



LL.B. II Term

LB-201 Law of Evidence

Cases Selected and Edited by

**Rajni Abbi
Gunjan Gupta
Shabnam
Belu Gupta
Anju Sinha
Narender Bishnoi**

**FACULTY OF LAW
UNIVERSITY OF DELHI,
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LL.B. II TERM

Paper : LB - 201 - Evidence Law

Prescribed Legislation:

The Indian Evidence Act, 1872

Prescribed Books:

1. Vepa P. Sarathi, *Law of Evidence* (6th ed., 2006)
2. M. Monir, *Law of Evidence* (14th ed., 2006)

I. GENERAL ISSUES RELATING TO LAW OF EVIDENCE (6 periods)

- (a) (i) Re-enactment of past events for deducing blameworthiness or entitlements of the parties is the core enquiry of Evidence Law. Similarities between the historians, authors, media persons and lawyers in their re-enactment of 'past event' enterprise.
(ii) Why rules of evidence have different significance under the Adversarial System and Inquisitorial System of Justice?
- (b) History of statutory Evidence Law in India – Pre and post Indian Evidence Act, 1872 realities – Role of Judiciary, particularly the appellate judiciary in updating the Evidence Law rules by judicial creativity.
- (c) Understanding the concepts such as : 'Facts', 'Facts in issue', 'Relevant Fact', 'Evidence-Oral and Documentary', 'Proved', 'Disproved' and 'Not Proved'.
- (d) Relationship between law of Evidence and substantive laws (Criminal and Civil laws) and procedural laws (Code of Criminal Procedure and Civil Procedure Code).

II. RELEVANCY AND ADMISSIBILITY OF FACTS (14 periods)

- (a) (i) Logically relevant facts – sections 5-9, 11
(ii) Special class of relevant facts relating to Conspiracy – section 10
- (b) Stated relevant facts
 - (i) Admissions - sections 17-23
 - (ii) Confessions - sections 24-30
 - (iii) Dying Declarations - section 32(1)
- (c) Opinion of Third Person when relevant - sections 45-51

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III. ON PROOF (7 periods)

- (a) (i) Facts which need not be proved – sections 56-58
- (ii) Facts which the parties are prohibited from proving – Doctrine of Estoppel – sections 115-117
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IMPORTANT NOTE:

1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up-to-date and consult the latest editions of books.
3. The Question Paper shall include one compulsory question consisting of five parts out of which four parts will be required to be attempted. The question papers set for the examinations held during 2007-08 and 2008-09 are printed below for guidance of the students.
4. The periods indicated against each topic are the minimum teaching hours.

* * * * *

State of Maharashtra v. Praful B. Desai (Dr.)

(2003) 4 SCC 601

S.N. VARIAVA, J. - 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 22-12-1987 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 Bombay Hospital belied the respondent's case that the complainant's wife was not his patient. The bill sent by 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 were dismissed by this Court on 8-7-1996. 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 29-6-1998 the prosecution made an application to examine Dr Greenberg through video-conferencing. The trial court allowed that application on 16-8-1999. 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 the abovementioned facts, it *prima facie* appears to us that the evidence of Dr Greenberg would be relevant and essential to the case of the prosecution.

9. It was submitted on behalf of the respondents, that the procedure governing a criminal trial is crucial to the basic 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 would be contrary to Article 21. 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 of the Criminal Procedure Code. It was submitted that Section 273 of the 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 Section 317 (provision for inquiries and trial being held in the absence of the accused in certain cases) and Section 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 expositio est optima et fortissima in lege* - 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 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) of the 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 Sixth 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 judgments 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 extent 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 the 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 Aun Craig* [497 US 836 (1990)] has held that recording of evidence by video-conferencing was not a violation of the Sixth Amendment (Confrontation Clause).

12. Considering the question on the basis of the 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:

“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 term “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.

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 *Nageshwar Shri Krishna Ghobe v. State of Maharashtra* [(1973) 4 SCC 23], 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 overemphasized to the extent of forgetting that the victims also have rights.

15. At this stage the words of Justice Bhagwati in *National Textile Workers' Union v. P.R. Ramakrishnan* [(1983) 1 SCC 228, 255] 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 move 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 *CIT v. Podar Cement (P) Ltd* [(1997) 5 SCC 482]. They were also cited with approval in *State v. S.J. Choudhary* (1996) 2 SCC 428. 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* [(1999) 4 SCC 567]. 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 interpreted, 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”; “banker’s books” to include “microfilm”; “to take note” to include “use of tape recorder”; “documents” to include “computer databases”.

17. These principles have also been applied by this Court whilst considering an analogous provision of the Criminal Procedure Code. In *Basavaraj R. Patil v. State of Karnataka* [(2000) 8 SCC 740] 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 *personally* 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.

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 exist. 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 the ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one's 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 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 on TV, it cannot be said that he is in the 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 the presence of each other. The submissions of the 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 meet the requirements of Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

20. Recording of 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 courtroom. They can observe his or her demeanour. In fact the facility to playback 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 playback 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.

21. 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 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 drawback. As the witness is not 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.

22. However, even if the equipment cannot be set up in court, the Criminal Procedure Code contains provisions for examination of witnesses on commissions. Sections 284 to 289 deal with examination of witnesses on commissions. 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-off 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 cases 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.

23. It was, however, submitted that India has no arrangement with the Government of the United States of America and therefore commission cannot be issued for recording evidence of a witness who is in USA. Reliance was placed on *Ratilal Bhanji Mithani v. State of Maharashtra* [(1972) 3 SCC 793]. 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 pp. 797-98 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 18-11-1953, published in the Gazette of India, Part II, Section 3 on 28-11-1953, illustrate the reciprocal arrangements between the Government of India and the Government of the United Kingdom and the Government of Canada for examination of witnesses 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 9-9-1969, 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 witnesses residing in West Germany. The notification, dated 9-9-1969, 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.”

24. 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 deputed 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.

25. 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 USA. 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 witness 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-examining him. Lastly, it was submitted that the cost of video-conferencing, if at all permitted, must be borne by the State.

26. 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 officer concerned. 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 in 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 left the country. There also have been cases where a foreign witness has given evidence in a court in India and then gone away abroad. In all such cases the 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 officer concerned 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.

27. 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 of the case as early as possible and in any case within one year from today. With these directions the appeals stand disposed of.

* * * * *

R.M. Malkani v. State of Maharashtra

(1973) 1 SCC 471 : AIR 1973 SC 157

A.N. RAY, J. - The appellant was at the crucial time the Coroner of Bombay. The prosecution case was as follows. Jagdish Prasad Ramnarayan Khandelwal was admitted to the nursing home of a Gynaecologist Dr Adatia on May 3, 1964. Dr Adatia diagnosed the case as acute appendicitis. Dr Adatia kept the patient under observation. After 24 hours the condition of the patient became serious. Dr Shantilal J. Mehta was called. His diagnosis was acute appendicitis with "generalised peritonitis" and he advised immediate operation. Dr Adatia performed the operation. The appendix, according to Dr Adatia, had become gangrenous. The patient developed paralysis of the ileum. He was removed to Bombay Hospital on May 10, 1964, to be under the treatment of Dr Motwani. The patient died on May 13, 1964. The Hospital issued a Death Intimation Card as "paralytic ileus and peritonitis following an operation for acute appendicitis".

3. The appellant allowed the disposal of the dead body without ordering post-mortem. There was however a request for an inquest from the Police Station. The cause for the inquest was that this was a case of post operation death in a hospital. The Coroner's Court registered the inquest on May 13, 1964. The dates for inquest were in the months of June, July, September and October, 1964. The appellant was on leave for some time in the months of June and July, 1964. This is said to delay the inquest.

4. It was the practice of the Coroner's Court to send letters to professional people concerned in inquest to get the explanation of the doctor who treated or operated upon the patient. The appellant on October 3, 1964 made an order that Dr Adatia be called. It is alleged that the appellant had told Dr Adatia a few days earlier that though he might have operated satisfactorily the cause of death given by the hospital would give rise to a presumption of negligence on his part. Dr Adatia was asked by the appellant to meet Dr Motwani, so that the latter could get in touch with the appellant to resolve the technical difficulties. Dr Motwani met the appellant on October 3, 1964. The appellant told Dr Motwani that Dr Adatia was at fault but he might be cleared of the charge in the inquest. The appellant asked for a sum of Rs 20,000. Dr Motwani said that he would consult Dr Adatia. Dr Motwani conveyed the proposal to Dr Adatia. The latter refused to pay any illegal gratification. Dr Motwani intimated the same to the appellant. The appellant then reduced the demand to Rs 10,000. Dr. Adatia also refused to pay the same.

5. On October 4, 1964 the appellant got in touch with Dr Jadhav, Superintendent of the Bombay Hospital to find out if the cause of death given in the Hospital Card could be substantiated. Dr Motwani told Dr Jadhav on the same day that incorrect cause of death was shown and great injustice was done to Dr Adatia. Dr. Jadhav said that he would send an amended deposition to the Coroner, the appellant.

6. On October 5, 1964, Dr Motwani and Dr. Adatia decided to lodge a complaint with the Anti Corruption Bureau. Dr Adatia's Nursing Home got messages on the telephone to get in touch with the appellant. Dr Adatia complained to Dr Motwani of the harassment on the telephone. Dr. Motwani rang up the appellant. The appellant asked Dr Motwani to intimate by

10 a.m. on October 7, 1964 whether Dr Adatia was willing to pay Rs 10,000. Dr Motwani rang up Mugwe, Director of the Anti Corruption Branch, and complained that a higher Government official was demanding a heavy bribe from a Doctor. Mugwe then arranged for his staff to be present near Dr Motwani's residence on the morning of October 7, 1964 with the tape recording equipment to record on the tape the telephonic conversation.

7. On October 7, 1964, Mugwe and the Assistant Commissioner of Police Sawant went to Dr Motwani's residence. They met Dr Motwani and Dr Adatia. When they commenced recording the First Information Report of Dr Mutwani, Dr Adatia left for his Nursing Home. Mugwe then arranged for the tape recording equipment to be attached to the telephone of Dr Motwani. Dr Motwani was asked by Mugwe to ring up the appellant in the presence of Mugwe and other Police Officers about the appellant's demand for the money. Dr Motwani rang up the appellant and spoke with him. Dr Motwani reported the gist of the talk to Mugwe. Mugwe then asked Dr Motwani to ring up Dr Adatia to speak on certain special points. After the talk with Dr Adatia, Dr Motwani was asked by Mugwe to ring up the appellant and ask for an appointment to discuss the matter further. Dr Motwani rang up the appellant and an appointment was made to meet the appellant at 12 noon the same day. The conversation between Dr Motwani and the appellant and the conversation between Dr Motwani and Dr Adatia are all recorded on the tape.

8. The two doctors Motwani and Adatia met the appellant in the Coroner's Chamber at 12 noon. The appellant raised the demand to Rs 15,000 and said that Rs 5,000 was to be paid to Coroner's Surgeon for giving an opinion in favour of Dr Adatia. The appellant said that if the amount was not paid the Police Surgeon's opinion would be incorporated in the case. The two doctors went out of the Chamber for a while. Dr Adatia then told the appellant that he would pay the appellant Rs 15,000 on October 9, 1964.

9. Dr Adatia paid Rs 15,000 to Dr Motwani. Dr Motwani took the amount to his house. Dr Motwani informed the appellant on the telephone that he had received the money from Dr Adatia. The appellant asked Dr Motwani to keep it. The appellant also told Dr Motwani to bring the money to the appellant's house on October 10, 1964. On October 10, the Assistant Commissioner Sawant came to Dr Motwani's residence and asked him to go to the appellant's residence to fix up an appointment for payment of money. Dr Motwani went to the appellant's house on October 10, 1964 at 10 a.m. The appellant was not in the house. The appellant's wife was there. Dr Motwani told her that he had come to pay the money. The appellant's wife said that he could pay her. Dr Motwani said that he had no instructions to pay. As Dr Motwani was leaving the building, Sawant, the Assistant Commissioner, met him. Sawant asked Dr Motwani to come to Dr Adatia to ring up the appellant from there.

10. The Police Officers and Dr Motwani met at the residence of Dr Adatia at about 4 p.m. The raiding party connected the tape recorder to the telephone mechanism of Dr Motwani. Dr Motwani dialled the appellant's residence and spoke with the appellant in the presence of the Police Officers. The conversation was also recorded on the tape. It was arranged at the talk that Dr Motwani would pay the amount to the appellant's wife on October 12, 1964. Dr Motwani was asked to take a letter addressed to the appellant stating that he was returning a loan of Rs 15,000 which he had taken at the time of buying a flat.

11. On October 11, 1964, Dr Motwani received a telephone call from the appellant asking Dr Motwani to come to his residence to meet the person to whom the money was to be paid. Dr Motwani declined to go then. On October 12, 1964, the appellant told Dr Motwani that the appointment was cancelled because he had not come to the appellant's residence on October 11. Dr Motwani conveyed the news to the Assistant Commissioner.

13. The appellant was charged under Sections 161, 385 and 420 read with Section 511 of the Indian Penal Code. Broadly stated, the charges against the appellant were these. He attempted to obtain from Dr Adatia through Dr Motwani a sum of Rs 20,000 which was later reduced to Rs 10,000 and which was then raised to Rs 15,000 as gratification for doing or forbearing to do official acts. He put Dr Adatia in fear of injury in body, mind, reputation and attempted dishonestly to induce Dr Adatia and Dr Motwani to pay the sum of money. The appellant was also charged with cheating for having falsely represented to Dr Adatia and Dr Motwani that Rs 5,000 out of the amount of Rs 10,000 was required to be paid to the Police Surgeon for obtaining his favourable opinion.

15. Four questions were canvassed in this appeal. The first contention was that the trial Court and the High Court erred in admitting the evidence of the telephonic conversation between Dr Motwani and the appellant which was recorded on the tape. The evidence was illegally obtained in contravention of Section 25 of the Indian Telegraph Act and therefore the evidence was inadmissible. Secondly, the conversation between Dr Motwani and the appellant which was recorded on the tape took place during investigation inasmuch as Mugwe asked Dr Motwani to talk and therefore the conversation was not admissible under Section 162 of the Code of Criminal Procedure. The third contention was that the appellant did not attempt to obtain gratification. Fourthly, it was said that the sentence of six months imprisonment should be interfered with because the appellant has already paid Rs 10,000 as fine. The appellant suffered heart attacks and therefore the sentence should be modified.

16. The trial Court as well as the High Court found that the evidence of Dr Motwani and Dr Adatia needed corroboration. The High Court found that the conversation recorded on tape corroborated their evidence. The evidence of Dr Motwani is that on October 7, 1964, Mugwe accompanied by Sawant and members of the Police staff went to the residence of Dr Motwani. Mugwe directed Sawant to record Dr Motwani's statement. Mugwe had instructed his staff to bring a tape recording machine. After the statement of Dr Motwani Mugwe connected the tape recording machine to Dr Motwani's phone and asked Dr Motwani to talk to any one he liked in order to test whether the tape recording machine was in order. Motwani was then asked to talk to the appellant. Motwani talked with the appellant. That conversation was recorded on the tape. This tape recorded conversation is challenged by counsel for the appellant to be inadmissible because it infringes Articles 20(3) and 21 of the Constitution and is an offence under Section 25 of the Indian Telegraph Act.

17. Section 25 of the Indian Telegraph Act, 1885 states that if any person intending to intercept or to acquaint himself with the contents of any message damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both. "Telegraph" is defined in the Indian Telegraph Act in Section 3 to mean any appliance,

instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electric-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

19. In the present case the High Court held that the telephone call put by Dr Motwani to the appellant was tapped by the Police Officers, and, therefore, there was violation of Section 25 of the Indian Telegraph Act. But the High Court held that the tape recorded conversation was admissible in evidence in spite of the violation of the Telegraph Act.

20. The Police Officer in the present case fixed the tape recording instrument to the telephone instrument with the authority of Dr Motwani. The Police Officer could not be said to intercept any message or damage or tamper or remove or touch any machinery within the meaning of Section 25 of the Indian Telegraph Act. The reason is that the Police Officer instead of hearing directly the oral conversation between Dr Motwani and the appellant recorded the conversation with the device of the tape recorder. The substance of the offence under Section 25 of the Indian Telegraph Act is damaging, removing, tampering, touching machinery battery line or post for interception or acquainting oneself with the contents of any message. Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone. There was no violation of the Indian Telegraph Act. The High Court is in error on that point.

21. This Court in *Shri N. Sri Rama Reddy, etc. v. Shri V. V. Giri* [(1970) 2 SCC 340] (*Presidential Election* case), *Yusufalls Esmail Nagree v. The State of Maharashtra* [AIR 1968 SC 147] and *S. Pratap Singh v. The State of Punjab* [AIR 1964 SC 72] accepted conversation or dialogue recorded on a tape recording machine as admissible evidence. In *Nagree* case, the conversation was between Nagree and Sheikh. Nagree was accused of offering bribe to Sheikh.

22. In the *Presidential Election* case, questions were put to a witness Jagat Narain that he had tried to dissuade the petitioner from filing an election petition. The witness denied those suggestions. The election petitioner had recorded on tape the conversation that had taken place between the witness and the petitioner. Objection was taken to admissibility of tape recorded conversation. The Court admitted the tape recorded conversation. In the *Presidential Election* case, the denial of the witness was being controverted, challenged and confronted with his earlier statement. Under Section 146 of the Evidence Act questions might be put to the witness to test the veracity of the witness. Again under Section 153 of the Evidence Act a witness might be contradicted when he denied any question tending to impeach his impartiality. This is because the previous statement is furnished by the tape recorded conversation. The tape itself becomes the primary and direct evidence of what has been said and recorded.

23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of

the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is *res gestae*. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr Motwani and the appellant in the present case is relevant to the matter in issue. There *is* no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.

24. It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of Section 25 of the Telegraph Act in the facts and circumstances of the present case. There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. The Judicial Committee in *Kwruma, Son of Kanju v. R.* [1955 AC 197] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

25. This Court in *Magraj Patodia v. R. K. Birta* [AIR 1971 SC 1295] dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of respondent No. 1. The correspondence was between respondent No. 1 the elected candidate and various other persons. The witness who produced the file said that respondent No. 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court. This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved.

26. In *Nagree* case, the appellant offered bribe to Sheikh - a Municipal Clerk. Sheikh informed the police. The police laid a trap. Sheikh called Nagree at the residence. The police kept a tape recorder concealed in another room. The tape was kept in the custody of the police inspector. Sheikh gave evidence of the talk. The tape record corroborated his testimony. Just as a photograph taken without the knowledge of the person photographed can become relevant and admissible so does a tape record of a conversation unnoticed by the talkers. The

Court will take care in two directions in admitting such evidence. First, the Court will find out that it is genuine and free from tampering or mutilation. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the police. The reason is that the police officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position of the accused, the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding circumstances.

27. The admissibility of evidence procured in consequence of illegal searches and other unlawful acts was applied in a recent English decision in *R. v. Maqsood Ali* [(1963) 2 All ER 464]. In that case two persons suspected of murder went voluntarily with the police officers to a room in which, unknown to them, there was a microphone connected with a tape-recorder in another room. They were left alone in the room. They proceeded to have a conversation in which incriminating remarks were made. The conversation was recorded on the tape. The Court of Criminal Appeal held that the Trial Judge had correctly admitted the tape-recording of the incriminating conversation in evidence. It was said “that the method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper”. The Courts often say that detention by deception is a form of police procedure to be directed and used sparingly and with circumspection.

28. When a Court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. The fact that tape-recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence.

29. In the present case the recording of the conversation between Dr Motwani and the appellant cannot be said to be illegal because Dr Motwani allowed the tape-recording instrument to be attached to his instrument. In fact Dr Motwani permitted the police officers to hear the conversation. If the conversation were relayed on a microphone or an amplifier from the telephone and the police officers heard the same they would be able to give direct evidence of what they heard. Here the police officers gave direct evidence of what they saw and what they did and what they recorded as a result of voluntary permission granted by Dr Motwani. The tape-recorded conversation is contemporaneous relevant evidence and therefore it is admissible. It is not tainted by coercion or unfairness. There is no reason to exclude this evidence.

30. It was said that the admissibility of the tape recorded evidence offended Articles 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape-recorded conversation was not procedure established by law and the appellant was incriminated. The appellant’s conversation was voluntary. There was no compulsion. The attaching of the tape-recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant’s conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In *R. v. Leatham* [(1861) 8 Cox CC 498] it was said “it matters not how you get it if you steal it even, it would be admissible in evidence” as long as it is not tainted by an inadmissible confession of guilt evidence even if it is illegally obtained is admissible.

31. There is no scope for holding that the appellant was made to incriminate himself. At the time of the conversation there was no case against the appellant. He was not compelled to speak or confess. Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or even irregular method in obtaining the tape-recording of the conversation.

32. The second contention on behalf of the appellant was that the entire tape-recorded conversation is within the vice of Section 162 of the Criminal Procedure Code. In aid of that contention the oral evidence of Mugwe, the Director of Intelligence Bureau, was relied on. Mugwe said that it was under his advice and instruction that Dr Motwani started talking with the appellant and Dr Adatia. Therefore, it was said that the tape-recording was in the course of investigation. Sections 161 and 162 of the Criminal Procedure Code indicate that there is investigation when the police officer orally examines a person. The telephonic conversation was between Dr Motwani and the appellant each spoke to the other. Neither made a statement to the police officer. There is no mischief of Section 162.

33. The third contention was that the appellant did not attempt an offence. The conversation was said to show bargain. The evidence is that the patient died on May 13, 1964. Dr Motwani saw the appellant on October 3, 1964. The appellant demanded Rs 20,000. The appellant asked for payment of Rs 20,000 in order that Dr Adatia would avoid inconvenience and publicity in newspapers in case inquest was held. Dr Motwani informed Dr Adatia about the conversation with the appellant. On October 4, 1964, the appellant rang up Dr Motwani and said that he was willing to reduce the amount to Rs 10,000. On October 5, 1964, Dr Adatia received calls from the appellant asking him to attend the Coroner's Court on October 6, 1964. Dr Adatia got in touch with Dr Motwani on October 6, 1964 and gave him that message. Dr Adatia rang up the appellant on October 6 and asked for adjournment. The appellant granted the adjournment to October 7. On October 6 there were two calls from the appellant asking Dr Adatia to attend the Coroner's Court on October 7 and also that Dr Adatia should contact the appellant on October 6. Dr Motwani rang up the appellant and told him that the telephonic conversation had upset Dr Adatia. On October 6, Dr Motwani conveyed to Mugwe, Director of Intelligence Bureau about the demand of bribe to the appellant. These are the facts found by the Court. These facts prove that the offence was committed.

34. The last contention on behalf of the appellant was that the sentence of imprisonment should be set aside in view of the fact that the appellant paid the fine of Rs 10,000. In some cases the Courts have allowed the sentence undergone to be the sentence. That depends upon the fact as to what the term of the sentence is and what the period of sentence undergone is. In the present case, it cannot be said that the appellant had undergone any period of sentence. If it is said that the appellant had heart attacks and therefore the Court should take a lenient view about the sentence the gravity of the offence and the position held by the appellant at the relevant time do not merit such consideration.

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Mirza Akbar v. Emperor

AIR 1940 PC 176

LORD WRIGHT - This is an appeal *in forma pauperis* by special leave from a judgment and order of the Court of the Judicial Commissioner, North-West Frontier Province dated July 10, 1939. The learned Judicial Commissioner dismissed the appellant's appeal from his conviction of an offence punishable under Section 302/120-B Indian Penal Code, i.e., conspiracy to murder in consequence of which conspiracy murder was committed, and confirmed the sentence of death passed on him by the Additional Sessions Judge, Peshawar Division, on May 8, 1939.

The appeal raises two main points, which are the only points calling in their Lordships' judgment for consideration here. They are independent of each other. The first is a question as to the jurisdiction of the Court by which the sentence was confirmed. It was contended on behalf of the appellant that the Court was not legally constituted, because the appeal to the Court was dismissed and the sentence confirmed by a single Judge of the Court of the Judicial Commissioner sitting alone. The second was whether if the objection as to jurisdiction failed, the decision of the Court was vitiated by misreception of evidence. As their Lordships announced at the conclusion of the arguments before them, they were of opinion that both points failed the appellant and that the appeal should be dismissed. They will now state their reasons for coming to that conclusion.

The appellant was charged with conspiracy to murder, in consequence of which conspiracy murder was committed under the joint effect of Section 302/120B of the Indian Penal Code. He was convicted and sentenced to death by the Trial Judge, Mr. Mohammad Ibrahim, Additional Sessions Judge, Peshawar Division, assisted by four assessors who were unanimously of opinion that all three accused including the appellant were guilty. The facts of the case and the circumstances under which they were convicted will be dealt with so far as relevant in this appeal, in connection with the second question, that of evidence. When, after some preliminary proceedings, the appeal came on for hearing before of Court of the Judicial Commissioner on July 10, 1939, it was heard by Almond, the Judicial Commissioner, sitting alone. Kazi Mir Ahmad, A.J.C., the Additional Judicial Commissioner, was absent on leave. The period of his leave was for two months with effect from May 30, 1939. The Honourable Mr. M.A. Soofi had been appointed under Section 222 (2) of the Government of India Act, 1931, to act as a Judge of the Court during the absence of Kazi Mir Ahmad, A.J.C. But it happened that in this particular case Mr. M.A. Soofi was disqualified from sitting on the appeal because, as the Judicial Commissioner at the outset of his judgment on the appeal explained, Mr. M.A. Soofi had exercised judicial functions in the proceedings. The question whether in those circumstances the Court was properly constituted by Almond, J. C. sitting alone falls to be determined on the basis of Rules 1 and 3, of the Rules made on May 19, 1939, by the Governor of the North-West Frontier Province in the exercise of the powers conferred on him by Section 7 of the North-West Frontier Province Courts Regulation, 1931 (as amended), for the purpose of specifying the classes of civil and criminal proceedings which were to be heard by a Bench of the Court of the Judicial Commissioner, North-West Frontier Province. The Rules provide respectively as follows: -

Rule 1 of the said rules provides that the following classes of criminal cases are to be disposed of by a Bench, viz., any appeal from a sentence of death or of transportation for life and any cases of confirmation or revision of any such sentence.

Rule 3 provides that notwithstanding anything contained in these rules where a Judge of the Court has in a subordinate capacity exercised judicial functions at any stage of a criminal proceedings or is personally interested therein, he shall not hear any appeal or reference arising out of such proceeding, and if it is not practicable to constitute a Bench without such Judge, such appeal or reference shall be heard by another Judge sitting alone.

That Mr. M.A. Soofi was disqualified under Rule 3 was not disputed, but it was contended on behalf of the appellant that in the circumstances of the case compliance with Rule 1 was not excused and that the appeal could only be legally disposed of by a Bench. It was not established, so it was contended, that it was not practicable to constitute a Bench without such Judge (that is Mr. M.A. Soofi) and accordingly the appeal could not legally be heard by another Judge (in this case the Judicial Commissioner), sitting alone.

Their Lordships are of opinion that the abjection is not well founded. On July 10, 1939, when the appeal came on for hearing, it was not practicable to constitute a Bench without Mr. M.A. Soofi, because there was no other Judge of the Court available to sit with Almond, J. C. In the event the precise language of Rule 3 was thus satisfied. It was however contended that the appeal might have been adjourned until the return of Kazi Mir Ahmad, A.J.C. from his leave, say, until July 30, 1939, an adjournment of 20 days. But their Lordships find in the Rule nothing to justify this qualification of the words of the Rule. If however there is some reservation implied, so that the Rule is to be construed as meaning "not reasonably practicable" there must be some authority to decide what is reasonable in the circumstances. Their Lordships think that this authority could be no other than the Judge. To decide whether or not an appeal should be adjourned is particularly a matter for the discretion of the Judge. It is not here necessary to decide whether in any case the decision of the Judge under Rule 3 can be overruled, but their Lordships think that if the exercise of this discretion, which is a judicial discretion, is to be in any case overruled, strong grounds for doing so must be shown. It is enough to say that no such grounds are shown here.

No authority has been cited directly in point. Reference was made to various decisions under Section 274 of the Code of Criminal Procedure, which provides that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable of nine persons. The language of this provision is different from that of the Rule and the conditions are different, particularly in view of Section 276, which enables a deficiency to be made good by leave of the Court by choosing other jurors from persons who may be present. There has been some difference of judicial opinion as to the true effect of the Section 274, but the more recent and, in their Lordships' opinion, better view is that adopted in *Emperor v. Benat Parmanik* [ILR 62 Cal 900] which is that if the Judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that Section 274 had been complied with. These decisions so far as they go may tend to support the opinion just expressed in regard to Rule 3, but as already stated, they do not give direct help in the construction of Rule 3.

In their Lordships' judgment the objection of want of jurisdiction fails.

The second objection requires some statement of the facts and the evidence. The appellant was tried along with the actual murderer Umar Sher, and with Mst. Mehr Taja who had been the wife of the murdered man, Ali Askar. The murder was committed on August 23, 1938, in the village of Taus Banda about four miles from Hoti. The guilt of Umar Sher was not really open to doubt. He was practically caught red-handed. He was caught running away with a single barrel shot gun in his hand, the barrel of which smelt as if freshly discharged. There was an empty cartridge jammed in the barrel. When the appellant came up from the field in which he had been working about half a mile away from the scene of the murder he asserted that Umar Sher was innocent and should be released, but the other present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact however was relied upon by the prosecution as showing that he was a hired assassin, bribed to commit the murder by the appellant and Mst. Mehr Taja who were co-conspirators in that regard. This was found by the Court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant, and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be, and the handwriting have not and could not have been contested before their Lordships.

It will be convenient to set out the relevant portions of the three letters. They are Exhibit P.A., in the handwriting of Mst. Mehr Taja:

Greetings to thee O my sweet-heart. Mind not in the least if I have been hard on thee at times - pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy cars to these. They are arch devils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry my darling for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftab often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings.

Exhibit P. B. (also in Mst. Mehr Taja's handwriting).

Letter to the sweet-heart. Peace be on you. The fact, my darling is that I am in great distress: otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord.... I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings.

Exhibit P. D. (in handwriting of the appellant).

My sweet-heart and the bearer of my burden. If thou tauntest me in regard to my mother what do I care for her. I look to my God and to thee only for reliance. I cannot wait any more. For the sake of God and his Prophet do try or I will die. You must find out the money or I would die. Is it of my choice to be roaming about and thou be enjoying with him, but what shall I do. If I had my own way I would not have left you to remain with him. I am burning and have pity on me for God's sake. To me the passing of each day is like months and years. Once place thy self in my charge and satiate me with the honey of thy red lips. Even if thou cuttest my head off my neck I would still yearn for thy white breast. This is my last word if only thou wouldst attend to it. I have vowed for thy sake at many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's limbs have grown sapless after thee.

The judges in the Court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The Judicial Commissioner in dismissing these prisoners' appeals thus summed up the position, with special reference to the letters. He said:

There is a reference to Mirza Akbar by name in Ex. P. D. and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other. There was a question of finding money for hired assassin to get rid of him. Subsequently we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in the earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach my importance to it at the time because they had no conception as to what was the motive for the commission of the offence.

In my opinion there is no doubt whatsoever that these two Appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did.

But the appellant's contention was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the Examining Magistrate after she had been arrested on the charge of conspiracy. That statement which was made in the appellant's absence was admitted in evidence both by the trial judge and by the Judicial Commissioner on appeal as relevant against the appellant under Section 10 of the Evidence Act. The Judicial Commissioner said that it had been argued that Section 10 did not apply to any statement made by conspirators if the offence to which they conspired, has actually been committed. He rejected that argument and refused to hold that Section 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant, since he had not had any opportunity of cross-examining Mst. Mehr Taja upon it.

In their Lordships' judgment, the Judicial Commissioner misconstrued the effect of Section 10. The English rule on this matter is in general well settled. It is a common law rule not based on, or limited by, express statutory words. The leading case of *R. v. Blake*

[6 QB 126] illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt what was contained in it amounted to a statement evidencing what had been done and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect. Lord Denman said at p. 138 that the evidence must be rejected.

On the principle that a mere statement made by one conspirator to a third party or any act not done in pursuance of the conspiracy is not evidence for or against another conspirator.

Patteson, J. described it as “a statement made after the conspiracy was effected”. Williams, J. said that it merely related, “to a conspiracy at that time completed”. Coleridge, J. said that it “did not relate to the furtherance of the common object”. The words relied upon in Section 10 of the Evidence Act are “in reference to their common intention”. These words may have been chosen as having the same significance as the word ‘related’ used by Williams and Coleridge, JJ. Where the evidence is admissible it is in their Lordships’ judgment on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy (per Patteson, J. at p. 139). The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being the act in the course of the conspiracy : or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle, their Lordships think the words of Section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships’ judgment, the words “a common intention” signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships’ judgment Section 10 embodies this principle. That is the construction which has been rightly applied to Section 10 in decisions in India. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.

In their Lordships’ judgment the statement of Mst. Mehr Taja falls under the latter category, and was wrongly admitted.

But in truth the question of law is not really material in this case. The statement so far from admitting a conspiracy with the appellant, categorically denied it. While the woman

stated that the appellant had threatened to kill her and her husband if she refused to marry him, she had, she said, refused his advances and stopped him coming to the house. Mr. Roberts, Counsel for respondent, frankly admitted that apart from the legal question, he could not rely on the statement as evidence of the conspiracy, or indeed on any other ground.

In their Lordships' judgment, however, the admission of the statement (to which it should be repeated that the Judicial Commissioner did not attach very great weight) did not vitiate the proceedings. On the material before the Court, after the statement is excluded, there was evidence sufficient to justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar. The vague suggestion that they related merely to a scheme to obtain a divorce and to raise money for that purpose is clearly untenable. The handwriting of the letters is clearly established. Under those circumstances their Lordships will follow the precedent established in *Pakala Narayana Swami v. King-Emperor* [1939 ALJ 298] and hold that in this case as in that it is impossible to say that the proceedings which ended with the conviction resulted in a failure of justice. They accordingly humbly advise His Majesty that the appeal should be dismissed.

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Badri Rai v. State of Bihar

1959 SCR 1141 : AIR 1958 SC 953

SINHA, J.- This appeal is directed against the concurrent judgments and orders of the courts below, convicting the two appellants under Section 120-B read with Section 165-A of the Indian Penal Code, and sentencing them to rigorous imprisonment for 18 months, and to pay a fine of Rs 200 each, and in default of payment of fine, to undergo further rigorous imprisonment for 6 months. A separate conviction under Section 165-A has been recorded in respect of the first appellant, Badri. Under this head, he has been sentenced to rigorous imprisonment for 18 months, the sentence to run concurrently with the sentence under the common charge.

2. The facts as found by the courts below, which could not be successfully challenged before us, are as follows: The second appellant, Ramji Sonar, is a gold smith by profession, and runs a shop on the main road in the Village Naogachia. In that village, there is a police station, and the shop in question is situated in between the police station building and the residential quarters of the Inspector of police, who was the First Informant in the case, resulting in the conviction and sentences of the appellants, as stated above. The first appellant, Badri, runs a school for small boys in the same village, about 50 yards away from the shop aforesaid, of the second appellant. On August 22, 1953, the First Informant, who, holding the position of an Inspector of Police, was in charge of the police station, made a seizure of certain ornaments and molten silver from a vacant building in front of the house of the second appellant, Ramji. Those ornaments were being melted by six strangers coming from distant places, with implements for melting, said to have been supplied by Ramji. The seizure was made on the suspicion that the ornaments and the molten silver were stolen property, which were to be sold to Ramji in a shape which could not be identified with any stolen property. After making the seizure-list of the properties, thus seized, the police officer arrested Ramji, as also the other six strangers. Ramji was released on bail that very day. Police investigations into the case, thus started, followed. During that period, on August 24, 1953, at about 7.30 p.m., the Inspector was on his way from his residential quarters to the police station, when both the appellants accosted him on the road, and Ramji asked him to hush up the case for a valuable consideration. The Inspector told them that he could not talk to them on the road, and that they should come to the police station. Thereafter, the Inspector reported the matter to his superior officer, the DSP (PW 8) and to the Sub-Inspector, PW 9, attached to the same police station. On August 31, the same year, the first appellant, Badri, came to the police station, saw the Inspector in the central room of the *thana*, and offered to him a packet wrapped in a piece of old newspaper, containing Rs 500 in currency notes. He told the Inspector, (PW 1) that the second appellant, Ramji, had sent the money through him in pursuance of the talk that they had with him, in the evening of August 24, as a consideration for hushing up the case that was pending against Ramji. At the time the offer was made, a number of police officers, besides a local merchant (PW 7), were present there. The Inspector at once drew up the first information report of the offer of the bribe on his own statement, and prepared a seizure-list of the money, thus offered, and at once arrested Badri, and put him in the *thana* lock-up. After

the usual investigation, the appellants were placed on their trial, with the result indicated above.

3. Both the courts below have found that the prosecution case, a summary of which has been given above, has been proved by good and reliable evidence, and that the defence case that the prosecution was started by the Inspector out of spite and in order to defend himself against the consequences of wrongfully arresting Ramji, was unfounded. We are not impressed with the halting criticism of the evidence adduced in this case on behalf of the prosecution, and accepted by the courts below. Ordinarily, this Court does not interfere with concurrent findings of fact.

4. The only serious question raised in this appeal, is the point raised on behalf of the second appellant, Ramji, as to whether the statement made by the first appellant, Badri, on August 31, 1953, that he had been sent by the second appellant with the money to be offered by way of bribe to the police officer, was admissible against him. The learned counsel for the appellant was not able clearly to formulate his grounds of objection to the admissibility of that piece of evidence, which is the basis of the charge against both the accused persons. Section 10 of the Evidence Act, is a complete answer to this contention.

The incident of August 24, when both the appellants approached the Inspector with the proposal that he should hush up the case against the second appellant, for which he would be amply rewarded, is clear evidence of the two persons having conspired to commit the offence of bribing a public servant in connection with the discharge of his public duties. There cannot, therefore, be the least doubt that the court had reasonable grounds to believe that the appellants had entered into a conspiracy to commit the offence. Therefore, the charge under Section 120-B had been properly framed against both of them. That being so, anything said or done by any one of the two appellants, with reference to the common intention, namely, the conspiracy to offer bribe, was equally admissible against both of them. The statement made by the first appellant on August 31, that he had been sent by the second appellant to make the offer of the bribe in order to hush up the case which was then under investigation, is admissible not only against the maker of the statement — the first appellant — but also against the second appellant, whose agent the former was, in pursuance of the object of the conspiracy. That statement is admissible not only to prove that the second appellant had constituted the first appellant his agent in the perpetration of the crime, as also to prove the existence of the conspiracy itself. The incident of August 24, is evidence that the intention to commit the crime had been entertained by both of them on or before that date. Anything said or done or written by any one of the two conspirators on and after that date until the object of the conspiracy had been accomplished, is evidence against both of them.

5. It was faintly suggested on behalf of the second appellant, that the charge under Section 120-B of the Indian Penal Code, had been deliberately added by the prosecution in order to make the first appellant's statement of August 31, admissible against the second appellant, as otherwise, it could not have been used as evidence against him. As already indicated, the incident of August 24, is a clear indication of the existence of the conspiracy, and the court was perfectly justified in drawing up the charge under Section 120-B also. It is no answer in law to say that unless the charge under that section had been framed, the act or statement of one could not be admissible against the other. Section 10 of the Evidence Act, has been

deliberately enacted in order to make such acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of the crime. A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore, it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts or statements of the others, unless there is a common bond linking all of them together. Ordinarily, specially in a criminal case, one person cannot be made responsible for the acts or statements of another. It is only when there is evidence of a concerted action in furtherance of a common intention to commit a crime, that the law has introduced this rule of common responsibility, on the principle that every one concerned in a conspiracy, is acting as the agent of the rest of them. As soon as the court has reasonable grounds to believe that there is identity of interest or community of purpose between a number of persons, any act done, or any statement or declaration made, by any one of the co-conspirators, is, naturally, held to be the act or statement of the other conspirators, if the act or the declaration has any relation to the object of the conspiracy. Otherwise, stray acts done in darkness in prosecution of an object hatched in secrecy, may not become intelligible without reference to the common purpose running through the chain of acts or illegal omissions attributable to individual members of the conspiracy.

6. It was also suggested that the statement made by the first appellant on August 31, about the purpose of the payment, having been made after the payment, was not admissible in evidence, because the object of the conspiracy had been accomplished before the statement in question was made. Reliance was placed in this connection upon the decision of their Lordships of the Judicial Committee in *Mirza Akbar v. King-Emperor* [AIR 1940 PC 176]. But that decision is itself an answer to the contention raised. The payment was made, and the statement that it was being made with a view to hushing up the case against the second appellant, is a part of the same transaction, that is to say, the statement accompanied the act of payment of the bribe. Hence, it cannot be said that the statement was made after the object of the conspiracy had already been accomplished. The object of the conspiracy was the hushing up of the criminal case against the second appellant, by bribing the public servant, who was in charge of the investigation of the case. The object of the conspiracy was yet far from being accomplished, when the statement in question was made. The leading case on the subject is that of *R. v. Blake* [(1844) 6 QB 126]. That decision is an authority both for the positive and the negative aspects of the question. It lays down what is admissible and what is not admissible. It held that the documents actually used in effectuating the objects of the conspiracy, were admissible, and that those documents which had been created by one of the conspirators after the object of the conspiracy had been achieved, were not admissible. Section 10 of the Evidence Act is on the same lines. It is manifest that the statement in question in the present case, was made by the first appellant in the course of the conspiracy, and accompanied the act of the payment of the money, and is clearly covered by the provisions of Section 10, quoted above. It must, therefore, be held that there is no substance in the only question of law raised in this appeal. It is accordingly dismissed.

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Mohd. Khalid v. State of W.B.

(2002) 7 SCC 334

ARIJIT PASAYAT, J. - No religion propagates terrorism or hatred. Love for all is the basic foundation on which almost all religions are founded. Unfortunately, some fanatics who have distorted views of religion spread messages of terror and hatred. They do not understand and realize what amount of damage they do to the society. Sometimes people belonging to their community or religion also become victims. As a result of these fanatic acts of some misguided people, innocent lives are lost, distrust in the minds of communities replaces love and affection for others. The devastating effect of such dastardly acts is the matrix on which the present case to which these appeals relate rests. On 16-3-1993, just before the stroke of midnight, people in and around B.B. Ganguly Street in the Bow Bazar area of Calcutta heard deafening sounds emanating from thundering explosions which resulted in total demolition of a building and partial demolition of two other adjacent buildings situated at 267, 266 and 268-A, B.B. Ganguly Street. A large number of people were trapped in and buried under the demolished buildings. It was indeed a very ghastly sight and a large number of people died because of the explosions' impact and/or on account of the falling debris. Human limbs were found scattered all around the area. Those who survived tried to rescue the unfortunate victims. Police officers arrived at the spot immediately. The first information report was lodged at Bow Bazar Police Station for alleged commission of offences punishable under Sections 120-B, 436, 302, 307, 326 of the Indian Penal Code, 1860 ("IPC") and Sections 3 and 5 of the Explosive Substances Act, 1908 ("the Explosive Act").

2. Considering the seriousness and gravity of the incident, the Commissioner of Police set up a special investigating team. On investigation, 8 persons including the six appellants were found linked with the commission of offences. Arrests were made. While rescue operations were on, there was further explosion on 18-3-1993. The exploded bomb was handed over to the police officer after its examination on the spot by a military officer. Meanwhile, the payloader picked up a gunny bag containing 22 live bombs. Afterwards, they were defused after examination. Certain materials were seized by the investigating team from the site of the occurrence and on examination, it was found that nitroglycerine explosives were involved in the explosion. A large number of witnesses were examined.

