6 to 8 inches from the muzzle. In the cross examination he says that the flattening of the two damaged bullets, Exs. F-2 and F-2a, could have been caused by their hitting a flat hard surface, and that the tearing of the copper jacket of one of the bullets could have been caused by a heavy impact, such as hitting against a hard surface; it may have also been caused, according to him, by a human bone of sufficient strength provided the bullet hits the bone tangently and passes of without obstruction. These answers, if accepted - we do not see any reason why we should not accept them - prove that the bullets, Exs. F-2 and F-2a, could have been damaged by their coming into contact with some hard substance such as a bone. He says in the cross-examination that one 'struggling' will not cause three automatic firings and that even if the struggle continues he would not expect three rounds to go off, but he qualifies his statement by adding that this may happen if the person holding the revolver "co-operates so far as the reflex of his finger is concerned", to pull the trigger. He further elaborates the same idea by saying that a certain kind of reflex co-operation is required for pulling the trigger and that this reflex pull could be either conscious or unconscious. This answer is strongly relied upon by learned counsel for the accused in support of his contention of accidental firing. He argues that by unconscious reflex pull of the trigger three times by the accused three shots could have gone off the revolver. But the possibility of three rounds going off by three separate reflexes of the finger of the person holding the trigger is only a theoretical possibility, and that too only

on the assumption of a fairly long struggle. Such unconscious reflex pull of the finger by the accused three times within a space of a few seconds during the struggle as described by the accused is highly improbable, if not impossible. We shall consider the evidence of this witness on the question of ricocheting of bullets when we deal with individual injuries found on the body of the deceased.

102. This witness is not a doctor but has received training in Forensic Ballistics (Identification of Fire Arms) amongst other things in London and possesses certificates of competency from his tutors in London duly endorsed by the covering letter from the Education Department, High Commissioner's Office, and he is a Government Criminologist and has been doing this work for the last 22 years; he says that he has also gained experience by conducting experiments by firing on mutton legs. He stood the test of cross-examination exceedingly well and there is no reason to reject his evidence. He makes the following points : (1) Three used bullets, Exs. F-2, F-2a, and F-3, were shot from the revolver Ex. B. (2) The revolver can be fired only by pulling the trigger; and for shooting thrice, a person shooting will have to give a deep pull to the trigger thrice and release it thrice. (3) A pressure of 28 pounds is required to pull the trigger. (4) One "struggling" will not cause three automatic firings. (5) If the struggle continues and if the person who pulls the trigger co-operates by pulling the trigger three times, three shots may go off. (6) The bullet may be damaged by hitting a hard surface or a bone. As we have pointed out the fifth point is only a theoretical possibility based upon two hypothesis, namely, (i) the struggle continues for a considerable time, and (ii) the person holding the trigger co-operates by pulling it thrice by reflex action. This evidence, therefore, establishes that the bullets went off the revolver brought by the accused - indeed this is not disputed - and that in the course of the struggle of a few seconds as described by the accused, it is not possible that the trigger could have been accidentally pulled three times in quick succession so as to discharge three bullets.

103. As regards the pressure required to pull the trigger of Ex. B, Triloksing, who is the Master Armourer in the Army, deposing as D.W. 11, does not accept the figure given by the Bhanagay and he would put it at 11 to 14 pounds. He does not know the science of ballistics and he is only a mechanic who repairs the arms. He had not examined the revolver in question. He admits that a double-action revolver requires more pressure on the trigger than single-action one. While Major Burrard in his book on Identification of Fire-arms and Forensic Ballistics says that the normal trigger pull in double-action revolvers is about 20 pounds, this witness reduces it to 11 to 14 pounds; while Major Burrard says in his book that in all competitions no test other than a dead weight is accepted, this witness does not agree with him. His opinion is based on the experiments performed with spring balance. We would prefer to accept the opinion of Bhanagay to that of this witness. But, on the basis of the opinion of Major Burrard, we shall assume for the purpose of this case that about 20 pounds of pressure would be required to pull the trigger of the revolver Ex. B.

104. Before considering the injuries in detail, it may be convenient to ascertain from the relevant text-books some of the indications that will be found in the case of injuries caused by shooting. The following passage from authoritative text-books may be consulted :

105. Snyder's Homicide Investigation, P. 117 :

Beyond the distance of about 18 inches or 24 at the most evidence of smudging and tattooing are seldom present.

106. Merkeley on Investigation of Death, P. 82 :

"At a distance of approximately over 18" the powder grains are no longer carried forward and therefore the only effect produced on the skin surface is that of the bullet."

107. Legal Medicine Pathology and Toxicology by Gonzales, 2nd Edn., 1956 :

The powder grains may travel 18 to 24 inches or more depending on the length of barrel, calibre and type of weapon and the type of ammunition.

108. Smith and Glaister, 1939 Edn., P. 17

"In general with all types of smokeless powder some traces of blackening are to be seen but it is not always possible to recognize unburnt grains of powder even at ranges of one and a half feet."