3. Two of the accused persons, Pannalal Jaysoara (accused-appellant in Criminal Appeal No. 299 of 2002) and Mohd. Gulzar (accused-appellant in Criminal Appeal No. 494 of 2002) were arrested on 29-3-1993 and 13-5-1993 respectively. As they wanted to make their confessions, those were to be recorded before the Judicial Magistrate. Accordingly, their confessional statements were recorded by the Magistrates (PWs 81 and 82). Some of the accused persons were also identified by witnesses in the test identification parade. On 11-6-1993, the Commissioner of Police on examination of the case diary, statement of witnesses, reports of the experts and confessional statements came to the conclusion that provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("the TADA Act") were applicable. Accordingly, sanction was accorded for prosecution of the accused persons under the said statute. Charge-sheet was submitted on 14-6-1993.

4. The accused persons filed a writ application before the Calcutta High Court challenging the validity of the sanction and the order whereby the Designated Court took cognizance of the offences under the TADA Act. The High Court quashed the order of sanction and taking of cognizance. The matter was challenged before this Court by the prosecution. The appeal was allowed and the Designated Court was directed to proceed with the case in accordance with law with utmost expedition. The Designated Court framed charges under Sections 120-B, 436/34, 302/34 IPC, Sections 3 and 5 of the Explosive Act and under Sections 3(2)(1) and 3(3) of the TADA Act. As the accused persons facing trial pleaded innocence, trial was conducted.

5. The case of the prosecution, in short, is that the accused persons conspired and agreed to manufacture bombs illegally by using explosives to strike terror in the people, particularly, in the minds of the people living in Bow Bazar and its adjacent areas to adversely affect communal harmony amongst members of the Hindu and Muslim communities. Pursuant to this criminal conspiracy and in pursuance of the common intention, they caused complete/partial destruction of properties by using the explosive substances. They committed murders knowing fully well that illegal manufacture of bombs by explosive substances in most likelihood would result in deaths or bodily injuries, by causing explosion. In causing explosion by unlawful and malicious user of explosive substances which was likely to endanger life or to cause serious injury to properties, they committed offences in terms of Sections 3 and 5 of the Explosive Act. The fact that they possessed explosive substances gave rise to a reasonable suspicion that such possession and control of the explosive substances were not for a lawful object. Provisions of the TADA Act were applied on the allegation that pursuant to the conspiracy and in pursuance of the common intention they prepared bombs with huge quantities of explosive substances and highly explosive materials with the intent to strike terror in the minds of the people adversely affecting the communal harmony amongst the people belonging to the Hindu and Muslim religions. Their terrorist activities resulted in the death of 69 persons, injuries to a large number of persons and destruction and damage to properties. As a result of these acts, commission of terrorist acts was facilitated.

6. Out of the 165 witnesses examined, three witnesses were picked up as star witnesses to prove the conspiracy and the connected acts. They are PW 40 (Md. Sabir @ Natu), PW 67 (Santosh Hazra) and PW 68 (Kristin Chow @ Kittu). By a detailed judgment, the Designated Court found the accused- appellants guilty of offences punishable under Section 120-B IPC, Sections 3 and 5 of the Explosive Act and Sections 3(2)(1) and 3(3) of the TADA Act read with Section 34 IPC. However, they were found not guilty of the offences in terms of Sections 302 and 436 read with Section 34 IPC. After hearing on the question of sentence, the accused-appellants were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs 3000 each for commission of offences under Section 3(2)(1) of the TADA Act read with Section 34 IPC, to undergo rigorous imprisonment for five years and to pay a fine of Rs 500 each for commission of offence under Section 3(3) of the TADA Act. They were further sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs 1000 each for commission of offence under Section 3 of the Explosive Act and to suffer an imprisonment for one year and to pay a fine of Rs 300 each for commission of offence under

Section 5 of the Explosive Act. Each of them was also sentenced to imprisonment for life and to pay a fine of Rs 3000 each for commission of offence under Section 120-B IPC.

7. These appeals relate to the common judgment of the Designated Court. While the accused-appellants have questioned the legality of the conviction and sentences imposed, the State has questioned the propriety of acquittal in respect of the offences in terms of Sections 302/34 and 436/34 IPC. Learned counsel for the accused-appellants have submitted, *inter alia*, that the so-called star witnesses are persons with doubtful antecedents. They were rowdy elements who were under the thumb of police officers and the possibility of their having deposed falsely at the behest of police officers cannot be ruled out, and this is more probable. Referring to the evidence of PWs 40, 67 and 68, it was submitted that their evidence suffers from innumerable fallacies. PW 40 claimed to have heard the accused-appellant Rashid asking the accused-appellant Pannalal Jaysoara about the preparation of bombs. He was the witness who was available immediately after the incident. But his statement was recorded two days after without any explanation being offered as to why he was examined two days after. Similarly, PWs 67 and 68, were also examined after two days. In court, they made embellished and highly ornamented statements. It was pointed out that the evidence of PW 67, in particular, is full of holes. According to his own testimony, he was only connected with *satta* games. It was, therefore, highly improbable that he was allowed to go up and notice all those materials which were lying in the rooms and the activities being carried out. It was highly improbable that nobody stopped him. Many independent witnesses were not examined though their presence is accepted by the prosecution. A grievance is made that some of the persons who were available to be examined have not been so done. Particular reference has been made to Nausad and Osman. It is stated that the prosecution case is that Nausad was the owner of one of the premises and PW 68 told Osman about the conspiracy. Non-examination of these material and independent witnesses rendered the prosecution version suspect. There was no reliable evidence of conspiracy. There was no design to commit any act even if it is accepted that there was any explosion. That was an accident. In fact, no importance can be attached to the so-called judicial confessions because the two accused persons who allegedly made the confession had made retraction subsequently on 3-2-1995. They were terrorized, threatened and were compelled to make the confession. Even if, according to them, the prosecution case is accepted *in toto*, it only proves that the Muslims were trying to protect themselves in the event of a possible attack of the Hindus on them. In the bomb blast which took place in Bombay a few months earlier, the police was totally ineffective and could not save the lives of a number of Muslims and were silent onlookers. That spread a message of fear in the minds of the Muslims and as the prosecution version itself goes to show, they were preparing to protect themselves as a matter of exercise of their right of private defence, in the most likely event of attack by the Hindus on them. This according to them rules out application of the TADA Act. They were not the aggressors and their preparations to protect their rights and properties in the event of an attack was not to spread terror or to cause any unlawful act but was an act intended to be used as a shield and not a weapon. Further, Section 3 of the Explosive Act has no application because there was no material to show that the accused persons had caused the explosion. It was pointed out that several persons who had lost their lives in the explosion were arrayed as accused persons. Even if they caused the explosion, they could not save their own lives and it cannot be said that the accused-

appellants were responsible for the explosion. Coming to the charge of conspiracy, it was submitted that the statements recorded under Section 164 of the Code of Criminal Procedure, 1973 ("the Code") of the two accused persons cannot be used against others unless the prescriptions of Section 30 of the Indian Evidence Act, 1872 ("the Evidence Act") were fulfilled. According to them, confession of a co-accused was not a substantive piece of evidence. It had a limited role to play. In case other evidence was convincing and credible, as an additional factor, confession of a co-accused for limited purpose can be used in evidence. The present was not a case of that nature. Finally, it was submitted that the accused-appellants are in custody since 1993 and a liberal view on sentence should be taken.

8. In response, Mr K.T.S. Tulsi, learned Senior Counsel appearing for the prosecution submitted that the apparent intention of the accused-appellants was to terrorise the people. A large quantity of the explosives and bombs recovered clearly gives a lie to the plea that self-protection was the object. Seen in the context of the motive, it is clear that the intention was to terrorise a section of the people and it is not a case that the accused-appellants wanted to exercise their right of private defence for themselves. The real object and the motive were to use it for spreading communal disharmony under the cover of self-protection and to terrorise people. So far as the confession in terms of Section 164 of the Code is concerned, it was submitted that the statements were recorded after making the confessors aware that they may be utilized in evidence against them. The so-called retraction was an afterthought. The mere fact that the witnesses were examined after two days does not *per se* render their evidence suspect. It has to be noted that there was total chaos after the explosions. Everywhere bodies were lying scattered. There was no information as to how many were buried under the debris. The first attempt was to save the lives of the people rendering immediate medical assistance. At that point of time, recording of evidence was not the first priority. In fact, after the special team was constituted, the process of recording statements was started on 18-3-1993 and on that date the statements of material witnesses were recorded. With reference to Section 15 of the TADA Act, it is submitted that though the statements recorded by the Magistrate was not strictly in line with Section 15 of the TADA Act, yet they deserve a greater degree of acceptability under the said Act. It cannot be conceived that the confession recorded by a police officer would stand on a better footing than one recorded by the Judicial Magistrate. Further, it was submitted that the confessional statements recorded clearly come within the ambit of Section 10 of the Evidence Act and, therefore, no further corroboration was necessary and to that extent Section 30 may not be applicable. Even otherwise, according to him, there was ample material to connect the accused-appellants with the crime and the confessional statements were the last straw.

11. First, we shall deal with the plea regarding acceptability of the evidence. It is to be seen as to what is the evidence of PWs 40, 67 and 68 and how they establish the prosecution case. PW 40 had deposed about the presence of Murtaza Bhai, Gulzar Bhai, Khalid Bhai, Ukil Tenia, Khursid and Hansu while they were coming inside the *satta gali* carrying two loaded gunny bags. Thereafter, they went upstairs of 267, B.B. Ganguly Street. PW 40 followed them up. He noticed the aforesaid persons mixing the ingredients of bombs and also manufacturing bombs. He found two drums, a few gunny bags and small containers lying there. Murtaza, Gulzar and Khalid were sifting and straining the explosive materials after

taking them out from the gunny bags. His nose and eyes got irritated when the process was going on. Therefore, he came down. Around 10 to 10.30 p.m. he saw Rashid, Aziz Zakrin and Lalu coming inside the *satta gali* with an old man wearing spectacles (identified as accused-appellant Pannalal Jaysoara). While moving up the stairs to the upper floor, Rashid asked the old man to prepare bombs with the materials brought by him. Criticism was levelled by learned counsel for the accused-appellant that the entire conversation alleged to have taken place was disclosed by PW 40 during investigation. On verification of records, it appears that though the exact words of the conversation were not stated, in substance the same idea was conveyed. PWs 67 and 68 have stated about the plan of and preparation for manufacture of bombs. Their statement was to the effect that on 16-3-1993 at about 11.00 p.m. they went to meet Rashid Khan to ventilate their grievance against some of the pencillers disturbing the tranquillity of the locality. PW 67 has deposed that Rashid was standing alone in front of the *satta* office. As he and PW 68 were reporting the matter to Rashid, an old man wearing spectacles (identified as accused Pannalal Jaysoara) and Osman came out of the *satta gali*. The old man reported to Rashid that it would take the whole night to prepare bombs by using the mixture. On being asked as to what would be done with the bombs, Rashid replied that a large number of bombs were required because of the riot at Bombay between the Hindus and Muslims. Statement of PW 68 is to a similar effect that on 16-3-1993 around 11.00 p.m. accused-appellant Rashid intimated an old man (identified as accused-appellant Pannalal Jaysoara) that preparation of a large number of bombs was required to be used in the event the Hindus attacked the Muslims, and it was necessary in view of the riots in Bombay. PWs 67 and 68 belonged to the locality and were acquainted with Rashid Khan. Their near relatives were staying in the locality. It is on record that some relatives of PW 68 have lost their lives in the incident. Confidential statement of accused-appellant Pannalal Jaysoara was to the effect that he had asked accused-appellant Rashid as to the urgency for preparing a large number of bombs. His reply was that he took the decision of preparing bombs so that the Muslims could fight in the possible riot. In the test identification parade PWs 40, 67 and 68 identified accused-appellant Pannalal Jaysoara on 15-4-1993. The confessional statement of accused-appellant Gulzar is relevant. He stated that Rashid had reminded them that many Muslims had been killed in the riot at Bombay and the Government did not do anything for the Muslims. If there is a riot, many Muslims may die as the Government may not do anything. Therefore, he took the decision of preparing a large quantity of explosives and bombs. PW 67 has deposed that accused-appellant Rashid directed preparation of a large number of bombs overnight. Presence of the accused persons in and around the place of occurrence has been amply established by the evidence of PWs 40, 67 and 68, as well as the confessional statements of Pannalal and Gulzar.

12. In the case at hand, the evidence of PWs 40, 67 and 68 even after a close scrutiny cannot be termed to be unreliable. Merely because they were persons with no fixed avocation, the very fact that they were regular visitors to the place of occurrence described as "*satta gali*", makes their presence nothing but natural. Additionally, we find that relatives of PW 68 have lost their lives. Mere delay in examination of the witnesses for a few days cannot in all cases be termed to be fatal so far as the prosecution is concerned. There may be several reasons. When the delay is explained, whatever be the length of the delay, the court can act on the testimony of the witness if it is found to be cogent and credible. In the case at hand, as has

been rightly pointed out by the learned counsel for the respondents, the first priority was rendering assistance to those who had suffered injuries and were lying under the debris of the demolished buildings. The magnitude of the incident can be well judged from the fact that a total building collapsed and two other buildings were demolished to a substantial extent, 69 persons lost their lives and a large number of persons were injured. Therefore, statement of PW 68 that he was busy in attending to the injured and collecting dead bodies till 18-3-1993 cannot be said to be improbable. Though, an attempt has been made to show that there is no truth in his statement that he had carried the injured persons to the hospital by making reference to certain noting in the medical reports to the effect that an unknown person brought the injured to the hospital, that is really of no consequence. When a large number of persons were being brought to the hospital, the foremost duty of the doctors and other members of the staff was to provide immediate treatment, and not to go about collecting information as to who had brought the injured to the hospital for treatment. That would be contrary to the normal human conduct. Looked at from any angle, the evidence of PWs 40, 67 and 68 cannot be said to be suffering from any infirmity. Their statements along with the confessional statements of the co-accused lend a definite assurance to the prosecution version.

14. Normally, the prosecution's duty is to examine all the eyewitnesses the selection of whom has to be made with due care, honestly and fairly. The witnesses have to be selected with a view not to suppress any honest opinion, and due care has to be taken that in selection of witnesses, no adverse inference is drawn against the prosecution. However, no general rule can be laid down that each and every witness has to be examined even though his testimony may or may not be material. The most important factor for the prosecution being that all those witnesses strengthening the case of the prosecution have to be examined, the prosecution can pick and choose the witnesses who are considered to be relevant and material for the purpose of unfolding the case of the prosecution. It is not the quantity but the quality of the evidence that is important. In the case at hand, if the prosecution felt that its case has been well established through the witnesses examined, it cannot be said that non-examination of some persons rendered its version vulnerable.

27. Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration. It can in some cases be inferred from the acts and conduct of the parties.

28. That brings us to another angle, i.e., acceptability of the confession. Section 24 of the Evidence Act interdicts a confession if it appears to the court to be the result of any inducement, threat or promise in certain conditions. The principle therein is that confession must be voluntary. It must be the outcome of his own free will inspired by the sound of his own conscience to speak nothing but the truth.

29. *Words and Phrases*, Permanent Edn., Vol. 44, p. 622 defines "voluntary" as:

“ 'Voluntary' means a statement made of the free will and accord of accused, without coercion, whether from fear of any threat of harm, promise, or inducement or any hope of reward - *State v. Mullin* [85 NW 2d 598, 600, 249 Iowa 10] .”

30. In *Words and Phrases* by John B. Saunders, 3rd Edn., Vol. 4, p. 401, “voluntary” is defined as:

“ ‘the classic statement of the principle is that of Lord Sumner in *Ibrahim v. R.* [1914 AC 599, 609] where he said, “it has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to be a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale”. However, in five of the eleven textbooks cited to us ... support is to be found for a narrow and rather technical meaning of the word “voluntary”. According to this view, “voluntary” means merely that the statement has not been made in consequence of (i) some promise of advantage or some threat, (ii) of a temporal character, (iii) held out or made by a person in authority, and (iv) relating to the charge in the sense that it implies that the accused’s position in the contemplated proceedings will or may be better or worse according to whether or not the statement is made. *R. v. Power* [(1966) 3 All ER 433] *per* Cantley, V.”

31. A confessional statement is not admissible unless it is made to the Magistrate under Section 25 of the Evidence Act. The requirement of Section 30 of the Evidence Act is that before it is made to operate against the co-accused the confession should be strictly established. In other words, what must be before the court should be a confession proper and not a mere circumstance or an information which could be an incriminating one. Secondly, it being the confession of the maker, it is not to be treated as evidence within the meaning of Section 3 of the Evidence Act against the non-maker co-accused and lastly, its use depends on finding other evidence so as to connect the co-accused with the crime and that too as a corroborative piece. It is only when the other evidence tendered against the co-accused points to his guilt then the confession duly proved could be used against such co-accused if it appears to affect him as lending support or assurance to such other evidence. To attract the provisions of Section 30, it should for all purposes be a confession, that is a statement containing an admission of guilt and not merely a statement raising the inference with regard to such a guilt. The evidence of the co-accused cannot be considered under Section 30 of the Evidence Act, where he was not tried jointly with the accused and where he did not make a statement incriminating himself along with the accused. As noted above, the confession of a co-accused does not come within the definition of evidence contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is only when a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth. The legislature provides that his statement may be considered against his fellow accused charged with the same crime. The test is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered. The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course

it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence. This position has been clearly explained by this Court in *Kashmira Singh v. State of M.P.* [AIR 1952 SC 159]. The exact scope of Section 30 was discussed by the Privy Council in the case of *Bhuboni Sahu v. R.* [AIR 1949 PC 257] The relevant extract from the said decision which has become *locus classicus* reads as follows:

Section 30 applies to confessions, and not to statements which do not admit the guilt of the confessing party. ... But a confession of a co-accused is obviously evidence of a very weak type. ... It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.

32. *Kashmira Singh* principles were noted with approval by a Constitution Bench of this Court in *Haricharan Kurmi v. State of Bihar* [AIR 1964 SC 1184]. It was noted that the basis on which Section 30 operates is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly. So Section 30 provides that such a confession may be taken into consideration even against the co-accused who is being tried along with the maker of the confession. It is significant, however, that like other evidence which is produced before the court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Evidence Act is produced before the court, it is the duty of the court to consider that evidence. What weight should be attached to such evidence is a matter in the discretion of the court. But the court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the court in dealing with a confession because Section 30 merely enables the court to take the confession into account. Where, however, the court takes it into confidence, it cannot be faulted. The principle is that the court cannot start with confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidences, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence. That is the true effect of the provision contained in Section 30. We may note that great stress was laid down on the so-called retraction of the makers of the confession. Apart from the fact that the same was made after about two years of the confession, PWs 81 and 82 have stated in court as to the procedures followed by them, while

recording the confession. The evidence clearly establishes that the confessions were true and voluntary. That was not the result of any tutoring, compulsion or pressurization. As was observed by this Court in *Shankaria v. State of Rajasthan* [(1978) 3 SCC 435] the court is to apply a double test for deciding the acceptability of a confession, i.e., (i) whether the confession was perfectly voluntary, and (ii) if so, whether it is true and trustworthy. Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to the court to have been caused by any inducement, threat or promise, such as mentioned in Section 24 of the Evidence Act, it must be excluded and rejected *brevi manu*. If the first test is satisfied, the court must before acting upon the confession reach the finding that what is stated therein is true and reliable. The Judicial Magistrates, PWs 81 and 82 have followed the requisite procedure. It is relevant to further note that complaint was lodged before the Magistrate before his recording of the confessional statement of accused Md. Gulzar. The complaint was just filed in court and it was not moved. The name of the lawyer filing the complaint could not be ascertained either. This fact has been noted by the Designated Court.

33. In view of what we have said about the confessional statement it is not necessary to go into the question as to whether the statement recorded under Section 164 of the Code has to be given greater credence even if the confessional statement has not been recorded under Section 15 of the TADA Act. However, we find substance in the stand of learned counsel for the accused-appellants that Section 10 of the Evidence Act which is an exception to the general rule while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. In *State of Gujarat v. Mohd. Atik* [(1998) 4 SCC 351] it was held that the principle is no longer *res integra* that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of Section 10 of the Evidence Act. Once the common intention ceased to exist, any statement made by a former conspirator thereafter cannot be regarded as one made in reference to their common intention. In other words, the post-arrest statement made to a police officer, whether it is a confession or otherwise touching his involvement in the conspiracy, would not fall within the ambit of Section 10 of the Evidence Act.

34. The first condition which is almost the opening lock of that provision is the existence of “reasonable ground to believe” that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement “in reference to their common intention”. Under the corresponding provision in the English law the expression used is “in furtherance of the common object”. No doubt, the words “in reference to their common intention” are wider than the words used in English law.

35. But the contention that any statement of a conspirator, whatever be the extent of time, would gain admissibility under Section 10 if it was made “in reference” to the common intention, is too broad a proposition for acceptance. We cannot overlook that the basic principle which underlies Section 10 of the Evidence Act is the theory of agency. Every

conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under Section 10.

36. Way back in 1940, the Privy Council had considered this aspect and Lord Wright, speaking for Viscount Maugham and Sir George Rankin in *Mirza Akbar v. King-Emperor* [AIR 1940 PC 176] had stated the legal position thus:

“[T]he words ‘common intention’ signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party.”

37. Intention is the volition of mind immediately preceding the act while the object is the end to which effect is directed, the thing aimed at and that which one endeavours to attain and carry on. Intention implies the resolution of the mind while the object means the purpose for which the resolution was made.

38. In *Bhagwan Swarup* case it was observed that the expression “in reference to their common intention” is wider than the words “in furtherance of the common intention” and this is very comprehensive and it appears to have been designedly used to give it a wider scope than the words “in furtherance of” in the English law. But, once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made “in reference to the common intention”. Therefore, a post-arrest statement made to the police officer was held to be beyond the ambit of Section 10 of the Evidence Act.

39. In *Sardul Singh Caveeshar v. State of Bombay* [AIR 1957 SC 747] it was held:

The principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in Section 10 of the Evidence Act, confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were ‘in reference to their common intention’ that is to say ‘things said, done or written, while the conspiracy was on foot’ and ‘in carrying out the conspiracy’. It would seem to follow that where, the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence.

40. In a given case, however, if the object of conspiracy has not been achieved and there is still agreement to do the illegal act, the offence of a criminal conspiracy continues and Section 10 of the Evidence Act applies. In other words, it cannot be said to be a rule of universal application. The evidence in each case has to be tested and the conclusions arrived at. In the present case, the prosecution has not led any evidence to show that any particular

accused continued to be a member of the conspiracy after his arrest. Similar view was expressed by this Court in *State v. Nalini* [(1999) 5 SCC 253].

42. While dealing with an accused tried under TADA, certain special features of the said statute need to be focused. It is also necessary to find out the legislative intent for enacting it. It defines “terrorist acts” in Section 2(h) with reference to Section 3(1) and in that context defines a terrorist. It is not possible to define the expression “terrorism” in precise terms. It is derived from the word “terror”. As far as the Statement of Objects and Reasons leading to enactment of TADA is concerned, reference to the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter referred to as “the old Act”) is necessary. It appears that the intended object of the said Act was to deal with persons responsible for escalation of terrorist activities in many parts of the country. It was expected that it would be possible to control the menace within a period of two years, and the life of the Act was restricted to the period of two years from the date of its commencement. But noticing the continuance of the menace, that too on a larger scale, TADA has been enacted. The menace of terrorism is not restricted to our country, and it has become a matter of international concern and the attacks on the World Trade Centre and other places on 11-9-2001 amply show it. The attack on Parliament on 13-12-2001 shows how grim the situation is. TADA is applied as an extreme measure when the police fails to tackle the situation under the ordinary penal law. Whether the criminal act was committed with an intention to strike terror in the people or a section of the people would depend upon the facts of each case. As was noted in *Jayawant Dattatray Suryarao v. State of Maharashtra* [(2001) 10 SCC 109] for finding out the intention of the accused, there would hardly be a few cases where there would be direct evidence. It has to be mainly inferred from the circumstances of each case.

43. In *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602] this Court observed that

“the legal position remains unaltered that the crucial postulate for judging whether the offence is a terrorist act falling under TADA or not is whether it was done with the intent to overawe the Government as by law established or to strike terror in the people etc.”

“A ‘terrorist’ activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity is to be one that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. It is in essence a deliberate and systematic use of coercive intimidation.”

46. Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society. “Terrorism” has not been defined under TADA nor is it possible to give a precise definition of “terrorism” or lay down what constitutes “terrorism”. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being

punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb the harmony of the society or “terrorise” people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquillity of the society and create a sense of fear and insecurity.

47. In the background of what we have said about terrorist acts (*supra*), the plea of the accused-appellants is clearly unacceptable. As was observed by this Court when earlier the matter was before it in the prosecution’s appeal questioning the quashing of order of sanction and application of TADA, the preparation of bombs and possession of bombs would tantamount to terrorizing the people. Credible evidence proves it to be a terrorist act. The explosion of a large number of live bombs is a clear indication of conspiracy. It was further held that it cannot be contended that if the bombs are for self-defence there was no *mens rea*. Preparation and storage of bombs are *per se* illegal acts.

48. Further question is when the right of private defence arises. It never commences before a reasonable apprehension arises in the mind of the accused. Here there was no evidence that there was any indication about an attack on the Muslims and, therefore, the question of any reasonable apprehension does not arise. The cover of self-protection when pierced unravels a sinister design to unleash terror.

52. In view of our conclusions that charges under Sections 3(2)(1) and 3(3) of the TADA Act and Section 120-B IPC are clearly established, we do not think it necessary to go through a hair-splitting approach *vis-à-vis* Sections 3 and 4 of the Explosive Act. Even if it is accepted that Section 3 of the Act was not applicable and what was applicable is Section 4 of the Explosive Act yet it can only be the question of sentence which can be imposed. As the charge is for higher offence, conviction of lesser offence is permissible. As we are upholding the award of life sentence for the offences under Section 120-B IPC and Section 3(2)(1) and Section 3(3) of the TADA Act, any reduction in sentence from 10 years to 7 years (in the background of Sections 3 and 4 of the Explosive Act) is really of no consequence. The appeals filed by the accused persons deserve to be dismissed, and we so direct.

53. Coming to the appeal filed by the prosecution against the acquittal in respect of charges under Sections 302/34 and Sections 436/34 IPC, learned counsel for the prosecution fairly stated, and in our opinion rightly, that the acquittal is justified. Though, it was submitted by Mr K.T.S. Tulsi that higher sentences would have been more appropriate in respect of established offences, we do not think it necessary to go into that question in absence of an appeal by the prosecution in that regard. The appeal filed by the State is accordingly dismissed. In the result, all the seven appeals stand dismissed.

54. Before parting with the case, we may point out that the Designated Court deferred the cross-examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that the accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in-chief is over, unless compelling reasons are there, the trial court should not adjourn the matter on the mere asking. These aspects were highlighted by this Court in *State of U.P. v. Shambhu Nath Singh* [(2001) 4 SCC 667] and *N.G. Dastane v.*

Shrikant S. Shivde [(2001) 6 SCC 135]. In **Shambhu Nath Singh** case this Court deprecated the practice of courts adjourning cases without examination of witnesses when they are in attendance with the following observations:

“9. We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of *bhatta* (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner.”

55. In **N.G. Dastane** case the position was reiterated. The following observations in the said case amply demonstrate the anxiety of this Court in the matter:

“20. An advocate abusing the process of court is guilty of misconduct. When witnesses are present in the court for examination the advocate concerned has a duty to see that their examination is conducted. We remind that witnesses who come to the court, on being called by the court, do so as they have no other option, and such witnesses are also responsible citizens who have other work to attend to for eking out a livelihood. They cannot be treated as less respectable to be told to come again and again just to suit the convenience of the advocate concerned. If the advocate has any unavoidable inconvenience it is his duty to make other arrangements for examining the witnesses who are present in the court. Seeking adjournments for postponing the examination of witnesses who are present in court even without making other arrangements for examining such witnesses is a dereliction of an advocate’s duty to the court as that would cause much harassment and hardship to the witnesses. Such dereliction if repeated would amount to misconduct of the advocate concerned. Legal profession must be purified from such abuses of the court procedures. Tactics of filibuster, if adopted by an advocate, is also a professional misconduct.”

57. Appeals are dismissed.

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Jayantibhai Bhenkarbhai v. State of Gujarat

(2002) 8 SCC 165

R.C. LAHOTI AND BRIJESH KUMAR, JJ. - 1. In an incident which took place in Village Singpur of Taluk Songadh, Gujarat on 6-7-1989 at about 8.30 p.m. one Lalubhai Naranbhai died on account of injuries inflicted on him. Nine accused persons were charged with having committed offences punishable under Sections 302/149 and 147/ 148/452 IPC. Four accused persons, namely, Accused 2, 4, 5 and 8 were directed to be acquitted by the trial court as the charges against them were not proved and they were entitled to the benefit of doubt. Accused 1, 3, 6, 7 and 9 were held guilty of having committed the offence punishable under Sections 302/149 IPC. These five accused persons were sentenced to undergo imprisonment for life and a fine of Rs 250 each and in default to further undergo rigorous imprisonment for one month each. They were further sentenced to undergo rigorous imprisonment for one year each for having committed offences under Sections 147/148 and 452 IPC and also to pay a fine of Rs 125 and in default of payment to undergo further imprisonment of one month each. The sentences were directed to run concurrently. All the five convicted accused persons preferred appeal before the High Court which has been dismissed. Accused 1, 3, 6 and 7, namely, Singha Magan, Dina Afiniya, Digniya Rama and Rupa Singha have accepted the judgment of the High Court and have not pursued challenge to their conviction up to this Court. It is only Accused 9 Jayantibhai Bhenkarbhai who has filed this appeal by special leave.

2. The prosecution case briefly stated is that Accused 1 Singha Magan came to visit the house of one Lalji Rajia at about 6.00 p.m. on 6-7-1989. Lalji Rajia was not at his house. Singha Magan demanded liquor from Ashwin, a minor son of Lalji Rajia, which was objected to by Ushniben, the wife of Lalji Rajia. There was some verbal altercation. Singha Magan (A-1) was speaking in a foul language and was argumentative insisting on fulfilling his demand for liquor. At this point of time, Lalubhai and his brother Kantibhai, who were next-door neighbours of Lalji Rajia came out and intervened and chastised the accused Singha Magan by telling him that in the absence of Lalji Rajia, the accused should not have harassed the lady who was alone in the house. The accused was asked by Lalubhai to leave that locality and go away. This annoyed the accused and he left threatening that he would see him later.

3. At about 8.00 p.m. on the same day, Accused 1 Singha Magan returned to the house of the deceased accompanied by Accused 2 to 9. The accused persons were severally armed. Accused 1 Singha Magan was armed with a knife, Accused 7 Rupa Singha had a pestle with him. Accused 6 Digniya Rama and Accused 9 Jayantibhai Bhenkarbhai were armed with sticks. The incident was witnessed by Kantibhai and Thakorebhai, brothers of the deceased. The accused persons fled away after assaulting the victim. Thakorebhai went to Channabhai Dhirubhai and narrated to him the incident. He advised for a report being lodged with the police. Thakorebhai accompanied by Channabhai Dhirubhai went to Ukai Police Station situated at a distance of about 10-12 km and lodged FIR of the incident at 6.00 a.m. on 7-7-1989. A cognizable offence was registered and investigation commenced.

4. Shortly after the incident of assault Lalubhai succumbed to his injuries. *Post-mortem* on the dead body was performed by Dr Surendra, Medical Officer, General Hospital,

Songadh. The deceased was found to have sustained 22 injuries out of which 3 were incised wounds and remaining were contused lacerated wounds or abrasions. On internal examination, the deceased was found to have sustained fracture of right 5th and 6th ribs at the level of right mid-clavicular line and fracture of left 7th, 8th and 9th ribs at the level of left mid-scapular line. The injuries were *ante-mortem*. The incised wounds could have been caused by a sharp-cutting weapon such as a knife while other injuries could have been caused by a blunt object such as a stick, pestle or the back portion of a *dharia*.

5. The short question for decision in this appeal is whether Jayantibhai, the accused-appellant can be held to have participated in the incident of assault and as a member of an unlawful assembly.

6. The accused denied his participation in the incident of assault on the deceased. His defence is that a day before the incident he had left Village Singpur and gone to Ahmedabad in order to attend a hearing in an election appeal filed by him before the Additional Development Commissioner which was scheduled to be heard on 6-7-1989 at Gandhinagar. According to the accused-appellant there was yet another case — a criminal case under Section 409 IPC wherein he was accused and pending for trial in the Court of Judicial Magistrate at Vyara. Therein also the date of hearing was appointed as 6-7-1989 and his personal appearance was required. In the election appeal Kantilal Shah, DW 3 was the advocate appointed by him. The election appeal had come up for hearing on 14-6-1989 and was adjourned for hearing on 6-7-1989. In the criminal case at Vyara, Dhansukhbhai, DW 4 was the counsel appointed by the accused-appellant. Kantilal Shah, DW 3 had, on the hearing being adjourned on 14-6-1989, sent a postcard to the accused-appellant informing him that the hearing would positively take place on 6-7-1989 which he must attend. As the accused-appellant could not have attended both the cases, i.e., the criminal case at Vyara and the election appeal at Gandhinagar, both fixed for 6-7-1989, he had through counsel Shri Dhansukhbhai, DW 4 moved an application in the Court of Judicial Magistrate, Vyara seeking exemption from personal appearance and an adjournment. This application was rejected on 6-7-1989 and the learned Judicial Magistrate at Vyara directed warrants to be issued against the accused. However, the accused-appellant did attend the hearing before the Additional Development Commissioner on 6-7-1989. The hearing commenced after 11.00 a.m. and continued up to 2.30 p.m.

7. The version of the defence proceeds to say that the accused-appellant went to see and was going around the zoo at Ahmedabad for about half an hour commencing at 4.00 p.m. Thereafter, he went to Gandhinagar to meet one Rahulbhai who was employed as a clerk in the Secretariat at Gandhinagar. He secured a pass for entry in the Secretariat and he signed the entry register wherein his name is mentioned along with his signatures. The accused then returned to Ahmedabad and went to stay with one Manekbhai, DW 2. It was at about midnight that Manekbhai and Dineshbhai went to see off the accused-appellant at the bus station at Ahmedabad where the accused-appellant boarded a bus originating from a station in Rajasthan and proceeding to Songadh and reached Singpur in the morning of 7-7-1989. This register was summoned in evidence and the accused-appellant appearing as DW 2 has deposed on oath to the entry made in his presence by the clerk concerned and the signatures put by him on the register.

8. The accused himself chose to appear in the witness box and took oath to depose in support of his own version. He also examined Kantilal Shah, Advocate, DW 3 and Ramanbhai, DW 5, clerk in the office of the Additional Development Commissioner. According to Ramanbhai, DW 5 the Additional Development Commissioner was regular in coming to the office at 10.30 a.m. and his routine was to attend to miscellaneous work, including disposal of the mail received, for about half an hour and commence hearing of cases at 11.00 a.m. The appellant's case was at Item 4. The first three cases did not proceed and therefore the hearing of the appellant's case was taken up at about 11.30 a.m. and lasted up to 2.00 or 2.30 p.m. In the records maintained in the office of the Additional Development Commissioner, the presence of the accused-appellant along with his counsel Kantilal Shah, DW 3 is recorded and both have signed in token of their having attended the office of the Additional Development Commissioner and participated in the hearing. Ramanbhai, DW 5 has further deposed that he used to remain present during the course of hearings by the Additional Development Commissioner and take notes of the submissions made which he did on 6-7-1989 also. In view of the involvement of the accused-appellant having been alleged in the incident, he moved an application to the Additional Development Commissioner to issue certificate showing his presence in the office of the Additional Development Commissioner on 6-7-1989. Certificate in that regard was issued though the time at which the accused-appellant was present before the Additional Development Commissioner was not mentioned in the certificate; obviously because a record of such time is not maintained. The fact remains that the accused-appellant was in attendance in the office of the Additional Development Commissioner at Gandhinagar sometime after 11.00 a.m. on that day. The postcard dated 19-6-1989 written by Kantilal Shah, Advocate to the accused-appellant and sent through post bearing postal stamps and seals was produced in evidence wherein it has been communicated by the counsel to the appellant that his default in appearance on 14-6-1989 was viewed seriously and his appearance on 6-7-1989 was a must. On this very ground the appellant had moved an application before the Judicial Magistrate, Vyara seeking exemption from personal appearance on 6-7-1989. In support of the said application the postcard sent by Advocate Kantilal Shah was filed. The record of this application accompanied by a postcard was summoned in the trial court and proved by Dhansukhbhai, Advocate, DW 4 appearing for the accused-appellant before the Magistrate's Court at Vyara.

9. The accused-appellant also produced in evidence two tickets of the zoo purchased by him for himself and Dineshbhai on 6-7-1989. He also produced the bus tickets issued by the conductor of the bus by which he had travelled from Ahmedabad to Singpur. The appellant had boarded the bus at about 1.00 a.m., that is, a little after the midnight of 6-7-1989/7-7-1989 and reached Singpur in the morning of 7-7-1989.

11. Babulal, PW 9, the investigating officer has admitted during his cross-examination that if the road is clear and there are no obstructions then ST bus can reach Ahmedabad from Songadh village in 8 hours. However, he further admitted that if one has to travel by ST bus from Songadh to Ahmedabad then all ST buses go to Ahmedabad from Songadh invariably *via* Surat which would take a little longer time.

12. The High Court took into consideration the plea of *alibi* taken by the accused-appellant and formed an opinion that the plea was not strictly proved as required so as to

completely exclude the possibility of the accused having been present at the place and time of the incident. The reasons assigned by the High Court are that through the prosecution evidence the involvement of the accused in the incident is proved beyond reasonable doubt. As against this, the conduct of the accused-appellant appears to be unnatural inasmuch as he did not promptly (that is, on 7-7-1989 itself) approach the investigation officer to tell him that he was being falsely implicated as he was in fact in Ahmedabad on the date and at the time of the incident. In the opinion of the High Court the plea of *alibi* was not also fully substantiated in view of non-examination of Dineshbhai, who had accompanied the accused in Ahmedabad while he boarded the bus for Songadh and Rahulbhai, the clerk in the Secretariat to whom the accused claims to have gone to meet at about 5.15 p.m. on 6-7-1989.

13. These very reasons were assigned by the trial court for disbelieving the plea of *alibi* taken by the accused-appellant. However, an additional reason assigned by the trial court is that in the application for anticipatory bail the accused has stated his presence in the office of the Additional Development Commissioner up to 1.00 p.m. only while later on he tried to improve upon his version by pleading that he had remained present there up to 2.30 p.m. Vide para 27.1 of the judgment, the High Court while appreciating the defence evidence, has arrived at a positive finding that the accused-appellant has been able to prove by his evidence his presence at about 11.00 a.m. at Gandhinagar in the office of the Additional Development Commissioner. Thus, even in the opinion of the High Court, the plea of the accused that he had on the date of the incident gone to Ahmedabad to take part in the hearing of his appeal fixed before the Additional Development Commissioner is not false and at least at 11.00 a.m. he was present thereat.

14. In the facts and circumstances of this case, we propose to begin by dealing with the evidence of *alibi* adduced by the accused-appellant. We have no reason to disbelieve the statement of Kantilal Shah, Advocate, DW 3 and Ramanbhai, DW 5, the clerk who have deposed that the hearing before the Additional Development Commissioner had taken place on that date and that the accused was present at the time of hearing. The hearing must have lasted for a reasonable length of time assuming without holding that it had not continued up to 2 or 2.30 p.m. We have also no reason to doubt the entry in the Secretariat register wherein the name and particulars of the accused-appellant are mentioned as one of the visitors to the Secretariat on that date along with the signatures of the accused-appellant against the entry. This shows that on 6-7-1989 the accused did visit Gandhinagar. Assuming that the accused-appellant had departed from the office of the Additional Development Commissioner at the conclusion of hearing of his case, he must have spent a reasonable time in visiting the Secretariat which would obviously be during the working hours of the day. Thereafter, he may have left Gandhinagar for Songadh. According to the available modes of transport he would have taken a bus from Gandhinagar for Ahmedabad and from Ahmedabad he would have boarded a bus for Songadh which would proceed *via* Surat only. A public transport required to cover a distance of about 300 km allowing a reasonable margin for the time lost in stoppages on the way, would take about 8 to 10 hours to reach Songadh. It does not appear probable that the accused-appellant could have reached Singpur and participated in the incident which is said to have taken place at about 8.00 p.m.

15. On the next day the accused-appellant learnt of the Judicial Magistrate, Vyara having turned down his prayer for exemption from personal appearance before the court at Vyara on 6-7-1989 and consequently having issued a warrant of arrest for securing the presence of the accused before him. The accused-appellant rushed to Vyara, appeared in the court and moved an application for recalling the warrant of arrest stating the factum of his presence before the Additional Development Commissioner at Gandhinagar on 6-7-1989. This application was allowed and the warrant of arrest was recalled. These relevant facts have been deposed to by reference to the documents from the record of the Judicial Magistrate, Vyara by Dhansukhbhai, Advocate, DW 4.

16. We have carefully gone through the prosecution evidence. Although the trial court as well as the High Court have recorded a finding of the accused-appellant having participated in the incident but a few prominent features of the prosecution case and of the findings arrived at by the two courts need to be noticed. All the four eyewitnesses are not specific about the overt act attributed to this accused-appellant. While some witnesses attribute two specific injuries on the person of the deceased having been caused by this accused-appellant, others only make a generalized statement of this accused-appellant also having participated in the assault. There is another accused also, namely, Digniya Rama (A-6) who was armed with a stick. A stick stated to have been used in the incident has been recovered from the accused Digniya Rama (A-6). No recovery has been made from the accused-appellant. Secondly, the incident took place at about 8 p.m. while the first information report of the incident was lodged at 6 a.m. at a police station situated at a distance of about 10 to 12 km from the village where the incident took place. The FIR cannot be said to be belated. But the fact remains that the first informant was in the company of Channabhai Dhirubhai, a political rival of the accused-appellant, soon after the incident and before and at the time of lodging of FIR. A possibility of some embellishment having crept into the FIR in view of the political influence wielded by such opponent of the accused-appellant cannot be completely ruled out. Thirdly, this accused-appellant, from the very beginning, no sooner he learnt of the accusation against him, took the defence of *alibi* by informing the necessary facts to the investigating officer on 8-7-1989 itself. Thereafter, this plea of *alibi* has been consistent and reflected in several documents of undoubted veracity as also substantiated by the testimony of such witnesses who do not have any *animus* to falsely depose in favour of the accused. There is also supporting documentary evidence of unimpeachable veracity adduced in support of the defence plea.

17. In view of the overwhelming evidence adduced by the accused-appellant, the factum of non-examination of Dineshbhai and Rahulbhai pales into insignificance. Rahulbhai could have only supplied some more details of the visit of the accused-appellant to him in the Secretariat which visit cannot be doubted on account of entries made in the visitors' register. Dineshbhai could have spoken of the accused-appellant's stay at Ahmedabad up to the midnight of 6-7-1989 and 7-7-1989. His evidence would have been oral and subjected to the usual criticism. But his non-examination does not water down the impact of finding that during the day at least up to after midday the accused was undoubtedly present in Ahmedabad and Gandhinagar leaving aside the exact time whether up to 1.00 p.m. or 2.00 p.m. or 2.30 p.m. His such presence at Gandhinagar and Ahmedabad renders it highly improbable that he could have been in, or reached, Singpur by 8.00 p.m. the same day.

18. Section 11 of the Evidence Act, 1872 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable.

19. The plea of *alibi* flows from Section 11 and is demonstrated by Illustration (a). **Sarkar on Evidence** (15th Edn., p. 258) states the word “*alibi*” is of Latin origin and means “elsewhere”. It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. *Alibi* is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of *alibi*. The plea of *alibi* taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of *alibi*. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of *alibi* to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the court to weigh in scales the evidence adduced by the prosecution in proving the guilt of the accused and the evidence adduced by the accused in proving his defence of *alibi*. If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of *alibi*. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to the benefit of that reasonable doubt which would emerge in the mind of the court.