109. Glaister in his book on Medical Jurisprudence and Toxicology, 1957 Edn., makes a statement that at a range of about 12 inches and over as a rule there will not be marks of carbonaceous tattooing or powder marks. But the same author in an earlier book from which we have already quoted puts it at 18 inches. In the book "Recent Advances in Forensic Medicine" 2nd Edn., p. 11, it is stated :

At ranges beyond 2 to 3 feet little or no trace of the powder can be observed.

110. Dr. Taylor's book, Vol. 1, 11th edn., p. 373, contains the following statement :

In revolver and automatic pistol wounds nothing but the grace ring is likely to be found beyond about two feet.

111. Bhanagay, P.W. 4, says that charring around the would could occur with the weapon of the type Ex. B within about 2 to 3 inches from the muzzle of the weapon, and the blackening round about the wound could be caused from such a weapon up to about 6 to 8 inches from the muzzle. Dr. Jhala, P.W. 18, says that carbonaceous tattooing would not appear if the body was beyond 18 inches from the mouth of the muzzle.

112. Dr. Baliga, D.W. 2, accepts the correctness of the statement found in Glaister's book, namely, "when the range reaches about 6 inches there is usually an absence of burning although there will probably be some evidence of bruising and of powder mark, at a range of about 12 inches and over the skin around the wound does not as a rule show evidence of powder marks." In the cross-examination this witness says that he does not see any conflict in the authorities cited, and tries to reconcile the various authorities by stating that all the authorities show that there would not be powder marks beyond the range of 12 to 18 inches. He also says that in the matter of tattooing, there is no difference between that caused by smokeless powder used in the cartridge in question, and black powder used in other bullets, though in the case of the former there may be greater difficulty to find out whether the marks are present or not in a wound.

113. Having regard to the aforesaid impressive array of authorities on Medical Jurisprudence, we hold, agreeing with Dr. Jhala, that carbonaceous tattooing would not be found beyond range of 18 inches from the mouth of the muzzle of the weapon. We also hold that charring around the wound would occur when it is caused by a revolver like Ex. B within about 2 or 3 inches from the muzzle of the revolver.

114. The presence and nature of the abrasion collar around the injury indicates the direction and also the velocity of the bullet. Abrasion collar is formed by the gyration of the bullet caused by the rifling of the barrel. If a bullet hits the body perpendicularly, the wound would be circular and the abrasion collar would be all around. But if the hit is not perpendicular, the abrasion collar will not be around the entire wound (See the evidence of Dr. Jhala and Dr. Baliga).

115. As regards the injuries found on the dead-body, two doctors were examined, Dr. Jhala, P.W. 18, on the side of the prosecution, and Dr. Baliga, D.W. 2, on the side of the defence. Dr. Jhala is the Police Surgeon, Bombay, for the last three years. Prior to that he was a Police Surgeon in Ahmedabad for six years. He is M.R.C.P. (Edin.), D.T.M. and H. (Lond.). He conducted the postmortem on the dead-body of Ahuja and examined both external and internal injuries on the body. He is, therefore, competent to speak with authority on the wounds found on the dead-body not only by his qualifications and experience but also by reason of having performed the autopsy on the dead-body. Dr. Baliga is an F.R.C.S. (England) and has been practising as a medical surgeon since 1933. His qualifications and antecedents show that he is not only an experienced surgeon but also has been taking interest in extra-surgical activities, social, political and educational. He says that he has studied medical literature regarding bullet injuries and that he is familiar with medico-legal aspect of wounds including bullet wounds. He was a Causality Medical Officer in the K.E.M. Hospital in 1928. He had seen bullet injuries both as Causality Medical Officer and later on as a surgeon. In the cross-examination he says :

I have never fired a revolver, nor any other fire-arm. I have not given evidence in a single case of bullet injuries prior to this occasion though I have treated and I am familiar with bullet injuries. The last that I gave evidence in Medico-legal case in a murder case was in 1949 or 1950 or thereabout. Prior to that I must have given evidence in a medico-legal

case in about 1939. I cannot off hand tell how many cases of bullet injuries I have treated till now, must have been over a dozen. I have not treated any bullet injuries case for the last 7 or 8 years. It was over 8 or 9 years ago that I have treated bullet injuries on the chest and the head. Out of all these 12 bullet injuries cases which I have treated up to now there might be 4 or 5 which were bullet injuries on the head. Out of these 4 or 5 cases probably there were three cases in which there were injuries both on the chest as well as on the head..... I must have performed about half a dozen post-mortems in all my career.

116. He further says that he was consulted about a week before he gave evidence by Mr. Khandalawala and Mr. Rajani Patel on behalf of the accused and was shows the post-mortem report of the injuries; that he did not have before him either the bullets or the skull; that he gave his opinion in about 20 minutes on the basis of the post-mortem report of the injuries that the said injuries could have been caused in a struggle between the accused and the deceased. This witness has come to the Court to support his opinion based on scanty material. We are not required in this case to decide upon the comparative qualifications or merits of these two doctors of their relative competency as surgeons, but we must say that so far as the wounds on the dead-body of the deceased are concerned, Dr. Jhala, who has made the post-mortem examination, is in a better position to help us to ascertain whether shooting was by accident or by intention than Dr. Baliga, who gave his opinion on the basis of the post-mortem report.