20. Reverting back to the facts and circumstances of the case and keeping in view the nature of the accusations made against the accused-appellant and weighing the same against the overwhelming defence evidence adduced by the accused-appellant in support of his plea of *alibi*, in our opinion, a reasonable doubt is created in the prosecution case so far as the participation of this accused-appellant in the incident is concerned. We have already noted, the High Court itself, having arrived at a finding in favour of the accused-appellant that his presence at Gandhinagar up to 11.00 a.m. on the date of the incident cannot be doubted. That being so, it is rendered highly improbable if the accused-appellant could have reached back to Village Singpur by the time the incident happened.

21. For the foregoing reasons, we are of the opinion that the accused-appellant is entitled to the benefit of doubt and his appeal therefore deserves to be allowed.

22. Though we are holding Jayantibhai Bhenkarbhai, the accused-appellant before us entitled to acquittal, we are conscious of the fact that the High Court has held five accused persons guilty and convicted them with the aid of Section 149 IPC. With the acquittal of Jayantibhai Bhenkarbhai (A-9), the accused-appellant before us, the number of culprits who participated in the incident is reduced to less than five and the charge with the aid of Section 149 IPC falls to the ground. We could have, in exercise of our jurisdiction under Article 136 of the Constitution, entered into the legality and propriety of the conviction of the non-appealing accused persons also. However, in the facts and circumstances of the present case, we are not inclined to do so. Though the charge with the aid of Section 149 IPC may fail, yet the non-appealing accused persons could still have been held liable to conviction with the aid of Section 34 IPC in which event the sentences would have remained the same. Be that as it may, inasmuch as the other accused have chosen not to file any appeal of their own, we are not inclined to enter into examining the sustainability of the conviction of the non-appealing accused persons.

23. The appeal filed by Jayantibhai Bhenkarbhai, the appellant before us, is allowed. His conviction under Sections 302/149 IPC and Sections 147/148/452 IPC is set aside. He is directed to be acquitted. He shall be released forthwith if not required to be detained in any other offence.

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Bishwanath Prasad v. Dwarka Prasad

(1974) 1 SCC 78 : AIR 1974 SC 117

V.R. KRISHNA IYER, J. - This appeal arises out of a suit for partition where the narrow area of conflict in this Court is confined to two items claimed by the plaintiffs but disallowed by the High Court. The first two of the three points formulated for determination by the High Court reflect the controversy raised before us and may be excerpted:

1. Whether the said shop-room at the extreme north west corner of plot No. 1238 belongs exclusively to the defendants first party;

2. Whether the entire properties mentioned in Schedule C to the plaint are joint family properties liable to partition....

3. Point No. 2 relates to three items in Schedule C to the plaint which were covered by four usufructuary mortgages. The case of the first (contesting) defendant, who is the first respondent before us now, is that these items of property exclusively belonged to him. The trial Court has accepted this case and the High Court has affirmed this finding. The foundation for these concurrent findings is the admissions made by the first plaintiff and the eighth defendant, the father of the plaintiff, in depositions in an earlier suit, Title Suit No. 61 of 1945, as well as similar admissions made in the written statement filed in that suit by the present eighth defendant (who was first defendant there) together with the present plaintiffs, two of whom were majors at that time. The inference fluently drawn by the Courts below from these admissions is that the said property belongs to the first defendant.

4. Some challenge has been made in this Court about the propriety of relying on these admissions but we will deal with it a little later. Suffice it to say for the present that admissions are usually telling against the maker unless reasonably explained, and no acceptable ground to extricate the appellants from the effect of their own earlier statements has been made out. Be that as it may, concurrent conclusions from the two judicial tiers ordinarily find this Court's doors closed unless substantial reasons to the contrary exist. Having heard arguments at length we are disposed to agree with the High Court on the issue of the properties items 1 to 3 in Schedule C to the plaint.

5. The other short dispute relates to a shop-room at the north west corner of plot No. 1238. Here again the admissions of the eighth defendant and the plaintiffs, already referred to before, stand in the way of the plaintiffs' success. While the trial Court partially upheld the possession of the first defendant of this shop-building it did not go the whole hog in upholding his right. The learned Judges of the High Court held that the same admissions which had been relied upon by the trial Court for holding in favour of the first defendant's title to the mortgaged lands covered by Exs. B-1 to B-4 operated against the plaintiffs regarding the shop-building also. There is no doubt that if the admissions—Ex. G (the deposition of the present first plaintiff in Title Suit No. 61 of 1945), Ex. G2 (the deposition in the same suit by the present eighth defendant), and Ex. H (the written statement filed by these parties in the earlier suit) are reliable, the plaintiff's case is damaged by their own admissions. The High Court has taken this view and concluded:

“On the strength of the written statement and the other statements aforesaid, there is no escape from the conclusion that this disputed shop-room was allotted to defendant No. 1 in the partition that took place in 1938.”

6. Counsel for the appellants strenuously urged that the fatal admissions used against him have prejudiced him for many reasons. He contended that, for one thing, these statements were vague and therefore insufficient to justify a clear verdict against his client. For another, he argued, the case of the first respondent was that the suit for partition was not maintainable because the properties claimed belonged to him as heir of his father, Narain Sah, and the alternative case which has found favour with the Courts below, based on the admissions of the plaintiffs and the eighth defendant, was not even suggested in the written statement, and as such a new case at total variance from the pleadings should not have been considered by the Court. His further grievance is that these admissions were not put to his client, the first plaintiff, when he was in the witness box; nor was the eighth defendant summoned for examination by the first defendant to give him an opportunity to explain the admissions. Therefore, Counsel contended that he was seriously harmed by the surprise reliance on statements attributed to his clients without extending a fair opportunity to them to offer their explanation and neutralise the effect of the admissions.

7. We are not satisfied that there is any substance in the grievances voiced by Counsel. There was no *volte face* on the part of the first defendant. Although it is true that his basic defence was a denial of joint family ownership, it is seen that even in the trial Court Exs. G, G2 and H had been considered and acted upon. In the appeal to the High Court the present appellants did not state that they had been hit below the belt by the reliance on the admissions by the trial Court in holding against them. Indeed, there is no suggestion in the judgment of the High Court that the appellants had even contended about any prejudice to them or that they had been denied an opportunity to explain the material so used against them. What is more, it is found that at no stage subsequent to the High Court decision, either in the memorandum of appeal appended to the application for a certificate or in the statement of the case in this Court, has there been a pointed ground of complaint about the unfair reliance on the admissions aforesaid to the detriment of the appellants. Under these circumstances it is difficult to take the plea of prejudice seriously in the absence of earlier articulation thereof.

8. There is no merit even in the contention that because these three statements had not been put to the first plaintiff when he was in the witness box or to the eighth defendant although he had discreetly kept away from giving evidence, they cannot be used against him. Counsel drew our attention to Section 145 of the Indian Evidence Act. There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfils the requirements of Section 21 of the Evidence Act; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by Section 145 of the Evidence Act. This distinction has been clearly brought out in

the ruling in *Bharat Singh* case [AIR 1966 SC 405]. This Court disposed of a similar argument with the following observations:

“Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.”

We, therefore, reach the conclusion that the appellants’ arrival in this Court has been an exercise in futility. The appeal must, therefore, fail and is hereby dismissed. There is some force in the submission that the first respondent had throughout in his pleadings set out a case against the joint family character of the properties and it was only at the stage of the evidence that he fell back on the alternative case that has got him through. We, therefore, direct that the appellants shall be directed to pay only half the costs in this Court.

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Central Bureau of Investigation v. V.C. Shukla

AIR 1998 SC 1406

M.K. MUKHERJEE, J. - On May, 3, 1991 the Central Bureau of Investigation (CBI), New Delhi, searched the premises of J.K. Jain at G-36, Saket, New Delhi to work out an information received while investigating RC Case No. 5(S)/91 SIU (B)/CBI/New Delhi. In course of the search they recovered, besides other articles and documents, two diaries, two small note books and two files containing details of receipts of various amounts from different sources recorded in abbreviated forms of digits and initials and details of payments to various persons recorded in similar fashion. Preliminary investigation taken up by the CBI to decode and comprehend those entries revealed payments amounting to Rs. 65.47 crores, out of which 53.5 crores had been illegally transferred from abroad through hawala channels, during the years 1988 to 1991 to 115 persons including politicians, some of whom were members of either House of the Parliament during the relevant period, officials of government and Public Sector Undertakings, and friends of S.K. Jain, B. R. Jain, and N.K. Jain, who are three brothers carrying on different businesses. It further revealed that the Jain brothers and J.K. Jain, who is their employee, had acted as middlemen in the award of certain big projects in the power sector of the Government of India to different bidders; that they had official dealings with politicians and public servants whose names were recorded in the diaries and the files; and that some of them had accepted illegal gratification other than legal remuneration from Jains as a reward for giving them and the companies they own and manage various contracts. On such revelation the CBI registered a case on march 4, 1995 under Sections 7 and 12 of the Prevention of Corruption Act, 1988 and Section 56 read with Section 8(1) of the Foreign Exchange Regulation Act, 1973 against the Jains, some public servants and others being RC No.1(A)/95 ACU (VI) and on completion of investigation filed 34 charge-sheets (challans) in the Court of the Special Judge, New Delhi against various politicians, Government servants and Jains. In one of the above charge-sheets (C.S. No. 4 dated 16.1.1996) Shri Lal Krishna Advani, who at the material time was a Member of the Parliament, and the Jains figure as accused and in another (C. S. No. 8 dated 23.1.1996), Shri V.C. Shukla, also a Member of Parliament, along with the Jains.

3. The common allegations made in the above two charge-sheets (from which these appeals stem) are that during the years 1988 to 1991 Jains entered into a criminal conspiracy among themselves, the object of which was to receive unaccounted money and to disburse the same to their companies, friends, close relatives and other persons including public servants and political leaders of India. In pursuance of the said conspiracy S.K. Jain lobbied with various public servants and Government organisations in the power and steel sectors of the Government of India to persuade them to award contracts to different foreign bidders with the motive of getting illegal kickbacks from them. During the aforesaid period the Jain brothers received Rs. 59, 12, 11, 685, major portion of which came from foreign countries through hawala channels as kickbacks from the foreign bidders of certain projects of power sector undertakings and the balance from within the country. An account of receipts and disbursements of the monies was maintained by J.K. Jain in the diaries and files recovered from his house and Jain brothers authenticated the same.

4. As against Shri Advani the specific allegation in the charge-sheet (in which he and Jains figure as accused) is that he received a sum of Rs. 25 lacs from Jains during his tenure as a Member of the Parliament, (besides a sum of Rs. 35 lacs which was received by him while he was not a Member of the Parliament). In the other charge-sheet (filed against Shri Shukla and Jains) it is alleged that during the period 1988 to 1991, while Shri Shukla was a Member of the Parliament and for some time a Cabinet Minister of the Central Government he received Rs. 39 lacs (approximately) from Jains.

5. According to CBI the materials collected during investigation clearly disclosed that Jains were in the habit of making payments to influential public servants and political leaders of high status expecting official favours from them and the above payments were made to Shri Shukla and Shri Advani with that oblique motive. Thereby, the CBI averred, the above persons (the respondents in these appeals) committed offences under Section 120B I.P.C. and Section 13(2) read with Section 13(1)(d), 7 & 12 of the Prevention of Corruption Act, 1988.

6. The special Judge took cognizance upon the above two charge-sheets and issued processes against the respondents. After entering appearance they agitated various grounds (to which we will refer at the appropriate stage) to contend that there was no material whatsoever to frame charges against them. The Special Judge, however, rejected all those contentions and passed separate orders deciding to frame charges and try the respondents. Pursuant to the order passed in Case No. 15 of 1996 (arising out of C.S. No. 8 dated 23.1.1996) the following charges were framed against Shri Shukla:- "Firstly, that you, V.C. Shukla, during the period from Feb. 90 to Jan. 91 at Delhi agreed with other co-accused S.K. Jain, N.K. Jain, B. R. Jain, and J. K. Jain to do an illegal act, to wit, to obtain pecuniary advantage from the said Jains by abusing your official position as a public servant being Member of Parliament during the said period and also be Minister of External Affairs from 21.11.90 to Jan. 91 and in pursuance of the said agreement, you obtained the pecuniary advantage and accepted Rs. 38, 85,834/- as gratification other than legal remuneration from the said Jains for a general favour to them from you and you, thereby, committed an offence punishable U/s 120-B IPC r/w Sec. 7, 12 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 and within the cognizance of this Court. Secondly, that you during the aforesaid period at the aforesaid place in your aforesaid capacity being a public servant, accepted a sum of Rs. 38,85,834 from the above said co-accused persons, namely S.K. Jain, N.K. Jain, B. R. Jain and J.K. Jain as gratification other than legal remuneration for showing general favour to them and you, thereby, committed an offence punishable U/s 7 of the Prevention of Corruption Act, 1988 and within the cognizance of this Court. Thirdly, that you during the aforesaid period and at the aforesaid place, in your aforesaid capacity being a public servant obtained pecuniary advantage amounting to Rs. 38,85,834/- from the co-accused persons namely, S.K. Jain, B. R. Jain, N.K. Jain and J.K. Jain by abusing your position as a public servant and also without any public interest and you, thereby committed an offence punishable u/s 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 and within the cognizance of this Court."

7. The charges framed against S.K. Jain, in that case read as under:" "Firstly, that you, S.K. Jain, during the period from Feb. 90 to Jan. 91 at Delhi, agreed with other co-accused V.C. Shukla, N. K. Jain, B. R. Jain and J.K. Jain to do an illegal act, to wit, to make payment

of Rs. 38,85,834/- to said Sh. V.C. Shukla, as a gratification other than legal remuneration as a motive or reward for getting general favour from said V. C. Shukla who was holding the post of a Member of Parliament during the said period and also was Minister for External Affairs during the period from 21.11.90 to Jan. 91 and in pursuance of the said agreement, the pecuniary advantage was obtained by said V. C. Shukla by abusing his official position and without any public interest and the payment was made by you as, aforesaid, gratification and you, thereby, committed an offence punishable u/s 120-B IPC r/w Sec. 7, 12, 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 and within the cognizance of this Court. Secondly, that you, S.K. Jain during the aforesaid period and at the aforesaid place abetted the commission of offence punishable u/s 7 of the P. C. Act, 1988 by offering bribe of Rs. 38,85,834 to said V. C. Shukla, who was a public servant during the relevant period as a Member of Parliament and also as a minister of External Affairs during the period from 21.11.90 to Jan. 91 for getting general favour from him and you, thereby committed an offence punishable u/s 12 of the Prevention of Corruption Act, 1988 and within the cognizance of this Court."

8. Similar charges were also framed against the other Jains.

9. In the other case (c.c. No. 17 of 1996), in which Shri Advani figure as an accused with Jains no formal charge was framed (as by then the respondents had moved the High Court), but the special Judge decided to frame charges against them in similar lines as would be evident from the order dated September 6, 1996, the relevant portion of which reads as under:

"So, after going through the entire material available on record, i.e. charge-sheet statements of the witnesses recorded u/s 161 Cr.P.C, documents placed on record prima facie, it cannot be said that the allegations made against all these accused are groundless or that there is no sufficient ground for proceeding against all the accused. Prima facie, it is clear that there are sufficient grounds for framing of charges against all these accused. Accordingly, I hereby order that the charges against all these accused. Accordingly, I hereby order that the charges for offences u/s 120B IPC and Sections 7, 12, 13(2) r/w 13(1)(d) of the P. C. Act, 1988 be framed against all the accused namely, L.K. Advani, S.K. Jain, J.K. Jain, B.R. Jain and N.K. Jain. Further Charges for offence u/s. 7 and 13(2) read with 13(1)(d) of P.C. Act, 1988 be framed against accused L.K. Advani. Further charges for offence u/s 12 of P.C. Act, 1988 be framed against accused S.K. Jain, J.K. Jain, B.R. Jain and N. K. Jain."

10. Assailing the above order/charges the respondents moved the High court through petitions filed under Section 482 Cr. P. C, which were allowed by a common order and the proceedings of the above two cases were quashed and the respondents were discharged. The above order of the High Court is under challenge in these appeals at the instance of the CBI.

11. From the above resume of facts it is manifest that the entire edifice of the prosecution case is built on the diaries and files - and for that matter the entries made therein - recovered from J. K. Jain. While the appellant claimed that the entries in the documents would be admissible under Sections 34, 10 and 17 of the Evidence Act, ('Act' for short) the respondents contended that the nature and character of the documents inhibited their admissibility under

all the above Sections. Needless to say, to delve into and decide this debatable point it will be necessary at this stage to look into the documents; the two spiral note books (marked MR 68/91 and MR 71/91), two small spiral pads (MR 69/91 and MR 70/91) and two files, each containing some loose sheets of papers (MR 72/91 and MR 73/91). Since according to the prosecution MR 71/91 is the main (mother) book we first take the same for scrutiny. Page 1 of the book begins with the heading "A/C given upto 31st January on 31.1.1998;" and then follows serially numbered entries of various figures multiplied by some other figures on the left hand column and the product thereof on the next column for each month commencing from January, 1990 to April, 1991. The overleaf ('o' for short) of the page contains similar entries for the period from April, 1988 to December, 1989 and it ends with the words "2.77" we have to receive. In the subsequent pages the book records monthly receipts of monies/funds from inconspicuous persons/entities during the period commencing from the month of February, 1988 to April 1991 maintained on '2 columns' basis. The left hand column represents the receipts and the right hand column disbursements. In the column of receipts the source is indicated in abbreviated form on the left of the figure representing the sum received. On the right side of the said figures a number is mentioned which co-relates with the serial number of the account of receivers recorded on pages 1 and 1(o) of the diary for the period subsequent to 31.1.1988. So far as the names of the payees are concerned the same have also been recorded in abbreviated form, alphabets or words. The entries, however, do not give any indication of any sale, purchase or trading and show only receipts of money from a set of persons and entities on one side and payments to another set of persons and entities on the other, both reckoned and kept monthly. As regards the actual amounts received and disbursed we notice that the figures which have been mentioned briefly against the respective names are not suffixed with any symbol, volume or unit so as to specifically indicate whether they are in lakhs, thousands or any other denomination. It is noticed that in most of the entries the figures against transactions extend to 2 places after decimal which seem to suggest that the figures in money column may be in thousands, but then in some of the months, namely, 11/ 88, 6/89, 10/90, 2/91, 3/91, 4/91, figures extend to 5 places after decimal point in money column. This gives an impression that the figures are in lakhs; and this impression gains ground from other transactions. For example, at page 9 of the book in the transactions relating to the month of September 80, a figure of 32,000 prefixed by £ (sterling pound symbol) indicates that it is 32,000 sterling pounds and the same has been multiplied by Rs. 40/- per pound (which was possibly the conversion rate of pound according to Indian currency at that time) and the total has been indicated at 12.80 as against the product of Rs. 12,80,000. That necessarily means that the 2 places after decimal denotes that the figures are in lakhs. The book further indicates that it was from time to time shown to some persons and they put their signatures in token thereof.

12. The other book (M.R. 68/91) contains, *inter alia*, entries relating to cash and fund received and disbursed in the months of February, March and April 1991 recorded in similar fashion as in M.R. 71/91 (some or all of which correspond with the entries in MR 71/91 for those months); expenses incurred in the month of March 91; and 'political expenses as on 26.4.91' with names of a number of persons mentioned thereunder through their initials or surnames and various amounts shown against their respective names in only figures running upto 2 points after decimal. The other entries in this book seem to be wholly unconnected to

the entries earlier referred to. The two small spiral pads (M.R. 69/71 and M.R. 70/91) also contain some entries relating to similar receipt and disbursement on certain days and in certain months during the above period – all written in similar fashion. So far as the two files containing some loose sheets of paper are concerned (M. R. 72/91 and 71/91) we notice that in some of these papers accounts of money received and disbursed in one particular month or a period covering a number of months are written.

13. While arguing their case for framing of charges against the respondents it was contended on behalf of the appellant before the Trial Court that having regard to the fact that the documents unmistakably showed that accounts of business regarding receipt and payment of money during the period 1988 to 1991 were regularly maintained those documents would be admissible under Section 34 of the Act. Relying upon the statements of some of the witnesses recorded during investigation and report of the handwriting expert that the entries in the documents were in the handwriting of J.K. Jain, and that the three Jain brothers had signed those documents in token of their authenticity, it was contended that entries therein would be admissible also under Section 10 of the Act to prove that pursuant to a conspiracy hatched up by the Jains to obtain favours from politicians and other public servants payments were made to them from moneys received through hawala transactions. Section 17 and 21 were also pressed into service to contend that the entries would be 'admission' of the Jains of such payments.

14. In refuting the above contentions it was submitted on behalf of the respondents that since those documents were not books of accounts nor were they maintained in regular course of business they would not be relevant under Section 34. It was next submitted that even it was assumed that those documents were relevant and admissible under Section 34 they could be, in view of the plain language of that Section, used only as corroborative evidence, but in absence of any independent evidence to prove the payments alleged therein the documents were of no avail to the prosecution. The admissibility of the documents under Section 10 was resisted by the respondents contending that there was not an iota of material to show even, *prima facie*, that there was a conspiracy. Similar was the contention regarding applicability of Sections 17 and 21 in absence of any material to prove 'admission' of Jains. In support of their respective contentions they relied upon some decisions of this Court as also of different High Courts.

18. To appreciate the contentions raised before us by the learned counsel for the parties it will be necessary at this stage to refer to the material provisions of the Act. Section 3 declares that a fact is relevant to another when it is connected with the other in any of the ways referred to in the provisions of the Act relating to the relevancy of facts; and those provisions are to be found in Sections 6 to 55 appearing in Chapter II. Section 5, with which Chapter II opens, expressly provides that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and the facts declared relevant in the aforesaid sections, and of no others.

46. We may now turn to the principle and scope of Section 10 of the Act and its applicability to the entries in question. This section reads as under:-

“10. Things said or done by conspirator in reference to common design –

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

In dealing with this section in *Sardul Singh v. State of Bombay* [AIR 1957 SC 747], this court observed that it is recognised on well established authority that the principle underlining the reception of evidence of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. Ordinarily, a person cannot be made responsible for the acts of others unless they have been instigated by him or done with his knowledge or consent. This section provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all. But then, the opening of words of the Section makes it abundantly clear that such concept of agency can be availed of, only after the Court is satisfied that there is reasonable ground to believe that they have conspired to commit an offence or an actionable wrong. In other words, only when such a reasonable ground exists, anything said, done or written by any one of them in reference to their common intention thereafter is relevant against the others, not only for the propose of proving the existence of the conspiracy but also for proving that the other person was a party to it. In *Bhagwan Swamp v. State of Maharashtra* [AIR 1965 SC 682], this court analyzed the section as follows:-

- “(1) There shall be a *prima facie* evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;
- (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;
- (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them;
- (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and
- (5) it can only be used against a co-conspirator and not in his favour.”

49. In the light of the above principles we may now consider the arguments canvassed by Mr. Altaf Ahmed to make the entries in the books and the loose sheets admissible under the above section as relevant evidence. He submitted that the materials collected during investigation and placed on record clearly establish the existence of a general conspiracy amongst Jains to promote their economic interest by corrupting public servants. He next contended that the materials further disclosed that in order to accomplish the design of the general conspiracy, a number of separate conspiracies with similar purpose had been hatched up between Jains and different public servants.

50. At the outset we may point out that no charge was framed against the Jains from having entered into a criminal conspiracy amongst themselves (even though such was the

allegation in the charge sheet). We need not, therefore, consider the materials collected during investigation from that perspective. Indeed, according to the charges of conspiracy all the respondents were parties thereto and the conspiracy existed for the period from February, 1990 to January, 1991. Therefore we have to ascertain whether there is *prima facie* evidence affording a reasonable ground for us to believe about its such existence.

51. To persuade us to give an affirmative answer to the above question Mr. Altaf Ahmed drew our attention to the statements of Jacob Mathai (L.W. 4), Dr. P.K. Magu (L.W. 14), Vijay Kumar Verma (L.W. 15), Bharat Singh (L.W. 16) C. D.D Reddy (L.W. 17), S.R. Choudhary (L.W. 18), Ram Prasad (L.W. 19), H. P. Guha Roy (L.W. 20) and Narendra Singh (L.W. 21). On perusal of their statements we find that some of them are irrelevant to the charges of conspiracy with which we are now concerned while others, to the extent they can be translated into legally admissible evidence, only indicate that Shri Shukla was known to the Jain brothers and had gone to their residence on formal occasions. The above statements cannot be made a reasonable ground to believe that all of them have conspired together. So far as Shri Advani is concerned, we find that no one has even spoke about him in their statements. Since the first requirement of Section 10 is not fulfilled the entries in the documents cannot be pressed into service under its latter part.

52. Lastly, comes the questions whether the entries are 'admissions' within the meaning of Section 17 of the Act so as to be admissible as relevant evidence under Section 21; and if so, as against whom can the entries be proved. In Section 17 admission has been defined to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons, and under the circumstances, mentioned in the subsequent Sections (Sections 18 to 21). Section 18, so far as it is relevant for our present purposes, provides that statements made by party to the proceeding or by an agent to any such party, whom the Court regards under the circumstances of the case, has expressly or impliedly authorised by him to make them are admissions. Section 21 reads as under:

“21. Proof of admissions against persons making them, and by or on their behalf - Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-

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

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

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

From a combined reading of the above Sections it is manifest that an oral or documentary statement made by a party or his authorised agent, suggesting any inference as to any fact in

issue or relevant fact may be proved against a party to the proceeding or his authorised agent as 'admission' but, apart from exceptional cases (as contained in Section 21), such a statement cannot be proved by or on their behalf. While on this point the distinction between 'admission' and 'confession' needs to be appreciated. In absence of any definition of 'confession' in the Act, judicial opinion, as to its exact meaning, was not unanimous until the judicial Committee made an authoritative pronouncement about the same in *Pakala Narayana v. Emperor* [AIR 1939 PC 47] with these words:-

“[A] confession must either admit in terms the offence, or at any rate substantially all the facts which constitutes the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22 of the Stephen's "Digest of the Law of Evidence" as 'an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime'. If the surrounding articles are examined it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872, and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed the crime.’”

The above statement of law has been approved and consistently followed by this Court. See *Palvinder Kaur v. State of Punjab* [1953 SCR 94], *Om Parkash v. State of U.P.* [AIR 1960 SC 409] and *Veera Ibrahim v. State of Maharashtra* [(1976) 3 SCR 672].

53. It is thus seen that only voluntary and direct acknowledgement of guilt is a confession but when a confession falls short of actual admission of guilt it may nevertheless be used as evidence against the person who made it or his authorised agent as an 'admission' under section 21. The law in this regard has been clearly - and in our considered view correctly - explained in *Monir's Law of Evidence* (New Edition at pages 205 and 206), on which Mr. Jethmalani relied to bring home his contention that even if the entries are treated as 'admission' of Jains still they cannot be used against Shri Advani. The relevant passage reads as under:-

“The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the evidence Act, unless the statement amounts to a confession and was made to a person in authority in consequence of some improper inducement, threat or promise, or was made to police officer, or was made at a time when the accused was in custody of a police officer. If a statement was made by the accused in the circumstance just mentioned its admissibility will depend upon the determination of the question whether it does not

amount to a confession. It will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an inference as to a fact which is in issue in, or relevant to, the case and was not made to a police officer in the course of an investigation under Chapter XIV of the CrPC. *Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him.* Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between admission and a confession is of fundamental importance.” (emphasis supplied)

54. In the light of the preceding discussion we proceed to consider the validity of the arguments canvassed by Shri Altaf Ahmed in this regard. Mr. Altaf Ahmed urged that it being a settled principle of law that statements in account books of a person are 'admissions' and can be used against him even though those statements were never communicated to any other person, the entries would be admissible as admission of J.K. Jain, who made them that apart, he contended, they would be admissible against Jain brothers also as they were made under their authority as would be evident from their endorsements/signatures appearing against/below some of those entries. In support of his first contention he relied upon the following passage from the judgment of his Court in *Bhogilal Chunilal Pandya v. State of Bombay* [(1959) Supp. 1 SCR 310]:

“The first group of sections in the Act in which the word 'statement' occurs, are Ss. 17 to 21, which deal with admissions. Section 17 defines the word 'admission', Ss. 18 to 21 lay down what statements are admissions, and s. 21 deals with the proof of admissions against persons making them. The words used in Ss. 18 to 21 in this connection are 'statements made by.'. It is not disputed that statements made by persons may be used as admissions against them even though they may not have been communicated to any other person. For example, statements in the Account books of a person showing that he was indebted to another person are admissions which can be used against him even though these statements were never communicated to any other person. Illustration (b) of s. 21 also shows that the word 'statement' used in these sections does not necessarily imply that they must have been communicated to any other person. In the Illustration in question entries made in the book kept by a ship's captain in the ordinary course of business are called statements, though these entries are not communicated to any other person. An examination, therefore, of these sections show that in this part of the Act the word 'statement' has been used in its primary meaning namely, 'something that is stated' communication is not necessary in order that it may be a statement.”.

55. Even if we are to accept the above contentions of Mr. Altaf Ahmed the entries, which are statements as held by this Court in *Bhogilal Chunilal* and, being 'admissions' - and not 'confession' - cannot be used as against Shri Advani or Shri Shukla. However, as against Jains the statements may be proved as admissions under Section 18 read with Section 21 of the Act provided they relate to 'any fact in issue or relevant fact.' Needless to say, what

will be 'facts in issue' or 'relevant facts' in a criminal trial will depend upon, and will be delineated by, the nature of accusations made or charges levelled against the person indicated. In the two cases with which we are concerned in these appeals, the gravamen of the charges which were framed against Jains in one of them (quoted earlier) and were to be framed in the other pursuant to the order of the trial Court (quoted earlier) is that they entered into two separate agreements; one with Shri Shukla and the other with Shri Advani, in terms of which they were to make certain payments to them as a gratification other than legal remuneration as a motive or reward for getting their favour while they were 'public servants' and in pursuance of the said agreements payments were actually made to them. Thereby the Jains committed the offence of conspiracy under Section 120B of the Indian Penal code; and under Section 12 of the Prevention of Corruption Act, 1988 (P.C. Act for short), in that, they abetted the commission of offences under Section 7 of the Act by Shri Shukla and Shri Advani.

56. It is thus seen that the prosecution sought to prove that there were two separate conspiracies, in both of which Jains together figured as the common party and Shri Advani or Shri Shukla, as the other. Since we have already found that the prosecution has not been able to make out a *prima facie* case to prove that Shri Advani and Shri Shukla were parties to such conspiracies, the charges of conspiracy, as framed/sought to be framed, cannot stand also against the Jains, for the simple reason that in a conspiracy there must be two parties. Resultantly, the statements cannot be proved as admission of Jains of such conspiracy. We hasten to add that the case the prosecution intended to project now was not that there was a conspiracy amongst the Jains to offer illegal gratification to Shri Advani and Shri Shukla and that pursuant thereto the latter accepted the same. We need not, therefore, dilate on the question whether, if such was the case of the prosecution, the statements could be proved against the Jains as their admission.

60. Before we conclude it need be mentioned that another question of considerable importance that came up for consideration in these appeals was whether members of parliament come within the definition of 'public servant' in the P.C. Act so as to make the respondents liable for prosecution for alleged commission of offences thereunder. We did not deem it necessary to go into that question as we found, proceeding on the assumption that they could be so prosecuted, that no *prima facie* case was made out against any of the respondents to justify the charges that were framed against the Jains and Shri Shukla (in one case); and were to be framed against Jains and Shri Advani (in the other) pursuant to the order of the trial Court. Accordingly, we dismiss these appeals keeping this question of law open. Appeals dismissed.

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Veera Ibrahim v. State of Maharashtra

(1976) 2 SCC 302 : AIR 1976 SC 1167

R.S. SARKARIA, J. - Veera Ibrahim, appellant was accused No. 2 in the complaint filed by Assistant Collector of Customs, Preventive Department, Bombay before the Chief Presidency Magistrate for his prosecution along with one Abdul Umrao Rauf, accused No. 1, in respect of offences under Section 135 (a) and 135 (b) of the Customs Act, 1962 and Section 5 of the Imports and Exports (Control) Act, 1947. The trial Magistrate convicted both the accused on all the three charges and sentenced them to two years' rigorous imprisonment on each count with a direction that the sentences would run concurrently. Against that judgment, two separate appeals were filed by the convicts in the Bombay High Court which acquitted both the accused of the offences under Section 5 of the Imports and Exports (Control) Act, 1947 and under Section 135 (b) of the Customs Act, but maintained their conviction on the charge under Section 135 (a) of that Act reducing the sentence to one year's rigorous imprisonment. The High Court, however, granted a certificate under Article 134(1)(c) of the Constitution, on the basis of which, this appeal has been filed.

2. The main question with reference to which the certificate was granted by the High Court, was: whether Section 108 of the Customs Act, 1962 is *ultra vires* the provisions of clause (3) of Article 20 of the Constitution? But Mr Chaudhury, appearing for the appellant, does not press this question now before us.

3. The first contention canvassed by the Counsel is that on the facts and circumstances of the case, the appellant's statement recorded under Section 108 of the Customs Act, 1962, on the foot of which the appellant has been convicted, was hit by clause (3) of Article 20 because at the time of making that statement, the appellant was "accused of an offence" under Section 124 of the Bombay Police Act, and the statement was obtained under compulsion of law. Stress has been placed on the fact that the appellant was, in fact, arrested by the police on a charge under Section 124 of the Bombay Police Act and the goods were seized under a *panchnama*, prepared by them in the course of investigation. In this connection, reference has been made to *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi* [AIR 1954 SC 300].

4. On the other hand, Mr H.R. Khanna, appearing for the respondent submits that the words "accused of an offence" occurring in Article 20(3) take in only that person against whom a formal accusation of an offence has been levelled. Two other conditions for the applicability of this clause, according to the counsel, are: (a) that the testimony in question had been obtained under compulsion, and (b) it relates to the offence of which he stands formally accused. These conditions, it is maintained were not fulfilled in the present case.

5. Clause (3) of Article 20 provides:

"No person accused of any offence shall be compelled to be a witness against himself."

6. From an analysis of this clause, it is apparent that in order to claim the benefit of the guarantee against testimonial compulsion embodied in this clause, it must be shown, firstly, that the person who made the statement was "accused of any offence"; secondly, that he made

this statement under *compulsion*. The phrase “accused of any offence” has been the subject of several decisions of this Court so that by now it is well settled that only a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in his prosecution, would fall within its ambit.

7. In *R.C. Mehta v. State of West Bengal* [AIR 1970 SC 940], this point came up for consideration in the context of a statement recorded by an officer of customs in an enquiry under Section 171-A of the Sea Customs Act. One of the contentions raised was, that a person against whom such an enquiry is made is a “person accused of an offence”, and on that account, he cannot be compelled to be a witness against himself and the statement obtained or evidence collected under the aforesaid provision by the officer of customs is inadmissible. This contention was repelled. Shah, J., speaking for the Court, made these apposite observations:

“Under Section 171-A of the Sea Customs Act, a Customs Officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression “any person” includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a customs officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the customs officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the customs officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The customs officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs: when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act he is not accusing the person of any offence punishable at a trial before a magistrate.”

8. After a survey of case law, the Court pointed out the circumstances, the existence of which is ordinarily necessary to clothe a person with the character of a “person accused of an offence” :

“Normally a person stands in the character of an accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a magistrate competent to try or send to another magistrate for trial of the offence. Where a customs officer arrests a person and informs that person of the grounds of his arrest [which he is bound to do under Article 22(1) of the Constitution] for the purpose of holding an enquiry into the

infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.”

9. The abovementioned observations are a complete answer to the contention of the appellant. In the light of these principles, it is clear that when the statement of the appellant was recorded by the Customs Officer under Section 108, the appellant was not a person “accused of any offence” under the Customs Act, 1962. An accusation which would stamp him with the character of such a person was levelled only when the complaint was filed against him, by the Assistant Collector of Customs complaining of the commission of offences under Section 135(a) and Section 135(6) of the Customs Act.

10. True, that the appellant was arrested by the police on December 12, 1967 on suspicion of having committed an offence under Section 124 of the Bombay Police Act and a *panchnama* of the packages in the truck was also prepared. But the factual ingredients of that offence are materially different from those of an offence under the Customs Act. This will be apparent from a bare reading of Section 124 of the Bombay Police Act, which provides:

“Whoever has in his possession or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe is stolen property or property fraudulently obtained, shall, if he fails to account for such possession or to act to the satisfaction of the magistrate, on conviction, be punished with imprisonment for a term which may extend to one year but shall not, except for reasons to be recorded in writing, be less than one month and shall also be liable to the fine which may extend to five hundred rupees.”

11. Even in respect of that offence, the police did not register any case or enter any F.I.R. which normally furnishes a foundation for commencing a police investigation. The police did not open the packages or prepare inventories of the goods packed therein. Indeed, the police appear to have dropped further proceedings. They did not take any steps for prosecuting the appellant even for an offence under the Bombay Police Act, 1951. They informed the customs authorities, who opened the packages, inspected the goods and on finding them contraband goods, seized them under a *panchnama*. The customs authorities called the appellant and his companion to the customs house, took them into custody, and after due compliance with the requirements of law, the Inspector of Customs questioned the appellant and recorded his statement under Section 108 of the Customs Act. Under the circumstances it was manifest that at the time when the customs officer recorded the statement of the appellant, the latter was not formally “accused of any offence”. The High Court was therefore right in holding that the statement recorded by the Inspector of Customs was not hit by Article 20(3) of the Constitution.

12. The next question to be considered is, whether this statement was hit by Section 24 of the Evidence Act. The contention is that this statement was obtained under compulsion of law inasmuch as he was required to state the truth under threat of prosecution for perjury.

13. For reasons that follow, we are unable to sustain this contention.

14. To attract the prohibition enacted in Section 24, Evidence Act, these facts must be established:

- (i) that the statement in question is a confession;
- (ii) that such confession has been made by an accused person;
- (iii) that it has been made to a person in authority;
- (iv) that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;
- (v) such inducement, threat or promise, must have reference to the charge against the accused person;
- (vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

15. In the present case, facts (i), (iv) and (vi) have not been established. Firstly, the statement in question is not a “confession” within the contemplation of Section 24. It is now well-settled that a statement in order to amount to a “confession” must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, howsoever grave, is not by itself a confession. A statement which contains an exculpatory assertion of some fact, which if true, would negative the offence alleged cannot amount to a confession

16. A perusal of the statement Ex. I made by the appellant before the Inspector of Customs would show that it contained exculpatory matter. Therein, the deponent claimed that he was not aware that the packages which were loaded in the truck were contraband goods, and alleged that the goods were not loaded under his instructions. The deponent claimed to be an innocent traveller in the truck when he said:

I did not ask Mullaji (driver) what goods were being loaded in his lorry ... Mullaji was only my friend and I was not aware of any of his *mala fide* activities.

17. Moreover, the incriminating facts admitted in this statement, do not, even if taken cumulatively amount to admission of *all* the facts which constitute any offence. To bring home an offence under Section 135 of the Customs Act, in addition to the facts admitted in Ex. I, it had to be established further that these goods were dutiable or contraband goods.

18. For these reasons, it could be said beyond doubt, that the statement Ex. I was not a “confession” within the meaning of Section 24, Evidence Act.

19. *Secondly*, it has not been shown that the customs officer - though a person in authority - had offered any inducement or held out any threat or promise to the appellant.

20. Christophen Scares, the Inspector of Customs (PW 4) testified that no threats, coercion or inducements were used and that the statement Ex. I was made by the appellant, voluntarily.

21. While it may be conceded that a person summoned by an officer of customs to make a statement under Section 108 of the Customs Act, is under compulsion of law to state the truth,

the compulsion thereunder, assuming it amounts to a threat, does not proceed “*from a person in authority*” within the contemplation of Section 24 but emanates from law.

22. *Thirdly*, the mere fact that the Inspector of Customs had before recording the statement, warned the deponent of the possibility of his prosecution for perjury in case he did not make the statement truthfully, cannot be construed as a threat held out by the officer which could have reasonably caused the person making the statement to suppose that he would by making that statement, gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him for smuggling.

23. In view of what has been said above, we have no hesitation in holding that the statement Ex. I, was not barred under Section 24, Evidence Act. The statement Ex. P-1 was clearly admissible under Section 21, Evidence Act as an admission of incriminating facts.

24. *Lastly*, Mr Chaudhury tried to contend that the incriminating facts admitted in Ex. I taken along with the other facts appearing in the evidence of prosecution witnesses, were insufficient to establish an offence under Section 135, Customs Act against the appellant because no notification under sub-section (2) of Section 123, of the Customs Act had been issued in respect of the import of the goods of the kind seized, and the aid of the statutory presumption under that section was not available to the prosecution.

25. We are unable to accept this contention. While it is true that in the absence of the requisite notification, the statutory presumption under Section 123 could not be invoked by the prosecution, the circumstances established unerringly raise an inference with regard to all the factual ingredients of an offence under Section 135(6) read with Section 135 (ii) of the Customs Act. In Ex. I which was proved by PW 4, it is admitted that these packages which were later found to contain contraband goods by the customs authorities, were surreptitiously loaded in the truck under cover of darkness at Reti Bunder (seashore) from the side of seaside wall, in the presence of the appellant, and thereafter the first accused took the wheel, while the appellant sat by his side in the truck, and drove towards Sandhurst railway station. It is further admitted that some bania paid Rs2,000 to the appellant which was meant to be given to the driver of the truck. Unfortunately, the truck skidded near the Dongri police station and came to a stop. On hearing the impact of the accident, the police came out, took both the accused into the police station and seized the truck and the goods. In short, the appellant had clearly admitted that these packages containing the contraband goods were imported surreptitiously from Reti Bunder under cover of darkness. It was further established *de hors* the statement of the appellant, that these packages, on opening by the customs officer, were found to contain contraband goods of foreign make. They were brand new articles packed in bulk. The circumstances of the arrest of the appellant while escaping from the truck, the seizure of the truck and the goods, the contraband nature of the goods, the fact that at the time of the seizure the goods were in the charge of the appellant, the fact that no duty on these goods had been paid, the seizure of Rs 2,000 as cash from the appellant etc. were proved by evidence *aliunde* rendered by PWs 1 and 2. To some extent, the hostile witness, PW 5, also, supported the prosecution. The circumstances established unmistakably and irresistibly pointed to the conclusion that the appellant was knowingly concerned in a fraudulent attempt at evasion, if not, fraudulent evasion, of duty chargeable on those contraband goods.

26. In the result, the appeal fails and is dismissed.

* * * * *

Aghnoo Nagesia v. State of Bihar

(1966) 1 SCR 134 : AIR 1966 SC 119

BACHAWAT, J. - The appellant was charged under Section 302 of the Indian Penal Code for murdering his aunt, Ratni, her daughter, Chamin, her son-in-law, Somra and Dilu, son of Somra. He was convicted and sentenced to death by the Judicial Commissioner of Chotanagpur. The High Court of Patna accepted the death reference, confirmed the conviction and sentence and dismissed the appeal preferred by the appellant. The appellant now appeals to this Court by special leave.

2. The prosecution case is that on August 11, 1963 between 7 a.m. and 8 a.m. the appellant murdered Somra in a forest known as Dungijharan Hills and later Chamin in Kesari Garha field and then Ratni and Dilu in the house of Ratni at Village Jamtoli.

3. The first information of the offences was lodged by the appellant himself at Police Station Palkot on August 11, 1963 at 3.15 p.m. The information was reduced to writing by the officer-in-charge, Sub-Inspector H.P. Choudhury, and the appellant affixed his left thumb-impression on the report. The Sub-Inspector immediately took cognisance of the offence, and arrested the appellant. The next day, the Sub-Inspector in the company of the appellant went to the house of Ratni, where the appellant pointed out the dead bodies of Ratni and Dilu and also a place in the orchard of Ratni covered with bushes and grass, where he had concealed a *tangi*. The appellant then took the Sub-Inspector and witnesses to Kasiari garha khet and pointed out the dead body of Chamin lying in a ditch covered with *Ghunghu*. The appellant then took the Sub-Inspector and the witnesses to Dungijharan Hills, where he pointed out the dead body of Somra lying in the slope of the hills to the north. The Sub-Inspector also recovered from the appellant's house a *chadar* stained with human blood. The evidence of PW 6 shows that the appellant had gone to the forest on the morning of August 11, 1963.