117. Now we shall take injury No. 1. This injury is a punctured one of dimensions 1/4" x 1/4" x chest cavity deep just below and inside the inner end of the right collar bone with an abrasion collar on the right side of the wound. The internal examination showed that the bullet, after causing the punctured wound in the chest just below the inner end of the right collor bone, struck the sternum and after striking it, it slightly deflected in its course and came behind the shoulder bone. In the course of its journey the bullet entered the

chest, impacted the soft tissues of the lung, the aorta and the left lung, and ultimately damaged the left lung and got lodged behind the scapula. Dr. Jhala describes the wound as ellipsoid and oblique and says that the abrasion collar is missing on the left side. On the injury there is neither charring nor carbonaceous tattooing. The prosecution version is that this wound was caused by intentional shooting, while the defence suggestion is that it was caused when the accused and the deceased were struggling for the possession of the revolver. Dr. Jhala, after describing injury No. 1, says that it could not have been received by the victim during a struggle in which both the victim and the assailant were in each other's grip. He gives reasons for his opinion, namely, as there was no carbonaceous tattooing on the injury, it must have been caused by the revolver being fired from a distance of over 18 inches from the tip of the mouth of the muzzle. We have earlier noticed that, on the basis of the authoritative text-books and the evidence, there would not be carbonaceous tattooing if the target was beyond 18 inches from the mouth of the muzzle. It is suggested to him in the cross-examination that the absence of tattooing may be due to the fact that the bullet might have first hit the fingers of the left palm causing all or any of injuries Nos. 2, 4 and 5, presumably when the deceased placed his left palm against the line of the bullet causing carbonaceous tattooing on the said fingers and thereafter hitting the chest. Dr. Jhala does not admit the possibility of the suggestion. He rules out this possibility because if the bullet first had an impact on the fingers, it would get deflected, lose its direction and would not be able to cause later injury No. 1 with abrasion collar. He further explains that an impact with a solid substance like bones of fingers will make the bullet lose its gyratory movement and thereafter it could not cause any abrasion collar to the wound. He adds, "assuming that the bullet first hit and caused the injury to the web between the little finger and the ring finger, and further assuming that it had not lost its gyrating action, it would not have caused the injury No. 1, i.e., on the chest which is accompanied by internal damage and the depth to which it had gone."

118. Now let us see what Dr. Baliga, D.W. 2 says about injury No. 1. The opinion expressed by Dr. Jhala is put to this witness, namely, that injury No. 1 on the chest could not have been caused during the course of a struggle when the victim and the assailant were in each other's grip, and this witness does not agree with that opinion. He further says that it is possible that even if the bullet first caused injury in the web, that is, injury No. 2, and thereafter caused injury No. 1 in the chest, there would be an abrasion collar such as seen in injury No. 1. Excepting this of the suggestion possibility, he has not controverted the reasons given by Dr. Jhala why such an abrasion collar could not be caused if the bullet had hit the fingers before hitting the chest. We will presently show in considering injuries Nos. 2, 4 and 5 that the said injuries were due to the hit by one bullet. If that be so, a bullet, which had caused the said three injuries and then took a turn through the little and the ring finger, could not have retained sufficient velocity to cause the abrasion collar in the chest. Nor has Dr. Baliga controverted the reasons given by Dr. Jhala that even if after causing the injury in the web the bullet could cause injury No. 1, it could not have caused the internal damage discovered in the post-mortem examination. We have no hesitation, therefore, to accept the well reasoned view of Dr. Jhala in preference to the possibility envisaged by Dr. Baliga and hold that injury No. 1 could not have been caused when the accused and the deceased were in close grip, but only by a shot fired from a distance beyond 18 inches from the mouth of the muzzle.

119. The third injury is a lacerated ellipsoid wound oblique in the left parietal region with dimensions 1 1/8" x 1/4" and skull deep. Dr. Jhala in his evidence says that the skull had a gutter fracture of the outer table and a fracture of the inner table and the brain showed subarachnoid haemorrhage over the left parieto-occipital region accompanying the fracture of the vault of the skull. The injury was effected in a "glancing way", that is, at a tangent, and the injury went upward and to the front. He is of the opinion that the said injury to the head must have been caused by firing of a bullet from a distance of over 18 inches from the mouth of the muzzle and must have been caused with the back of the

head of the victim towards the assailant. When it was suggested to him that the said wound could have been caused by a ricocheted bullet, he answered that though a ricocheted bullet coming from the same line of direction could have caused the said injury, it could not have caused the intracranial haemorrhage and also could not have caused the fracture of the inner table of the skull. He is definite that injury No. 3 could not have been inflicted from "front to back" as the slope of the gutter fracture was from the back to the front in the direction of the "grazing" of the bullet. He gives a further reason that as a rule the fracture would be broader in the skull where the bullet has the first impact and narrower where it emerges out, which is the case in respect of injury No. 3. He also relies upon the depth of the fracture at the two points and its slope to indicate the direction in which the bullet grazed. He further says that it is common knowledge that the fracture of both the tables accompanied by haemorrhage in the skull requires great force and a ricocheted bullet cannot cause such an injury. He opines that, though a ricocheted bullet emanating from a powerful fire-arm from a close range can cause injury to a heavy bone, it cannot be caused by a revolver of the type Ex. B.