4. The medical evidence discloses incised wounds on all the dead bodies. The injuries were caused by a sharp-cutting weapon such as a *tangi*. All the four persons were brutally murdered.

5. There is no eyewitness to the murders. The principal evidence against the appellant consists of the first information report, which contains a full confession of guilt by the appellant. If this report is excluded, the other evidence on the record is insufficient to convict the appellant. The principal question in the appeal is whether the statement or any portion of it is admissible in evidence.

6. The first information report reads as follows:

“My name is Aghnu Nagesia. (1) My father's name is Lodhi Nagesia. I am a resident of Lotwa, Tola Jamtoli, Thana Palkot, District Ranchi. Today, Sunday, date not known, at about 3 p.m. I having come to the P.S. make statement before you the S.I. of Police (2) that on account of my Barima (aunt) Mussammat having given away her property to her daughter and son-in-law quarrels and troubles have been occurring among us. My Barima has no son and she is a widow. Hence on her death we shall be owners of her lands and properties and daughter and son-in-law of Barima shall have no right to them. She lives separate from us, and lives in her house

with her daughter and son-in-law and I live with my brother separately in my house. Our lands are separate from the time of our father. (3) Today in the morning at about 7-8 a.m. I had gone with a *tangi* to Duni Jharan Pahar to cut shrubs for fencing. I found Somra sitting alone there who was grazing cattle there. (4) Seeing him I got enraged and dealt him a *tangi* blow on the filli (calf) of right leg, whereby he toppled down on the ground. Thereupon I dealt him several Chheo (blows) on the head and the face, with the result that he became speechless and died. At that time there was none near about on that Pahar. (5) Thereafter I came to the Kesari Garu field where Somra's wife Chamin was weeding out grass in the field. (6) I struck her also all of a sudden on the head with the said *tangi* whereby she dropped down on the ground and died then and there. (7) Thereafter I dragged her to an adjoining field and laid her in a ditch to the north of it and covered her body with Gongu (Pala ke Chhata) so that people might not see her. There was no person then at that place also. (8) Thereafter I armed with that *tangi* went to the house of my Barima to kill her. When I reached there, I found that she was sitting near the hearth which was burning. (9) Reaching there all of a sudden I began to strike her on the head with *tangi* whereupon she dropped down dead at that very place. (10) Near her was Somra's son aged about 3-4 years. (11) I also struck him with the *tangi*. He also fell down and died. (12) I finished the line of my Barima so that no one could take share in her properties. (13) I hid the *tangi* in the *jhari* of my Barima's house. (14) Later on I narrated the occurrence to my *chacha* (father's brother) Lerha that I killed the aforesaid four persons with *tangi*. After sometime (15) I started for the P.S. to lodge information and reaching the P.S. I make this statement before you. (16) My Barima had all along been quarrelling like a *Murukh* (foolish woman) and being vexed, I did so. (17) All the dead bodies and the *tangi* would be lying in those places. I can point them out. (18) This is my statement. I got it read over to me and finding it correct, I affixed my left thumb-impression."

7. We have divided the statement into 18 parts. Parts 1, 15 and 18 show that the appellant went to the police station to make the report. Parts 2 and 16 show his motive for the murders. Parts 3, 5, 8 and 10 disclose the movements and opportunities of the appellant before the murders. Part 8 also discloses his intention. Parts 4, 6, 9 and 11 disclose that the appellant killed the four persons. Part 12 disclose the killing and the motive. Parts 7, 13 and 17 disclose concealment of a dead body and a *tangi* and his ability to point out places where the dead bodies and the *tangi* were lying. Part 14 discloses the previous confession by the appellant. Broadly speaking, the High Court admitted in evidence parts 1, 2, 3, 5, 7, 8, 10, 13, 15, 16, 17 and 18.

8. On behalf of the appellant, it is contended that the entire statement is a confession made to a police officer and is not provable against the appellant, having regard to Section 25 of the Indian Evidence Act, 1872. On behalf of the respondent, it is contended that Section 25 protects only those portions of the statement which disclose the killings by the appellant and the rest of the statement is not protected by Section 25.

9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Sections 24 to

30 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides: "No confession made to a police officer, shall be proved as against a person accused of an offence." The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by Section 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by Section 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Sections 24, 25 and 26. It provides that when any fact is proved to be 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 forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-section (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of Section 27 of the Evidence Act. The words of Section 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under Section 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by Section 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under Section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by Section 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by Section 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.

10. Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under Section 157 of the Evidence Act or to contradict him under Section 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under Section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under Section 21

of the Evidence Act and is relevant. But a confessional first information report to a police officer cannot be used against the accused in view of Section 25 of the Evidence Act.

11. The Indian Evidence Act does not define “confession”. For a long time, the courts in India adopted the definition of “confession” given in Article 22 of *Stephen’s Digest of the Law of Evidence*. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. This definition was discarded by the Judicial Committee in *Pakala Narayanaswami v. King-Emperor* [(1939) LR 66 IA 66, 81]. Lord Atkin observed:

“(N)o statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man’s possession.”

These observations received the approval of this Court in *Palvinder Kaur v. State of Punjab* [(1953) SCR 94]. In *State of U.P. v. Deoman Upadhyaya* [(1961) 1 SCR 14], Shah, J. referred to a confession as a statement made by a person stating or suggesting the inference that he has committed a crime.

12. Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him, the whole of it should be tendered in evidence, and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused.

13. Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.

14. If proof of the confession is excluded by any provision of law such as Section 24, Section 25 and Section 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as Section 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

15. Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under Section 304-A of the Indian Penal Code and a statement made by him to a police officer that "I was drunk; I was driving a car at a speed of 80 miles per hour; I could see A on the road at a distance of 80 yards; I did not blow the horn; I made no attempt to stop the car; the car knocked down A." No single sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under Section 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement. Again, take a case where a single sentence in a statement amounts to an admission of an offence. 'A' states "I struck 'B' with a *tangi* and hurt him." In consequence of the injury 'B' died. 'A' committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession.

16. If the confession is caused by an inducement, threat or promise as contemplated by Section 24 of the Evidence Act, the whole of the confession is excluded by Section 24. Proof of not only the admission of the offence but also the admission of every other incriminating fact such as the motive, the preparation and the subsequent conduct is excluded by Section 24. To hold that the proof of the admission of other incriminating facts is not barred by Section 24 is to rob the section of its practical utility and content. It may be suggested that the bar of Section 24 does not apply to the other admissions, but though receivable in evidence, they are of no weight, as they were caused by inducement, threat or promise. According to this suggestion, the other admissions are relevant, but are of no value. But we think that on a plain construction of Section 24, proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, Sections 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence.

17. A little reflection will show that the expression "confession" in Sections 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact

discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of Sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, Section 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

18. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27.

19. Our attention is not drawn to any decision of this Court or of the Privy Council on the question whether apart from Section 27, a confessional first information report given by an accused is receivable in evidence against him. Decisions of the High Courts on this point are hopelessly conflicting. They contain all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime.

20. We think, therefore, that save and except Parts 1, 15 and 18 identifying the appellant as the maker of the first information report and save and except the portions coming within the purview of Section 27, the entire first information report must be excluded from evidence.

21. Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. *Prima facie* therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer 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 Section 27, there is conflict of opinion. For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the *tangi* is admissible in evidence. The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the *tangi*, the discovery of the dead bodies and the *tangi* in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to Dungi Jharan Hills on the morning of August 11, 1963. This evidence is not sufficient to convict the appellant of the offences under Section 302 of the Indian Penal Code. In the result, the appeal is allowed, the conviction and sentence passed by the Courts below are set aside, and the appellant is directed to be set at liberty forthwith.

Pulukuri Kottaya v. Emperor

AIR 1947 PC 67 : 1947 IC 135

SIR JOHN BEAUMONT - This is an appeal by special leave against the judgment and order of the High Court of Judicature at Madras, dated October 22, 1945, dismissing an appeal against the judgment and order of the Court of Sessions, Guntur Division, dated August 2, 1945 whereby the appellants, who were accused Nos. 1 to 9 and nine others, were found guilty on charges of rioting and murder. Appellants Nos. 1, 2, 3, 4, 7 and 8 were sentenced to death, and appellants Nos. 3 to 9 were sentenced to transportation for life. There were other lesser concurrent sentences which need not be noticed. At the conclusion of the arguments their Lordships announced the advice which they would humbly tender to His Majesty and they now give their reasons for that advice.

2. The offence charged was of a type common in many parts of India in which there are factions in a village, and the members of one faction are assaulted by members of the other faction and, in the prosecution which results, the Crown witnesses belong to the party hostile to the accused; which involves that their evidence requires very careful scrutiny. In the present case, the assessors were not prepared to accept the prosecution evidence, but the learned Sessions Judge, whilst taking careful note of the fact that the six eye-witnesses were all hostile to the accused, nevertheless considered that the story which they told was substantially true, and accordingly he convicted the accused. As already noted, this decision was upheld by the High Court in appeal.

3. The grounds upon which leave to appeal to His Majesty in Council, was granted were two:-

1. The failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary Police investigation involving, it is alleged, a breach of the express provisions of S. 162 of the Criminal P.C.

2. The alleged wrongful admission and use in evidence of confessions alleged to have been made whilst in Police custody by appellants Nos. 3 and 6. This point involves an important question as to the construction of S.27 of the Indian Ev. Act upon which the opinions of High Courts in India are in conflict.

5. The facts material upon this part of the case are these. The offence took place at about 6.30 p.m. on December 29, 1944 and at 7.00 a.m. on December 30, the Police Sub-Inspector held an inquest on the body of one of the murdered men. He examined five of the prosecution witnesses, including four of the alleged six eye-witnesses and wrote down their statements in his note book. After the conclusion of the Inquest, the Circle Inspector took over the investigation from the Police Sub-Inspector and on the same day, that is, December 30, he examined all the alleged eye-witnesses and others, including all the witnesses who had been examined by the Police Sub-Inspector, and their statements were recorded in the Case Diary prepared by the Circle Inspector. It is the failure to produce the note-book of the Police Sub-Inspector which constitutes the alleged infringement of the proviso to S. 162, and the facts as to this are stated in an affidavit of Gutlapally Venkata Appayya sworn on October 19, 1945

and are not challenged. Prior to the commencement of the preliminary inquiry before the Magistrate, an application was made on behalf of the accused for grant of copies of statements under S. 162 of the Criminal P.C. recorded by the Sub-Inspector and the Circle Inspector of Police from the prosecution witnesses in the case during investigation. The accused were supplied with copies of statements made by witnesses before the Circle Inspector of Police and were informed that statements made to the Sub-Inspector of Police were not available. During the Sessions trial, when prosecution witness No.2 who was the principal prosecution witness, was in the witness-box, Counsel for the accused represented to the Court that he had not been supplied with copies of statements recorded by the Sub-Inspector at the first inquest and requested the Court to make those statements available to enable him to cross-examine the important prosecution witnesses with reference to the earliest statements. The learned Sessions Judge directed the Public Prosecutor to comply with the request. The Public Prosecutor, after consulting the Sub-Inspector and Circle Inspector, who were present in Court, submitted to the Court that except what was recorded in the inquest report itself, no other statements were recorded by the sub-Inspector, and the learned Judge directed the defence Counsel to proceed. The next day, when the cross-examination of prosecution witness No.2 was continued, Counsel for the accused submitted to the Court that he desired to file an application for copies of statements recorded by the Sub-Inspector at the first inquest so that it might be endorsed by the prosecution that no such record of statements existed. Then the Public Prosecutor stated to the Court that he fully realized his responsibility in making the statements he had made on the previous day, but there was no record of any statement made at the inquest available. On the fourth day of the trial, after the principal prosecution witnesses had been discharged, the Police Sub-Inspector gave evidence, and he then produced in the witness-box his note-book containing the statements of the five witnesses he had examined at the inquest, and a copy of such statements was then supplied to the accused. There are some discrepancies between the statements made to the Police Sub-Inspector and the statements of the witnesses in the witness-box, but it is not suggested that such discrepancies are of a vital nature.

6. It is clear from the facts narrated above that there was a breach of the proviso to S. 162 of the Criminal P.C., and that the entries in the Police Sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence, and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to S.162 as matter of gravity. *Baliram v. King-Emperor* [AIR 1945 Nag] where the record of statements made by witnesses had been destroyed, and *Emperor v. Bansidhar* [AIR 1931 All 262] where the Court had refused to supply the accused copies of statements made by witnesses to the Police, afford instances in which failure to comply with the provisions of S.162 have led to the conviction being quashed. Their Lordships would, however, observe that where, as in those

two cases, the statements were never made available to the accused, an inference which is almost irresistible, arises of prejudice to the accused. In the present case, the statements of the witnesses were made available though too late to be effective, and their contents are known. This by itself might not be decisive, but, as already noted, the Circle Inspector re-examined the witnesses whom the Police Sub-Inspector had examined, and did so on the same day. The notes of the examination by the Circle Inspector were made available to the accused at the earliest opportunity, and when the note-book of the Police Sub-Inspector was produced towards the end of the prosecution case, Counsel for the accused was in a position to ascertain whether there was any inconsistency between the statements made to the Police Sub-Inspector and those made later in the day to the Circle Inspector. If any such inconsistency had been discovered, this would have been a strong point for the accused in their appeal, but no such point was taken; indeed, the only complaint upon this subject in the High Court was that the Police Sub-Inspector ought to be presumed to have prepared a Case Diary which he was suppressing. The High Court rejected this contention, rightly as their Lordships think. Nor has any such point been taken before this Board, and the entries from the Circle Inspector's diary are not on record. In the result, their Lordships are satisfied that, in the peculiar circumstances of this case, no prejudice was occasioned to the accused by the failure to produce in proper time the note-book of the Police Sub-Inspector.

7. Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Criminal P.C. cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of S. 537 of the Criminal P.C. if the Court is satisfied that such irregularity has not, in fact, occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha v. Nanak* [28 Cr. LJ 291] in which the Court expressed the view that S. 537 of the Criminal P.C. applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of or disobedience to, mandatory provisions of the Code, and to *Madura Muthu Vannian In re* [AIR 1922 Mad. 512] in which the view was expressed that any failure to examine the accused under S. 342 of the Criminal P.C. was fatal to the validity of the trial and could not be cured under S. 537. In their Lordships' opinion, this argument is based on too narrow a view of the operation of s. 537. When a trial is conducted in a manner different from that prescribed by the Code the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and nonetheless so because the irregularity involves, as much nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman v. King Emperor* [AIR 1927 PC 44] where failure to comply with S. 360 of the Criminal P.C. was held to be cured by ss. 533 and 537. The present case falls under S. 537 and their Lordships hold the trial valid notwithstanding the breach of S.162.

8. The second question, which involves the construction of S.27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms:-

“25. No confession made to a Police Officer, shall be proved as against a person accused of any offence.

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

27. 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.”

10. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in Police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly, can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in Police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the “fact discovered” is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of S. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the Police, or by persons in Police custody. That ban was presumably inspired by the fear of the Legislature that a person under Police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the Police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held to nullify the substance of the section. In their Lordships’ view, it is fallacious to treat the “fact discovered” within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its

discovery in the setting in which it is discovered. Information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added “with which I stabbed A”, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

11. High Courts in India have generally taken the view as to the meaning of S.27 which appeals to their Lordships, and reference may be made particularly to *Sukhan v. Crown* [AIR 1929 Lah 344] and *Ganu Chandra Kashid v. Emperor* [AIR 1932 Bom 286] on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court in *Athappa Goundan, In re* [AIR 1937 Mad. 618] where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S.27. In that case, the Court had to deal with a confession of murder made by a person in Police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag, which, according to the confession, had been used in, or were connected with the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature, their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S.26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof and the other links must be forged in manner allowed by law.

12. In their Lordships’ opinion *Athappa Goundan* case [AIR 1937 Mad. 618] was wrongly decided, and it no doubt influenced the decision now under appeal.

13. The statements to which exception is taken in this case are first a statement by accused No.6 which he made to the Police Sub-Inspector and which was reduced into writing, and is Ex. “P”. It is in these terms:-

“The mediatorsnama written at 9.00 a.m. on January 12, 1945, in front of Maddineni Verrayya’s choultry and in the presence of the undersigned mediators”.

Statement made by the accused, Inala Sydayya on being arrested.

“About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and

Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village, I will show if you come. We did all this at instigation of Pulukuri Kotayya”.

(Signed) POTLA CHINA MATTAYYA (Signed) KOTTA KRISHNAYYA
(Sgd.) G. BAPAI AH

January 12, 1945

Sub-Inspector of Police

14. The whole of that statement except the passage “I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come” is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused No.6 said “I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya” must be omitted.

15. A confession of accused No.3 was deposed to by the Police Sub-Inspector, who said that accused No.3 said to him:-

“I stabbed Sivayya with a spear. I hid the spear in a yard in my village. I will show you the place.”

The first sentence must be omitted. This was followed by a Mediatordnama, Ex. Q.1, which is unobjectionable except for a sentence in the middle, “He said that it was with that spear that he had stabbed Boddapati Sivayya,” which must be omitted.

16. The position therefore, is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in S. 167 of the Indian Evidence Act. It was therefore, the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore, to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions, they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them.

17. Their Lordships have, therefore, humbly advised His Majesty that this appeal be allowed and that the case be remitted to the High Court of Madras, with directions to consider whether the evidence on record apart from the confessional statements of accused No.3 and accused No.6 which their Lordships have held to be inadmissible, is sufficient to justify the convictions and to make such order in the matter as may be right having regard to their decision upon the question remitted to them.

* * * * *

Bodhraj v. State of J. & K.

(2002) 8 SCC 45

ARIJIT PASAYAT, J. - These four appeals relate to a Division Bench judgment of the Jammu and Kashmir High Court dated 31-7-2000. While Criminal Appeals Nos. 921 of 2000, 791 and 792 of 2001 have been filed by the accused, Criminal Appeal No. 837 of 2001 has been filed by the State.

2. Ravinder Kumar (Accused 1), Ashok Kumar (Accused 2) and Rajesh Kumar (Accused 6) were convicted by the trial court while Bodhraj (Accused 3), Bhupinder (Accused 4), Subash Kumar (Accused 5) and Rakesh Kumar (Accused 7) were acquitted by the trial court, but the High Court set aside their acquittal and convicted them. Rohit Kumar (Accused 8) and Kewal Krishan (Accused 9) were acquitted by the trial court and their acquittal has been upheld by the High Court. Another accused, i.e., Kishore Kumar was acquitted by the trial court. He having died during the pendency of the appeal before the High Court, the appeal against him was held to have abated. Accused Rajesh Kumar has not preferred any appeal against the conviction as upheld by the High Court.

3. Accused 1 and Accused 2 having been convicted under Section 302 read with Section 120-B of the Indian Penal Code, 1860 (in short "IPC") were sentenced to suffer imprisonment for life and pay a fine of Rs 20,000 each. It was stipulated that for default in paying the fine, each had to suffer another year of imprisonment. Similar was the case with Accused 6. So far as Accused 3, 4, 5 and 7 are concerned, the High Court convicted and sentenced them on a par with the other three accused.

4. The factual scenario as highlighted by the prosecution is as follows:

Swaran Singh @ Pappi (hereinafter referred to as "the deceased") was running a finance company. Accused 2 (Ashok Kumar) and Accused 1 (Ravinder Kumar) had taken huge amounts as loan from the deceased. They suggested to the deceased to enter into a financial arrangement. On the fateful day, i.e., 3-8-1994, the deceased went to his business premises. After about 10 minutes of his arrival, accused Ravinder Kumar also reached his office. As the deceased had brought some money from his house which was to be deposited in a bank, Darshan Singh (PW 15), an employee was asked to make the deposit. Since no vehicle was available, Ravinder Kumar gave the key of his car to Darshan Singh. The registration number of the car is CH 01 5408. Darshan Singh left the office around 11.30 a.m. and returned around 1.30 p.m. On his return, Darshan found the deceased in the company of accused Ravinder Kumar and Ashok Kumar. He returned the key of the car to Ravinder Kumar. After about 10/15 minutes, the deceased and accused Ashok Kumar left the office. At the time of his departure, the deceased told Darshan to take the food which was to come from his house, as they were going out to have food. Accused Ashok Kumar and the deceased went to Hotel Asia for taking their food. Later on, accused Ravinder Kumar joined them. All the three after taking food went to the business premises of Gian Singh (PW 1) who was a property dealer and broker. He was informed that they were interested in purchasing some land for setting up a flour mill. Ravinder and Ashok Kumar persuaded the deceased to accompany them for the selection of the site. Along with Gian Singh (PW 1), another property dealer was also picked

up. This was done as PW 1 wanted to go to the site in question along with Pratap Singh (PW 2) who was his business partner. All of them went to Village Dhiansar where the land was situated. They went by Car No. JK 02B 566. As accused Ravinder Kumar appeared to be in extreme haste, he told that the site has been approved and PWs 1 and 2 were told that they would settle the matter at their business premises. When they were returning, the deceased was attacked by some persons (later on identified as Accused 3 to 10). Accused 1 and 2 remained silent spectators and even did not pay any heed to the pitiful plea of the deceased to bring the car so that he could escape the attacks. On the contrary, they left the scene of occurrence leaving behind the deceased and PWs 1 and 2. They did not report the matter to the police and even though they claimed to be friends of the deceased, did not even inform the family members of the deceased. They owed huge amounts and issued cheques for which they had made no provision. Ashok Kumar made use of the cheque book of his wife and issued a cheque in respect of her bank account, though, the same was not operated for quite some time. Accused Rajesh Kumar's presence was established as later on, a licensed revolver belonging to accused Ravinder Kumar was recovered at the instance of Ravinder Kumar. The licence of the revolver was seized from the house of Ravinder Kumar and the father of the said accused produced the same before the police in the presence of witnesses. Pistol of the deceased was also recovered at his instance. The licence in respect of the pistol was seized on a personal search of the deceased at the spot of occurrence. One Hari Kumar (PW 18) stated that accused Ravinder Kumar and Ashok Kumar made a statement before him that they had got the deceased killed because he was demanding money from them. From the fact that the land was to be selected was only known to accused Ravinder Kumar and Ashok Kumar, an inference was drawn that it was these two accused who had hired the assailants and planted them well in advance for the ultimate elimination of the deceased. The fact that accused Ravinder Kumar left the office of the deceased earlier and joined them at the hotel was considered significant, as the intervening period was utilized by him to inform the assailants as to where they would be taking the deceased for the assaults being carried out. Accused Rajesh Kumar and Subash Kumar had also suffered bullet injury which was on account of the firing done by the deceased while he was trying to save his life.

5. Recoveries of various weapons used by the assailants were made pursuant to the disclosures made by the accused Bodhraj, Bhupinder, Subash Kumar, Rajesh Kumar and Rakesh Kumar. Recoveries were witnessed by several witnesses. Bodhraj was identified by Jhuggar Singh (PW 6) and Santokh Singh (PW 7). Bhupinder Singh was identified by Hari Kumar (PW 18) and Gurmit Singh. Similar was the case with accused Subash Kumar. Rajesh Kumar was identified by Ranjit Sharma (PW 23) and Hari Kumar (PW 18). Accused Rakesh Kumar was identified by Ranjit Sharma (PW 23) and Gurmit Singh, who was not examined in court. Accused Bodhraj, Bhupinder, Rakesh Kumar, Rohit and Kewal Krishan were identified by Nainu Singh (PW 9) while Subash Kumar and Rajesh Kumar were identified by Santokh Singh (PW 7) and Surjit Singh (PW 8). The identification was done on two dates i.e. 11-8-1994 and 16-8-1994. Different eyewitnesses claimed to have seen the occurrence either in full or partially. PWs 1, 2, 7, 8 and 9 were really the crucial witnesses. Santokh Singh (PW 7) was disbelieved by the trial court as well as by the High Court.

6. In order to establish the plea that conspiracy was hatched, reliance was placed on the plea of Kapur Chand who was not examined in court. Several other circumstances were highlighted by the prosecution, to establish the plea of conspiracy. It was submitted that nobody knew except PW 2 where the land was. If he was the person who had hired the assailants, they (meaning PW 1 and deceased) would not have gone empty-handed. But, knowing particularly well that the deceased was always armed, accused Ravinder purchased a car which was used as a getaway car but never transferred it to his name. It was, however, conceded by the learned Advocate-General appearing before the trial court that there was no direct evidence of conspiracy. The police seems to have proceeded to reach the spot on getting some reliable information.

7. In order to attach vulnerability to the judgment of the High Court, several points were urged by the learned counsel for the accused persons. It was pointed out that there was no evidence of any conspiracy. The only witness Kapur Chand who is alleged to have stated before the police about the conspiracy was not examined. Even the investigating officer has admitted that there was no direct evidence of conspiracy. There was no evidence collected against the accused persons to link them with the crime till 11-8-1994 when suddenly materials have been supposed to come like a floodgate. Initiation of action by the police is also shrouded in mystery. It has not been disclosed in either the trial court or the High Court as to how the police received information about the killing and arrived at the spot. Though it was claimed at some point of time that a telephone call was supposedly made, but the FIR was registered on the basis of reliable sources. There are no independent witnesses. It is surprising as the alleged killing took place in the evening time at a highly populated place. The so-called identification of the witnesses is highly improbable. Additionally, having discarded the evidence of PW 7 the courts erred in believing the evidence of PWs 8 and 9 who stand on the same footing. The presence of these witnesses is highly doubtful. Their behaviour was unnatural and there is no corroborative evidence. They are persons with criminal records. Since their presence is doubtful, identification, if any, done by them becomes ipso facto doubtful. The recoveries purported to have been done pursuant to the disclosure made by the accused persons is highly improbable and requisite safeguards have not been adopted while making alleged recoveries. The case against four of the accused persons who were acquitted by the trial court rests on circumstantial evidence. The approach to be adopted by the court while dealing with circumstantial evidence was kept in view by the trial court. Unfortunately, the High Court did not do so. It was further submitted that there was no complete chain of circumstances established which ruled out even any remote possibility of anybody else than the accused persons being the authors of the crime. The examination of the so-called eyewitnesses PWs 1 and 2 was belated and, therefore, should not have been accepted. The evidence of PWs *vis-à-vis* accused persons is so improbable that no credence should be put on it. The High Court should not have disturbed the findings of innocence of the four accused persons without any plausible reasoning.

9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The

principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

12. In *Padala Veera Reddy v. State of A.P.* [AIR 1990 SC 79], it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

“10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

16. In *Hanumant Govind Nargundkar v. State of M.P.* [(1992) 2 SCC 86], it was observed thus:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be

such as to show that within all human probability the act must have been done by the accused.”

17. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* [AIR 1984 SC 1622]. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short “the Evidence Act”) is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. The words “so much of such information” as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision, i.e., Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime

which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in *Pulukuri Kottaya v. Emperor* [AIR 1947 PC 67], is the most-quoted authority for supporting the interpretation that the “fact discovered” envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which “distinctly relates to the fact thereby discovered”. But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.

19. Coming to the evidence brought on record to substantiate the accusations, it is at least clear that Accused 1 and 2 left in the company of the deceased. Some evidence has also been brought to establish the motive i.e. the indebtedness of the accused to the deceased. In addition to this is the evidence of PWs 1 and 2. So far as Accused 2 is concerned, he almost stands on the same footing as Accused 1. Additionally, Hari Kumar (PW 18) has stated that Accused 2 came to his shop and took sweets and left in Car No. JK 02B 566 belonging to Accused 1. He has also stated about the return of Accused 2 to the shop and a demand for a scooter. This witness has also stated to have seen Car No. CH 01 5408 passing in front of the shop carrying seven to eight persons out of which he identified accused Kishore Kumar (since dead). PW 9 also has stated to have seen the deceased running while being chased and he claimed to have seen the deceased firing. He stated about Accused 1 and 2 giving *lalkara* that the deceased shall be killed and should not escape. Accused 1 had fired some shots in the air. Another white car No. CH 01 5408 was also standing there. He had identified accused Bodhraj, Bhupinder, Rakesh Kumar and the two acquitted accused Rohit and Kewal Krishan. It has to be noted that Car No. CH 01 5408 was found discarded after it had met with an accident. This car is stated to be the getaway car.

20. As the evidence of PWs 1 and 2 are very material it is desirable to note as to what their evidence was. On 3-8-1994, PW 1 was in his shop. At about 4.30 p.m., A-1 accompanied by the deceased and A-2 came to meet him in a car. A-1 informed him that he and his colleagues in the car were interested in setting up a flour mill. A-2 was in a hurry to proceed towards the site. On their way, PW 1 asked A-1 to stop the car to pick up PW 2. A-2 was reluctant to stop the car and only on PW 1's insistence PW 2 was picked up. When the deceased was attacked by the assailants and was pursued by the assailants he had started running towards the national highway. A-2 also ran after the deceased whereas A-1 kept standing near PW 1. The deceased asked A-1 to bring the car immediately but A-1 only shouted to one Shori that the deceased should not escape. PW 1 identified A-1 and A-2 who were present in the Court.

21. PW 2 stated that on 3-8-1994, he was sitting at his house when at about 4 to 4.30 to 5.00 p.m., PW 1 accompanied by A-1 and A-2 came to his residence and asked him to show some land to the persons accompanying them for the installation of rice-cum-flour mill. They all went to Dhiansar by car. When they were still seeing the land, A-2 told them that he approved of the land and led them to the shop. While returning the deceased was attacked by 4-5 persons who were armed with *tokas*, daggers etc. The deceased started running away towards the canal and the assailants followed him and assaulted him. Then PW 1 immediately told him to inform the police, by which time the deceased had started bleeding, and that he ran to ring up the police. PW 2, however, noticed that while the deceased was running, he asked accused A-1 to bring the car but the latter did not move. Meanwhile, PW 2 went to the house of a contractor which was at a distance of 200 ft from the place of occurrence to make the telephone call. When he came back, he found the dead body of the deceased lying on the road and heard accused A-2 telling accused A-1 "*kam ho gaya, let us go to Jammu*". The presence of PWs 1 and 2 at the place of occurrence is fortified from the fact that they were witnesses to the seizure memos Exts. PW-GS, PW-GS/1 and PW-GS/2 recorded by the police immediately after the incident.

22. Evidence of PWs 8, 9 and 18 are also relevant and their evidence is to the following effect. PW 8 (Surjit Singh) *inter alia*, stated as follows:

On 3-8-1994, he had gone for repair of his vehicle to Dhiansar. He was at a tea stall near the garage when he saw Vehicles Nos. 566 and 5408 parked on the other side of the road. He saw Kishore armed with a revolver. Shots fired by the deceased caused injuries to two assailants. Rajesh shot the deceased. The deceased was then surrounded by the assailants and attacked by *tokas*, swords etc. Accused Kishore fired in the air and the assailants ran towards Vehicle No. 5408. He had noticed accused A-1 and A-2 standing near their vehicle. The assailants reversed the other car and drove towards the deceased and accused Rajesh came out of the vehicle, picked up the weapon lying near the deceased and they mounted on the vehicle and drove off. A-1 and A-2 also drove off.

23. PW 9 (Nainu Singh) *inter alia*, stated as follows:

On 3-8-1994, he was getting a vehicle repaired in a workshop at Dhiansar. He along with Surjit Singh went towards a tea shop. They heard the sound of firearms being used. They saw the deceased bleeding profusely and running towards Jammu-Pathankot Road. Six-seven

assailants were chasing him. They were armed with *tokas*, *churas* and revolver. The deceased while running had fired at the assailants. Kishore Kumar who was armed with a pistol was running after the deceased. The shots fired by the deceased were fired in his presence. Two of the accused were identified by him as Subash Kumar and Rajesh Kumar. When the deceased reached near the road, Rajesh Kumar fired at him and hit on his arm. Thereafter, six to seven persons surrounded the deceased. They were said to be armed with *chakus* (knives) and *churas* (bigger knives) and were stabbing the deceased. Near the workshop gate, Car No. 566 was standing. This was of grey (*slaty*) colour. A-2 and A-1 had given a *lalkara* that the deceased should be killed and should not escape. A-1 had fired some shots in the air. Another white car bearing No. CH 01 5408 was also parked there. He noticed the accused sitting in the car. He had identified Krishan Kumar, A-2 and A-1. The driver reversed the car. It was stopped near the dead body of the deceased. The revolver lying near the deceased was picked up. After the car had left, A-1 and A-2 also left in another car. He knew the names of the accused Bhupinder, Rohit and Rakesh Kumar because he had identified them in the police station in the presence of the Tahsildar. He deposed that accused Bhupinder, Rakesh, Subash and Rajesh were holding *toka*, *kirch*, sword and revolver respectively. The witness identified the revolver, sword, *kirch* and *toka* and stated that these were the weapons with which the accused were armed.

24. Evidence of PW 18 (Hari Kumar) *inter alia*, stated is as follows:

He was the owner of a *halwai* shop in Parade Ground, Jammu. On 3-8- 1994, at about 11.00 a.m. accused Ravi Kumar came to the shop of Hari Kumar in his Car No. CH 01 5408 and left for Moti Bazar. At 1 or 1.30 p.m., accused Ashok and the deceased came to his shop and told them that they were going to Hotel Asia for taking meals. They took some sweets from his shop and left in Car No. JK 02B 566 which belonged to A-1. After 10 or 15 minutes, A-2 also came to the shop and demanded a scooter from him for going to Hotel Asia, telling him that he needed the scooter since he had given his car to some friend. He did not give a scooter to A-2. Half an hour thereafter, he found Car No. CH 01 5408 passing in front of his office shop carrying 7-8 boys out of which he identified Kishore Kumar (who is now dead). The car was being driven by a dark-complexioned boy.

25. Some factors which weighed with the High Court in upholding the conviction of the three accused as was done by the trial court are the evidence of eyewitnesses, PWs 1 and 2. Evidence of these witnesses has been analysed in detail by both the trial court and the High Court. Before both the said courts, it was urged that they cannot be termed to be truthful witnesses. By elaborate reasoning the stand was negated. Additionally, it was noticed that both Accused 1 and 2 were seen in the company of the deceased by employees of the deceased i.e. Darshan Singh (PW 15) and Rajinder Kumar (PW 14). Additionally, Hari Kumar (PW 18) has also spoken about having seen the deceased in the company of Accused 1 and 2. For some time Accused 1 was not in the company of the deceased and Accused 2. At that period of time he wanted PW 18 to take him to Hotel Asia. He has also stated that Accused 2 and the deceased had taken some sweets from his shop and were travelling in Car No. JK 02B 566. He has also stated about the statement of Accused 1 and 2 that there was some scuffle between some boys and the deceased at the land which they had gone to see and in that scuffle the killing took place. The reason for this was stated to be pressure on Accused

1 and 2 to return the money. One of the important circumstances noticed by the trial court as well as the High Court is that the land which was to be seen by the deceased was only known to Accused 1 and 2. Another circumstance noted was the use of Car No. CH 01 5408. There was some amount of controversy raised about the owner of the car, as was evident from the lengthy cross-examination made so far as the original owner, that is, L.B. Gupta, Advocate (PW 31) is concerned.

26. The evidence of PWs 1 and 2 has rightly been accepted by the trial court and the High Court and we find no reason to discard their evidence. So far as accused Rajesh Kumar is concerned, as has been found by the trial court and the High Court, live pistol belonging to Accused 1 was recovered from his house. He has sustained bullet injuries on account of firing done by the deceased while trying to protect his life.

27. In view of the circumstances noticed and highlighted by the trial court and the High Court and in our considered opinion rightly the appeals filed by accused Ravinder Kumar and Ashok Kumar are devoid of merit and deserve dismissal, which we direct.

28. Coming to the appeals filed by the four appellants who were acquitted by the trial court but convicted by the High Court, it has been argued with emphasis that even if it is accepted that two views are possible on the evidence, the one in favour of the accused was to be accepted and their acquittals should not have been lightly interfered with. It is to be noticed that the trial court placed reliance on the evidence of Hari Kumar (PW 18) for the purpose of convicting accused Rajesh Kumar, but so far as the other four accused are concerned, it was not held to be reliable. There was no cogent reason indicated as to why the same was termed to be unreliable. Additionally, recoveries were made pursuant to the disclosure made by them. Though arguments were advanced that due procedure was not followed, in view of the evidence of the witnesses examined by the prosecution in that regard, we find nothing illegal ruling out its acceptance. There are certain additional features also. A pant was recovered from the house of Subash Kumar which had holes indicating passage of bullet. However, a chemist (PW 22) was examined to show when he had gone to purchase the medicine to be applied to the injury. It was submitted that so far as Santokh Singh (PW 7) is concerned, his evidence was held to be not reliable. Therefore, the identification of Accused 5 Subash Kumar by Santokh Singh was not of any consequence. Even if it is accepted, the evidence relating to recovery established by the evidence of PW 18 cannot be lost sight of.

29. The evidence of Nainu (PW 9) was also described to be unreliable and it was said that he stood on a par with Santokh Singh. Similar was the criticism in respect of Surjit Singh. Their evidence has been analysed in great detail by the High Court and has been held to be reliable. It is of significance that practically there was no cross-examination on the recovery aspect. We do not find any reason to differ with the High Court in that regard. There can be no dispute with the proposition as urged by learned counsel for the appellants that when two views are possible, the one in favour of the accused has to be preferred. But where the relevant materials have not been considered to arrive at a view by the trial court, certainly the High Court has a duty to arrive at a correct conclusion taking a view different from the one adopted by the trial court. In the case at hand, the course adopted by the High Court is proper.

30. Judged in the aforesaid background, conviction by the High Court of those four who were acquitted by the trial court does not warrant any interference.

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses, i.e., PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.

32. It was submitted that there was unexplained delay in sending the FIR. This point was urged before the trial court and also the High Court. It was noticed by the High Court that Showkat Khan (PW 38) was an investigating officer on 3-8-1994 for a day only. He had taken steps from 5.30 evening onwards to 9.00 p.m. on the spot. Thereafter, Gian Chand Sharma (PW 42) was asked to investigate into the matter. It was also noticed that the road between Bari Brahamana and Samba where the court was located was closed due to traffic on account of heavy rains. Though, the road was open from Jammu to Bari Brahamana but it was closed from Bari Brahamana to Samba. The day's delay for the aforesaid purpose (the FIR had reached the Magistrate on 5-8-1994) cannot be said to be unusual when proper explanation has been offered for the delay. The plea of delayed dispatch has been rightly held to be without any substance.

33. Another point which was urged was the alleged delayed examination of the witnesses. Here again, it was explained as to why there was delay. Important witnesses were examined immediately. Further statements were recorded subsequently. Reasons necessitating such examination were indicated. It was urged that the same was to rope in the accused persons. This aspect has also been considered by the trial court and the High Court. It has been recorded that there was a valid reason for the subsequent and/or delayed examination. Such conclusion has been arrived at after analysing the explanation offered. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

35. Therefore, in the aforesaid background, the appeals filed by the four appellants who were acquitted by the trial court but convicted by the High Court also deserve dismissal which we direct.

36. Coming to the appeal filed by the State in respect of whom both the trial court and the High Court recorded acquittal, it is seen that there was no acceptable material. This aspect has been analysed in great detail by the trial court and the High Court and we do not find any reason to interfere with the conclusions. The appeal filed by the State is accordingly dismissed. In the ultimate result, all the four appeals are dismissed.

Khushal Rao v. State of Bombay

1958 SCR 552 : AIR 1958 SC 22

SINHA, J. -This appeal on a certificate of fitness under Article 134(1)(c), granted by the High Court at Nagpur (as it then was), is directed against the concurrent judgment and orders of the courts below, so far as the appellant Khushal is concerned, convicting and sentencing him to death under Section 302 of the Indian Penal Code, for the pre-meditated murder of Baboolal on the night of February 12, 1956, in one of the quarters of the city of Nagpur.

2. It appears that there are two rival factions in what has been called the mill area in Nagpur. The appellant and Tukaram who has been acquitted by the High Court, are the leaders of one of the factions, and Ramgopal, PW 4, Inayatullah, PW 1, and Tantu, PW 5, are said to be the leaders of the opposite faction. Before the time and date of the occurrence, there had been a number of incidents between the two rival factions in respect of some of which, Inayatullah and Tantu aforesaid had been prosecuted. Even on the date of the occurrence, apart from the one leading to the murder of Baboolal, which is the subject-matter of the present appeal, Tantu and Inayatullah had made two separate reports about the attacks on them by Khushal's party. There was another report lodged by Sampat — one of the four persons placed on trial along with the appellant, for the murder of Baboolal. That report was lodged at Ganeshpeth Police Station at about 9.30 p.m. on the same date — February 12, 1956 — against, Inayatullah *alias* Kalia and Tantu, that they had attacked the former with sharp-edged weapons. The prosecution case is that the appellant Khushal was on bad terms with Baboolal who was on very friendly terms with the leaders of the opposite faction aforesaid. Being infuriated by the conduct of Baboolal in associating with the enemies of the party of the accused, Sampat, Mahadeo, Khushal and Tukaram suddenly attacked Baboolal with swords and spears and inflicted injuries on different parts of his body. The occurrence took place in a narrow lane of Nagpur at about 9 p.m. Baboolal was taken by his father and other persons to the Mayo hospital where he reached at about 9.25 p.m. The doctor in attendance Dr Kanikdale (PW 14) at once questioned him about the incident and Baboolal is said to have made a statement to the doctor which the latter noted in the bed-head ticket (Ex. P-17) that he had been assaulted by Khushal and Tukaram with swords and spears. After noting the statement aforesaid, of Baboolal, the doctor telephoned to the Ganeshpeth Police Station where the information was noted at 9.45 p.m.. On receiving the information Sub-Inspector A.K. Khan recorded and registered an offence under Section 307 of the Indian Penal Code, and immediately went to the Mayo hospital along with a head-constable and several constables. He found Baboolal in a serious condition and suspecting that he might not survive and apprehending that it might take time for the Magistrate to be informed and to be at the spot, to record the dying declaration, he consulted Dr Ingle, the attending doctor, whether Baboolal was in a fit condition to make a statement. The doctor advised him to have the dying declaration recorded by a Magistrate. The Sub-Inspector decided that it would be more advisable for him to record the dying declaration without any delay. Hence, he actually recorded Baboolal's statement in answer to the questions put by him (Ex. P-2) at 10.15 p.m. In the meantime, Shri M.S. Khetkar, a Magistrate, First Class, was called in, and he recorded the dying declaration between 11.15 and 11.35 p.m., in the presence of Dr Ingle who certified

that he had examined Baboolal and had found him mentally in a fit condition to make his dying declaration. Besides these three dying declarations recorded in quick succession, as aforesaid, by responsible public servants, Baboolal is said to have made oral statements to a number of persons, which it is not necessary to set out because the High Court has not acted upon those oral dying declarations. We shall have to advert, later, to the recorded dying declarations in some detail, in the course of this judgment. It is enough to say at this stage that the courts below have founded their orders of conviction of the appellant mainly on those dying declarations. Baboolal died the next morning at about 10 a.m. in hospital.

3. Having come to know the names of two of the alleged assailants of Baboolal from his recorded dying declarations, the police became busy apprehending those persons. They could not be found at their respective houses. The appellant was arrested four days later in an out-house locked from outside, of a bungalow on Seminary Hill in Nagpur. The other person named as one of the assailants, Tukaram, was arrested much later. The prosecution case is that these persons were absconding and keeping out of the way of the police.