120. Another suggestion made to him is that the bullet might have hit the glass pane of the window in the bathroom first and then ricocheted causing the injury on the head. Dr. Jhala, in his evidence, says that if the bullet had hit the glass pane first, it would have caused a hole and fallen on the other side of the window, for ricocheting is not possible in the case of a bullet directly hitting the glass. But on the other hand, if the bullet first hit a hard substance and then the glass pane, it would act like a pebble and crack the glass and would not go to the other side. In the present case, the bullet must have hit the skull first and then the glass pane after having lost its velocity, and fallen down like a pebble inside the bathroom itself. If, as the defence suggests, the bullet had directly hit the glass pane, it would have passed through it to the other side, in which case four bullets must have been fired from the revolver Ex. B, which is nobody's case.

121. The evidence, of Dr. Jhala is corroborated by the evidence of the ballistics expert Bhanagay, P.W. 4, when he says that if a bullet hits a hard substance and gets flattened and damaged like the bullets Exs. F-2 and F-2a, it may not enter the body and that even if it enters the body, the penetration will be shallow and the injury caused thereby will be much less as compared to the injury caused by a direct hit of the bullet. Dr. Baliga, on the other hand, says that injury No. 3 could be caused both ways, that is, from "front backward" as well as from "back forward". He also contradicts Dr. Jhala and says "back that in the type of the gutter fracture caused in the present case the wound is likely to be narrower at the entry than at the exit. He further says that assuming that the gutter fracture wound was caused by a ricocheted bullet and assuming further that there was enough force left after rebound, a ricocheted bullet could cause a fracture of even the inner table and give rise to intra-cranial haemorrhage. He asserts that a bullet that can cause a gutter fracture of the outer table is capable of fracturing the inner table also. In short, he contradicts every statement of Dr. Jhala; to quote his own words, "I do not agree that injury No. 3, i.e., the gutter fracture, cannot be inflicted from front to back for the reason that the slope of the gutter fracture was behind forward direction of the grazing of the bullet; I also do not agree with the proposition that if it would have been from the front then the slope of the gutter wound would have been from the front backward; I have not heard of such a rule and that at the near end of the impact of a bullet the gutter fracture is deeper than where it files off; I do not agree that the depth of the fracture at two points is more important factor in arriving at the conclusion of the point of impact of the bullet." He also contradicts the opinion of Dr. Jhala that injury No. 3 could not be caused in a struggle between the victim and the assailant. Dr. Baliga has been cross-examined at great length. It is elicited from him that he is not a ballistics expert and that his experience in the matter of direction of bullet injuries is comparatively less than his experience in other fields. His opinion that the gutter fracture injury could be and was more likely to be caused from an injury glancing front backwards is based upon a

comparison of the photograph of the skull shown to him with the figure 15 in the book "Recent Advances in Forensic Medicine" by Smith and Glaister, p. 21. The said figure is marked as Ex. Z in the case. The witness says that the figure shows that the narrower part of the gutter is on the rear and the wider part is in front. In the cross-examination he further says that the widest part of the gutter in figure Ex. Z is neither at the front and nor at the rear end, but the rear end is pointed and tailed. It is put to this witness that figure Ex. Z does not support his evidence and that he deliberately refused to see at it correctly, but he denies it. The learned Judges of the High Court, after seeing the photograph Ex. Z with a magnifying glass, expressed the view that what Dr. Baliga called the pointed and tailed part of the gutter was a crack in the skull and not a part of the gutter. This observation has not been shown to us to be wrong. When asked on what scientific principle he would support his opinion, Dr. Baliga could not give any such principle, but only said that it was likely - he puts emphasis on the word "likely" - that the striking end was likely to be narrower and little broader at the far end. He agrees that when a conical bullet hits a hard bone it means that the hard bone is protruding in the path of the projectile and also agrees that after the initial impact the bullet adjusts itself in the new direction of flight and that the damage caused at the initial point of the impact would be more than at any subsequent point. Having agreed so far, he would not agree on the admitted hypothesis that at the initial point of contract the wound should be wider than at the exist. But he admits that he has no authority to support his submission. Finally, he admits that generally the breadth and the depth of the gutter wound would indicate the extensive nature of the damage. On this aspect of the case, therefore, the witness has broken down and his assertion is not based on any principle or on sufficient data.