4. After investigation and the necessary inquiry, four persons were placed on trial and the appellant was one of them. The Additional Sessions Judge acquitted two of them and convicted the remaining two - the appellant and Tukaram - under Section 302 of the Indian Penal Code, or in the alternative, under Section 302 read with Section 34 of the Indian Penal Code. He sentenced the appellant to death because in his opinion, he had caused Baboolal's death intentionally, and there were no extenuating circumstances. He sentenced Tukaram to imprisonment for life, because in the learned Judge's view of the case, Tukaram had acted under the instigation of the appellant. Accordingly, the learned Additional Sessions Judge made a reference to the High Court for confirmation of the sentence of death. That reference was heard along with the appeal filed by the condemned prisoner. The reference, the appeal by the convicted accused persons, as also the appeal by the Government of Madhya Pradesh, against the two accused persons who had been acquitted by the learned trial Judge, and the revisional application for enhancement of sentence passed upon Tukaram, also filed by the State Government, were all heard together and disposed of by one judgment, by a Bench consisting of Hidayatullah, C.J., and Mangalmurti, J. The High Court, apparently with a view to understanding the evidence adduced in the case on behalf of the parties, made a local inspection on September 17, 1956, and recorded their impressions in a note which forms part of the record of the High Court. In a very well-considered judgment, the High Court, by its judgment and orders dated October 13, 1956, acquitted Tukaram, giving him the benefit of the doubt caused chiefly by the fact that in the dying declaration recorded by the Magistrate as aforesaid, he has been described as a *Teli*, whereas Tukaram before the Court is a *Kolhi*, as stated in the charge-sheet. The doubt was further accentuated by the fact that there were three or four persons of the name of Tukaram, residing in the neighbourhood and some of them are *Telis*. The High Court examined, in meticulous details, the evidence of the eyewitnesses, Inayatullah, PW 1, and Sadashiv, PW 3, and agreed with the trial Judge in his estimate of their testimony that those witnesses being partisan, their evidence could not be relied upon, to base a conviction. The High Court went further and came to the conclusion that their evidence being suspect, could not be used even as corroboration, if corroboration was needed of the three dying declarations made by Baboolal, as aforesaid. They upheld the conviction and

sentence of the appellant on the ground that the dying declarations were corroborated by the fact that the appellant had been absconding and keeping out of the way of the police, and had been arrested under very suspicious circumstances. The circumstances and the alleged absconding by Tukaram, were not so suspicious as to afford corroboration against him. In that view, the High Court “very reluctantly” gave the benefit of the doubt to Tukaram and allowed his appeal. The High Court also agreed with the trial Judge in acquitting the other two accused persons - Sampat and Mahadeo - because these two persons had not been named in the dying declarations, and the oral testimony was not of such a character as to justify conviction. Accordingly, the Government appeal and application in revision, were dismissed. As against the appellant, the reference made by the learned trial Judge was accepted and his appeal dismissed. Thus, under the orders of the High Court, only the appellant stood convicted on the charge of murder with a sentence of death against him. He moved the High Court for a certificate under Article 134(1)(c) of the Constitution, and the High Court granted a “certificate of fitness”. Hence, this appeal.

5. At the outset, we must repeat what this Court has observed in a number of appeals coming up to this Court on certificates of fitness granted by High Courts, mainly on questions of fact. The main ground for the grant of the certificate, may be reproduced in the words of the High Court itself:

“The main ground is that there is not enough evidence against the accused and that there is an error in our judgment in holding that there was no evidence to show that Khushal whose absconding has been held to corroborate the dying declaration, was involved in a liquor case. During the course of the argument neither side drew our attention to the documents which were in the record; nor was any point made of it, though we questioned why the absconding should not be taken into consideration. Now it seems that there are one or two defence exhibits in which it has been shown that Khushal was not found in his house when he was wanted in a liquor case after a search on 5th February, 1956. In view of the fact that there is this error and the sufficiency of the evidence might be a matter for consideration in the light of this additional evidence, we think this is a fit case for a special certificate under Article 134(1)(c) of the Constitution.”

7. In view of these considerations, it has got to be held that the certificate of fitness granted by the High Court, does not satisfy the requirements of Article 134(1)(c) of the Constitution. The appeal on such a certificate has, therefore, to be dismissed in limine; but we have to satisfy ourselves whether there are such grounds as would justify this Court in granting special leave to appeal to this Court, if the appellant had approached this Court in that behalf. We have, therefore, examined the record of this case from that point of view. It appears from the judgments of the courts below that the prosecution case rests mainly upon the three dying declarations of Baboolal who died shortly after making those statements as to his assailants, in quick succession within about two and a half hours of the occurrence — indeed, the first one to the doctor, was made within half an hour; as also upon the evidence of two persons Inayatullah, PW 1 and Sadashiv, PW 3, who figure as eyewitnesses, and Trimbak, PW 2 and Ramgopal, PW 4, who claimed to have turned up in the nick of time, to witness the last stages of the occurrence. Though the trial Judge did not disbelieve the oral

testimony of the witnesses aforesaid, and only insisted upon corroboration, the High Court was more pronounced in its view that the testimony of those four witnesses was not trustworthy. The High Court has discussed their evidence in great detail, and was not prepared to accept any part of their testimony on the ground that they were strongly partisan witnesses and that they did not come to the rescue of the victim of the murderous assault if they were really in the neighbourhood of the place of the occurrence, as claimed by them. If we had to assess the value of that body of oral evidence, we may not have come to the same conclusion, but we proceed on the assumption that the High Court is right in its estimate of the oral testimony adduced on behalf of the prosecution. After discussing all that evidence, the High Court took the view that it could not place any reliance on the oral testimony of what Baboolal had spoken to PWs 2 and 19 when they deposed that Baboolal had named two of his assailants, namely, the appellant and Tukaram. The High Court relied upon the three dying declarations recorded at the hospital — first, by the attending doctor, second, by the Sub-Inspector of Police and the third, by the Magistrate, First Class, between 9.25 and 11.35 p.m. As regards authenticity of the record of those three statements of the deceased, the High Court had no doubt, nor has any doubt been cast upon them by counsel for the appellant. The High Court then considered the question whether the conviction of the accused could be based on those dying declarations alone. It pointed out that in that High Court as also in other High Courts, convictions on dying declarations alone, had been rested if the Court was satisfied that the dying declaration was true and, therefore, could be acted upon. But the decision of this Court in *Ram Nath Madhoprasad v. State of Madhya Pradesh* [AIR 1953 SC 420] was brought to their notice, and in view of that decision, the High Court looked for corroboration of the dying declarations aforesaid. It found that corroboration in the subsequent conduct of the appellant in that, as deposed to by prosecution witness 31 - the Sub-Inspector in charge of Ganeshpeth Police Station - the appellant could not be traced till February 16, 1956, on which day, the police obtained information to the effect that the accused had been concealing himself in the premises of Ganesh *dhobi* at Hazari Pahar. He went there and found the appellant sitting in a room which had been locked from the front side. He arrested the accused. The High Court did not believe the defence suggestion that the appellant had been concealing himself for fear of the police in connection with an excise case in which he had been suspected. The records in connection with that case have been placed before us, and after examining those records, we do not find any good reasons for differing from the High Court in its appreciation of the circumstances connected with the absconding of the accused. The High Court took the view that the circumstances of the appellant's conduct in concealing himself and evading the police for a number of days, was consistent with the prosecution case that he was concerned in the crime which was the subject-matter of the charge against him. Thus, in effect, the High Court found corroboration which according to the ruling of this Court referred to above, was necessary in order to base the conviction upon the dying declarations of Baboolal.

8. The question whether the circumstances of the appellant's alleged keeping out of the way of the police, for a number of days after the occurrence, can be used as corroboration of the dying declarations, is not free from doubt and difficulty. The argument on behalf of the accused that he had been keeping out of the way of the police because he was suspected in the excise case, is not entirely unfounded. He had not left the city of Nagpur and gone out of the

jurisdiction of the local police. In those circumstances we are not prepared to say that the alleged absconding of - the accused could afford sufficient corroboration, if corroboration of the dying declarations was needed.

9. In this Court, a good deal of argument was addressed to us, to the effect that the ruling of this Court lays down a sound proposition of law which should have been followed by the High Court, and that the alleged fact of the accused absconding and keeping out of the way of the police, could not be used as corroboration of the dying declaration. The decision of this Court in *Ram Nath Madhoprasad v. State of Madhya Pradesh* contains the following observations at p. 423, which have been very strongly relied upon, on behalf of the appellant, as having a great bearing upon the value to be placed upon the dying declarations:

“It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved in the case have to be considered....”

10. We have, therefore, to examine the legal position whether it is settled law that a dying declaration by itself, can, in no circumstances, be the basis of a conviction. In the first place, we have to examine the decision aforesaid, of this Court from this point of view. This Court examined the evidence in detail with a view to satisfying itself that the dying declarations relied upon in that case, were true. In that case, apart from the dying declarations, there was the evidence of the approver. This Court found that the evidence of the approver and other oral testimony had been rightly rejected by the High Court. In that case also, the Court had mainly relied upon the dying declarations for basing the conviction under Section 302, read with Section 34 of the Indian Penal Code. This Court examined for itself, the dying declarations and the other evidence bearing upon the truth and reliability of the dying declarations, and after an elaborate discussion of all that evidence, came to the conclusion that the dying declarations did not contain “a truthful version of what actually happened”. Thus, after a very careful and cautious examination of the facts of the case, connected with the recording of the dying declaration, and of the other evidence in the case and of the fact that it was a dark night without any lights available at the place of occurrence, this Court distinctly came to the conclusion that the dying declaration was not true and could not be relied upon to base, upon that alone, the conviction of the appellants. It is, thus, clear that the observations quoted above, of this Court, are in the nature of obiter dicta. But as it was insisted that those observations were binding upon the courts in India and upon us, we have to examine them with the care and caution they rightly deserve.

11. The legislature in its wisdom has enacted in Section 32(1) of the Evidence Act that “When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question”, such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to

the general rule that hearsay is no evidence and that evidence which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death, has been accorded by the legislature, a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood, was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction. No decision of this Court, apart from the decision already noticed, has been pointed out to us as an authority for the proposition that a dying declaration, in order to be acted upon by a court, must be corroborated by independent evidence. On the other hand, the different High Courts in India (including Burma) have taken conflicting views as to the value of a dying declaration in part or in its entirety, without any independent corroboration. For example, a Division Bench of the Bombay High Court, presided over by Sir John Beaumont, C.J., has laid down in the case of *Emperor v. Akbarali Karimbhai* [ILR (1932) 58 Bom 31] that a statement which is covered by Section 32(1) of the Evidence Act, is relevant evidence and has to be judged on the same principles as other evidence, bearing in mind that such a declaration was not made on oath and was not subject to cross-examination, and is, therefore, a weaker type of evidence than that given by a witness on oath. Therefore, if a part of a dying declaration is deliberately false, it will not be safe to act upon the other part of the declaration without very definite corroboration. That Bench also ruled that it is not correct to postulate that because some part of the dying declaration is false, the whole declaration must necessarily be disregarded. The Bombay High Court, thus, did not agree with the observations of the Calcutta High Court in the case of *Emperor v. Premananda Dutt* [ILR (1925) 52 Cal 987] to the effect that it is not permissible to accept a dying declaration in part and to reject the other part and that a dying declaration stood on a widely different footing from the testimony of a witness given in court. On the other hand, we have the decision of the Rangoon High Court, reported in the case of the *King v. Maung Po Thi* [AIR 1938 Rang 282]. In that case, the positive evidence led on behalf of the prosecution, was found to have been tampered with and unreliable. The Court set aside the order of acquittal passed by the trial Judge, and recorded an order of conviction

for murder, practically on the dying declaration of the victim of the crime. The Court observed that there was no such rule of prudence as had been invoked in aid of the accused by the trial Judge who had observed that an accusation by a dying man without corroboration from an independent source, could not be the sole basis for conviction. The learned Judges of the High Court further observed that in order to found on a dying declaration alone, a judgment of conviction of an accused person, the Court must be fully satisfied that the dying declaration has the impress of truth on it, after examining all the circumstances in which the dying person made his statement *ex prate* and without the accused having the opportunity of cross-examining him. If, on such an examination, the Court was satisfied that the dying declaration was the true version of the occurrence, conviction could be based solely upon it.

12. In the High Court of Madras, there was a difference of judicial opinion, as expressed in certain unreported cases, which resulted in a reference to a Full Bench. Sir Lionel Leach, C.J., presiding over the Full Bench [*In re Guruswami Tevar*, ILR (1940) Mad 158, 170], delivered the unanimous opinion of the Court after examining the decisions of that High Court and of other High Courts in India. His conclusions are expressed in the penultimate paragraph of his judgment, thus:

“In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and, naturally, it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility.”

13. The Judicial Committee of the Privy Council had to consider, in *Chandrasekera alias Alisandiri v. King*, [12. LR (1937) AC 220, 229], the question whether mere signs made by the victim of a murderous attack which had resulted in the cutting of the throat, thus, disabling her from speaking out, could come within the meaning of Section 32 of the Ceylon Evidence Ordinance, which was analogous to Section 32(1) of the Indian Evidence Act. The Privy Council affirmed the decision of the Supreme Court of Ceylon, and made the following observations in the course of their judgment, which would suggest that a dying declaration, if found reliable by a jury, may, by itself, sustain a conviction:

“Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased’s statement but pointed in the same direction. It was a case in which, if the deceased’s statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified and, indeed, inevitable.”

15. Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under Section 133 of the Evidence Act, it is not illegal to convict a

person on the uncorroborated testimony of an accomplice, Illustration (b) to Section 114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has been made by a person whose antecedents are as doubtful as in the other cases, that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.

16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion

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

18. Having made the general observations bearing on the question of the legality of basing a conviction on a dying declaration alone, and keeping in view the tests set out above, let us examine the dying declarations now in question before us. The most remarkable fact which emerges from an examination of the three successive dying declarations made in the course of about two hours, by the deceased, is that he consistently named the appellant and Tukaram as the persons who had assaulted him with sword and spear. The injuries found on his person, namely, the punctured wounds and the incised wounds on different parts of his body, are entirely consistent with his statement that he was attacked by a number of persons with cutting and piercing weapons. No part of his dying declarations has been shown to be false. Of the two assailants named by him, Tukaram was convicted by the learned trial Judge, but acquitted by the High Court which very reluctantly gave him the benefit of the doubt created by the similarity of names in that locality, as already stated. There was no such confusion in the case of the appellant. The deceased indicated that there were two more persons concerned in the crime, but he could not name them. The other two accused persons who were acquitted by the courts below had not been named in the dying declarations and, therefore, their acquittal did not, in any way militate against the truth of the dying declarations. The courts below also agreed in holding that Baboolal was in a position to see his assailants and to identify them in the light of the electric lamp nearby. They have also pointed out that there was no "coaching". There is no doubt, therefore, that Baboolal had been consistent throughout in naming the appellant as one of his assailants, and he named him within less than half an hour of the occurrence and as soon as he reached the Mayo Hospital. There was, thus, no opportunity or time to tutor the dying man to tell a lie. At all material times, he was in a proper state of mind in spite of multiple injuries on his person, to remember the names of his assailants. Hence, we have no reasons to doubt the truth of the dying declarations and their reliability. We have also no doubt that from the legal and from the practical points of view, the dying declarations of the deceased Baboolal are sufficient to sustain the appellant's conviction for murder. The only other question that remains to be considered is whether there are any extenuating circumstances in favour of the accused justifying the lesser of the two sentences prescribed by law. In our opinion, there are none. It was a case of a deliberate cold-blooded murder.

19. For the reasons given above, we uphold the judgment and order of the High Court convicting the appellant of murder and sentencing him to death. The appeal is, accordingly, dismissed.

* * * * *

Sudhakar v. State of Maharashtra
(2000) 6 SCC 671

R.P. SETHI, J. - Ms Rakhi, a young girl of about 20 years of age was working as a teacher in Zila Parishad Primary School at Banegaon, Maharashtra at a monthly salary of Rs 300. Appellant 1 was the headmaster and Appellant 2 was a co-teacher in the same school. On one unfortunate morning of Saturday, 9-7-1994 Ms Rakhi went to her school in the morning as usual. When the school was closed at about 12 o'clock in the afternoon and all students had gone back to their homes, the appellants came in the room where Rakhi was sitting and closed the door and windows of the room. She was forcibly subjected to sexual intercourse by the appellants and her wailing cries did not have any effect upon them. She was thus subjected to gang rape by the appellants. After the incident Ms Rakhi went to her house and narrated the incident to her mother Padmabai, brother Prakash and uncle Balasaheb @ Balaji. The incident was also narrated to the father of the prosecutrix who came back home after two-three days. The matter was reported to the police on 20-7-1994. PW 15 ASI Laxman Wadje, In-Charge, Police Station Pathri recorded the statement of the prosecutrix and on that basis Crime Report No. 100 of 1994 was registered. Petticoat of the prosecutrix and the metal bangles which she was wearing at the time of occurrence were seized. After preparation of panchnama, the seized articles were sent to the chemical analyser for his report. On 6-8-1994 statements of two child witnesses, namely, Dnyaeshwar Mujmul and Dnyaneshwar Adhav were recorded under Section 164 of the Criminal Procedure Code before the Special Executive Magistrate. Ms Rakhi was taken for medical examination to Dr Gauri Rathod, PW 1 who reported that the prosecutrix had been subjected to sexual intercourse in the recent past. On completion of the investigation the charge-sheet was filed against both the appellants in the Court of Judicial Magistrate, Ist Class, Pathri, who committed them to the Court of Sessions Judge to stand their trial for the offences under Section 376 read with Section 34 of the Indian Penal Code. After the matter was reported to the police, the prosecutrix was sent to stay with her married sister Saraswatibai, PW 14 as it was found that she had lost her equilibrium of mind and was mentally upset.

2. Having failed to withstand the humiliation which she was subjected to on account of rape committed by the appellants, Ms Rakhi is stated to have committed suicide on 22-12-1994 at about 10.30 p.m. at the house of her sister Saraswatibai. Autopsy was conducted on the same date and the cause of death was reported as poisoning. In view of the subsequent development, additional charge under Section 306 read with Section 34 IPC was added against the appellants on 8-5-1995. Both the accused pleaded not guilty and claimed to be tried. The prosecution examined 18 witnesses. However, at the trial except PW 1 Gauri Rathod, PW 2 Padmabai, PW 3 Gangadhar, PW 12 Dr Anandgaonkar, PW 13 Sanjay Deshpande, PW 14 Saraswatibai and PW 15 ASI Wadje, the other witnesses turned hostile. The trial Judge of the Sessions Court, however, vide his judgment dated 12-7-1995 in Sessions Case No. 135 of 1994 convicted the appellants under Section 376(2)(g) read with Section 34 IPC and sentenced each one of them to suffer rigorous imprisonment of seven years and to pay a fine of Rs. 1000 each, in default of payment of fine, the appellants were directed to suffer further rigorous imprisonment for three months. The appellants were also

convicted and sentenced for the offences punishable under Section 306 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs 500 each, in default of payment of fine, they were to suffer rigorous imprisonment for one month more. Both these sentences were directed to run concurrently. Criminal appeal filed by the appellants was dismissed vide the order impugned in this appeal. Not satisfied with the findings of the courts below the appellants have preferred the present appeal with prayer for setting aside their conviction and sentence and acquitting them of the charges.

4. It is not disputed that the prosecutrix reported the matter to Police Station Pathri on 20-7-1994 admittedly after about 11 days from the day of occurrence. It is also not disputed that the statement of the prosecutrix could not be recorded before any Judicial Magistrate or the criminal court. It is, however, not denied that her statement Exhibit 59 was recorded by PW 15 on 20-7-1994 in which she had narrated the whole incident and explained the delay for not lodging the report earlier. The courts below have relied upon the aforesaid statement treating it as the dying declaration being admissible in evidence under Section 32 of the Evidence Act. Admissibility of the statement of Ms Rakhi is of paramount importance for deciding the present appeal. If the statement is held to be admissible in evidence, being the dying declaration of Ms Rakhi, the appellants may not escape their liability to conviction and sentence as there exists other corroborative evidence against them. However, if the aforesaid report/statement is not admissible in evidence, the appellants may be entitled to all consequential legal benefits. In that event the offence of rape may not be held to have been proved against them and if rape is not proved, the appellants cannot be held responsible for the commission of the offence under Section 306 IPC.

5. Section 32 of the Evidence Act is an exception to the general rule of exclusion of the hearsay evidence. Statement of a witness, written or verbal, of relevant facts made by a person who is dead or cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, are deemed relevant facts under the circumstances specified in sub-sections (1) to (8). Sub-section (1) of Section 32 with which we are concerned, provides that when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, being relevant fact, is admissible in evidence. Such statements are commonly known as dying declarations. Such statements are admitted in evidence on the principle of necessity. In case of homicidal deaths, statement made by the deceased is admissible only to the extent of proving the cause and circumstances of his death. To attract the provisions of Section 32 for the purposes of admissibility of the statement of a deceased, it has to be proved that:

(a) The statement sought to be admitted was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay and expense or is incapable of giving evidence.

(b) Such statement should have been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act.

As distinguished from the English law, Section 32 does not require that such a statement should have been made in expectation of death. Statement of the victim who is dead is admissible insofar as it refers to the cause of his death or as to any circumstances of the transaction which resulted in his death. The words “as to any of the circumstances of the

transaction which resulted in his death” appearing in Section 32 must have some proximate relation to the actual occurrence. In other words, the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. Due weight is required to be given to a dying declaration keeping in view the legal maxim *nemo moriturus praesumitur mentiri* i.e. a man will not meet his maker with a lie in his mouth. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of the statement as a fact. If it is in writing, the scribe must be produced in the court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement. However, in cases where the original recorded dying declaration is proved to have been lost and not available, the prosecution is entitled to give secondary evidence thereof.

6. In this case the statement of the prosecutrix Exhibit P-59 does not directly state any fact regarding the cause of her death. At the most it could be stretched to say referring to “circumstances of the transaction” resulting in her death. The phrase “circumstances of the transaction” was considered and explained in ***Pakala Narayana Swami v. Emperor:***

“The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. ‘Circumstances of the transaction’ is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in ‘circumstantial evidence’ which includes evidence of all relevant facts. It is on the other hand narrower than ‘res gestae’. Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that ‘the circumstances’ are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that ‘the cause of (the declarant’s) death comes into question’.”

7. The death referred to in Section 32(1) of the Evidence Act includes suicidal besides homicidal death.

8. In ***Rattan Singh v. State of H.P.***, this Court held that the expression “circumstances of transaction which resulted in his death” means that there need not necessarily be a direct nexus between the circumstances and death. Even distant circumstance can become admissible if it has nexus with the transaction which resulted in death. Relying upon ***Sharad Birdhichand Sarda*** case, the Court held that:

“It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstance can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death.”

9. In *Najjam Faraghi v. State of W.B.*, this Court held that the death of the declarant long after making the dying declaration did not mean that such a statement lost its value merely because the person making the statement lived for a longer time than expected. But to make the statement admissible, it has to be shown that the statement made was the cause of the death or with respect to the circumstances of the transaction which resulted in his death. The facts mentioned in the statement are, however, required to be shown connected with the cause of the death whether directly or indirectly. Rejecting the contention that as the injuries caused as mentioned in the dying declaration were indirectly responsible for the cause of death, the statement of the deceased could not be admitted in evidence, this Court in *G.S. Walia v. State of Punjab* held:

“Therefore, there is no substance in the contention raised by Mr U.R. Lalit that the injuries were only indirectly responsible for causing death of Balwant Singh and as his death cannot be said to have been caused due to the injuries caused, the statement made by him would not fall within Section 32 of the Indian Evidence Act. In view of our finding on this point, the decisions in *Imperatrix v. Rudra, Abdul Gani Bandukchi v. Emperor, Mallappa Shivlingappa Chanagi, Re* and *Moti Singh v. State of U.P.* relied upon by Mr Lalit are of no help to him. In all these cases, the Court had held that there was no evidence or that the evidence led was insufficient to prove that the deceased had died as a result of injuries caused to him. As the statement of Balwant Singh related to the cause of his death it was admissible in evidence under Section 32 and the High Court was in error in holding otherwise.”

10. In the light of the legal position noticed hereinabove, let us examine the statement of the deceased prosecutrix Exhibit P-59 to decide whether such a statement can be admitted in evidence, relied upon and made a basis for conviction and sentence of the accused. In that statement, admittedly recorded after 11 days of the day of occurrence, she had stated:

“I am serving in Balwadi of Banegaon from 2-2-1992 as a teacher. The name of my mother is Padmabai and my father is Gangadharrao. I have one brother namely Prakash and four sisters. I am living with my brother Prakash at Banegaon and my father and mother are living at Mazalgaon and my mother had come to Banegaon before 15 days.

In Banegaon the classes of Zila Parishad Primary School are held up to 4th Class from the Balwadi. There are two teachers in our school namely (1) Sudhakar Gndapin Bhujbal, (2) Bhaskar Babwrao Kedre and I am working as a Balwadi teacher getting Rs 300 per month. The timing of our school is from 9.00 to 16.00 o'clock but the Balwadi classes work from 9.00 to 12.00 o'clock. The headmaster of our school is Sudhakar Bhujbal.

Ever since I have joined my service Sudhakar Bhujbal and Bhaskar Kedre are teasing me. Sudhakar Bhujbal always says that your sari looks very nice; will you come to see the picture with me? That by asking this they try to talk with me. Before six months Sudhakar Bhujbal had touched my cheek and waist. I was afraid at that time. But due to the fear of defamation I did not tell anything to any person and because of it they had been adoring to proceed.

On 9-7-1994 on Saturday 8/9 o'clock in the morning I had gone to my school in a routine way. Bhaskar Kedre and Sudhakar Bhujbal had also come to the school. The school was closed at 12 o'clock in the afternoon. All the boys and girls had gone back to their home. That Bhaskar Kedre had closed the windows of the school and Sudhakar Bhujbal had closed the door and came near to me. Then he had removed his pant. At that time he was wearing ready-made underwear. Thereafter Sudhakar Bhujbal had caught hold of me and put me on the ground. And at that time Bhaskar Kedre had held my hands. I was crying for my mother and trying to get up. But they did not allow me to get up. Sudhakar Bhujbal had removed his underpants and had lifted up my sari and petticoat and pressed my breast. After that he had entered his male organ into my vagina and had committed sexual intercourse forcibly with me. After that Sudhakar Bhujbal had held my hands and Bhaskar Kedre had removed his pant. At that time he was wearing reddish cotton underwear, then he had removed his underwear and caught my both breasts and entered his male organ into my vagina and had committed sexual intercourse with me forcibly.

It was 12.30 in the afternoon at that time. Then both of them had worn their pants and went. I was crying and went to my house and informed this incident to my mother Padmabai, brother Prakash and uncle Balaji. After this they had called my father from Mazalgaon and narrated to him this incident. We had not filed any complaint due to the fear of defamation in the society. Bhaskar Kedre and Sudhakar Bhujbal, both of them have done sexual intercourse with me on 9-7-1994 in the afternoon at 12.30. Therefore inquiry should be made against them.”

11. There is no legal evidence on record that the prosecutrix at or about the time of making the statement had disclosed her mind for committing suicide allegedly on account of the humiliation to which she was subjected to on account of the rape committed on her person. The prosecution evidence does not even disclose the cause of death of the deceased. The circumstances stated in Exhibit P-59 do not suggest that a person making such a statement would, under the normal circumstances, commit suicide after more than five-and-a-half months. The High Court was, therefore, not justified in relying upon Exhibit P-59 as a dying declaration holding that the said statement was in series of circumstances of the transaction which resulted in the death of the deceased on 21-12-1994.

The conviction of the persons accused of offences cannot be based upon conjectures and suspicions. Statement Exhibit P-59 if not treated as a dying declaration, there is no cogent and reliable evidence which can connect the accused with the commission of the crime. In that event the other arguments advanced on behalf of the appellants assume importance. Other circumstances such as delay in lodging FIR, medical examination of the prosecutrix, the non-examination of material witnesses and turning hostile of witnesses including Dnyaeshwar

Mujmul and Dnyaneshwar Adhav are also required to be taken note of. It has also to be kept in mind that after the incident on 9-7-1994 the prosecutrix is shown to have attended the school on 10-7-1994 and 11-7-1994 as well. Her mother in cross-examination also stated that Ms Rakhi had told her about the incident only on 12-7-1994 at about 5.00 p.m. PW 3, the father of the prosecutrix deposed in the Court that:

“Rakhi did not tell me on 17th, 18th, 19th July, 1994 that she wanted to file a complaint. I did not ask Rakhi whether she wanted to file a criminal complaint. I did not disclose before the police on 20-7-1994 that Rakhi told me that she wanted to file criminal complaint.”

12. We are, therefore, of the opinion that the prosecution has failed to prove, beyond reasonable doubt, that the appellants had committed forcible sexual intercourse with Ms Rakhi on 9-7-1994 under the circumstances as narrated in Exhibit P-59 and relied upon by the courts below. The appellants cannot be convicted and sentenced merely on suspicion.

13. In the absence of the charge being proved under Section 376 IPC, the prosecution could not have asked for conviction of the appellants under Section 306 IPC as according to the prosecution it was the commission of the rape on her person which resulted in the suicide of Ms Rakhi, allegedly on the abetment of the appellants. If the cause for committing suicide is not legally proved, the appellants cannot be held responsible for the abetment of the ultimate offence of suicide.

14. We are, therefore, of the opinion that as the prosecution has failed to prove its case against the appellants beyond all reasonable doubt, they are entitled to acquittal. Before parting with the judgment we would, however, observe that in the present case the investigating as well as the prosecution agency has not acted promptly and diligently as was expected under the circumstances. The appeal is, therefore, allowed and the judgment of the High Court is set aside. The appellants be released forthwith unless required in some other case.

* * * * *

Patel Hiralal Joitaram v. State of Gujarat

(2002) 1 SCC 22

K.T. THOMAS, J. - A businessman of Patan (Gujarat) was arraigned for scorching a young hapless woman (mother of two infant children) to death. The gory felony was perpetrated in broad daylight on a public road. The man against whom the accusation was made had no relationship with the victim, marital or otherwise. The trial court exonerated him, but a Division Bench of the High Court of Gujarat found him to be the killer of that lady and convicted him and sentenced him to imprisonment for life. Hence this appeal by him as of right.

2. Asha Ben, the roasted victim of the gory episode was one of the 7 daughters of her father. In her wedlock with Vinod Bhai (PW 5) she became mother of two children (Mital and Bhargav). The small family consisting of Asha Ben, her husband and the two children were living in their own house in the city of Patan. Her eldest child Mital was studying in Bal Mandir attached to a school by the name of Bombay Metal School at Patan.

3. The story of the prosecution is the following: the appellant developed some affair with the sister of Asha Ben which the deceased resented for her own reasons. She had expressed her detestation to her sister (Sharada Ben) and also mentioned it to some other persons. When the appellant came to know of the above reaction of the deceased he wanted to settle score with her.

4. On 21-10-1988 at about 10 a.m., Asha Ben was proceeding to the school (Bal Mandir) for collecting her child Mital back home. On the way the appellant who was on a scooter met her and buttonholed her malevolently. He questioned her for spreading the canard that he and Sharada Ben had an illicit relationship. So doing the appellant took out a can and doused combustible liquid contained therein on Asha Ben. He then whipped out a lighter and after lighting it hurled its flame on her. In a trice Asha Ben was transformed into an anthropoid inferno, screaming and yelling she scampered towards a waterfall to escape from the devouring fire. She reached the water column situated near the railway station and sat beneath it, and the water flowing therefrom eventually extinguished the flames and embers which enwrapped her. But by then she was blistered with substantial burns and her clothes incinerated into ashes. Among the pedestrians there was a lady who flanked Asha Ben with some clothes to cover up her nudity and a rickshaw was procured for rushing the charred victim to the hospital.

5. On coming to know of the incident, Vinod Bhai (husband of Asha Ben) reached the place and by taking her in a rickshaw, speeded up her route to the hospital. Though she was treated in the hospital for nearly a fortnight she succumbed to her burn injuries on 15-11-1988.

6. On 21-10-1988, an FIR was registered on the basis of the statement made by Asha Ben to the police officer (PW 10) who reached the hospital on getting some uncrystallised information of the episode. In the meanwhile, the Executive Magistrate (PW 1) on being informed by the doctor who examined the lady, visited the hospital and recorded her statement around 11.15 a.m. In that statement she mentioned the name of "Hiralal Patel" as

the culprit. After her death the police continued the investigation and completed it and charge-sheeted the appellant for the offence of murder of Asha Ben.

7. There is practically no dispute that Asha Ben was set ablaze after dousing her with some inflammable liquid on the morning of 21-10-1988. But on the question of who the culprit was, the prosecution and the defence had great divergence. The prosecution relied on the statements made by the deceased for establishing the identity of the culprit, which included the statement given to her husband, to the Executive Magistrate and to the police in the FIR.

8. The Sessions Judge picked out some infirmities in the statements of the deceased and finally held that those statements cannot be relied on as dying declarations. He also found that the description of the incident narrated by Asha Ben is not consistent with probability, particularly when the investigating officer demonstrated in the court how the lighter (alleged to have been used in setting her ablaze) could be lighted.

9. The Division Bench of the High Court after re-evaluating the evidence came to the conclusion that the trial court has grossly erred in rejecting the statements of the deceased and that the reasons advanced by the trial court were so erroneous that no court would ever have come to such conclusions. Relying on the statements of the deceased, learned Judges of the Division Bench of the High Court came to the irresistible conclusion that the identity of the assailant had been unmistakably established as against the appellant.

10. Hence, the High Court convicted him and sentenced him as aforesaid.

11. Shri U.R. Lalit, learned Senior Counsel for the appellant urged, at the outset, that the High Court should have borne in mind that it was an appeal against the acquittal which they were dealing with and the approach should have been different from that of appeal against conviction. According to the learned Senior Counsel the Division Bench has overlooked the standard formulated by this Court for dealing with an appeal against acquittal and consequently the order of the acquittal was wrongly reversed. We reminded ourselves of the standards to be adhered to while dealing with an appeal against acquittal. In *Dhanna v. State of M.P.* [(1996) 10 SCC 79], this Court has reiterated the perspective to be adopted in such a situation, after referring to some of the earlier decisions rendered by this Court on that aspect. We may extract the following observations from the said decision:

“11. Though the Code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate court has to bear in mind: first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial court acquitted him, he would retain that benefit in the appellate court also. Thus, the appellate court in appeals against acquittals has to proceed more cautiously

and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed.”

12. Bearing in mind the above standard of caution we may make the judicial scrutiny of the findings arrived at by the High Court. As pointed out earlier, the focus of discussion can first be mustered on the identity of the assailant, for, there is little dispute on the fact situation that one assailant had set her ablaze at the time and place mentioned in her statements. We are, in this context, tempted to dub the reasoning of the Sessions Judge for concluding that “it is impossible that the saree could catch fire if the lighter is thrown at her” as preposterous. It requires no effort for any sensible person to understand that it was the flame of the lighter which was hurled at the victim who was by then soaked with inflammable liquid and catching fire in such a situation is a matter of easy grasping for anyone.

13. We are aware that the statements made by the deceased are the only materials available for establishing the identity of the appellant and hence if those statements are inadmissible or unreliable, even if admissible, or insufficient to point to the appellant as the assailant, its inevitable consequence is to set the appellant free. Knowing this position well Shri U.R. Lalit, learned Senior Counsel first focussed his contention for showing that the prosecution has failed to prove that Asha Ben’s death was due to burns sustained by her on 21-10-1988.

14. The interval between the date of the incident when the deceased sustained burns and the date of her death was a fortnight. PW 2 Dr Vikarambhai, who examined Asha Ben at 10.30 a.m. on 21-10-1988, noticed second-degree burns on the upper and lower portions of her hands, front and back of her chest and on the neck, ears and forehead. He found that her condition was “critical” when he saw her first.

15. PW 12 Dr N.N. Parikh, a tutor in Forensic Medicine of B.J. Medical College, Ahmedabad, conducted autopsy on her dead body on 15-11-1988. He noticed burns of the third degree on the front and back of her trunk, both thighs etc., besides second-degree burns on some other limbs. In his opinion the death of the deceased was due to a stroke on account of such burns and that those burns were sufficient in the ordinary course of nature to cause her death.

16. Harping on an answer given by PW 12 in cross-examination that death of the deceased had occurred due to “septic” learned Senior Counsel made out an argument that such septic condition could have developed on account of other causes. Mere possibility of other causes supervening during her hospitalisation is not a safe premise for deciding whether she would not have died due to the burns sustained on 21-10-1988. The cause of death can be determined on broad probabilities. In this context we may refer to a passage from **Modi’s Medical Jurisprudence and Toxicology**, dealing with death by burns:

“As already mentioned, death may occur within 24 to 48 hours, but usually the first week is the most fatal. In suppurative cases, death may occur after five or six weeks or even longer.”

17. In *Om Parkash v. State of Punjab* [(1992) 4 SCC 212], the victim was set ablaze on 17-3-1979 and she sustained burns with which she died only 13 days thereafter. The assailant was convicted of murder and the conviction was confirmed by this Court.

18. It is preposterous to say that the deceased in this case would have been healed of the burn injuries and that she would have contracted infection through some other causes and developed septicaemia and died of that on 15-11-1988. Court of law need not countenance mere academic possibilities when the prosecution case regarding death of the deceased was established on broad probabilities as a sequel to the burns sustained by her. Hence we repel the contention of the learned counsel on that score.

19. Next contention which needs consideration is that even from the statements made by the deceased after sustaining the burns, the identity of the assailant cannot unmistakably refer to the appellant. The first occasion on which she made statement revealing the name of the assailant was when she talked to PW 3 (Sadbhai), a pedestrian. The witness has deposed that when the victim was sitting beneath the water column of the railway station writhing in pain and frantically trying to get the flames quelled, some sadhus gathered nearby and asked her who had done it to her and then she answered by mentioning the name as "Hiralal". A little later, when she narrated the incident to her husband (PW 5 Vinod Bhai) she disclosed a little more details about the identity of the assailant. This is how PW 5 had deposed about it:

"Asha told me that she was burnt by Hiralal Patel of our society.... She told me that Hiralal asked her why she was defaming him by spreading the story that he had illicit relations with her sister Sharada."

20. It must be borne in mind that so far as PW 5 is concerned he had absolutely no doubt that Hiralal Patel referred to by her is the appellant. When Asha Ben spoke to PW 2 Dr Vikarambhai she did not mention the name of the assailant. Learned Senior Counsel highlighted that omission for contending that she did not know who that assailant was when she narrated the incident to that doctor. We are unable to give accord to the said contention as it is too much to expect a lady in such a condition to disclose the name of the assailant to the doctor spontaneously without being asked for it. For the doctor, the name of the assailant or even his identity is of no use and hence he would not have bothered to know about it.

21. The main dying declaration was given by Asha Ben to the Executive Magistrate (PW 1). That dying declaration was marked as Ext. 11. It was recorded at 11.15 a.m. on 21-10-1988, when she said this:

"Hiralal Patel, who burnt me, met me near Siddharaj Nagar. His Scooter No. is 3040. He asked me why are you spreading wrong stories about me. He got very excited and poured some corrosive liquid from a tin of 500 gm on me and threw a lighter lighted on me.... Hiralal is the son-in-law of Nanavati."

22. Three specifications regarding the identity of the assailant could be discerned from those statements. First is that the name of the assailant is Hiralal Patel. Second is that he reached the place by Scooter No. 3040. Third is that he is the son-in-law of Nanavati. Prosecution was able to place materials to show that all the above three identifying features are referring to the appellant. We may point out that the appellant himself admitted that he is Hiralal Patel. When the investigating officer seized the scooter from his house the appellant made an application before the court for return of the said scooter. It is significant to point out that the registration number of that scooter is 3040. In fact he filed an application before the court for returning the scooter. The father-in-law of the appellant is admittedly one Nanavati

and that fact has been spoken to by Valiben (PW 9). The aforesaid features would almost conclusively establish that it was the appellant whom the deceased meant when she told others that it was Hiralal who caused her burn injuries.

23. Shri U.R. Lalit, learned Senior Counsel in his arguments projected the description of the name of the assailant given by Asha Ben in the statement attached to the FIR (Ext. 40) as "Hiralal Lalchand" and contended that the appellant is not the son of Lalchand. The appellant is "Hiralal Joitaram" and hence the deceased would have referred to some other person, contended the counsel.

24. In this context we have to look into the words which Asha Ben has spoken in Ext. P-40, FIR regarding that aspect. Those words are extracted below:

"The resident of our society, Patel Hiralal whose father's name I don't know, he was having illicit relationship with my sister Sharada and I saw them two or three times. I scolded Hiralal and hence he was annoyed with me. The abovesaid Hiralal Lalchand, whose name I give on recollecting afterwards caused me burns."

25. In the above context we have to refer to a clarificatory statement elicited from the deceased by PW 13 (Bhagwat), the investigating officer. That statement is marked as Ext. 67. It reads thus:

"In my statement I have given the name of the accused's father as Lalchand which has been stated inadvertently. Lalchand is the name of the father-in-law of my sister and hence I remembered it inadvertently. The name of the father of Hiralal is really Joitabhai. He is the son-in-law of Nanavati Soap Factory."

26. Learned Senior Counsel made a twofold attack on the admissibility of Ext. 67. First is that a statement recorded by the police under Section 161 of the Code of Criminal Procedure is inadmissible in evidence. Second is that even if it is admissible for any purpose it cannot be used under Section 32 of the Evidence Act as the said statement related only to the parentage of Hiralal.

27. If what is extracted above from Ext. 67 falls under Section 32(1) of the Evidence Act it would stand extricated from the ban contained in Section 162 of the Code of Criminal Procedure. The former is exempted from the ban contained in Section 162. This can be seen from sub-section (2) of Section 162 which reads thus:

"162. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act."

28. We have therefore to see whether the statement in Ext. 67 would fall within the purview of Section 32(1) of the Evidence Act.

29. The above provision relates to the statement made by a person before his death. Two categories of statements are made admissible in evidence and further made them as substantive evidence. They are: (1) his statement as to the cause of his death; (2) his statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelop a far wider amplitude than the first category. The words "statement as to any of the circumstances" are by themselves capable of expanding the width and contours of

the scope of admissibility. When the word “circumstances” is linked to “transaction which resulted in his death” the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statements in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the court has to consider how far it is reliable. Once that test of reliability is found positive the court has to consider the utility of that statement in the particular case.

30. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] a three-Judge Bench of this Court considered the scope of Section 32(1) of the Evidence Act. After referring to a number of decisions of different High Courts on the point Fazal Ali, J. who spoke for the majority opinion, laid down five propositions. Among them the first is that the legislature has thought it necessary to widen the sphere of Section 32 for avoiding injustice. Among the remaining propositions the second is relevant for our purpose and hence it is extracted below:

“(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. ... Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death.”

32. Taking cue from the legal position as delineated above we have to consider now whether the statement of Asha Ben in Ext. 67 related to any circumstance connected with her death. We cannot overlook the fact that the context in which she made such statements was not for resolving any dispute concerning the paternity of a person called Hiralal or even to establish his parentage. It was in the context of clarifying her earlier statement that she was set ablaze by a man called Hiralal whose second name happened to be mentioned by her as Lalchand. When subsequently she was confronted by the investigating officer with the said description to confirm whether it was Hiralal, son of Lalchand who set her to fire, she made the correction by saying that she made a mistake inadvertently and that it was Hiralal Joitaram who did it and not Hiralal Lalchand. Thus Ext. 67 is inextricably intertwined with the episode in which she was burnt and eventually died of such burns. Looking at Ext. 67 from the above perspective we have no doubt that the said statement would fall within the ambit of Section 32(1) of the Evidence Act.

33. Thus, from the statements made by the deceased we have no doubt that it was the appellant whom Asha Ben referred to as the assailant who doused combustible liquid on her and ignited her with the flame of the lighter. There is no reason even remotely suggesting that the deceased would have had only a scanty acquaintance with the appellant so as to commit a mistake in identifying him. We, therefore, agree with the conclusion of the Division Bench of the High Court that the prosecution succeeded in proving beyond reasonable doubt that the appellant was the assailant who set Asha Ben ablaze.

34. Shri U.R. Lalit, learned Senior Counsel then made an alternative argument that the offence would not escalate beyond culpable homicide not amounting to murder. This argument was made on the premise that the burns caused to her did not result in her death during the initial fatal period and that her death happened on account of setting in of some later complications.