122. The next statement he makes is that he does not agree that the fracture of the inner table shows that the initial impact was from behind; but he admits that the fracture of the inner table is exactly below the backside of the gutter, though he adds that there is a more extensive crack in front of the anterior end of the gutter. He admits that in the case of a

gutter on the skull the bone material which dissociates from the rest of the skull is carried in the direction in which the bullet flies but says that he was not furnished with any information in that regard when he gave his opinion.

123. Coming to the question of the ricocheting, he says that a ricocheting bullet can produce depressed fracture of the skull. But when asked whether in his experience he has come across any bullet hitting a hard object like a wall and rebounding and causing a fracture of a hard bone or whether he has any text-book to support his statement, he says that he cannot quote any instance nor an authority. But he says that it is so mentioned in several books. Then he gives curious definitions of the expressions "likely to cause death", "necessarily fatal" etc. He would go to the extent of saying that in the case of injury No. 3, the chance of recovery is up to 80 per cent.; but finally he modifies that statement by saying that he made the statement on the assumption that the haemorrhage in the subarachnoid region is localised, but if the haemorrhage is extensive his answer does not hold good. Though he asserts that at a range of about 12 inches the wound does not show as a rule evidence of powder mark, he admits that he has no practical experience that beyond a distance of 12 inches no powder mark can be discovered as a rule. Though text-books and authorities are cited to the contrary, he still sticks to his opinion; but finally he admits that he is not a ballistics expert and has no experience in that line. When he is asked if after injury No. 3, the victim could have continued the struggle, he says that he could have, though he adds that it was unlikely after the victim had received both injuries Nos. 1 and 3. He admits that the said injury can be caused both ways, that is, by a bullet hitting either on the front of the head or at the back of the head. But his reasons for saying that the bullet might have hit the victim on the front of the head are neither supported by principle nor by the nature of the gutter wound found in the skull. Ex. Z relied upon by him does not support him. His theory of a ricocheted bullet hitting the skull is highly imaginary and cannot be sustained on the material available to us : firstly, there is no mark found in the bathroom wall or elsewhere indicating that the bullet struck a hard

substance before ricocheting and hitting the skull, and secondly, it does not appear to be likely that such a ricocheted bullet ejected from Ex. B could have caused such an extensive injury to the head of the deceased as found in this case.

124. Mr. Pathak finally argues that the bullet Ex. F-2a has a "process", i.e., a projection which exactly fits in the denture found in the skull and, therefore, the projection could have been caused only by the bullet coming into contract with some hard substance before it hit the head of the deceased. This suggestion was not made to any of the experts. It is not possible for us to speculate as to the manner in which the said projection was caused.

125. We, therefore, accept, the evidence of the ballistics expert, P.W. 4, and that of Dr. Jhala, P.W. 18, in preference to that of Dr. Baliga.

126. Now coming to injuries Nos. 2, 4 and 5, injury No. 4 is found on the first joint of the crease of the index finger on the back side of the left palm and injury No. 5 at the joint level of the left middle finger dorsal aspect, and injury No. 2 is a punctured wound in the web between the ring finger and the little finger of the left hand communicating with a punctured wound on the palmer aspect of the left knukle level between the left little and the ring finger. Dr. Jhala says that all the said injuries are on the back of the left palm and all have corbonaceous tattooing and that the injuries should have been caused when his left hand was between 6 and 18 inches from the muzzle of the revolver. He further says that all the three injuries could have been caused by one bullet, for, as the postmortem discloses, the three injuries are in a straight line and therefore it can clearly be inferred that they were caused by one bullet which passed through the wound on the palmer aspect. His theory is that one bullet, after causing injuries Nos. 4 and 5 passed between

the little and ring finger and caused the punctured wound on the palmar aspect of the left hand. He is also definitely of the view that these wounds could not have been received by the victim during a struggle in which both of them were in each other's grip. It is not disputed that injury No. 1 and injury No. 3 should have been caused by different bullets. If injuries Nos. 2, 4 and 5 were caused by different bullets, there should have been more than three bullets fired, which is not the case of either the prosecution or the defence. In the circumstances, the said wounds must have been caused only by one bullet, and there is nothing improbable in a bullet touching three fingers on the back of the palm and taking a turn and passing through the web between the little and ring finger. Dr. Baliga contradicts Dr. Jhala even in regard to these wounds. He says that these injuries, along with the others, indicate the probability of a struggle between the victim and the assailant over the weapon; but he does not give any reasons for his opinion. He asserts that one single bullet cannot cause injuries Nos. 2, 4 and 5 on the left hand fingers, as it is a circuitous course for a bullet to take and it cannot do so without meeting with some severe resistance. He suggests that a bullet which had grazed and caused injuries Nos. 4 and 5 could then have inflicted injury No. 3 without causing carbonaceous tattooing on the head injury. We have already pointed out that the head injury was caused from the back, and we do not see any scope for one bullet hitting the fingers and thereafter causing the head injury. If the two theories, namely, that either injury No. 1 or injury No. 3 could have been caused by the same bullets that might have caused injury No. 2 and injuries Nos. 4 and 5 were to be rejected, for the aforesaid reasons, Dr. Baliga's view that injuries Nos. 2, 4 and 5 must have been caused by different bullets should also be rejected, for to accept it, we would require more than three bullets emanating from the revolver, whereas it is the common case that more than three bullets were not fired from the revolver. That apart in the cross-examination this witness accepts that the injury on the first phalangeal joint of the index finger and the injury in the knuckle of the middle finger and the injury in the web between the little and the ring finger, but not taking into account the injury on the palmar aspect would be in a straight line. The witness admits that there can be a deflection even against a soft tissue, but adds that the soft tissue being not of much

thickness between the said two fingers, the amount of deflection is negligible. But he concludes by saying that he is not saying this as an expert in ballistics. If so, the bullet could have deflected after striking the web between the little and the ring finger. We, therefore, accept the evidence of Dr. Jhala that one bullet must have caused these three injuries.

127. Strong reliance is placed upon the nature of injury No. 6 found on the back of the deceased viz, a vertical abrasion in the right shoulder blade of dimensions 3" x 1" just outside the spine, and it is said that the injury must have been caused when the accused pushed the deceased towards the door of the bath room. Nanavati in his evidence says that he "banged" him towards the door of the bathroom, and after some struggle he again pushed the deceased into the bathroom. It is suggested that when the accused "banged" the deceased towards the door of the bathroom or when he pushed him again into the bathroom, this injury might have been caused by his back having come into contract with the frame of the door. It is suggested to Dr. Jhala that injury No. 6 could be caused by the man's back brushing against a hard substance like the edge of the door, and he admits that it could be so. But the suggestion of the prosecution case is that the injury must have been caused when Ahuja fell down in the bathroom in front of the commode and, when falling, his back may have caught the edge of the commode or the bath-tub or the edge of the door of the bathroom which opens inside the bathroom to the left of the bath-tub. Shelat, J., says in his judgment :

If the abrasion was caused when the deceased was said to have been banged against the bathroom door or its frame, it would seem that the injury would be more likely to be caused, as the deceased would be in a standing position, on the shoulder blade and not inside the right shoulder. It is thus more probable that the injury was caused when the

deceased's back came into contact either with the edge of the door or the edge of the bath-tub or the commode when he slumped.

128. It is not possible to say definitely how this injury was caused, but it could have been caused when the deceased fell down in the bathroom.

129. The injuries found on the dead-body of Ahuja are certainly consistent with the accused intentionally shooting him after entering the bed-room of the deceased; but injuries Nos. 1 and 3 are wholly inconsistent with the accused accidentally shooting him in the course of their struggle for the revolver.

130. From the consideration of the entire evidence the following facts emerge : The deceased seduced the wife of the accused. She had confessed to him of her illicit intimacy with the deceased. It was natural that the accused was enraged at the conduct of the deceased and had, therefore, sufficient motive to do away with the deceased. He deliberately secured the revolver on a false pretext from the ship, drove to the flat of Ahuja, entered his bed-room unceremoniously with a loaded revolver in hand and in about a few seconds thereafter came out with the revolver in his hand. The deceased was found dead in his bathroom with bullet injuries on his body. It is not disputed that the bullets that caused injuries to Ahuja emanated from the revolver that was in the hand of the accused. After the shooting, till his trial in the Sessions Court, he did not tell anybody that he shot the deceased by accident. Indeed, he confessed his guilt to the Chowkidar Puransingh and practically admitted the same to his colleague Samuel. His description of the struggle in the bathroom is highly artificial and is devoid of all necessary particulars. The injuries found on the body of the deceased are consistent with the intentional shooting and the main injuries are wholly inconsistent with accidental shooting when the victim and the assailant were in close grips. The other circumstances

brought out in the evidence also establish that there could not have been any fight or struggle between the accused and the deceased.

131. We, therefore, unhesitatingly hold, agreeing with the High Court, that the prosecution has proved beyond any reasonable doubt that the accused has intentionally shot the deceased and killed him.

132. In this view it is not necessary to consider the question whether the accused had discharged the burden laid on him under s. 80 of the Indian Penal Code, especially as learned counsel appearing for the accused here and in the High Court did not rely upon the defence based upon that section.

133. That apart, we agree with the High Court that, on the evidence adduced in this case, no reasonable body of persons could have come to the conclusion which the jury reached in this case. For that reason also the verdict of the jury cannot stand.

134. Even so, it is contended by Mr. Pathak that the accused shot the deceased while deprived of the power of self-control by sudden and grave provocation and, therefore, the offence would fall under Exception 1 to s. 300 of the Indian Penal Code. The said Exception reads :

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

135. Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with : (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

136. The first question raised is whether Ahuja gave provocation to Nanawati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.