35. Section 299 IPC defines “culpable homicide” as:

“299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

36. Explanation 2 to Section 299 has a material bearing on the said contention and hence that is extracted below:

“*Explanation 2.* - Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.”

37. Section 300 IPC carves out two segments, one is culpable homicide amounting to murder and the second segment consists of culpable homicide not amounting to murder. Four clauses enumerated in the section are enveloped in the first segment. What is set apart for the second segment is compendiously described as “except in the cases hereinafter excepted” from out of the first segment. For the purpose of this case we deem it necessary to quote only the second clause in Section 300 IPC:

“*2ndly.* - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused,...”

38. In the present case, the appellant did not even make an effort to bring the case within any of the four exceptions enumerated in Section 300. Hence the only question to be answered is whether he did the act with the intention of causing such bodily injury as he knew “to be likely to cause death of the deceased”. It is inconceivable that the appellant would not have known that setting a human being ablaze after soaking her clothes with inflammable liquid would cause her death as the type of burns resulting therefrom would at least be “likely” to cause her death (if not, they are sufficient in the ordinary course of nature to cause her death). The fact that she died only after a fortnight of sustaining those burn injuries cannot evacuate the act out of the contours of the *2ndly* clause of Section 300 IPC. There was a little abatement of the ferocity of the flames which engulfed her as she, in the instinctive human thirst of getting extricated from the gobbling tentacles of the fire, succeeded in tracing out a waterflow. Such a reflex action performed by her had mitigated the conflagration of the flames but did not save her from the fatality of the calamity. Hence the interval of fourteen days between the attack and her death is not a cause for mitigation of the offence perpetrated by the offender. We are, therefore, not impressed by the alternative argument advanced by the learned Senior Counsel for the appellant. In the result, we dismiss this appeal.

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Laxman v. State of Maharashtra

(2002) 6 SCC 710 : JT 2002 (6) SC 313

G.B. PATTANAİK, J. - In this criminal appeal, the conviction of the accused-appellant is based upon the dying declaration of the voluntary and trustworthy. The Magistrate in his evidence had stated that he had contacted the patient through the medical officer on duty and after putting some questions to the patient to find out whether she was able to make the statement; whether she was set on fire; whether she was conscious and able to make the statement and on being satisfied he recorded the statement of the deceased. There was a certificate of the doctor which indicates that the patient was conscious. The High Court on consideration of the evidence of the Magistrate as well as on the certificate of the doctor on the dying declaration recorded by the Magistrate together with other circumstances on record came to the conclusion that the deceased Chandrakala was physically and mentally fit and as such the dying declaration can be relied upon. When the appeal against the judgment of the Aurangabad Bench of the Bombay High Court was placed before a three-Judge Bench of this Court, the counsel for the appellant relied upon the decision of this Court in ***Paparambaka Rosamma v. State of A.P.*** [(1999) 7 SCC 695] and contended that since the certification of the doctor was not to the effect that the patient was in a fit state of mind to make the statement, the dying declaration could not have been accepted by the Court to form the sole basis of conviction. On behalf of the counsel appearing for the State another three-Judge Bench decision of this Court in the case of ***Koli Chunilal Savji v. State of Gujarat*** [(1999) 9 SCC 562] was relied upon wherein this Court has held that if the materials on record indicate that the deceased was fully conscious and was capable of making a statement, the dying declaration of the deceased thus recorded cannot be ignored merely because the doctor had not made the endorsement that the deceased was in a fit state of mind to make the statement in question. Since the two aforesaid decisions expressed by two Benches of three learned Judges was somewhat contradictory the Bench by order dated 27-7-2002 referred the question to the Constitution Bench.

2. At the outset we make it clear that we are only resolving the so-called conflict between the aforesaid three-Judge Bench decision of this Court, whereafter the criminal appeal will be placed before the Bench presided over by Justice M.B. Shah who had referred the matter to the Constitution Bench. We are, therefore, refraining from examining the evidence on record to come to a conclusion one way or the other and we are restricting our considerations to the correctness of the two decisions referred to *supra*.

3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist

that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

4. Bearing in mind the aforesaid principle, let us now examine the two decisions of the Court which persuaded the Bench to make the reference to the Constitution Bench. In *Paparambaka Rosamma v. State of A.P.* the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. The doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the Court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the Court had also found serious lacunae and ultimately did not accept the dying declaration recorded by the Magistrate. In the latter decision of this Court in *Koli Chunilal Savji v. State of Gujarat*, it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The Court relied upon the earlier decision in *Ravi Chander v. State of Punjab* [(1998) 9 SCC 303], wherein it had been observed that for

not examining by the doctor the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

5. The Court also in the aforesaid case relied upon the decision of this Court in ***Harjit Kaur v. State of Punjab*** [(1999) 6 SCC 545] wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in ***Paparambaka Rosamma v. State of A.P.*** to the effect that

“(I)n the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration”

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in ***Paparambaka Rosamma v. State of A.P.*** must be held to be not correctly decided and we affirm the law laid down by this Court in ***a Koli Chunilal Savji v. State of Gujrat.***

6. The records of the criminal appeal may now be placed before the Bench presided over by Shah, J. from which court the reference has been made.

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Ram Narain v. State of U.P.

(1973) 2 SCC 86 : AIR 1973 SC 2200

I.D. DUA, J. - This appeal by special leave is directed against the judgment and order of a learned Single Judge of the Allahabad High Court, dated October 6, 1969, dismissing the appellant's revision from the order of a II Temporary Sessions Judge, Kanpur, dated November 8, 1967, dismissing his appeal from his conviction by a learned Magistrate under Sections 384/ 511; I.P.C. and sentence of rigorous imprisonment for one year.

2. On August 15, 1964, Mannu, a boy about 6 years old, was found missing from the house of the appellant's relation Shri Gajendra Nath, an Excise Inspector, residing in Mohalla Ashok Nagar, Kanpur, within the jurisdiction of police station Sisamau the following day. A report was lodged at the police station Sisamau about this fact and a notice was also published in the newspapers and hand-bills were distributed announcing a reward of Rs 501 for anyone who furnished the clue of the missing child's whereabouts. A post-card (Ext. Ka-1) bearing post office seals, dated August 21, 1964 and later an inland letter (Ext. Ka-2) bearing the date October 21, 1964, were received by Gajendra Nath demanding, in the first letter a ransom of Rs 1,000 and in the second a ransom of Rs 5,000 for the return of the boy. In December, 1964, a trainee of the local I.T.I., Kanpur, Yashpal Singh by name, after reading the announcement of the reward, made attempts to trace the whereabouts of the missing child. Having found a clue, he gave the necessary information to the father of the child regarding his whereabouts. Thereupon, on January 11, 1965, the child was recovered by Rahasbehari, the grand-father of the child, from the house of Ganga Bux Singh and Chandrabhushan Singh in village Pandeypur District Kanpur. The investigation of the case revealed that the appellant, Ram Narain, was also responsible for kidnapping and wrongfully confining the said child and that it was he who had sent the two anonymous letters demanding ransom. All the three persons were prosecuted under Sections 363, 368, 384 and 511, I.P.C. The trial court convicted Ganga Bux Singh and Chandrabhushan Singh under Sections 384 and 511, I.P.C. On appeals by the convicted persons, the learned II Temporary Sessions Judge, Kanpur, came to the conclusion that the offence under Section 368, I.P.C., had not been established beyond reasonable doubt with the result that Ganga Bux Singh and Chandrabhushan Singh were acquitted. The appellant, Ram Narain's conviction for an offence under Sections 384 and 511, I.P.C. was, however, upheld. This conviction was solely based on the conclusion that the two anonymous letters had been written by him. The appellant having categorically denied his authorship of those letters, Shri R.A. Gregory, a hand-writing expert was produced in support of the prosecution case. Believing his testimony that the appellant was the writer of those two letters, all the three courts below have agreed in convicting the appellant.

3. The short question raised before us relates to the legality and propriety of the appellant's conviction on the uncorroborated testimony of the hand-writing expert.

5. It was emphasised by the appellant's learned counsel that according to this decision it is not safe to record a finding about a person's writing merely on the basis of comparison because the opinion of a hand-writing expert is not conclusive and his evidence is normally insufficient for recording a definite finding about the writing being of a certain person or not. Indeed the appellant's contention was that in ***Fakhruddin v. State of M.P.*** [AIR 1967 SC

1326] though reference was made to this decision, its ratio was not properly appreciated and the decision in *Fakhruddin* case is not in conformity with this earlier decision. We are unable to agree with this submission. Reference was also made by the appellant's counsel to *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* [AIR 1964 SC 529] where it is observed that the expert evidence as to hand-writing is opinion evidence and it can rarely, if ever, take the place of substantive evidence, and therefore, before acting on it the courts usually look for corroboration either by direct or circumstantial evidence. In *Shashi Kumar*, it may be pointed out, this Court found all the probabilities against the expert opinion and the direct testimony of two witnesses accepted by this Court also wholly inconsistent with that opinion.

6. In our view, the legal position enunciated in *Fakhruddin* case cannot be said to be inconsistent with the ratio of any one of the earlier decisions to which reference has been made therein. Now it is no doubt true that the opinion of a hand-writing expert given in evidence is no less fallible than any other expert opinion adduced in evidence with the result that such evidence has to be received with great caution. But this opinion evidence, which is relevant, may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view expressed by the expert. If after comparison of the disputed and the admitted writings by the court itself, when the Presiding Officer is familiar with that language, it is considered safe to accept the opinion of the expert then the conclusion so arrived at cannot be assailed on special leave on the mere ground that comparison of hand-writing is generally considered as hazardous and inclusive (*sic*) and that the opinion of the hand-writing expert has to be received with considerable caution. The question in each case falls for determination on the appreciation of evidence and unless some serious infirmity or grave failure of justice is shown, this Court would normally refrain from re-appraising the matter on appeal by special leave. The trial court in this case agreeing with the principle of law enunciated by this Court compared the relevant documents and arrived at the conclusion that they have all been written in one hand. The learned II Temporary Sessions Judge on appeal, after referring to the comparison of the disputed and specimen writings by the Trial Magistrate, himself compared those writings with the help of the expert's opinion and his report and came to a definite conclusion "that the disputed hand-writings tally with the specimen hand-writing". In the High Court also the learned Single Judge, after referring to the decision in *Fakhruddin* case, observed as follows:

"I have myself made a comparison of the specimen writing of the applicant with the writing contained in the two letters. I have not the least doubt that the writing in the post-card and the writing in the admitted writing of the applicant are the same. Thus, I have no reason to differ from the finding recorded by the courts below."

7. No serious attempt was made on behalf of the appellant to find fault with the approach of the three courts below. There is, therefore, no ground made out for interference by this Court with the appellant's conviction. Unfortunately, the record is not before us otherwise we would have also tried to examine for ourselves the disputed and the specimen handwritings. However, in view of the concurrent decisions of the three courts below, we did not consider it necessary to adjourn the hearing of this case to have the documents before us for our examination.

8. The next question is one of sentence which is always a matter of some difficulty. It generally poses a complex problem which requires a working compromise between the competing views based on reformative, deterrent and retributive theories of punishments. Though a large number of factors fall for consideration in determining the appropriate sentence, the broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crime does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient. In the case in hand the imposition of rigorous imprisonment for one year upheld by the appellate and the revisional courts may not have been considered by us in the normal course to be too harsh calling for interference under Article 136 of the Constitution. The difficulty now posed is that the appellant is on bail and he has served out only one month's sentence. He was originally sentenced by the trial court on April 17, 1967, for the offence committed as far back as 1964. The proceedings against him have lasted for more than .8 years. He was released on bail by this Court in January, 1970. To send him back to jail now after the lapse of so many years for serving out the remaining period of sentence seems to us on the facts and circumstances of this case to be somewhat harsh. The offence of attempted exertion undoubtedly reflects to some extent anti-social depravity of mind but the attempt did not succeed. We, therefore, consider that on the facts and circumstances of this case the ends of substantial justice would be amply met if we now reduce the sentence of imprisonment to that already undergone but also imposita fine of Rs 700 and in default of payment of fine direct that he undergoes rigorous imprisonment for a period of three months. We order accordingly. The appeal is thus accepted in part as just stated.

* * * * *

R.S. Maddanappa v. Chandramma

(1965) 3 SCR 283

MUDHOLKAR, J. - This is an appeal by Defendants 3 to 8 from a decision of the High Court of Mysore passing a decree in favour of Respondent 1 who was Defendant 1 in the trial court, for possession of half the property which was the subject-matter of the suit and also allowing future mesne profits.

2. The relevant facts are briefly these: The plaintiff who is the elder sister of the first defendant instituted a suit in the Court of the District Judge, Bangalore for a declaration that she is the owner of half share in the properties described in the schedule to the plaint and for partition and separate possession of half share and for mesne profits. According to her the suit property was the absolute property of her mother Puttananjamma, and upon her death this property devolved on her and the first defendant as her mother's heirs. Since, according to her, the first defendant did not want to join her as co-plaintiff in the suit, she was joined as a defendant. It is common ground that the property was in the possession of the second defendant R.S. Maddanappa, the father of the plaintiff and the first defendant and Gangavva, the second wife of Maddanappa and her children Maddanappa died during the pendency of the appeal before this Court and his legal representatives are the other defendants to the suit. Briefly stated his defence, which is also the defence of the defendants other than Defendant 1 is that though the suit properties belonged to Gowramma, the mother of Puttananjamma, she had settled them orally on the latter as well as on himself and that after the death of Puttananjamma he has been in possession of those properties and enjoying them as full owner. He further pleaded that it was the last wish of Puttananjamma that he should enjoy these properties as absolute owner. The plaintiff and the first defendant had, according to him, expressly and impliedly abandoned their right in these properties, that his possession over the properties was adverse to them and as he was in adverse possession for over the statutory period, the suit was barred. Finally he contended that he had spent more than Rs 46,000 towards improvement of the properties which was met partly from the income of his joint ancestral property and partly from the assets of the third defendant. These improvements, he alleged, were made by him bona fide in the belief that he had a right to the suit properties and consequently he was entitled to the benefit of the provisions of Section 51 of the Transfer of Property Act.

3. The first defendant admitted the claim of the plaintiff and also claimed a decree against the other defendants in respect of her half share in the suit properties. The other defendants, however, resisted her claim and in addition to what the second defendant has alleged in his written statement contended that she was estopped by her conduct from claiming any share in the properties.

4. The trial court decreed the claim of the plaintiff but held that the first defendant was estopped from claiming possession of her half share in the properties left by her mother. The first defendant preferred an appeal before the High Court challenging the correctness of the decision of the trial court. The other defendants also filed an appeal before the High Court challenging the decision of the trial court in favour of the plaintiff. It would appear that the plaintiff had also preferred some cross-objections. All the matters were heard together in the

High Court, which dismissed the appeal preferred by Defendants 2 to 8 as well as the cross-objections lodged by the plaintiff but decreed the appeal preferred by the first defendant and passed a decree in her favour for possession of her half share in the suit properties, and future mesne profits against the remaining defendants. Defendants 2 to 8 applied for a certificate from the High Court under Articles 133(1) (a) and 133(1) (c) in respect of the decree of the High Court in the two appeals. The High Court granted the certificate to Defendants 2 to 8 insofar as Defendant 1 was concerned but refused certificate insofar as the plaintiff was concerned. We are, therefore, concerned with a limited question and that is whether the High Court was right in awarding a decree to the first defendant for possession of her half share and mesne profits.

5. Mr Venkatarangaiengar, who appears for the appellants accepts the position that as the certificate was refused to Defendants 2 to 8 insofar as the plaintiff is concerned, the only points which they are entitled to urge are those which concern the first defendant alone and no other. The points which the learned counsel formulated are as follows:

1. It is not open to a court to award future mesne profits to a party who did not claim them in the suit;
2. No decree can be passed in favour of a defendant who has not asked for transposition as plaintiff in the suit.
3. That the first defendant was estopped by her conduct from claiming possession of her alleged half share of the properties.

6. We will consider the question of estoppel first. The conduct of the first defendant from which the learned counsel wants us to draw the inference of estoppel consists of her attitude when she was served with a notice by the plaintiff, her general attitude respecting Bangalore properties as expressed in the letter dated 17th January, 1941, written by her to her stepmother and the attestation by her and her husband on 3rd October, 1944, of the will executed on 25th January, 1941 by Maddanappa. In the notice dated 26th January, 1948, by the plaintiff's lawyer to the first defendant it was stated that the plaintiff and the first defendant were joint owners of the suit properties which were in the possession of their father and requested for the cooperation of the first defendant in order to effect the division of the properties. A copy of this notice was sent to Maddanappa and he sent a reply to it to the plaintiff's lawyers. The first defendant, however, sent no reply at all. We find it difficult to construe the conduct of the first defendant in not replying to the notice and in not cooperating with the plaintiff in instituting a suit for obtaining possession of the properties as justifying the inference of estoppel. It does not mean that she impliedly admitted that she had no interest in the properties, It is true that in Ex. 15, which is a letter sent by her on 17th January, 1941, to her stepmother she has observed thus:

“I have no desire whatsoever in respect of the properties which are at Bangalore. Everything belongs to my father. He has the sole authority to do anything.... We give our consent to anything done by our father. We will not do anything.”

But even these statements cannot assist the appellants because admittedly the father knew the true legal position. That is to say, the father knew that these properties belonged to Puttananjamma and that he had no authority to deal with these properties. No doubt, in his

written statement Maddanappa had set up a case that the properties belonged to him by virtue of the declaration made by Puttananjamma at the time of her death, but that case has been negated by the courts below. The father's possession must, therefore, be deemed to have been, to his knowledge, on behalf of the plaintiff and the first defendant. There was thus no possibility of an erroneous belief about his title being created in the mind of Maddanappa because of what the first defendant had said in her letter to her stepmother.

7. Insofar as the attestation of the will is concerned, the appellants' position is no better. This "will" purports to make a disposition of the suit properties along with other properties by Maddanappa in favour of Defendants 3 to 8. The attestation of the will by the first defendant and her husband, would no doubt affix them with the knowledge of what Maddanappa was doing, but it cannot operate as estoppel against them and in favour of Defendants 3 to 8 or even in favour of Maddanappa. The will could take effect only upon the death of Maddanappa and, therefore, no interest in the property had at all accrued to Defendants 3 to 8 even on the date of the suit. So far as Maddanappa is concerned, he, as already stated, knew the true position and therefore, could not say that an erroneous belief about his title to the properties was created in his mind by reason of the conduct of the first defendant and her husband in attesting the document. Apart from that there is nothing on the record to show that by reason of the conduct of the first defendant Maddanappa altered his position to his disadvantage.

8. Mr Venkatarangaiengar, however, says that subsequent to the execution of the will he had effected further improvements in the properties and for this purpose spent his own moneys. According to him, he would not have done so in the absence of an assurance like the one given by the first defendant and her husband to the effect that they had no objection to the disposition of the suit properties by him in any way he chose to make it. The short answer to this is that Maddanappa on his own allegations was not only in possession and enjoyment of these properties ever since the death of Puttananjamma but had made improvements in the properties even before the execution of the will. In these circumstances, it is clear that the provisions of Section 115 of the Indian Evidence Act, which contain the law of estoppel by representation do not help him.

9. Mr Venkatarangaiengar, however, wanted us to hold that the law of estoppel by representation is not confined to the provisions of Section 115 of the Evidence Act, that apart from the provisions of this section there is what is called "equitable estoppel" evolved by the English Judges and that the present case would come within such "equitable estoppel". In some decisions of the High Courts reference has been made to "equitable estoppel" but we doubt whether the court while determining whether the conduct of a particular party amounts to an estoppel, could travel beyond the provisions of Section 115 of the Evidence Act. As was pointed out by Garth, C.J. in *Ganges Manufacturing Co. v. Saurjmul* [ILR 5 Cal 669] the provisions of Section 115 of the Evidence Act are in one sense a rule of evidence and are founded upon the well known doctrine laid down in *Pickard v. Sears* [1832 A & E 469] in which the rule was stated thus:

"Where one by his word or conduct wilfully causes another to believe for the existence of a certain state of thing and induced him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the first time."

The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation.

10. The general principle of estoppel is stated thus by the Lord Chancellor in *Cairneross v. Lorimer* [3 HLC 829]:

“The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.... I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of it being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had, been done by his previous license.”

11. It may further be mentioned that in *Carr v. London & N.W. Ry. Co.* [LR 10 CP 307] four propositions concerning an estoppel by conduct were laid down by Brett, J. the third of which runs thus:

“If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.”

This also shows that the person claiming benefit of the doctrine must show that he has acted to his detriment on the faith of the representation made to him.

12. This was quoted with approval in *Sarad v. Gopal* [19 IA 203]. It will thus be seen that here also the person who sets up an estoppel against the other must show that: his position was altered by reason of the representation or conduct of the latter and unless he does that even the general principle of estoppel cannot be invoked by him. As already stated no detriment resulted to any of the defendants as a result of what Defendant 1 had stated in her letter to her stepmother or as a result of the attestation by her and her husband of the will of Maddanappa.

14. Finally on this aspect of the case the learned counsel referred to the observations of Lord Granworth in *Ramsden v. Dyson* [LR I HL App 129] which are as follows:

“If a stranger begins to build on my land supposing it to be his own and I (the real owner) perceiving his mistake, abstain from setting him right, and leave him to

persevere in his error, a court of equity will not allow me afterwards to assert my title to the land, on which he has expended money on the supposition, that the land was his own. It considers that when I saw the mistake in which he had fallen, it was my duty to be active and to state his adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.”

The doctrine of acquiescence cannot afford any help to the appellants for the simple reason that Maddanappa who knew the true state of affairs could not say that any mistaken belief was caused in his mind by reason of what the first defendant said or did. According to the learned counsel, even if the first defendant’s claim to the half share in the suit property cannot be denied to her she must at least be made to pay for the improvements effected by Maddanappa, according to her proportionate share in the suit property. As already stated the appellant was in enjoyment of these properties after his wife’s death and though fully aware of the fact that they belonged to the daughters he dealt with them as he chose. When he spent moneys on those properties he knew what he was doing and it is not open to him or to those who claim under him to say that the real owners of the properties or either of them should be made to pay for those improvements. No man who, knowing fully well that he has no title to property spends money on improving it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person. In our view, therefore, neither was Defendant 1 estopped from claiming possession of half share of the properties nor can she be made liable to pay half the costs of improvements alleged to have been made by the second defendant.

15. Now regarding the second point, this objection is purely technical. The plaintiff sued for partition of the suit properties upon the ground that they were inherited jointly by her and by the first defendant and claimed possession of her share from the other defendants who were wrongfully in possession of the properties. She also alleged that the first defendant did not cooperate in the matter and so she had to institute the suit. The first defendant admitted the plaintiff’s title to half share in the properties and claimed a decree also in her own favour to the extent of the remaining half share in the properties. She could also have prayed for her transposition as a co-plaintiff and under Order 1 Rule 10(2) CPC the Court could have transposed her as a co-plaintiff. The power under this provision is exercisable by the Court even suo motu. As pointed out by the Privy Council in *Bhupender v. Rajeshwar* [581 A 228] the power ought to be exercised by a court for doing complete justice between the parties. Here both the plaintiff and the first defendant claim under the same title and though Defendants 2 to 8 had urged special defences against the first defendant, they have been fully considered and adjudicated upon by the High Court while allowing her appeal. Since the trial court upheld the special defences urged by Defendants 3 to 8 and negated the claim of the first defendant it may have thought it unnecessary to order her transposition as plaintiff. But the High Court could, while upholding her claim, well have done so. Apparently it either over-looked the technical defect or felt that under Order 41 Rule 33 it had ample power to decree her claim. However that, may be the provisions of Section 99 would be a bar to interfere here with the High Court’s decree upon a ground such as this.

16. The only other question for consideration is whether the High Court was justified in awarding mesne profits to the first defendant even though she was not transposed as a plaintiff. According to the learned counsel mesne profits cannot be awarded to a successful party to a suit for possession unless a claim was made in respect of them. The learned counsel is right insofar as mesne profits prior to the suit are concerned but insofar as mesne profits subsequent to the date of the institution of the suit, that is, future mesne profits are concerned, the position is governed by Order 20 Rule 12 CPC which is as follows:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree -

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until:

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

17. The learned counsel, however, relied upon the decision of this Court in *Mohd. Amin v. Vakil Ahmed* [1952 SCR 1133]. That was a suit for a declaration that a deed of settlement was void and for possession of the property which was the subject-matter of the settlement under that deed. The plaintiff's had not claimed mesne profits, at all in their plaint but the High Court had passed a decree in the plaintiffs favour not only for possession but also for mesne profits. In the appeal before this Court against the decision of the High Court one of the points taken was that in a case of this kind, the court has no power to award mesne profits. While upholding this contention Bhagwati, J. who delivered the judgment of the Court has observed thus:

“The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression ‘awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto’. We are afraid that the claim for mesne profits cannot be included within this expression and the High-Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. The provision in regard to the mesne profits will therefore have to be deleted from the decree.”

19. In the result therefore we uphold the decree of the High Court and dismiss the appeal.

* * * * *

Kumari Madhuri Patil v. Addl. Commissioner

AIR 1995 SC 94

K. RAMASWAMY, J.- The appellants are Suchita and Madhuri, daughters of Laxman Pandurang Patil. Their grandfather was Panduranga Patil. Laxman Patil was admitted in the school in the year 1943. In his school admission register and his school and college certificates his caste was shown as 'Hindu Koli'. Suchita had applied through her father, Laxman Patil to the Tahsildar, Andheri on 30-11-1989 for issuance of caste certificate as 'Mahadeo Koli' a Scheduled Tribe. The Sub- Divisional Officer, Bombay Suburban District by his proceeding dated 22-6-1989 refused to issue caste certificate sought for by Ms Suchita and informed her that she was not a Scheduled Tribe 'Mahadeo Koli'. She filed an appeal before the Additional Commissioner, Konkan Division, Bombay. As she had applied for admission into the MBBS course and the time for her admission was running out, she filed Writ Petition No. 3516 of 1990 in the High Court to direct the Additional Commissioner to dispose of her appeal and to further direct to the Dean of D.Y.C. Naik Medical College to permit her to appear for interview and admit her in the college if she was found fit. It is not in dispute that she filed a copy of the judgment in Subhash Ganpatrao Kabade v. State Of Maharashtra, wherein 'Koli' was held to be 'Mahadeo Koli', before the Additional Commissioner and also in the High Court. Because of the directions of the High Court she was admitted in the MBBS course and she is continuing her studies. The Additional Commissioner directed the Tahsildar to issue the certificate and accordingly issued to Miss Suchita the certificate as Scheduled Tribe. Miss Suchita applied to the Verification Committee for confirmation of her status as Scheduled Tribe. Madhuri applied for the issuance of Scheduled Tribe certificate before the Divisional Executive Magistrate, Greater Bombay, enclosing the order passed by the High Court in Writ Petition No. 3516 of 1990, dated 4-12-1990, in favour of her sister Suchita, which was issued on 23-8-1990 declaring her status to be 'Mahadeo Koli' and then she got the admission into BDS in the year 1992. Thereafter, she applied to the Verification Committee for confirmation. The proceeding by the Verification Committee was jointly conducted into the claims of the appellants, initiated on 8-12-1989, the father of the appellants was called upon to furnish in the prescribed form the detailed information regarding his family background, ancestry; and anthropology of 'Mahadeo Koli', Scheduled Tribe, to verify the veracity of his claim of status as ST.

3. 'Mahadeo Koli' was declared to be a Scheduled Tribe by Bombay Province as early as 1933 and the President of India declared in 1950 under Article 342, in consultation with the Government of Bombay (Maharashtra) and as amended from time to time. Laxman submitted the particulars along with his school and college certificates, junior college certificate and school certificates of the appellants, the certificates of his sister and appellants' maternal aunt, Jyotsana Pandurang Patil dated 3-3-1978 and maternal uncle Balakrishna Pandurang Naik dated 22-10-1954 and a statement by the Caste Association. The Committee in their order dated 26-6-1992 considered the entire evidence placed before them, the particulars furnished by their father in the pro forma on their ancestry and other anthropological particulars and after hearing their counsel, found that the appellants are 'Koli' by caste which is recognised as Other Backward Class, i.e., OBC in the State and that they are not 'Mahadeo Koli', the

Scheduled Tribe and their claim for that social status was accordingly declared untenable. The certificates issued by the respective Executive Magistrates were cancelled and confiscated. Their appeal provided under the Rules too was heard by the Additional Commissioner in Caste Appeal No. 11 of 1992 who by an elaborate order dated 30-4-1993 found that the certificate issued in favour of Balakrishna Pandurang Naik, maternal uncle, was from a Magistrate, Greater Bombay, who had no jurisdiction and was issued social status certificate without proper scrutiny. The certificate issued to Jyotsana by the Judicial Magistrate was on the basis of the school leaving certificate, ration card etc. and that, therefore, it does not provide any probative value to their status as Scheduled Tribe, the entries in school and college certificates of the appellants are not conclusive.

4. It is obvious that Judicial Magistrate has no jurisdiction to issue caste certificate and it is a void certificate. The entries in the school certificate of the father of the appellants, Laxman Patil, being pre-independence period, it bears "great probative value" wherein he declared himself to be 'Hindu Koli' which is now recognised as a backward class. The caste affirmation certificate issued by the Samaj "Caste Association" consists of these very communities who seek to get the status as Scheduled Tribes. It also does not, therefore, bear any probative value. School certificates and college certificates in favour of the appellants are the subject of enquiry, therefore, do not bear any value and independently their status is to be considered.

5. The Committee as well as the Additional Commissioner relied upon a report of expert committee which had gone into the sociology, anthropology and ethnology of the Scheduled Tribes including 'Mahadeo Koli' which formed the basis for the pro forma questionnaire prepared by the Government and as given to and answered by the father of the appellants. On the basis of the information furnished by the father of the appellants and the anthropological and ethnological findings in that behalf, the Additional Commissioner, in our view rightly, held that an argument of social mobility and modernization often alluringly put forth to obviate the need to pass the affinity test is only a convenient plea to get over the crux of the question. Despite the cultural advancement, the genetic traits pass on from generation to generation and no one could escape or forget or get them over. The tribal customs are peculiar to each tribe or tribal communities and are still being maintained and preserved. Their cultural advancement to some extent may have modernized and progressed but they would not be oblivious to or ignorant of their customary and cultural past to establish their affinity to the membership of a particular tribe. The Mahadeo Koli, a Scheduled Tribe declared in the Presidential Notification, 1950, itself is a tribe and is not a sub-caste. It is a hill tribe, may be like 'Koya' in Andhra Pradesh. Kolis, a backward class, are fishermen by caste and profession and reside mostly in Maharashtra coastal area. Kolis have different sub-castes. Mahadeo Kolis reside in hill regions, agriculture, agricultural labour and gathering of minor forest produce and sale thereof is their avocation. Therefore, the cancellation of the social certificate issued by the Executive Magistrates concerned by the Scrutiny Committee was legal.

6. The appellants' Writ Petition No. 1849 of 1993 was dismissed by the Division Bench by its order dated 17-8-1993 with brief reasons. Shri Ganesh, the learned counsel for the appellants contended that in the affidavit filed by the appellant's father before the Verification Committee he has explained the circumstances in which he came to be described as Hindu Koli. Prior to 1950, there was no necessity to describe sub-caste. For the first time in 1976

under the Scheduled Castes Scheduled Tribes (Amendment) Act, 1976, Mahadeo Koli was introduced as a Scheduled Tribe in the State of Maharashtra. The certificates issued to the maternal uncle Balakrishna Naik as Mahadeo Koli in the year 1954 and entries in his service record and to maternal aunt, Jyotsana in the year 1979 probalilise the omission to describe Laxman Patil as Mahadeo Koli, though they, as a fact, belong to Scheduled Tribe. In the school registers the appellants had enjoyed the status as Scheduled Tribe which provides probative value. The Committee, the Additional Commissioner and the High Court had not appreciated the evidence in proper perspective before declining to confirm the social status of the appellants as Scheduled Tribes and the High Court ought to have gone into these aspects as was done in *Subhash Ganpatrao Kabade* casel. it is further contended that Suchita has completed her final year course of study. Madhuri is in midway and that, therefore, justice demands that their education should not be dislocated with the denial of the social status as Scheduled Tribes. The sheet-anchor for the counsel's argument is the judgment of the Division Bench of the Bombay High Court in *Subhash Ganpatrao Kabade* case. We find no force in the contentions.

7. From the counter-affidavit filed by the State which has not been disputed by filing any rejoinder and as is borne out from the public notification issued by the President in the year 1950 in exercise of the power under Article 342 read with Article 366(25) of the Constitution that Mahadeo Koli is declared as a Scheduled Tribe. Article 366(25) defines Scheduled Tribes, as meaning such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are declared under Article 342 to be Scheduled Tribes for the purposes of the Constitution.

Article 342 gives power to the President to specify the tribe with respect to any State or Union Territory, after consultation with the Governor where it is a State, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall, for the purposes of the Constitution, be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

8. In *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College* [(1990) 3 SCC 130] this Court declared that subject to the law made by Parliament under sub-section (2) of Section 342, the tribes or tribal communities or parts of or groups within tribes or tribal communities specified by the President by a public notification shall be final for the purpose of the Constitution. They are the tribes in relation to that State or Union Territory and that any tribe or tribes or tribal communities or parts of or groups within such tribe or tribal communities, not specified therein in relation to that State, shall not be Scheduled Tribes for the purpose of the Constitution. The father of one Chandra Shekhar Rao who hailed from Tenali in Guntur District of Andhra Pradesh is a Settibalija by caste which is recognised as a backward class. His father obtained a certificate from the Tahsildar, Tenali that he belonged to Scheduled Tribe and had got an appointment in a public undertaking of Bombay. On the basis of social status certificate obtained by his father and entries in service record of his father, he applied for admission into medical college as Scheduled Tribe. When he was not admitted, he filed the writ petition in this Court under Article 32 seeking a declaration that Settibalija though was not declared to be Scheduled Tribe in Maharashtra it was a Scheduled Tribe for the purpose of the Constitution and that he was entitled to the admission into the

medical college on the basis of his social status as a Scheduled Tribe. This Court did not uphold the contention. This Court held that the declaration by the President by a public notification in relation to a State in consultation with the Governor of that State is conclusive and court cannot give such a declaration. The same view was reiterated by another Constitution Bench in *Action Committee on issue of Caste Certificate to SCs and STs in the State of Maharashtra v. Union of India*.

9. The Preamble to the Constitution promises to secure to every citizen social and economic justice, equality of status and of opportunity assuring the dignity of the individual. The Scheduled Tribes are inhabitants of intractable terrain regions of the country kept away from the mainstream of national life and with their traditional moorings and customary beliefs and practices, they are largely governed by their own customary code of conduct regulated from time to time with their own rich cultural heritage, mode of worship and cultural ethos. The Constitution guarantees to them, who are also Indian citizens, equality before law and the equal protection of law. Though Articles 14 and 15(1) prohibit discrimination among citizens on certain grounds, Article 15(4) empowers the State to make special provisions for advancement of Scheduled Castes and Scheduled Tribes. Article 16(1) requires equality of opportunity to all citizens in matters of appointments to an office or a post under the Union or a State Government or public undertakings etc. But Article 16(4) empowers the State to make provision for reservation of appointments or posts in favour of classes of citizens not adequately represented in the services under the State.

Article 46 enjoins the State by mandatory language employed therein, to promote with special care the educational or economic interest of the Scheduled Tribes and Scheduled Castes and to protect them from "social injustice" and "all forms of exploitation". Article 51-A(h) enjoins every citizen to develop scientific temper, humanism and the spirit of inquiry and reform. Again Article 51-A(h) requires every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement. It is, therefore, a fundamental duty of every citizen to develop scientific temper and humanism and spirit of inquiry to reform himself in his onward thrust or strive to achieve excellence in all spheres of individual and collective activity. Since the Scheduled Tribes are a nomadic class of citizens whose habitat being generally hilly regions or forests, results in their staying away from the mainstream of the national life. Therefore, the State is enjoined under our Constitution to provide facilities and opportunities for development of their scientific temper, educational advancement and economic improvement so that they may achieve excellence, equality of status and live with dignity.

Reservation in admission to educational institutions and employment are major State policies to accord to the tribes, social and economic justice apart from other economic measures. Hence, the tribes, by reason of State's policy of reservation, have been given the exclusive right to admission into educational institutions or exclusive right to employment to an office or post under the State etc. to the earmarked quota. For availment of such exclusive rights by citizens belonging to tribes, the President by a notification specified the Scheduled Tribes or tribal communities or parts of or groups of tribes or tribal communities so as to entitle them to avail of such exclusive rights. The Union of India and the State Governments have prescribed the procedure and have entrusted duty and responsibility to Revenue Officers

of gazetted cadre to issue social status certificate, after due verification. It is common knowledge that endeavour of States to fulfil constitutional mandate of upliftment of Scheduled Castes and Scheduled Tribes by providing for reservation of seats in educational institutions and for reservation of posts and appointments, are sought to be denied to them by unscrupulous persons who come forward to obtain the benefit of such reservations posing themselves as persons entitled to such status while in fact disentitled to such status. The case in hand is a clear instance of such pseudo-status.

Kolis have been declared to be OBC in the State of Maharashtra being fishermen, in that their avocation is fishing and they live mainly in the coastal region of Maharashtra. Mahadeo Kolis are hill tribes and it is not a sub-caste. Even prior to independence, the Maharashtra Government declared Mahadeo Koli to be criminal tribe as early as 29-5-1933 in Serial No. 15 in List II thereof. In 1942 Resolution in Serial No. 15 in Schedule B of the Bombay resolution Mahadeo Koli tribe was notified as a Scheduled Tribe. It was later amended as Serial No. 13. In the Presidential Scheduled Castes/Scheduled Tribes Order, 1950, it was reiterated. A slight modification was made in that behalf by the Presidential Notification dated 29-10-1956. In the 1976 Amendment Act, there is no substantial change except removing the area restriction. Thus Mahadeo Koli, a Scheduled Tribe continued to be a Scheduled Tribe even after independence. The Presidential Notification, 1950 also does recognise by public notification of their status as Scheduled Tribes. The assumption of the Division Bench of the Bombay High Court in *Subhash Ganpatrao Kabade* case, that Mahadeo Koli was recognised for the first time in 1976 under Amendment Act, 1976, as Scheduled Tribe is not relatable to reality and an erroneous assumption made without any attempt to investigate the truth in that behalf. Presidential declaration, subject to amendment by Parliament being conclusive, no addition to it or declaration of castes/tribes or sub-castes/parts of or groups of tribes or tribal communities is permissible.

10. The entries in the school register preceding the Constitution do furnish great probative value to the declaration of the status of a caste. Hierarchical caste stratification of Hindu social order has its reflection in all entries in the public records. What would, therefore, depict the caste status of the people inclusive of the school or college records, as the then census rules insisted upon. Undoubtedly, Hindu social order is based on hierarchy and caste was one of the predominant factors during pre-Constitution period. Unfortunately instead of dissipating its incursion it is being needlessly accentuated, perpetrated and stratification is given legitimacy for selfish ends instead of being discouraged and put an end to by all measures, including administrative and legislative. Be it as it may, people are identified by their castes for one or the other is a reality. Therefore, it is no wonder that caste is reflected in relevant entries in the public records or school or college admission register at the relevant time and the certificates are issued on its basis. The father of the appellants admittedly described himself in 1943 and thereafter as a Hindu Koli. In other words his status was declared a Koli by caste and Hindu by religion. Kolis are admittedly OBCs. His feigned ignorance of the ancestry is too hard to believe. The averment in the affidavit that the entries were mistakenly made as Hindu Koli is an obvious afterthought. The anthropological moorings and ethnological kinship affinity (sic) gets genetically ingrained in the blood and no one would shake off from past, in particular, when one is conscious of the need of

preserving its relevance to seek the status of Scheduled Tribe or Scheduled Caste recognised by the Constitution for their upliftment in the society. The ingrained tribal traits peculiar to each tribe and anthropological features all the more become relevant when the social status is in acute controversy and needs a decision. The correct projectives furnished in pro forma and the material would lend credence and give an assurance to properly consider the claims of the social status and the officer or authority concerned would get an opportunity to test the claim for social status of particular caste or tribe or tribal community or group or part of such caste, tribe or tribal community. It or he would reach a satisfactory conclusion on the claimed social status. The father of the appellant has failed to satisfy the crucial affinity test which is relevant and germane one. On the other hand the entries in his school and college registers as Hindu Koli positively belie the claim of his social status as Scheduled Tribe.

11. It is seen that admittedly the appellants reside in Muland area. In the first instance Suchita rightly approached the Tahsildar having jurisdiction over the area concerned who refused to give her social status certificate as Mahadeo Koli, she filed an appeal and the High Court directed the Deputy Commissioner to dispose of the appeal who in turn without deciding the facts, directed the Tahsildar to issue the certificate. In the meanwhile she had, by orders of the court, got admission into the college and pursued her study. The Caste Certificate Scrutiny Committee consists of the Secretary as Chairman and two members, and a Research Officer-cum-Director who have intimate knowledge in the identification of the specified tribes, considered the entire material. The Committee has stated and as is seen that the appellant's father clearly accepted that his caste is recorded in the college as well as secondary school and college records as Hindu Koli only. This fact is strengthened by the candidate's father's school record (document at Serial No. 1). In the new English School locality at Thane, the name of the candidate's father appeared in the admission register at Serial No. 3733, and the caste clearly shown there was as H. Koli. This school record, comparatively, is not only oldest but it being the record pertaining to candidate's father's admission to school prior to independence, it carries greatest probative evidentiary value, The caste of the person, as stated earlier, is determined on the basis of the caste of their parents, basically for the reasons that the caste is acquired by birth. When the school record of the candidate's father shows his caste as Koli, the documents which the candidates have produced (documents quoted at Serial Nos. 3, 5 to 8, 11, 13 to 16) showing their caste as Mahadeo Koli cannot be relied upon. All these documents furnished by the candidates are those manipulated and fabricated with to knock of the seats in educational institutions defrauding the true Scheduled Tribes to their detriment and deprivation. As the school record of the candidate's father shows his caste as 'Koli', the caste certificates which have been issued to the appellants and their relatives by the Executive Magistrate, Greater Bombay (documents at Serial Nos. 9, 10, 12, 17 to 19) are without proper enquiry and investigation, besides being without jurisdiction. Its reiteration in service record would not carry any credibility or a ground to accept the caste as Scheduled Tribe. The caste certificate issued by Samaj being self-serving and subject to scrutiny, they cannot be held to be conclusive proof to determine the caste claim.

The finding recorded by the Committee is based on consideration of the entire material together with sociological, anthropological and ethnological perspectives which Mahadeo

Kolis enjoy and of the OBC castes and sub- caste of the Kolis. The Additional Commissioner as well, has minutely gone into all the material details and found that when a section of the society have started asserting themselves as tribes and try to earn the concession and facilities reserved for the Scheduled Tribes, the tricks are common and that, therefore, must be judged on legal and ethnological basis. Spurious tribes have become a threat to the genuine tribals and the present case is a typical example of reservation of benefits given to the genuine claimants being snatched away by spurious tribes. On consideration of the evidence, as stated earlier, both the Committee and the appellate authority found as a fact that the appellants are not tribe 'Mahadeo Koli' entitled to the constitutional benefits. In Subhash Ganpatrao Kabade case', the approach of the Division Bench of the High Court appears to be legalistic in the traditional mould totally oblivious of the anthropological and ethnological perspectives and recorded their findings with unwarranted strictures on the approach rightly adopted by the Scrutiny Committee and the Additional Commissioner to be '(funny)' "obviously incorrect" and "queer reasoning". Admittedly the petitioner therein, in days preceding the Constitution, described himself in the service book as well as school leaving certificate as a Hindu Koli. The High Court also found that they were backward class but proceeded on the erroneous footing that Mahadeo Koli was introduced for the first time through 1976 Amendment Act and that, therefore, they were the genuine Scheduled Tribes entitled to 254 the benefits. In view of the above, we cannot help holding that the reasoning of the High Court is wholly perverse and untenable.