137. Learned Attorney-General argues, that though a confession of adultery by a wife may in certain circumstances be provocation by the paramour himself, under different circumstances it has to be considered from the standpoint of the person who conveys it rather than from the standpoint of the person who gives it. He further contends that even if the provocation was deemed to have been given by Ahuja, and though the said provocation might have been grave, it could not be sudden, for the provocation given by Ahuja was only in the past.

138. On the other hand, Mr. Pathak contends that the act of Ahuja, namely, the seduction of Sylvia, gave provocation though the fact of seduction was communicated to the accused by Sylvia and that for the ascertainment of the suddenness of the provocation it is not the mind of the person who provokes that matters but that of the person provoked that is decisive. It is not necessary to express our opinion on the said question, for we are

satisfied that, for other reasons, the case is not covered by Exception 1 to s. 300 of the Indian Penal Code.

139. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In Mancini v. Director of Public Prosecutions L.R. (1942) A.C. 1, Viscount Simon, L.C., states the scope of the doctrine of provocation thus :

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death..... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini [1914] 3 K.B. 1116, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

140. Viscount Simon again in Holmes v. Director of Public Prosecutions L.R. (1946) A.C. 588 elaborates further on this theme. There, the appellant had entertained some suspicious of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it will ease your mind, I

have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't - at Mrs. X.'s". With this appellant lost his temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to Mancini's case L.R. (1942) A.C. 1, proceeded to state thus :

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.

141. Goddard, C.J., Duffy's case [[1949] 1 All. E.R. 932] defines provocation thus :

Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind..... What matters is whether this girl (the accused) had the time to say : 'Whatever I have suffered, whatever I have endured, I know that Thou shall not kill.' That is what matters. Similarly,.....circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation. Provocation being,.....as I have defined it, there are two things, in

considering it, to which the law attaches great importance. The first of them is, whether there was what is sometimes called time for cooling, that is, for passing to cool and for reason to regain dominion over the mind..... Secondly in considering whether provocation has or has not been made out, you must consider the retaliation in provocation - that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given.

142. A passage from the address of Baron Parke to the jury in R. v. Thomas (1837) 7 C. & P. 817 extracted in Russell on Crime, 11th ed., Vol. I at p. 593, may usefully be quoted :

But the law requires two things : first that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.

143. The passages extracted above lay down the following principles : (1) Except in circumstances of most extreme and exceptional character, a mere confession of adultery is not enough to reduce the offence of murder to manslaughter. (2) The act of provocation which reduced the offence of murder to manslaughter must be such as to cause a sudden and temporary loss of self-control; and it must be distinguished from a provocation which inspires an actual intention to kill. (3) The act should have been done during the continuance of that state of mind, that is, before there was time for passion to cool and for reason to regain dominion over the mind. (4) The fatal blow should be clearly traced to the influence of passion arising from the provocation.

144. On the other hand, in India, the first principle has never been followed. That principle has had its origin in the English doctrine that mere words and gestures would not be in point of law sufficient to reduce murder to manslaughter. But the authors of the Indian Penal Code did not accept the distinction. They observed :

It is an indisputable fact, that gross insults by word or gesture have as great tendency to move many persons to violem passion as dangerous or painful bodily in juries; nor does it appear to us that passio-excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of peculiarly bad heart.

145. Indian courts have not maintained the distinction between words and acts in the application of the doctrine of provocation in a given case. The Indian law on the subject may be considered from two aspects, namely, (1) whether words or gestures unaccompanied by acts can amount to provocation and (2) what is the effect of the time lag between the act of provocation and the commission of the offence. In Empress v. Khogayi I.L.R (1879) . 2 Mad. 122, a division bench of the Madras High Court held, in the circumstances of that case, that abusive language used would be a provocation sufficient to deprive the accused of self-control. The learned Judges observed :

What is required is that it should be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind and was addressed to man already enraged by the conduct of deceased's son.

146. It will be seen in this case that abusive language of the foulest kind was held to be sufficient in the case of man who was already enraged by the conduct of deceased's son. The same learned Judge in a later decision in Boya Munigadu v. The Queen I.L.R(1881) . 3 Mad. 33 upheld plea of grave and sudden provocation in the following circumstances : The accused saw the deceased when she had cohabitation with his bitter enemy; that night he had no meals; next morning he went to the ryots to get his wages from them, and at that time he saw his wife eating food along with her paramour; he killed the

paramour with a bill-hook. The learned Judges held that the accused had sufficient provocation to bring the case within the first exception to s. 300 of the Indian Penal Code. The learned Judges observed :

..... If having witnessed the act of adultery, he connected this subsequent conduct as he could not fail to connect it, with that act, it would be conduct of a character highly exasperating to him, implying as it must, that all concealment of their criminal relations and all regard for his feelings were abandoned and that they purposed continuing their course of misconduct in his house. This, we think, amounted to provocation, grave enough and sudden enough to deprive him of his self-control, and reduced the offence from murder to culpable homicide not amounting to murder.