12. We have seen that Scrutiny Committee proceedings although started on 8-12-1989 were prolonged till 26-6-1992. We do not have record to scan the reasons for the delay. It would appear that the constitution of a Committee with large number of members and Secretary as Chairman must have greatly contributed for the delay in deciding the claims for the social status. A right of appeal provided thereafter compounded further delay though the Additional Commissioner on the facts of this case has disposed of the appeal very expeditiously. However, all of them are the contributory factors for the delay.

13. The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee.

It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor.

It is the parent or the guardian who may play fraud claiming false status certificate. It is, therefore, necessary that the certificates issued are scrutinized at the earliest and with utmost expedition and promptitude. For that purpose, it is necessary to streamline the procedure for the issuance of social status certificates, their scrutiny and their approval, which may be the following:

1. The application for grant of social status certificate shall be made to the Revenue Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such officer rather than at the Officer, Taluk or Mandal level.

2. The parent, guardian or the candidate, as the case may be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub-castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the Directorate concerned.

3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six months in advance before seeking admission into educational institution or an appointment to a post.

4. All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the department concerned, (II) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer who has 255 intimate knowledge in the verification and issuance of the social status certificates.

In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims.

The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine" or 'doubtful' or spurious or falsely or wrongly claimed, the Director concerned should issue show-cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the educational institution concerned in which the candidate is studying or employed. The notice should indicate that the

representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receipt of the notice.

In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the candidate/parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-à-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the Caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalizing the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the educational institution concerned or the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority should cancel the admission/appointment without any further notice to the candidate and debar the candidate from further study or continue in office in a post.

14. Since this procedure could be fair and just and shorten the undue delay and also prevent avoidable expenditure for the State on the education of the candidate admitted/appointed on false social status or further continuance therein, every State concerned should endeavour to give effect to it and see that the constitutional objectives intended for the benefit and advancement of the genuine Scheduled Castes/Scheduled Tribes or backward classes, as the case may be are not defeated by unscrupulous persons.

15. The question then is whether the approach adopted by the High Court in not elaborately considering the case is vitiated by an error of law. High Court is not a court of appeal to appreciate the evidence. The Committee which is empowered to evaluate the evidence placed before it when records a finding of fact, it ought to prevail unless found vitiated by judicial review of any High Court subject to limitations of interference with findings of fact. The Committee when considers all the material facts and records a finding, though another view, as a court of appeal may be possible, it is not a ground to reverse the findings. The court has to see whether the Committee considered all the relevant material placed before it or has not applied its mind to relevant facts which have led the Committee ultimately record the finding. Each case must be considered in the backdrop of its own facts.

16. Whether appellants are entitled to their further continuance in the studies is the further question. Often the plea of equities or promissory estoppel would be put forth for continuance and completion of further course of studies and usually would be found favour with the courts. The courts have constitutional duty and responsibility, in exercise of the power of its judicial review, to see that constitutional goals set down in the Preamble, the Fundamental Rights and the Directive Principles of the Constitution, are achieved. A party that seeks equity, must come with clean hands. He who comes to the court with false claim, cannot plead equity nor the court would be justified to exercise equity jurisdiction in his favour. There is no estoppel as no promise of the social status is made by the State when a false plea was put forth for the social status recognised and declared by the Presidential Order under the Constitution as amended by the SC & ST (Amendment) Act, 1976, which is later found to be false. Therefore, the plea of promissory estoppel or equity have no application. When it is found to be a case of fraud played by the concerned, no sympathy and equitable considerations can come to his rescue. Nor the plea of estoppel is germane to the beneficial

constitutional concessions and opportunities given to the genuine tribes or castes. Courts would be circumspect and vary in considering such cases.

17. We have seen that Miss Suchita rightly made an application before the competent officer within whose jurisdiction her father lives in Muland and when he refused to give the certificate, she filed an appeal; approached the High Court and obtained direction and gained admission. It is not in dispute that the Additional Commissioner was delaying it; he did not decide as directed by the High Court, instead directed the Tahsildar to issue the certificate. Thus she secured a false social status certificate and orders of the court were used to gain admission. The judicial process is made use of to secure admission. She continued her studies thereafter pending scrutiny of her status certificate. No doubt there was a delay on the part of the Scrutiny Committee in the disposal of the claims and we do not find any record to scan the reasons for the delay. Suffice to state that her parents have put her under a cloud as to her social status. But as seen from the facts a course of conduct was adopted by her parents to gain admission on the claim which is now found to be false. Parents' misconduct visits the children also many a times. However, she has now completed the course of study except to appear for the final year as contended for her and nothing more is to be done in the situation for her to complete her course of study. We direct the Principal to permit her to sit for the final year examination, if she has completed the course of study as represented to us but not with the social status as a Scheduled Tribe which was claimed fraudulently and made her admission with the aid of the court's order and continue her studies. The delay in disposal facilitated her continuance in study of MBBS course.

18. The delay in the process is inevitable but that factor should neither be considered to be relevant nor be an aid to complete the course of study. But for the fact that she has completed the entire course except to appear for the final examination, we would have directed to debar her from prosecuting the studies and appearing in the examination. In this factual situation no useful purpose would be served to debar her from appearing for the examination of final year MBBS. Therefore, we uphold the cancellation of the social status as Mahadeo Koli fraudulently obtained by Km Suchita Laxman Patil, but she be allowed to appear for the final year examination of MBBS course. She will not, however be entitled in future for any benefits on the basis of the fraudulent social status as Mahadeo Koli. However, this direction should not be treated and used as a precedent in future cases to give any similar directions since the same defeats constitutional goals.

19. In the case of Madhuri Laxman Patil, she did not approach the competent officer. She appears to have wrongly gone to an officer who had no jurisdiction, obviously she has shown the order issued by the High Court in favour of her sister Suchita and secured the certificate and got the admission. Though she is in midway of her study in BDS in the end of second year, she cannot continue her studies with her social status as Mahadeo Koli, a Scheduled Tribe and the concessions which she might have got on that account. If she was eligible for obtaining admission as a general candidate she may continue her studies. Therefore, we uphold the cancellation and confiscation of her and of Suchita of social status as Mahadeo Koli ordered by Scrutiny Committee and affirmed by the order of Appellate Authority and that of the High Court in that behalf. Subject to the above modifications, the appeal is dismissed but without costs.

Sanatan Gauda v. Berhampur University

AIR 1990 SC 1075

SAWANT, J.- This is an appeal by special leave against the order dated 30th July, 1987 of the High Court of Orissa.

2. The appellant passed his M.A. examination in July 1981 securing in the aggregate 364 marks out of 900 marks, i.e., more than 40 per cent of the total marks. In 1983, he secured admission in Ganjam Law College for three-year Law Course. There is no dispute that at the time he took admission, he had submitted his marks-sheet along with his M.A. degree certificate. The appellant completed his first year course known as the "Pre-Law Course" and in 1984 was promoted to the second year course known as the "Intermediate Law Course". In 1985, he appeared for the Pre-Law and Inter-Law examinations held by the Berhampur University to which the Ganjam Law College is affiliated. He gave the said examination and in the same year he was admitted to the Final Law course in the same College.

3. It appears that although he was admitted to the Final Law classes, his results for the Pre-Law and Inter-Law examinations were not declared. The appellant made representations to the Bar Council 275 of India and the Administrator of the Berhampur University, on February 12, 1986. On October 30, 1986, the University replied that since the appellant had secured less than 39.5 per cent marks in his M.A. degree examination, he was not eligible for admission to the Law Course. On November 11, 1986, the appellant made a representation pointing out that he had secured more than 40 per cent marks in the said examination and, therefore, he was entitled to be admitted to the Law course. On November 14, 1986, the Chairman of the Board of Studies also wrote to the Deputy Registrar of the University pointing out that the Board of Studies in its meeting held on October 29, 1986 had recommended that those students who had passed their M.A. examination and had secured more than 40 per cent of the total marks should be considered eligible for admission to the Law course even though they had secured less than 20 per cent marks in any one of the papers in the said examinations.

4. In spite of this, the University did not take any step to announce the appellant's results. Hence, the appellant approached the Orissa High Court by a writ petition on May 11, 1987 challenging the non-declaration of his results and the University's refusal to permit the appellant to appear in the Final Law examination. The writ petition was dismissed by the High Court by the impugned order of July 30, 1987. Against the said decision the resent appeal was filed. By an interim order of March 15, 1988, the appellant was permitted to continue his Final Law course and to appear in the examination of the said course. It was also directed that the results of the examinations in which the appellant had appeared should be declared in due course.

5. On these facts, the question that falls for consideration is whether the appellant was eligible to be admitted to the Law course. The University has objected to the appellant's admission on the ground that the University Regulation 1 in Chapter VIII relating to the Bachelor of Laws Examination (Three-Year Course) read with Regulation 10 in Chapter V of the University Regulations relating to the Master's Degree Examination requires that if the

student has secured less than 25 per cent marks in any of the papers for M.A. examination, he should have on the aggregate more than 39.5 per cent marks in the said examination. Admittedly, the appellant has obtained in the aggregate 364 marks out of 900 marks, i.e., more than 40 per cent marks, but in one paper in Group-II, he has secured only 13 marks out of 100 which were less than 25 per cent. It is, therefore, the University's contention that in view of the said Regulations, he was not qualified to be admitted to the Law course and since he was admitted wrongly, he 276 was not entitled to appear for the examination and, therefore, for the declaration of his results in the said examination.

6. Regulation 1 of Chapter VIII which lays down qualification for admission to the Law course is as follows:

“1. Any registered candidate may be admitted to the degree of Bachelor of Laws, if (a) he passes the examination for the degree of Bachelor of Arts, Bachelor of Science, Bachelor of Commerce, Bachelor of Oriental Learning, Bachelor of Medicine and Bachelor of Surgery, Bachelor of Science (Engineering), Bachelor of Science (Agriculture), Bachelor of Veterinary Science and Animal Husbandary, B. Pharma or any other examination recognised by the Bar Council of India and the Academic Council as equivalent thereto securing 40% or more than 39.5% of marks in the aggregate of such examination or any other higher degree examination passed after graduation.

Provided that relaxation to the extent of 5% of marks in the qualifying examination be allowed to the Scheduled Caste and Scheduled Tribe candidates.

Provided further that in case of physically orthopaedically handicapped candidates, relaxation upto 5% of marks in the qualifying examination may be given on production of a certificate of disability from any Government Medical Officer to the satisfaction of the authority concerned.....”

The first paragraph of Regulation 1 on which reliance is placed by the University shows that the requirement of 40 per cent or more than 39.5 per cent marks in the aggregate, is meant only for graduates such as of Bachelors of Arts etc. That requirement does not apply to those candidates who pass any higher degree examination after graduation. Therefore, on a plain reading of the said paragraph, a postgraduate student like the appellant who has passed his M.A. examination is not required to satisfy further that in the said post-graduate examination he has secured 40 per cent or more than 39.5 per cent marks in the aggregate. It is enough if he has passed his post-graduate examination.

7. What is further, Regulation 10 in Chapter V of the Regulations which prescribes marks for passing M.A., M.Com. and M.Sc. examinations states that the minimum marks required for a student to pass the said examinations is 36 per cent in the aggregate of all the theory papers taken together in case of M.A. and M.Com. examinations, and in the case of M.Sc. examination, 36 per cent in the aggregate of all the theory papers taken together and 40 percent in the aggregate of all the practical papers taken together. I am not concerned here with the marks of M.Sc. examination. The proviso to the said Regulation 10, further states that no minimum pass marks shall be required in any paper. But if in any paper a candidate obtains less than 25 per cent of marks, those marks shall not be included in the aggregate.

In other words, in the case of the appellant, who has obtained 364 marks out of 900 on the aggregate, his 13 marks in one of the papers being less than 25 per cent have to be excluded. His aggregate marks, therefore, come to 351 out of 900 marks according to this Regulation. They are admittedly more than 36 per cent as required by the said Regulation for passing the M.A. examination. I may reproduce the said Regulation here:

10. The minimum marks that a candidate shall obtain to have passed shall be thirty six per cent in the aggregate of all the theory papers taken together in the case of M.A./ M.Com. and in the case of M.Sc. thirty six per cent in the aggregate of all the theory papers taken together and forty per cent in the aggregate of all the practical papers taken together.

Provided further that no minimum pass marks shall be required in any paper but if in any paper a candidate obtains less than twenty five per cent of marks then these shall not be included in the aggregate.

8. Even though, therefore, for admission to the Law course there is no requirement of any particular marks for post-graduate students like the appellant, and the appellant is entitled to be admitted under Regulation 1 in Chapter VIII of the said Regulations quoted earlier, the appellant satisfies the other qualification as well, viz., he has passed the M.A. examination with 36 per cent in the aggregate deducting 13 marks in one of the papers and is, therefore, duly qualified to be admitted to the Law course.

9. Mr. Misra appearing for the respondents, however, contended firstly that the qualifying marks for admission as per Regulation 1 of Chapter VIII even for post-graduate students was 40 per cent or more than 39.5 per cent and since the appellant admittedly did not secure more than 39.5 per cent marks after deducting from the aggregate 13 marks secured in one of the papers, he was not eligible for being admitted to the Law course. I have pointed out herein after that the plain reading of the said Regulation shows that the qualifying marks laid down there do not apply to the post-graduates. They apply only to graduates. As far as the post-graduates are concerned, it is enough that they have passed their examination. Secondly, he has also obtained the marks as required by the said Regulation 10 of Chapter V which is applicable to the appellant, viz., 39 per cent when the minimum marks laid down by the said Regulation is only 36 per cent. Mr. Misra then relied upon the prospectus of the Ganjam Law College which had laid down as follows:

“1.....

2.....

3. Eligibility for admission.

(1) Pre-law class.

(a) An aggregate of 40 per cent and above, in the B .A., B.Sc, B.Com, or any other university Degree of Higher University examination recognized by Berhampur University.”

and contended that even if a candidate has a higher degree than B .A., B.Sc., B.Com., he has to have an aggregate of 40 per cent minimum marks. As I read the said prospectus, I find that it is on par with the qualification for admission given in University Regulation 1 in Chapter VIII quoted above. The aggregate of 40 per cent and above marks is required only for

graduates and there is no requirement of any percentage of marks prescribed for the post-graduates.

Resolution No. 123/1984 of the Bar Council of India passed on October 30, 1984 and which is Annexure 'K' to the respondent-University's counter affidavit also shows that for admission to three-year Law course the qualification of minimum of 39.5 per cent marks is meant only for graduates.

That Resolution does not speak of the requirement of marks for examination at post-graduate level. I am also of the view that this distinction between graduates and post-graduates made in the 279 matter of the qualifying marks is as it ought to be, since graduates and post-graduates cannot be treated equally. A post-graduate student has a minimum of two years more of academic pursuit to his credit than the graduate before he seeks admission to the Law course. Obviously, therefore, they cannot be treated equally, and that is what the University and the Bar Council of India have rightly done. It is the interpretation placed by the University on its own Regulations and the Resolution of the Bar Council of India which is at fault and not the Regulations or the Resolution.

10. This is apart from the fact that I find that in the present case the appellant while securing his admission in the Law College had admittedly submitted his marks-sheet along with the application for admission. The Law College had admitted him. He had pursued his studies for two years.

The University had also granted him the admission card for the Pre-Law and Intermediate Law examinations. He was permitted to appear in the said examinations. He was also admitted to the Final year of the course. It is only at the stage of the declaration of his results of the Pre-Law and Inter-Law examinations that the University raised the objection to his so-called ineligibility to be admitted to the Law course. The University is, therefore, clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course.

11. For all these reasons, I am of the view that the University is not justified in refusing to declare the appellant's results of the Pre-Law and Intermediate Law examinations. The appeal, therefore, succeeds. The respondent-University is directed to declare the said results as well as the result of the Final examination if the appellant has appeared for the same. The appeal is allowed accordingly.

SHARMA, J. - I agree that the appeal should be allowed as indicated by my learned Brother.

13. The learned counsel for the appellant contended that the respondent University having issued the admit card and permitted the appellant to appear at parts I and II of Law Examination, should not have later refused to publish his result. If there was any irregularity in the admission of the appellant for the Law course, the University authorities ought to have scrutinized the position before permitting 280 him to take the examination. It was pointed out that in identical circumstances the same High Court had earlier in the same year allowed the case of another candidate in O.J.C. No. 2619 of 1986 by a judgment, which also was by a Division Bench.

14. Mr. P.N. Misra, the learned counsel for the respondent, contended that the University had informed the Colleges about the necessary condition for admission to the Law course which, it appears, was not respected by the College. When the applications by the candidates for sitting at the examination were forwarded by the College, the University asked the Principal to send the marks of the candidates for the purpose of verification. but the Principal did not comply. The letters Annexures 'F' and 'G' to the counter affidavit have been relied upon for the purpose. The learned counsel pointed out that instead, the Principal sent a letter Annexure 'I' stating that the marks-list would be sent in a few days for "your kind reference and verification" which was never sent. The Principal wrongly assured the University authorities that he had verified the position and that all the candidates were eligible. In these circumstances, the argument is that the appellant cannot take advantage of the fact that the University allowed him to appear at the examination. I am afraid, the stand of the respondent cannot be accepted as correct. From the letters of the University it is clear that it was not depending upon the opinion of the Principal and had decided to verify the situation for itself. In that situation it cannot punish the student for the negligence of the Principal or the University authorities. It is important to appreciate that the appellant cannot be accused of making any false statement or suppressing any relevant fact before anybody. He had produced his marks-sheet before the College authority with his application for admission, and cannot be accused of any fraud or misrepresentation. The interpretation of the rule on the basis of which the University asserts that the appellant was not eligible for admission is challenged by the appellant and is not accepted by the College and my learned Brother accepts the construction suggested by him as correct. In such a situation even assuming the construction of the rule as attempted by the University as correct, the Principal cannot be condemned for recommending the candidature of the appellant for the examination in question. It was the bounden duty of the University to have scrutinized the matter thoroughly before permitting the appellant to appear at the examination and not having done so it cannot refuse to publish his results.

15. Before parting I would like to impress upon the University authorities to frame the rules in such clear terms that it may not require great skill for understanding them. It is a serious matter if a student who acts upon one interpretation of a rule and spends a considerable period of his youth, is later threatened by a possible alternative construction, which may cost him several years of his life. In order to achieve clarity, it does not matter, if the rule, instead of being concise, is elaborate and lengthy.

Appeal allowed.

* * * * *

M.C. Verghese v. T.J. Poonan

(1969) 1 SCC 37

J.C. SHAH, J. - Rathi, daughter of M. C. Verghese, was married to T. J. Poonan. On July 18, 1964, July 25, 1964 and July 30, 1964, Poonan wrote from Bombay letters to Rathi who was then residing with her parents at Trivandrum which it is claimed contained defamatory imputations concerning Verghese. Verghese then filed a complaint in the Court of the District Magistrate, Trivandrum, against Poonan charging him with offence of defamation. Poonan submitted an application raising two preliminary contentions—(1) that the letters which formed the sole basis of the complaint were inadmissible in evidence as they were barred by law or expressly prohibited by law from disclosure; and (2) that uttering of a libel by a husband to his wife was not “publication” under the law of India and hence cannot support a charge for defamation, and prayed for an order of discharge, and applied that he may be discharged.

2. The District Magistrate held that a communication by a husband to his wife or by a wife to her husband of a matter defamatory of another person does not amount in law to publication, since the husband and wife are one in the eye of the law. In so holding, he relied upon the judgment in *Wennhak v. Morgan and Wife* [(1888) 20 QBD 635] He also held that the communication was privileged, and no evidence could be given in court in relation to that communication. He accordingly ordered that Poonan be discharged under Section 253(2) Code of Criminal Procedure.

3. In a revision application filed by Verghese before the Court of Session, the order was set aside and further enquiry into the complaint was directed. In the view of the learned Sessions Judge the doctrine of the common law of England that a communication by one spouse to another of a matter defamatory of another person does not amount to publication has no application in India, and Section 122 of the Indian Evidence Act does not prohibit proof in the Court by the complaint of the letters written by Poonan to his wife.

4. The case was then carried to the High Court of Kerala in revision. The High Court set aside the order of the Court of Session and restored the order of the District Magistrate. The High Court held that from the averments made in paragraphs 9 to 11 of the complaint it was clear that the writing of defamatory matter by Poonan to his wife Rathi was not in law publication, and that “if the letters written by Poonan to his wife cannot be proved in court either by herself directly or through her father, in whose hands she had voluntarily placed them, the imputations therein fell outside the court’s cognizance and no charge under Section 500, Indian Penal Code could be deemed to be made out”. Against the order passed by the High Court discharging Poonan, this appeal is preferred with certificate granted by the High Court.

5. It was assumed throughout these proceedings that the letters are defamatory of the complainant. Under the Indian Penal Code in order that an offence of defamation may be committed there must be making or publication of any imputation concerning any person by words either spoken or intended to be read, or by signs or by visible representations, intending to harm, or knowing or having reason to believe that such imputation will, harm, the

reputation of such person. To constitute the offence of defamation there must therefore be making or publication of an imputation concerning any person and the making or publication must be with intent to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person. Unless there is publication there can be no offence of defamation committed.

6. In England the rule appears to be well settled that except in certain well defined matters, the husband and wife are regarded as one and in an action for libel disclosure by the husband of the libel to his wife is not publication. In *Wennhak* case Manistry, J., observed:

(T)he maxim and principle acted on for centuries is still in existence, viz., that as regards this case, husband and wife are in point of that as law one person.”

The learned Judge examined the foundation of the rule and stated that it was, after all, a question of public policy or, social policy.

7. But the rule that husband and wife are one in the eye of law has not been adopted in its full force under our system of law and certainly not in our criminal jurisprudence.

8. In *Queen Express v. Butchi* [ILR 17 Mad 40] it was held that there is no presumption of law that the wife and husband constitute one person in India for the purpose of the criminal law. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft.

9. In *Abdul Khadar v. Taib Begum* [AIR 1957 Mad 339], the Madras High Court again held that there is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law, and therefore the English common law doctrine of absolute privilege cannot prevail in India:

10. It must be remembered that the Indian Penal Code exhaustively codifies the law relating to offences with which it deals and the rules of the common law cannot be resorted to for inventing exemptions which are not expressly enacted.

11. In *Tiruvengadda Mudali v. Tripurasundari Ammal* [ILR 49 Mad 728], a Full Bench of the Madras High Court observed that the exceptions to Section 499, I.P.C., must be regarded as exhaustive .as to the cases which they purport to cover and recourse can be had to the English common law to add new grounds of exception to those contained in the statute. A person making libellous statements in his complaint filed in Court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth Exception and the illustration to Section 499 the statements are privileged only when they are made in good faith. There is therefore authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English common law that the husband and wife are regarded as one.

12. But we do not, deem it necessary to record any final opinion on this question, because, in our judgment, this enquiry has to be made when the complaint is tried before the Magistrate.

13. Verghese has complained that he was defamed by the three letters which Poonan wrote to Rathi. Poonan, however, says that the letters addressed by him to his wife are not except with his consent - admissible in evidence by virtue of Section 122 of the Indian

Evidence Act, and since the only publication pleaded is publication to his wife, and she is prohibited by law from disclosing those letters, no offence of defamation could be made out. So stated, the proposition is, in our judgment, not sustainable.

The section consists of two branches - (1) that a married person shall not be compelled to disclose any communication made to him during marriage by his spouse; and (2) that the married person shall not except in two special classes of proceedings be permitted to disclose by giving evidence in Court the communication, unless the person who made it, or his representative in interest, consents thereto.

14. A *prima facie* case was set up in the complaint by Verghese. That complaint has not been tried and we do not see how, without recording any evidence, the learned District Magistrate could pass any order discharging Poonan. Section 122 of the Evidence Act only prevents disclosure in evidence in court of the communication made by the husband to the wife. If Rathi appears in the witness box to giving evidence about the communications made to her husband, *prima facie* the communications may not be permitted to be deposed to or disclosed unless Poonan consents. That does not, however, mean that no other evidence which is not barred under Section 122 of the Evidence Act or other provisions of the Act can be given.

15. In a recent judgment of the House of Lords *Rumping v. Director of Public Prosecutions* [(1962) 3 All ER 256]. Rumping the mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing, and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew, the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898 (of which the terms are similar to Section 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

16. The question whether the complainant in this case is an agent of the wife because he has received the letters from the wife and may be permitted to give evidence is a matter on which no opinion at this stage can be expressed. The complainant claims that he has been defamed by the writing of the letters. The letters are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, on the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused., he may be met with the bar of Section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is

a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage.

17. One more question which was raised by counsel for the appellant may be briefly referred to. It was urged that since the matter reached this Court, Rathi has obtained a decree for nullity of marriage against Poonan on the ground of his impotency, and whatever bar existed during the subsistence of the marriage cannot now operate to render Rathi an incompetent witness. But the argument is plainly contrary to the terms of Section 122. If the marriage was subsisting at the time when the communications were made, the bar prescribed by Section 122 will operate. In *Moss v. Moss* [(1963) 2 QBD 829], it was held that in criminal cases, subject to certain common law and statutory exceptions, a spouse is incompetent to give evidence against the other, and that incompetence continues after a decree absolute for divorce or a decree of nullity (where the marriage was annulled was merely voidable) in respect of matters arising during overtime.

Counsel for the appellant however urged that the rule enunciated in *Moss* case has no application in India, because under Sections 18 and 19 of the Divorce Act no distinction is made between marriage void and voidable. By Section 18 a husband or wife may present a petition for nullity of marriage to the appropriate Court and the Court has under Section 19 power to make the decree on the following grounds:

“(1) that the respondent was important at the time of the marriage and at the time of the institution of the suit;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of the marriage;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall effect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.”

Marriage with the respondent who was impotent at the time of the marriage or at the time of the institution of the suit is not *ab initio* void: it is voidable. As stated in *Latey on Divorce*, 14th Edn., at p. 194, Article 353:

“Where impotence is proved the ceremony of marriage is void only on the decree absolute of nullity, but then it is void *ab initio* ‘to all intents and purposes’. Such a marriage is valid for all purposes, unless a decree of nullity is pronounced during the life-time of the parties.”

When the letters were written by Poonan to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court.

19. We are, therefore, of the view that the appeal must be allowed and the order passed by the High Court set aside. The proceedings will be remanded for trial to the District Magistrate according to law.

State of U.P. v. Raj Narain
(1975) 4 SCC 428

RAY, C.J. - This is an appeal by special leave from the judgment dated March 20, 1974 of the learned Single Judge of the High Court at Allahabad, holding that no privilege can be claimed by the Government of Uttar Pra-desh under Section 123 of the Evidence Act in respect of what is described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh.

2. Shri Raj Narain, the petitioner in Election Petition No. 5 of 1971 in the High Court of Allahabad, made an application on July 27, 1973 for summoning certain witnesses along with documents mentioned in the application. The summons was inter alia for the following witnesses along with following documents:

3. First, the Secretary, General Administration, State of Uttar Pradesh, Lucknow or any officer authorised by him was summoned to produce inter alia (a) circulars received from the Home Ministry and the Defence Ministry of the Union Government regarding the security and tour arrangements of Shrimati Indira Nehru Gandhi, the respondent in election petition for the tour programmes of Rae Bareli District on February 1, 24 and 25, 1971 or any general order for security arrangement; and (a) all correspondence between the State Government and the Government of India and between the Chief Minister and the Prime Minister regarding police arrangement for meetings of the Prime Minister by Stale Government and in regard to their expenses.

4. Second, the Chief Secretary, Government of Uttar Pradesh, Lucknow was also summoned along with inter alia the documents, namely, (a) circulars received from the Home Ministry and Defence Ministry of the Union Government regarding the security and tour arrangements of Shrimati Indira Nehru Gandhi for the tour programmes of Rae Bareli District for February 1, 24 and 25, 1971; (b) all correspondence between the State Government and the Government of India and between the Chief Minister and the Prime Minister, regarding the arrangement of police, for the arrangement of meetings for the Prime Minister by State Government and in regard to their expenses.

5. Third, the Head Clerk of the office of the Superintendent of Police of District Rae Bareli was summoned along with inter alia the following (a) all documents relating to the tour programme of Shrimati Indira Nehru Gandhi of District Rae Bareli for February 1 and 25, 1971;(b) all the documents relating to arrangement of police and other security measures adopted by the police and all documents relating to expenses incurred on the police personnel, arrangements of the police, arrangement for constructions of rostrum, fixation of loudspeakers and other arrangements through Superintendent of Police, District Rae Bareli.

6. On September 3, 1973 the summons was issued to the Secretary, General Administration. The summons was endorsed to the Confidential Department by the General Department on September 3, 1973 as will appear from paragraph 5 of the affidavit of R. K. Kaul, Commissioner and Secretary in-charge. On September 5, 1973 there was an application by the Chief Standing Counsel on behalf of the Chief Secretary, Uttar Pradesh, Lucknow for

clarification to the effect that the Chief Secretary is not personally required to appear pursuant to the summons. The learned Judge made an order on that day that the Chief Secretary need not personally attend and that the papers might be sent through some officer. On September 6, 1973 S. S. Saxena, Under Secretary, Confidential Department, was deputed by R. K. Kaul, Home Secretary as well as Secretary, Confidential Department, to go to the High Court with the documents summoned and to claim privilege. This will appear from the application of S. S. Saxena dated September 19, 1973.

7. In paragraph 4 of the said application it is stated that in compliance with the summons issued by the High Court the Home Secretary deputed the applicant Saxena to go to the Court with the documents summoned with clear instructions that privilege is to be claimed under Section 123 of the Evidence Act in regard to the documents, namely, the Booklet issued by the Government of India containing rules and instructions for the protection of the Prime Minister when on tour and in travel, and the correspondence exchanged between the two governments and between the Chief Minister, U. P. and the Prime Minister in regard to the police arrangements for the meetings of the Prime Minister.

8. Saxena was examined by the High Court on September 10, 1973. On September 10, 1973 there was an application on behalf of the election petitioner that the claim of privilege by Saxena in his evidence be rejected. In the application it is stated that during the course of his statement Saxena admitted that certain instructions were issued by the Central Government for the arrangement of Prime Minister's tour which are secret and hence he is not in a position to file those documents. The witness claimed privilege in respect of that document. It is stated by the election petitioner that no affidavit claiming privilege has been filed by the Head of the Department and that the documents do not relate to the affairs of the State.

9. On September 11, 1973 there was an order as follows. The application of the election petitioner for rejection of the claim for privilege be put up for disposal. The arguments might take some time and therefore the papers should be left by Saxena in a sealed cover in the Court. In case the objection would be sustained, the witness Saxena would be informed to take back the sealed cover.

10. On September 12, 1973 an application was filed by Ram Sewak Lal Sinha on an affidavit that the Superintendent of Police, Rae Bareli claimed privilege under Section 123 of the Evidence Act. The witness was discharged. On behalf of the election petitioner it was said that an objection would be filed to make a request that the Superintendent of Police, Rae Bareli be produced before the Court for cross examination. The election petitioner filed the objection to the affidavit claiming privilege by the Superintendent of Police, Rae Bareli.

11. On September 13, 1973 the learned Judge ordered that arguments on the question of privilege would be heard on September 19, 1973. S. S. Saxena filed an application supported by an affidavit of R. K. Kaul. The deponent R. K. Kaul in his affidavit affirmed on September 19, 1973 stated that the documents summoned are unpublished official records relating to affairs of the State and their disclosure will be prejudicial to public interest for the reasons set out therein. The secrecy of security arrangement was one of the reasons mentioned. Another reason was that arrangements of the security of the Prime Minister, the maintenance of public

order and law and order on the occasion of the visits of the Prime Minister are essentially in nature such that to make them public would frustrate the object intended to be served by these rules and instructions.

12. On September 20, 1973 the case was listed for arguments for deciding preliminary issues and on the question of privilege. On September 20, 1973 an objection was made that the Chief Standing Counsel had no locus standi to file an objection claiming privilege. On September 21, 1973 the arguments in the matter of privilege were heard. On September 24, 1973 further arguments on the question of privilege were adjourned until October 29, 1973. October 29, 1973 was holiday. On October 30, 1973 arguments were not concluded. On October 30, 1973 the Advocate General appeared and made a statement regarding the Blue Book to the effect that the witness Saxena was authorised by the Head of the Department R. K. Kaul, Home Secretary to bring the Blue Book to the Court and the documents summoned by the Court and the Head of the Department did not permit Saxena to file the same. The witness was permitted to show to the Court if the Court so needed. Further arguments on the question of privilege were heard on 12, 13 and 14 days of March, 1974. The Judgment was delivered on March 20, 1974.

13. The learned Judge on March 20, 1974 made an order as follows:

No privilege can be claimed in respect of three sets of papers allowed to be produced. The three sets of papers are as follows: The first set consist-, of the Blue Book, viz., the circulars regarding the security arrangements of the tour programme of Snnmati Indira Nehru Gandhi and instructions received from the Government of India and the Prime Minister's Secretariat on the basis of which police arrangement for constructions of rostrum, fixation of loudspeakers and other arrangements were made, and the correspondence between the State Government and the Government of India regarding the police arrangements for the meetings of the Prime Minister. The second set also relates to circulars regarding security and tour arrangements of Shrimati Indira Nehru Gandhi for the tour programme of Rae Bareli and correspondence regarding the arrangement of police for the meetings of the Prime Minister. The third set summoned from the Head Clerk of the Office of the Superintendent of Police relates to the same.

14. The learned Judge expressed the following view. Under Section 123 of the Evidence Act the minister or the head of the department concerned must file an affidavit at the first instance. No such affidavit was filed at the first instance. The Court cannot exercise duty under Section 123 of the Evidence Act suo motu. The court can function only after a privilege has been claimed by affidavit. It is only when permission has been withheld under Section 123 of the Evidence Act that the Court will decide. Saxena in his evidence did not claim privilege even after the Law Department noted in the file that privilege should be claimed. Saxena was allowed to bring the Blue Book without being sealed in a cover. The head of the department should have sent tile Blue Book under sealed cover along with an application and an affidavit to the effect that privilege was being claimed. No privilege was claimed at the first instance.

15. The learned Judge further held as follows. The Blue Book is not an unpublished official record within the meaning of Section 123 of the Evidence Act because Rule 71(6) of the Blue Book was quoted by a Member of Parliament. The Minister did not object or deny the correctness of the quotation. Rule 71(6) of the Blue Book has been filed in the election petition by the respondent to the election petition. Extracts of Rule 71(6) of the Blue Book were filed by the Union Government in a writ proceeding. If a portion of the Blue Book had been disclosed, it was not an unpublished official record. The respondent to the election petition had no right to file even a portion of the Blue Book in support of her defence. When a portion of the Blue Book had been used by her in her defence it cannot be said that the Blue Book had not been admitted in evidence. Unless the Blue Book is shown to the election petitioner he cannot show the correctness or otherwise of the said portion of the Blue Book and cannot effectively cross-examine the witnesses or respondent to the election petition. Even if it be assumed that the Blue Book has not been admitted in evidence and Kaul's affidavit could be taken into consideration, the Blue Book is not an unpublished official record.

16. With regard to documents summoned from the Superintendent of Police the High Court said that because these owe their existence to the Blue Book which is not a privileged document and the Superintendent of Police did not give any reason why the disclosure of the documents would be against public interest, the documents summoned from the Superintendent of Police cannot be privileged documents either.

17. The High Court further said that in view of the decisions of this Court in *State of Punjab v. Sodhi Sukhdev Singh* [AIR 1961 SC 493]; *Amar Chand Butail v. Union of India* [AIR 1964 SC 1658] and the English decision in *Conway v. Rimmer* [(1968) 1 All ER 874], the Court has power to inspect the document regarding which privilege is claimed. But because the Blue Book is not an unpublished official record, there is no necessity to inspect the Blue Book.

18. The English decisions in *Duncan v. Cammell Laird & Co.* [1942 AC 624]; *Conway v. Rimmer* and *Rogers v. Home Secretary* [1973 AC 388], surveyed the earlier law on the rule of exclusion of documents from production on the ground of public policy or as being detrimental to the public interest or service. In the *Cammell Laird* case the respondent objected to produce certain documents referred to in the Treasury Solicitor's letter directing the respondent not to produce the documents. It was stated that if the letter was not accepted as sufficient to found a claim for privilege the First Lord of Admiralty would make an affidavit. He did swear an affidavit. On summons for inspection of the documents it was held that it is not uncommon in modern practice for the Minister's objection to be conveyed to the Court at any rate in the first instance by an official of the department who produces a certificate which the Minister has signed stating what is necessary. If the Court is not satisfied by this method the Court can request the Minister's personal attendance.

19. *Grosvenor Hotel, London group of cases* [(1963) 3 All ER 426]; [(1964) 1 All ER 92]; [(1964) 2 All ER 674]; and [(1964) 3 All ER 354] turned on an order for mutual discovery of documents and an affidavit of the respondent, the British Railway Board, objecting to produce certain documents. The applicant challenged that the objection of the respondent to produce the document was not properly made. The applicant asked for leave to

cross-examine the Minister. The Minister was ordered to swear a further affidavit. That order of the learned Chamber Judge was challenged in appeal. The Court of Appeal refused to interfere with the discretion exercised by the Chamber Judge. The Minister filed a further affidavit. That affidavit was again challenged before the learned Chamber Judge as not being in compliance with the order. It was held that the affidavit was in compliance with the order. The learned Judge held that Crown privilege is not merely a procedural matter and it may be enforced by the courts in the interest of the State without the intervention of the Executive, though normally the Executive claims it. The matter was taken up to the Court of Appeal, which upheld the order of the Chamber Judge. It was observed that the nature of prejudice to the public interest should be specified in the Minister's affidavit except in case where the prejudice is so obvious that it would be unnecessary to state it.

20. In the *Cammell Laird* case the House of Lords said that documents are excluded from production if the public interest requires that they should be withheld. Two tests were propounded for such exclusion. The first is in regard to the contents of the particular document. The second is the fact that the document belongs to a class which on grounds of public interest must as a class be withheld from production. This statement of law in the *Cammell Laird* case was examined in *Conway v. Rimmer*. In *Conway v. Rimmer* it was held that although an objection validly taken to production on the ground that this would be Injurious to the public interest is conclusive it is important to remember that the decision ruling out such document is the decision of the Judge. The reference to 'class' documents in the *Cammell Laird* case was said in *Conway v. Rimmer* to be obiter. The Minister's claim of privilege in the *Cammell Laird* case was at a time of total war when the slightest escape to the public of the most innocent details of the latest design of submarine founders might be a source of danger to the State.

21. In *Conway v. Rimmer* the test propounded in *Asiatic Petroleum Co. Ltd. v. Anglo Persian Oil Co. Ltd.* [(1961) 1 KB 830] was adopted that the information cannot be disclosed without injury to the public interest and not that the documents are confidential or official. With regard to particular class of documents for which privilege was claimed it was said that the Court would weigh in the balance on the one side the public interest to be protected and on the other the interest of the subject who wanted production of some documents which he believed would support his own or defeat his adversary's case. Both were said in *Conway v. Rimmer* case to be matters of public interest.

22. In this background it was held in *Conway v. Rimmer* that a claim made by a minister on the basis that the disclosure of the contents would be prejudicial to the public interest must receive the greatest weight; but even here the minister should go as far as he properly can without prejudicing the public interest in saying why the contents require protection. In *Conway v. Rimmer* it was said

(I)n such cases it would be rare indeed for the court to overrule the Minister but it has the legal power to do so, first inspecting the document itself and then ordering its production.

As to the "class" cases it was said in *Conway v. Rimmer* that some documents by their very nature fall into a class which requires protection. These are Cabinet papers, Foreign

Office despatches, the security of the State, high level inter-departmental minutes and correspondence and documents pertaining to the general administration of the naval, military and air force services. Such documents would be the subject of privilege by reason of their contents and also by their 'class'. No catalogue can be compiled for the 'class' cases. The reason is that it would be wrong and inimical to the functioning of the public service if the public were to learn of these high level communications, however innocent of prejudice to the State the actual contents of any particular document might be.

23. In *Rogers v. Home Secretary* witnesses were summoned to give evidence and to produce certain documents. The Home Secretary gave a certificate objecting to the production of documents. There was an application for certiorari to quash the summons issued to the witnesses. On behalf of the Home Secretary it was argued that the Court could of its own motion stop evidence being given for documents to be produced. The Court said that the real question was whether the public interest would require that the documents should not be produced. The minister is an appropriate person to assert public interest. The public interest which demands that the evidence be withheld has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material. Once the public interest is found to demand that the evidence should be withheld then the evidence cannot be admitted. In proper cases the Court will exclude evidence the production of which it sees is contrary to public interest. In short, the position in law in England is that it is ultimately for the Court to decide whether or not it is in the public interest that the document should be disclosed. An affidavit is necessary. Courts have sometimes held certain class of documents and information to be entitled in the public interest to be immune from disclosure.

24. Evidence is admissible and should be received by the Court to which it is tendered unless there is a legal reason for its rejection. Admissibility presupposes relevancy. Admissibility also denotes the absence of any applicable rule of exclusion. Facts should not be received in evidence unless they are both relevant and admissible. The principal rules of exclusion under which evidence becomes inadmissible are twofold. First, evidence of relevant facts is inadmissible when its reception offends against public policy or a particular rule of law. Some matters are privileged from disclosure. A party is sometimes estopped from proving facts and these facts are therefore inadmissible. The exclusion of evidence of opinion and of extrinsic evidence of the contents of some documents is again a rule of law. Second, relevant facts are subject to recognised exceptions inadmissible unless they are proved by the best or the prescribed evidence.

25. A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue. Secrets of State, State papers, confidential official documents and communications between the government and its officers or between such officers are privileged from production on the ground of public policy or as being detrimental to the public interest or service.

28. This Court in *Sukhdev Singh* case held that the principle behind Section 123 of the Evidence Act is the overriding and paramount character of public interest and injury to public interest is the sole of foundation of the section. Section 123 states that no one shall be permitted to give any evidence derived from unpublished official records relating to any

affairs of State except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. The expression “Affairs of State” in Section 123 was explained with reference to Section 162 of the Evidence Act. Section 162 is in three limbs. The first limb states that a witness summoned to produce a document shall, if it is in his possession or power, bring it to the Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the Court. The second limb of Section 162 says that the Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility. The third limb speaks of translation of documents which is not relevant here. In *Sukhdev Singh* case this Court said that the first limb of Section 162 required a witness to produce a document to bring it to the Court and then raise an objection against its production or its admissibility. The second limb refers to the objection both as to production and admissibility. Matters of State in the second limb of Section 162 were said by this Court in *Sukhdev Singh* case to be identical with the expression “affairs of State” in Section 123.

29. In *Sukhdev Singh* case it was said that an objection against the production of document should be made in the form of an affidavit by the Minister or the Secretary. When an affidavit is made by the Secretary, the Court may, in a proper case, require the affidavit of the Minister. If the affidavit is found unsatisfactory, a further affidavit may be called. In a proper case, the person making the affidavit can be summoned to face an examination. In *Sukhdev Singh* case this Court laid down these propositions. First, it is a matter for the authority to decide whether the disclosure would cause injury to public interest. The Court would enquire into the question as to whether the evidence sought to be excluded from production relates to an affair of State. The Court has to determine the character and class of documents. Second, the harmonious construction of Sections 123 and 162 shows there is a power conferred on the Court under Section 162 to hold a preliminary enquiry into the character of the document. Third, the expression “affairs of State” in Section 123 is not capable of definition. Many illustrations are possible.

If the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public affairs.

Fourth, the second limb of Section 162 refers to the objection both as to the production and the admissibility of the document. Fifth, reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of document in question. That is a matter for the authority concerned to decide. But the Court is competent and is bound to hold a preliminary enquiry and determine the validity of the objection to its production. That necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not.

30. In *Sukhdev Singh* case this Court said that the power to inspect the document cannot be exercised where the objection relates to a document having reference to matters of State and it is raised under Section 123. The view expressed by this Court is that the Court is empowered to take other evidence to enable it to determine the validity of the objection. The Court, it is said, can take other evidence in lieu of inspection of the document in dealing with

a privilege claimed or an objection raised even under Section 123. It is said that the Court may take collateral evidence to determine the character or class of documents. In *Sukhdev Singh's case* it has also been said that if the Court finds that the document belongs to what is said to be the noxious class it will leave to the discretion of the head of the department whether to permit its production or not.