147. The case illustrates that the state of mind of the accused, having regard to the earlier conduct of the deceased, may be taken into consideration in considering whether the subsequent act would be a sufficient provocation to bring the case within the exception. Another division bench of the Madras High Court in In re Murugian [I.L.R. [1957] Mad. 805] held that, where the deceased not only committed adultery but later on swore openly in the face of the husband that she would persist in such adultery and also abused the husband for remonstrating against such conduct, the case was covered by the first exception to s. 300 of the Indian Penal Code. The judgment of the Andhra Pradesh High Court in In re C. Narayan [A.I.R. 1958 A.P. 235] adopted the same reasoning in a case where the accused, a young man, who had a lurking suspicion of the conduct of his wife, who newly joined him, was confronted with the confession of illicit intimacy with, and consequent pregnancy by another, strangled his wife to death, and held that the case was covered by Exception 1 to s. 300 of the Indian Penal Code. These two decisions indicate that the mental state created by an earlier act may be taken into consideration in ascertaining whether a subsequent act was sufficient to make the assailant to lose his self-control.

148. Where the deceased led an immoral life and her husband, the accused, upbraided her and the deceased instead of being repentant said that she would again do such acts, and the accused, being enraged struck her and, when she struggled and beat him, killed her, the Court held the immediate provocation coming on top of all that had gone before was sufficient to bring the case within the first exception to s. 300 of the Indian Penal Code. So too, where a woman was leading a notoriously immoral life, and on the previous night mysteriously disappeared from the bedside of her husband and the husband protested against her conduct, she vulgarly abused him, whereupon the husband lost his self-control, picked up a rough stick, which happened to be close by and struck her resulting in her death, the Labour High Court, in Jan Muhammad v. Emperor I.L.R. [1929] Lah 861, held that the case was governed by the said exception. The following observations of the court were relied upon in the present case :

In the present case my view is that, in judgment the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman..... As stated above, the whole unfortunate affair should be looked at as one prolonged agony on the part of the husband which must have been preying upon his mind and led to the assault upon the woman, resulting in her death.

149. A division bench of the Allahabad High Court in Emperor v. Balku I.L.R. [1938] All. 789 invoked the exception in a case where the accused and the deceased, who was his wife's sister's husband, were sleeping on the same cot, and in the night the accused saw the deceased getting up from the cot and going to another room and having sexual intercourse with his (accused's) wife, and the accused allowed the deceased to return to

the cot, but after the deceased fell asleep, he stabbed him to death. The learned Judges held :

When Budhu (the deceased) came into intimate contact with the accused by lying beside him on the charpai this must have worked further on the mind of the accused and he must have reflected that 'this man now lying beside me had been dishonouring me a few minutes ago'. Under these circumstances we think that the provocation would be both grave and sudden.

150. The Allahabad High Court in a recent decision, viz., Babu Lal v. State MANU/UP/0047/1960 : AIR1960All223 applied the exception to a case where the husband who saw his wife in a compromising position with the deceased killed the latter subsequently when the deceased came, in his absence, to his house in another village to which he had moved. The learned Judges observed :

The appellant when he came to reside in the Government House Orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was absent. This could certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden.

151. All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery of the wife's infidelity and the subsequent act of her operated as a grave and sudden provocation on his disturbed mind.

152. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation ? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

153. The Indian law, relevant to the present enquiry, may be stated thus : (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to s. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

154. Bearing these principles in mind, let us look at the facts of this case. When Sylvia confessed to her husband that she had illicit intimacy with Ahuja, the latter was not present. We will assume that he had momentarily lost his self-control. But if his version is true - for the purpose of this argument we shall accept that what he has said is true - it shows that he was only thinking of the future of his wife and children and also of asking for an explanation from Ahuja for his conduct. This attitude of the accused clearly indicates that he had not only regained his self-control, but on the other hand, was planning for the future. Then he drove his wife and children to a cinema, left them there, went to his ship, took a revolver on a false pretext, loaded it with six rounds, did some official business there, and drove his car to the office of Ahuja and then to his flat, went straight to the bed-room of Ahuja and shot him dead. Between 1-30 P.M., when he left his house, and 4-20 P.M., when the murder took place, three hours had elapsed, and therefore there was sufficient time for him to regain his self-control, even if he had not regained it earlier. On the other hand, his conduct clearly shows that the murder was a deliberate and calculated one. Even if any conversation took place between the accused and the deceased in the manner described by the accused - though we do not believe that - it does not affect the question, for the accused entered the bed-room of the deceased to shoot him. The mere fact that before the shooting the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder. We, therefore, hold that the facts of the case do not attract the provisions of Exception 1 to s. 300 of the Indian Penal Code.

155. In the result, conviction of the accused under s. 302 of the Indian Penal Code and sentence of imprisonment for life passed on him by the High Court are correct, and there are absolutely no grounds for interference. The appeal stands dismissed.

156. Appeal dismissed.

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