33. In *Sukhdev Singh* case the majority opinion was given by Gajendragadkar, J. In *Amar Chand Butail* case Gajendragadkar, C.J. spoke for the Court in a unanimous decision. In the later case this Court saw the document. In *Sukhdev Singh* case this Court said that an enquiry would be made by the Court as to objections to produce document. It is said that collateral evidence could be taken. No oral evidence can be given of the contents of documents. In finding out whether the document is a noxious document which should be excluded from production on the ground that it relates to affairs of State, it may sometimes be difficult for the Court to determine the character of the document without the Court seeing it. The subsequent Constitution Bench decision in *Amar Chand Butail* case recognised the power of inspection by the Court of the document.

34. In *Sub-Divisional Officer, Mirzapur v. Raja Sri Niwas Prasad Singh* [AIR 1966 SC 1164], this Court in a unanimous Constitution Bench decision asked the Compensation Officer to decide in the light of the decisions of this Court whether the claim for privilege raised by the State Government should be sustained or not. This Court gave directions for filing of affidavits by the heads of the departments. This direction was given about 10 years after the State Government had claimed privilege in certain proceedings. In the *Sub-Divisional Officer, Mirzapur* case the respondent filed objections to draft compensation assessment rolls. Compensation was awarded to the respondent. The State applied for reopening of the objection cases. The respondent asked for production of some documents. The State claimed privilege. The District Judge directed that compensation cases should be heard by the Sub-Divisional Officer. The respondent's application for discovery and production was rejected by the Compensation Officer. The District Judge thereafter directed that compensation cases should be heard by the Sub-Divisional Officer. The respondent again filed applications for discovery and inspection of those documents. The State Government again claimed privilege. The respondent's applications were rejected. The respondent then filed a petition under Article 226 of the Constitution for a mandamus to Compensation Officer to hear and determine the applications. The High Court said that the assessment rolls had become final and could not be opened. This Court on appeal quashed the order of the Sub-Divisional Officer whereby the respondent's applications for discovery and production had been rejected and directed the Compensation Officer to decide the matter on a proper affidavit by the State.

35. On behalf of the election petitioner it was said that the first summons addressed to the Secretary, General Administration required him or an officer authorised by him to give evidence and to produce the documents mentioned therein. The second summons was addressed to the Home Secretary to give evidence on September 12, 1973. The third summons was addressed to the Chief Secretary to give evidence on September 12, 1973 and to produce certain documents. The first summons, it is said on behalf of the election petitioner, related to the tour programmes of the Prime Minister. The election petitioner, it is said, wanted the

documents for two reasons. First, that these documents would have a bearing on allegations of corrupt practice, viz., exceeding the prescribed limits of election expenses. The election petitioner's case is that rostrum, loudspeakers, decoration would be within the expenditure of the candidate. Second, the candidate had the assistance of the gazetted officers for furthering the prospects of the candidate's election.

36. On behalf of the election petitioner it is said that objection was taken with regard to certain documents in the first summons on the ground that these were secret papers of the State, but no objection was taken by an affidavit affirmed by the head of the department. With regard to the other documents which the Superintendent of Police was called to produce the contention on behalf of the election petition is that the Superintendent of Police is not the head of the department and either the Minister or the Secretary should have affirmed an affidavit.

39. The first question which falls for decision is whether the learned Judge was right in holding that privilege was not claimed by filing an affidavit at the first instance. Counsel on behalf of the election petitioner submitted that in a case in which evidence is sought to be led in respect of matters derived from unpublished records relating to affairs of State at a stage of the proceedings when the head of the department has not come into picture and has not had an opportunity of exercising discretion under Section 123 to claim privilege it will be the duty of the Court to give effect to Section 123 and prevent evidence being led till the head of the department has had the opportunity of claiming privilege. But in case in which documents are summoned, it is said by Counsel for the election petitioner, the opportunity of claiming privilege in a legal manner has already been furnished when summons is received by the head of the department and if he does not claim privilege the court is under no legal duty to ask him or to give him another opportunity.

40. The documents in respect of which exclusion from production is claimed are the Blue Book being rules and instructions for the protection of the Prime Minister when on tour and in travel. Saxena came to court and gave evidence that the Blue Book was a document relating to the affairs of State and was not to be disclosed. The Secretary filed an affidavit on September 20, 1973 and claimed privilege in respect of the Blue Book by submitting that the document related to affairs of State and should, therefore, be excluded from production.

41. The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The Court will *proprio motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. To illustrate the class of documents

would embrace Cabinet papers. Foreign Office despatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at once that in the public interest the documents are to be withheld.

42. It is now the well settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a minister to affirm an affidavit. That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production the matter ends there. If the Court would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibility contemplated in Section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in *Sukhdev Singh* case.

44. This Court has said that where no affidavit was filed an affidavit could be directed to be filed later on. The *Grosvenor Hotel, London group of cases* in England shows that if an affidavit is defective an opportunity can be given to file a better affidavit. It is for the Court to decide whether the affidavit is clear in regard to objection about the nature of documents. The Court can direct further affidavit in that behalf. If the Court is satisfied with the affidavits the Court will refuse disclosure. If the Court in spite of the affidavit wishes to inspect the document the Court may do so.

45. The next question is whether the learned Judge was right in holding that the Blue Book is not an unpublished official record. On behalf of the election petitioner, it was said that a part of the document was published by the Government, viz., paragraph 71(6) in a writ proceeding. It is also said that the respondent to the election petition referred to the Blue Book in the answer filed in the Court. In the *Cammell Laird* case, it was said that though some of the papers had been produced before the Tribunal of Enquiry and though reference was made to those papers in the Enquiry Report yet a privilege could be claimed. Two reasons were given. One is that special precaution may have been taken to avoid public injury and the other is that portions of the Tribunal's sittings may have been secret. In the present case, it cannot be said that the Blue Book is a published document. Any publication of parts of the Blue Book which may be described as innocuous part of the document will not render the entire document a published one.

46. For these reasons, the judgment of the High Court is set aside. The learned Judge will consider the affidavit affirmed by R. K. Kaul. The learned Judge will give an opportunity to the head of the department to file affidavit in respect of the documents summoned to be produced by the Superintendent of Police. The learned Judge will consider the affidavits. If the learned Judge will be satisfied on the affidavits that the documents require protection from production, the matter will end there. If the learned Judge will feel inclined in spite of the affidavits to inspect the documents to satisfy himself about the real nature of the documents, the learned Judge will be pleased to inspect the same and pass appropriate orders thereafter. If the Court will find on inspection that any part of a document is innocuous in the sense that it does not relate to affairs of State the Court could order disclosure of the innocuous part provided that would not give a distorted or misleading impression. Where the Court orders

disclosure of an innocuous part as aforesaid the Court should seal up the other parts which are said to be noxious because their disclosure would be undesirable.

K.K. MATHEW, J. - During the trial of the election petition filed by respondent No. 1 against respondent No. 2, respondent No. 1 applied to the Court for summons to the Secretary, General Administration and the Chief Secretary, Government of U. P. and the Head Clerk, Office of the Superintendent of Police, Rae Bareilly, for production of certain documents. In pursuance to summons issued to the Secretary, General Administration and the Chief Secretary, Government of U. P., Mr S. S. Saxena appeared in Court with the documents and objected to produce:

(1) A Blue Book entitled “Rules and Instructions for the Protection of Prime Minister when on tour or in travel”;

(2) Correspondence exchanged between the two governments viz., the Government of India and the Government of U. P. in regard to the police arrangements for the meetings of the Prime Minister; and

(3) Correspondence exchanged between the Chief Minister, U.P. and the Prime Minister in regard to police arrangements for the meetings of the latter;

without filing an affidavit of the minister concerned or of the head of the department.

48. Saxena was examined by Court on September 10, 1973. The first respondent filed an application on that day praying that as no privilege was claimed by Saxena, he should be directed to produce these documents. The Court passed an order on September 11, 1973 that the application be put up for disposal. As Saxena’s examination was not over on September 10, 1973, the Court kept the documents in a sealed cover stating that in case the claim for privilege was sustained, Saxena would be informed so that he could take back the documents. Examination of Saxena was over on September 12, 1973. On that day, the Superintendent of Police, Rae Bareilly, filed an affidavit claiming privilege in respect of the documents summoned from his office. The Court adjourned the argument in regard to privilege and directed that it be heard the next day. On September 13, 1973 the Court adjourned the hearing to September 14, 1973 on which date the hearing was again adjourned to September 20, 1973. On September 20, 1973, Saxena filed in Court an application and the Home Secretary to the Government of U. P., Shri R. K. Kaul, the head of the Department in question an affidavit claiming privilege for the documents. The argument was concluded on March 14, 1974 and the Court passed the order on March 20, 1974 rejecting the claims for privilege. This appeal, by special leave, is against that order.

49. The first question for consideration is whether the privilege was lost as no affidavit sworn by the minister in charge or the head of the department claiming privilege was filed in the first instance.

50. In *State of Punjab v. Sodhi Sukhdev Singh*, this Court held that the normal procedure to be followed when an officer is summoned as witness to produce a document and when he takes a plea of privilege, is, for the minister in charge or the head of the department concerned to file an affidavit showing that he had read and considered the document in respect of which privilege is claimed and containing the general nature of the document and the particular

danger to which the State would be exposed by its disclosure. According to the Court, this was required as a guarantee that the statement of the minister or the head of the department which the Court is asked to accept is one that has not been expressed casually or lightly or as a matter of departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement.

51. In response to the summons issued to the Secretary, General Administration and the Chief Secretary, Government of U. P., Saxena was deputed to take the documents summoned to the Court and he stated in his evidence that he could not file the Blue Book as it was marked 'secret' and as he was not permitted by the Home Secretary to produce it in Court. As no affidavit of the minister or of the head of the department was filed claiming privilege under Section 123 of the Evidence Act in the first instance, the Court said that privilege was lost and the affidavit filed on September 20, 1973 by Shri R. K. Kaul, Home Secretary, claiming privilege, was of no avail. The Court distinguished the decision in *Robinson v. State of South Australia* [AIR 1931 PC 254] where their Lordships of the Privy Council said that it would be contrary to the public interest to deprive the State of a further opportunity of regularising its claim for protection by producing an affidavit of the description already indicated, by saying that these observations have no application as, no affidavit, albeit defective, was filed in this case in the first instance. The Court further observed that it was only when a proper affidavit claiming privilege was filed that the Court has to find whether the document related to unpublished official record of affairs of State, that a duty was cast on the minister to claim privilege and that, that duty could not be performed by Court, nor would the Court be justified in *suo motu* ordering that the document should be disclosed. The Court then quoted a passage from the decision of this Court in *Sodhi Sukhdev Singh* case to the effect that Court has no power to hold an enquiry into the possible injury to the public interest which may result from the disclosure of the document as that is a matter for the authority concerned to decide but that the Court is competent and indeed bound to hold a preliminary enquiry and determine the validity of the objection and that necessarily involves an enquiry into the question whether the document relates to an affair of State under Section 123 or not.

52. The second ground on which the learned Judge held that no privilege could be claimed in respect of the Blue Book was that since portions of it had in fact been published, it was not an unpublished official record relating to affairs of State. He relied upon three circumstances to show that portions of the Blue Book were published. Firstly, the Union Government had referred to a portion of it (Rule 71/6) in an affidavit filed in Court. Secondly, respondent No. 2 had obtained a portion of the Blue Book (Rule 71/6) and had produced it in court along with her written statement in the case and thirdly that Shri Jyotirmoy Bosu, a Member of Parliament had referred to this particular rule in Parliament.

55. Having regard to the view of the High Court that since the privilege was not claimed in the first instance by an affidavit of the minister or of the head of the department concerned, the privilege could not thereafter be asserted and that no inquiry into the question whether the disclosure of the document would injure public interest can be conducted by the court when privilege is claimed, it is necessary to see the scope of Section 123 and Section 162 of the Evidence Act.

56. The ancient proposition that the public has a right to every man's evidence has been reiterated by the Supreme Court of U. S. A. in its recent decision in *United States v. Nixon*. This duty and its equal application to the Executive has never been doubted except in cases where it can legitimately claim that the evidence in its possession relates to secret affairs of State and cannot be disclosed without injury to public interest.

57. The foundation of the so-called privilege is that the information cannot be disclosed without injury to public interest and not that the document is confidential or official which alone is no reason for its non-production. In *Duncan v. Cammell Laird & Co.*, Lord Simon said that withholding of documents on the ground that their publication would be contrary to the public interest is not properly to be regarded as a branch of the law of privilege connected with discovery and that 'Crown privilege' is, for this reason, not a happy expression.

58. Dealing with the topics of exclusion of evidence on the ground of 'state interest', Cross says that this head of exclusion of evidence differs from privilege, as privilege can be waived, but that an objection on the score of public policy must be taken by the Judge if it is not raised by the parties or the Crown.

63. The rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is in principle quite unconnected with the interests or claims of particular parties in litigation and indeed, it is a matter on which the judge should, if necessary, insist, even though no objection is taken at all. This would show how remote the rule is from the branch of jurisprudence relating to discovery of documents or even to privilege.

64. So, the mere fact that Saxena brought the documents to court in pursuance to the summons and did not file an affidavit of the minister or of the head of the department concerned claiming privilege would not mean that the right to object to any evidence derived from an unpublished official record relating to affairs of State has been forever waived. As no affidavit of the minister or of the head of the department claiming privilege had been filed, it might be that a legitimate inference could be made that the Minister or the head of the department concerned permitted the production of the document or evidence being given derived from it, if there was no other circumstance. But, Saxena stated that the Blue Book was a secret document and he had not been permitted by the head of the department to produce it. Though that statement was not really an objection to the production of the document which could be taken cognizance of by the Court under Section 162 of the Evidence Act, it was an intimation to the Court that the head of the department had not permitted the production of the document in Court or evidence derived from it being given. Whatever else the statement might indicate, it does not indicate that the head of the department had permitted the production or the disclosure of the document. In other words, from the statement of Saxena that the document was a 'secret' one and that he was not permitted to produce it in court, it is impossible to infer that the minister or the head of the department had permitted the document to be produced in court or evidence derived from it being given. Section 123 enjoins upon the Court the duty to see that no one is permitted to give any evidence derived from unpublished official records relating to affairs of State unless permitted by the officer at the head of the department. The Court, therefore, had a duty, if the Blue Book related to secret affairs of State, not to permit evidence derived from it being given. And, in fact, the Court did not allow

the production of the document, for, we find a note in the proceedings of the Court on September 10, 1973 stating that the “question about the production of this document in Court shall be decided after argument of the parties on the point is finally heard”. And before the arguments were finally concluded Kaul, the officer at the head of the department, filed an affidavit claiming privilege. As the privilege could not have been waived and as, before the objection to the production of the document raised by Saxena - whether tenable in law or not - was decided by the Court, an affidavit was filed by Kaul objecting to the production of the document and stating that the document in question related to secret affairs of State, the Court should have considered the validity of that objection under Section 162 of the Evidence Act.

66. The question then arises as to what exactly is the meaning of the expression “affairs of State”.

69. In *Sodhi Sukhdev Singh* case this Court held that there are three views possible on the matter. The first view is that it is the head of the department who decides to which class the document belongs. If he comes to the conclusion that the document is innocent, he can give permission to its production. If, however, he comes to the conclusion that the document is noxious, he will withhold that permission. In any case, the Court does not materially come into the picture. The second view is that it is for the Court to determine the character of the document and if necessary to enquire into the possible consequence of its disclosure. On this view, the jurisdiction of the Court is very much wider. A third view which does not accept either of the two extreme positions would be that the Court can determine the character of the document and if it comes to the conclusion that the document belongs to the noxious class, it may leave it to the head of the department to decide whether its production should be permitted or not, for, it is not the policy of Section 123 that in the case of every noxious document the head of the department must always withhold permission. The Court seems to have accepted the third view as the correct one and has said:

Thus, our conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not.

As it was held in that case that the Court has no power to inspect the document, it is difficult to see how the Court can find, without conducting an enquiry as regards the possible effect of the disclosure of the document upon public interest, that a document is one relating to affairs of State as, *ex hypothesi*, a document can relate to affairs of State only if its disclosure will injure public interest. It might be that there are certain classes of documents which are *per se* noxious in the sense that, without conducting an enquiry, it might be possible to say that by virtue of their character their disclosure would be injurious to public interest. But there are other documents which do not belong to the noxious class and yet their disclosure would be injurious to public interest. The enquiry to be conducted under Section 162 is an enquiry into the validity of the objection that the document is an unpublished official record relating to affairs of State and therefore, permission to give evidence derived

from it is declined. The objection would be that the document relates to secret affairs of State and its disclosure cannot be permitted; for, why should the officer at the head of the department raise an objection to the production of a document if he is prepared to permit its disclosure even though it relates to secret affairs of State? Section 162 visualizes an enquiry into that objection and empowers the Court to take evidence for deciding whether the objection is valid. The Court, therefore, has to consider two things; whether the document relates to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in Section 123 “as he thinks fit” confer an absolute discretion on the head of the department to give or withhold such permission. As I said, it is only if the officer refuses to permit the disclosure of a document that any question can arise in a court and then Section 162 of the Evidence Act will govern the situation. An overriding power in express terms is conferred on the Court under Section 162 to decide finally on the validity of the objection. The Court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of Section 162 of the Evidence Act there is no limitation on the scope of the Court’s decision, though in the second part, the mode of enquiry is hedged in by conditions. It is, therefore, clear that even though the head of the department has refused to grant permission, it is open to the Court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public interest and the expression “as he thinks fit” in the latter part of Section 123 need not deter the Court from deciding the question afresh as Section 162 authorises the Court to determine the validity of the objection finally.

70. It is rather difficult to understand, after a court has inquired into the objection and found that disclosure of the document would be injurious to public interest, what purpose would be served by reserving to the head of the department the power to permit its disclosure because, the question to be decided by him would practically be the same, namely, whether the disclosure of the document would be injurious to public interest — a question already decided by the Court. In other words, if injury to public interest is the foundation of this so-called privilege, when once the Court has enquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would be a futile exercise for the minister or the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. It is difficult to imagine that a head of the department would take the responsibility to come to a conclusion different from that arrived at by a court as regards the effect of the disclosure of the document on public interest unless he has or can have a different concept of public interest.

71. Few would question the necessity of the rule to exclude that which would cause serious prejudice to the State. When a question of national security is involved, the Court may not be the proper forum to weigh the matter and that is the reason why a minister’s certificate is taken as conclusive. “Those who are responsible for the national security must be the sole judges of what national security requires.” As the Executive is solely responsible for national

security including foreign relations, no other organ could judge so well of such matters. Therefore, documents in relation to these matters might fall into a class which *per se* might require protection. But the Executive is not the organ solely responsible for public interest. It represents only an important element in it; but there are other elements. One such element is the administration of justice. The claim of the Executive to have exclusive and conclusive power to determine what is in public interest is a claim based on the assumption that the Executive alone knows what is best for the citizen. The claim of the Executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow department angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the Court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

72. The power reserved to the Court is a power to order production even though public interest is to some extent prejudicially affected. This amounts to a recognition that more than one aspect of public interest will have to be surveyed. The interests of government for which the minister speaks do not exhaust the whole public interest. Another aspect of that interest is seen in the need for impartial administration of justice. It seems reasonable to assume that a court is better qualified than the minister to measure the importance of the public interest in the case before it. The Court has to make an assessment of the relative claims of these different aspects of public interest. While there are overwhelming arguments for giving to the Executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive an exclusive power to determine what matters may affect public interest. Once considerations of national security are left out, there are few matters of public interest which cannot safely be discussed in public. The administration itself knows of many classes of security documents ranging from those merely reserved for official use to those which can be seen only by a handful of ministers or officials bound by oath of secrecy.

74. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption:

Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with public lands, the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede *to* them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained - a character which appears to have been

advanced only when it happens to have served some undisclosed interest to obstruct investigation into facts which might reveal a liability.

To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and it must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure. In how many transactions of official business is there ordinarily such as secrecy? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined on its merits.

80. Probably the only circumstance in which a court will not insist on inspection of the document is that stated by Vinson, C.J. in *United States v. Reynolds* [(1952) 345 US 1]:

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court from all the circumstances of the case, that there is a reasonable danger that compulsion of evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers.

82. In regard to the claim of privilege for the document summoned from the office of the Superintendent of Police, Rae Bareli, the High Court has only said that all the instructions contained in the file produced by the Superintendent of Police were the same as those contained in the Blue Book and since no privilege in respect of the Blue Book could be claimed, the Superintendent of Police could not claim any privilege in respect of those documents. It is difficult to understand how the High Court got the idea that the papers brought from the office of the Superintendent of Police contained only instructions or materials taken from the Blue Book. Since the Court did not inspect the Blue Book, the statement by the Court that the materials contained in the file produced by the Superintendent of Police were taken from the Blue Book was not warranted.;

85. I would set aside the order of the High Court and direct it to consider the matter afresh. The High Court will have to consider the question whether the documents in respect of which privilege had been claimed by Mr R.K. Kaul, Home Secretary and the Superintendent of Police relate to affairs of State and whether public interest would be injuriously affected by their disclosure.

86. If the averments in the affidavits are not full or complete, the Court will be at liberty to call for further affidavits. If, on the basis of the averments in the affidavits, the Court is satisfied that the Blue Book belongs to a class of documents, like the minutes of the proceedings of the cabinet, which is *per se* entitled to protection, no further question will arise in respect of that document. In such case, the question of inspection of that document by court will also arise. If, however, the Court is not satisfied that the Blue Book does not belong to

that class and that averments in the affidavits and the evidence adduced are not sufficient to enable the Court to make up its mind that its disclosure will injure public interest, it will be open to the Court to inspect the document for deciding the question whether it relates to affairs of State and that its disclosure will injure public interest. In respect of the other documents, the Court will be at liberty to inspect them, if on the averments in the affidavits or other evidence, it is not able to come to a conclusion that they relate to affairs of State or not.

87. If, on inspection, the Court holds that any part of the Blue Book or other document does not relate to affairs of State and that its disclosure would not injure public interest, the Court will be free to disclose that part and uphold the objection as regards the rest provided that this will not give a misleading impression. Lord Pearce said in *Conway v. Rimmer* :

If part of a document is innocuous but part is of such a nature that its disclosure would be undesirable, it should seal up the latter part and order discovery of the rest, provided that this will not give a distorted or misleading impression.

The principle of the rule of non-disclosure of records relating to affairs of State is the concern for public interest and the rule will be supplied no further than the attainment of that objective requires. I would allow the appeal.

* * * * *

Bhuboni Sahu v. The King

AIR 1949 PC 257

SIR JOHN BEAUMONT - This is an appeal by special leave from the judgment and order of the High Court of Judicature at Patna dated 19th September 1947 dismissing an appeal against the judgment and order of the Court of the Sessions Judge of Ganjam-Puri dated 23rd July 1947 whereby the appellant was convicted of the offence of murder under S. 302/34, Penal Code, and sentenced to death. At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal be allowed and would state their reasons later. This they now proceed to do.

2. It is not in dispute that on 11th October 1946 one Kalia Behara was brutally murdered at a place between Berhampur, where he lived and carried on business as a jutka driver, and Golantra, to which he was driving with passengers in his jutka. It is unnecessary to refer to the details of the murder; though it may be noted that the motive attributed to the appellant was that he is a relation of accused 1 and 2 who are said to have been on terms of enmity with the deceased, but both of whom were acquitted of the murder. Eight persons were charged with the offence and tried. By the sessions Judge of Ganjam Puri. The learned judge convicted six of the accused including the appellant who was accused 7 and one Trinath, who was accused 5. The six convicted persons appealed to the High Court at Patna. Two of the appeals were allowed, but the other appeals, including those of the appellant and Trinath, were dismissed. The only question which arises on this appeal is whether there was evidence upon which the appellant could be properly convicted.

3. The evidence against the appellant consisted of, (a) the evidence of Kholi Behara who had taken part in the murder and had become an approver; (b) the confession of Trinath recorded under S. 164 Criminal P. C., which implicated both himself and the appellant in the murder, but which was retracted in the Sessions Court; and (c) the recovery of a loin cloth identified as the one which the deceased was wearing when he was assaulted, and a khantibadi, or instrument for cutting grass, in circumstances alleged to implicate the appellant.

4. The Law in India relating to the evidence of accomplices stands thus: Even before the passing of the Indian Evidence Act, 1872, it had been held by a Full Bench of the High Court of Calcutta in *R.v. Elahee Buksh* [5 WRCr 80], that the law relating to accomplice evidence was the same in India as in England. Reading these two enactments, together the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore is substantially the same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase "corroborated in material particulars" in illustration B to S. 114.

5. The approver in the present case was a man aged about twenty. He was arrested on 12th October 1946, the day after the offence, and on 14th October was sent by the police to a Magistrate, who was called as a witness at the trial, and who on 15th October recorded a statement of the approver under S. 164, Criminal P. C. In this statement the approver described the murder, and alleged in effect that he and Trinath had been engaged by the appellant to assist in the murder, which they did; that in the struggle the cloth of the murdered man became untied and the appellant threw it over a bust. On 17th February 1947 the approver having been tendered a pardon, gave evidence before the Committing Magistrate. His evidence followed the general lines of his statement made under S. 164 but added some further details. In particular he said that the appellant gave him a khantibadi which he, the approver, subsequently gave to Trinath who handed it over at the appellant's house. The approver also alleged that the appellant gave to each of them, himself and Trinath, a sum of Rs. 25, presumably as remuneration for the part they had taken in the murder. On 8th July 1947, the approver gave evidence in the Sessions Court. His evidence was that he knew nothing about the murder, and he denied all the facts to which he had deposed before the committing magistrate. He affirmed that his evidence before the Committing Magistrate was the result of beating and tutoring by the police, and he denied that he had made any statement at all before a Magistrate under S. 164, Criminal P. C. Thereupon the Sessions Judge brought the evidence of the approver given before the Committing Magistrate upon record under S. 288, Criminal P. C., the effect being to make the evidence given before the Committing Magistrate evidence in the case for all purposes. Both the learned Sessions Judge, and the learned Judges of the High Court in appeal, preferred the evidence given by the approver before the Committing Magistrate to his evidence given in the Sessions Court. Some discussion took place in the High Court as to whether under S. 157, Evidence Act the Court could use the statement made by the approver under S. 164, Criminal P. C. Section 157 is in these terms:

“In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”

As statement made under S. 164, Criminal P. C., can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement. The statement made by the approver under S. 164 plainly does not amount to the corroboration in material particulars which the Courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself; faint evidence does not lose its taint by repetition. But in Considering whether the evidence of the approver given before the Committing Magistrate was to be preferred to that which he gave in the Sessions Court, the Court was entitled to have regard to the fact that very soon after the occurrence he had made a statement in the same sense as the evidence which he gave before the Committing Magistrate.

6. Although the learned Judges of the High Court accepted the evidence of the approver given before the Committing Magistrate, they appreciated that it would be unsafe to act upon such evidence unless it were corroborated in the manner required by the rule of prudence. A

part from the suspicion which always attaches to the evidence of an accomplice it would plainly be unsafe, as the Judges of the High Court recognised, to rely implicitly on the evidence of a man who had deposed on oath to two different stories. The learned Judges stated the principle upon which they proposed to act in these terms:

“It is of the utmost importance, however, that such evidence (i.e., the evidence of an approver admissible under S. 288, Criminal P. C.), before it can be acted upon as against other accused persons, should be corroborated by independent evidence in material particulars. The corroboration must be not only with regard to the occurrence but also as against each of the accused sought to be implicated in the crime.”

7. Acting upon this principle the learned Judges proceeded to consider, in the case of each accused, whether the evidence of the approver was sufficiently corroborated against him. They were not prepared to accept the confession of Trinath, who was also an accomplice, as sufficient corroboration of the evidence of the approved; and in the case of Mata Simma, who was accused No. 6, against whom there was only the evidence of the approver and Trinath, they allowed the appeal; but as against the appellant, they found sufficient independent corroboration in the discovery of the deceased's cloth and the production of the khantibadi. With regard to the cloth, as already noticed, the evidence of the approver was that the appellant threw the cloth over a hedge, and it was proved at the trial that the cloth was found in the place pointed out by the approved. This fact no doubt was of value as supporting the credibility of the approver's story, but there is nothing beyond the statement of the approved to connect the appellant with the cloth. It was not found at the appellant's house, or in any place under his control, and the statement made by the approver that it was the appellant who threw the cloth to the place where it was found is of no more, and no less, value than his statement that the appellant took an active part in the murder. Sir Valentine Holmes for the Crown admitted that he could not rely on the finding of the cloth as a piece of corroborative evidence implicating the appellant. With regard to the khantibadi the evidence of the approver was that the appellant gave it to him, that he passed in on to Trinath, and Trinath handed it over at the house of the appellant, and the police recovered a khantibadi from the house of the appellant where it was produced, somewhat unwillingly, by the appellant's mother. No blood stains were found on the khantibadi so produced, and there is nothing on the record from which it can be inferred that it was that khantibadi which was employed in the murder. Had a khantibadi been the sort of instrument which would be unlikely to be found in the house of an agriculturist it would no doubt be a striking coincidence that a khantibadi was handed over by Trinath at the appellant's house and one was subsequently found there. But the evidence is that a khantibadi is an instrument commonly possessed by agriculturists, and there was nothing strange in finding one at the house of the appellant. The High Court attached some importance to the unwillingness of the mother of the appellant to produce the khantibadi, but such unwillingness is in accord with the uncooperative attitude which agriculturists, and particularly female members of the family, usually display towards police investigations. In their Lordships' view neither the finding of the piece of cloth nor the production of the khantibadi tends to implicate the accused in the crime, nor affords such corroboration of the evidence of the approver as the rule of prudence requires.

8. Sir Valentine Holmes did not rely strongly upon these pieces of alleged corroboration. He concentrated his argument mainly on the contention that the High Court was wrong in not accepting the confession of Trinath as sufficient corroboration of the evidence of the approver. This involves consideration of the position of the confession of a co-accused under Indian law.

9. This section was introduced for the first time in the Evidence Act of 1872, and marks a departure from the Common Law of England. It will be noticed that the section applies to confessions, and not to statements which do not admit the guilt of the confessing party. In the present case the Courts in India appreciated this, and ruled out statements made by certain of the accused which were self-exculpatory in character. The statement of Trinath was, however, a confession. Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of conviction is correct. Sir Valentine Holmes puts his case in this way. He relies on one of the examples given by the Evidence Act of the sort of facts to which the Court should have regard in applying illustration b to S. 114, Evidence Act.

Sir Valentine contends that Trinath's confession was made independently of that of the approver, that neither he nor the approver had any reason for falsely implicating the appellant, and that the confession does afford sufficient corroboration to justify acceptance of the evidence of the approver, even if it does not amount to corroboration in material particulars within illustration (b) of S. 114. The evidence on record, however, does not support this argument. The confession of Trinath is a very short one and gives only the bare outline of the story. It discloses nothing which the police had not been able to ascertain from the approver, and affords no intrinsic evidence of its truth. It was, as already noted, retracted in the Sessions Court. Retraction of a confession by an accused is a common phenomenon in India. The weight to be attached to it must depend upon whether the Court thinks that it was induced by the consideration that the confession was untrue, or by realization that it had failed to secure the benefits the hope of which inspired it. Their Lordships will assume that the confession of Trinath was not weakened by its retraction. Even so, the approver and Trinath were, according to both their statements, working together on the day of the murder when they were summoned by the appellant to take part in the crime; they were arrested on the following day so they had a day, in which they must have appreciated that they were under suspicion, in

which to arrange their story. After their arrest they were for some two days in police custody before they were sent up together, and with other accused, to the Magistrate to have their confessions recorded, and there is no evidence that they were kept apart during this period. In that state of the evidence, it is impossible to say that the approver and Trinath were kept apart from each other, and that their previous concert was highly improbable. Sir Valentine Holmes has relied strongly on the case *In re B. K. Rajagopal* [AIR 1944 Mad. 117], in which the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused. Their Lordships whilst not doubting that such a conviction is justified in law under S. 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver. This tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger. An Indian villager is seldom in a position to produce cogent evidence of alibi. If he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut, or guarding his crops, he can only rely, as a rule, on the evidence of his wife, members of his family, or friends to support his story, and their evidence is interested and not likely to carry weight. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. This aspect of the matter was well expressed by Sir George Rankin in *Ambikacharain Roy v. Emperor* [AIR 1931 Cal 697].

10. In the present case their Lordships are in complete agreement with the Judges of the High Court in declining to act upon the evidence of the approver supported only by the confession of Trinath. These two persons appear to have been nothing but hinted assassins. They had ample opportunity of repairing their statements in concert, and in addition, the approver has sworn to two contradictory stories, and Trinath has denied that his confession was true. It is true that no motive is shown for their falsely implicating the appellant, but motive is often a matter of conjecture. It may be that these two men thought it advisable to say falsely that they were acting on the instigation of another rather than on their own initiative, or they may have had reasons of their own for wishing to conceal the name of the real instigator. For the above reasons their Lordships are of opinion that the conviction of the appellant cannot stand.

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Haroon Haji Abdulla v. State of Maharashtra

(1968) 2 SCR 641 : AIR 1968 SC 832

M. HIDAYATULLAH, J. - The appellant Haroon is the sole appellant from a batch of 18 persons who were tried jointly before the Chief Presidency Magistrate, Esplanade Court, Bombay for offences under Section 120-B of the Indian Penal Code read with Section 167(81) of the Sea Customs Act and certain offences under the Foreign Exchange Regulations Act, 1947. Of these, No. 17 accused (Saleh Mohamed Bhaya) was discharged by the Magistrate, No. 1 accused (Govind Narain Bengali) died after the conclusion of the case but before judgment in the court of trial and No. 4 accused (Noor Mohammad) jumped bail just before the same judgment. The case against Bengali was held to have abated and that against Noor Mohammad was kept pending. Nos. 11, 12, 13 and 16 accused were acquitted. Of the remaining accused who were convicted, Haroon alone is before us. His appeal to the High Court of Bombay was dismissed but he obtained special leave under Article 136 of the Constitution and brought this appeal.

2. As this appeal is to be considered on a question of law, it is not necessary to give the facts in detail. The several accused (and many others unknown) were said to be concerned in a criminal conspiracy the object of which was to smuggle gold into India from the Middle East. Gold was brought in steam launches from places on the Persian Gulf and transhipped into Indian boats standing out at sea, which would then shore it to be taken away by persons waiting for it. The operations were organised by No. 15 accused (Haji Sattar) and his Nephew No. 9 accused (Ayub) with the assistance of Bengali, Noor Mohammad and Kashinath (PW 1). Four trips, in which gold of the value of nearly a crore of rupees was smuggled, were made and Haroon is said to have taken part in the third and fourth trips. His share in the affair was only this; that he was present when gold was landed and he helped in taking it away and accompanied Haji Sattar and Ayub in their car.

3. As the smuggling of gold and the details of the operations are admitted it is not necessary to consider the prosecution evidence with a view to finding out whether there existed sufficient proof on that part of the case. It may, however be stated that as the raid took place while the last consignment of gold was still with the smugglers and many of them were arrested there and then, no successful attempt to refute it could at all be made. The only question was who were in the conspiracy besides those caught at the spot. The argument in this appeal is that there is no legal evidence to connect Haroon with the others.

4. The case against Haroon stands mainly on the basis of the statement of the accomplice Kashinath (PW 1). Kashinath must be held to be a competent witness in view of our decision in the *Chauraria* case [(1968) 2 SCR 624]. Corroboration for Kashinath's evidence on the general aspects of the conspiracy was amply available from diverse sources and this is not denied but in respect of Haroon (whose name does not figure in the rest of the oral or documentary evidence) it was found to exist in the statement of Kashinath before the Customs Authorities, and statements made by Bengali and Noor Mohammad also to the Customs Officers, all in answer to notices under Section 171-A of the Sea Customs Act. The use of these statements is objected to generally and in particular on the following grounds: it is submitted *firstly* that these statements are not confessions proper to which Section 30 of the

Evidence Act can be made applicable; *secondly*, that as Bengali died and Noor Mohammad absconded before the trial was finally concluded against them, their statements are not of persons jointly tried with Haroon; *thirdly* a confession of a co-accused is no better than accomplice evidence and just as one accomplice cannot be held to corroborate another accomplice, the confession of a co-accused cannot also be held to be sufficient corroboration; *fourthly* as these confessions, were later retracted their probative value is nil; and *fifthly* Kashinath's previous statement cannot be used to corroborate him as an accomplice cannot corroborate himself. On these submissions it is urged that Haroon's conviction is based really on the uncorroborated testimony of an accomplice.

5. We may begin by stating that we have read the deposition of Kashinath as the first prosecution witness. We have been impressed by the simplicity of the narrative and there is on record a note by the Magistrate that he was impressed by the manner in which Kashinath deposed. The High Court and the Magistrate have concurred in accepting it and we have not seen anything significant to reject it as false. To corroborate Kashinath, the Magistrate and the High Court have looked into his statement under Section 171-A of the Sea Customs Act. In *Rameshwar v. State of Rajasthan* [(1952) SCR 377], the previous statement was held under Section 157, Evidence Act, corroborative evidence provided it was made "at or about the time when the fact took place". This is perhaps true of other testimony but as pointed out by the Judicial Committee in *Bhuboni Sahu v. Emperor* [AIR 1949 PC 257], the use of the previous statement of an accomplice is to make the accomplice corroborate himself. We have, therefore, not used Ex. A to corroborate Kashinath but we cannot help saying that only two discrepancies were noticed on comparison. The first was that Haroon's name was mentioned in Ex. A in the second trip while in the deposition in Court he was shown to have taken part in the third trip. The details of the trips where his name is mentioned are identical and it seems that in counting the trips, Kashinath has made a confusion, counting the reconnaissance trip as the first trip in his deposition but not in his statement. The second was the omission of a couple of names from the long list of those who were on the beach to receive the gold. This is not of much consequence because any one who tries to give a long list of names, often makes such an omission. On the whole the two statements contained the same story with sufficient details for verification from outside sources. The reception of Ex. A as corroborative of accomplice testimony, although open to some objection, has, however, not affected the case.

6. This leads us to the consideration of the statements of Bengali and Noor Mohammad which were received in corroboration of Kashinath's testimony. These statements contain admission constituting the guilt of the makers under the charged sections. They also mention the name of Haroon, among others, as being concerned in the smuggling and in much the same way as does the accomplice. The question is, can they be used to corroborate him? These statements are not confessions recorded by a Magistrate under Section 164 of the Code of Criminal Procedure but are statements made in answer to a notice under Section 171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him. Section 30 of the

Evidence Act does not limit itself to confessions made to Magistrates, nor do the earlier sections do so, and hence there is no bar to its proper application to the statements such as we have here.

7. No doubt both Bengali and Noor Mohammad retracted their statements alleging duress and torture. But these allegations came months later and it is impossible to heed them. The statements were, therefore, relevant. Both Bengali and Noor Mohammad were jointly tried with Haroon right to the end and all that remained to be done was to pronounce judgment. Although Bengali was convicted by the judgment, the case was held abated against him after his death. In *Ram Sarup Singh v. Emperor* [AIR 1937 Cal 39], J was put on his trial along with L; the trial proceeded for some time and about six months before the delivery of judgment, when the trial had proceeded for about a year, J died. Before his death J's confession had been put on the record. R.C. Mitter, J. (Henderson, J. dubitante) allowed the confession to go in for corroborating other evidence but not as substantive evidence by itself. Of course, the confession of a person who is dead and has never been brought for trial is not admissible under Section 30 which insists upon a joint trial. The statement becomes relevant under Section 30 read with Section 32(3) of the Evidence Act because Bengali was fully tried jointly with Haroon. There is, however, difficulty about Noor Mohammad's statement because his trial was separated and the High Court has not relied upon it.

8. The statement of Bengali being relevant we have next to see how far it can be held to be legal corroboration of Kashinath's accomplice evidence. The law as to accomplice evidence is well settled. The Evidence Act in Section 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in Illustration (b) to Section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law.

9. The argument here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice. Therefore, unless there is some evidence besides these implicating the accused in some material respect, conviction cannot stand. Reliance is placed in this connection upon the observations of the Judicial Committee in *Bhuboni Sahu v. Emperor* a case in which a

conviction was founded upon the evidence of an accomplice supported only by the confession of a co-accused. The Judicial Committee acquitting the accused observed:

“Their Lordships whilst not doubting that such a conviction is justified in law under Section 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue....”

As against this the State relies upon the observations of Imam, J. in *Ram Prakash v. State of Punjab* [(1959) SCR 1219, 1223]:

“The Evidence Act nowhere provides that if the confession is retracted, it cannot be taken into consideration against the co-accused or the confessing accused. Accordingly, the provisions of the Evidence Act do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. Not a single decision of any of the courts in India was placed before us to show that a retracted confession was not admissible in evidence or that it was irrelevant as against a co-accused. An examination of the reported decisions of the various High Courts in India indicates that the preponderance of opinion is in favour of the view that although it may be taken into consideration against a co-accused by virtue of the provisions of Section 30 of the Indian Evidence Act, its value was extremely weak and there could be no conviction without the fullest and strongest corroboration on material particulars. The corroboration in the full sense implies corroboration not only as to the factum of the crime but also as to the connection of the co-accused with that crime. In our opinion, there appears to be considerable justification for this view. The amount of credibility to be attached to a retracted confession, however, would depend upon the circumstances of each particular case. Although a retracted confession is admissible against a co-accused by virtue of Section 30 of the Indian Evidence Act, as a matter of prudence and practice a court would not ordinarily act upon it to convict a co-accused without corroboration.”

The State further relies upon the observations of Govinda Menon J. in *Subramania Goundan v. State of Madras* [(1958) SCR 428], where the value of a confession was compared with the value of accomplice evidence.

10. The case of the Judicial Committee dealt with accomplice evidence which was sought to be corroborated by retracted confessions. The case of this Court dealt with a retracted confession which was sought to be used without corroboration. Both cases treat the retracted

confession as evidence which may be used although not within the definition of evidence. But both cases regard this evidence as very weak and only to be used with great caution. Although Govinda Menon, J. in *Subramania Goundan* case [(1958) SCR 428] placed a confession on a slightly higher level than accomplice evidence, the observation is intended to convey the difference between the extent of corroboration needed for the one or the other before they can be acted upon. To read more meaning into the observations is not permissible for no such meaning was intended. The confession there considered was also intended to be used against the maker and not against a co-accused. A confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross-examination whilst the former is not. The observations of Govinda Menon, J. must not be applied to those cases where the confession is to be used against a co-accused. As pointed out by this Court in *Nathu v. State of Uttar Pradesh* [AIR 1956 SC 56] confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict.

11. In this connection the question of retraction must also be considered. A retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. Once the confession is proved satisfactorily any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority. A retracted confession is a weak link against the maker and more so against a co-accused.

13. The offence in this case was detected on the night of August 13, 1961 and investigation went on till the morning of the 14th. Thereafter the Customs Authorities served notices upon various suspects and recorded their statements in answer to these notices. The statements of Kashinath and Bengali were recorded on the 15th, the former by Karnik and the latter by Rane. These statements were recorded simultaneously or almost simultaneously. The statement of Noor Mohammad was recorded by Randive on August 19. As there was no gap of time between the statements of Kashinath and Bengali and the incident was only a few hours old, it is impossible that the officers could have tutored them to make statements which agree in so many details. Both the statements receive corroboration at numerous points in the story from other than accomplice evidence. For example the statements of Kashinath regarding the boats employed, the names of the owners and pilots, the manner the trips were made, the names of persons who took part and what they did, the description of the residences of the Muslim co-accused, the furniture and furnishings in the room where gold used to be secreted, the description of the cars employed, and the identity of the several participants other than Haroon, are amply borne out by evidence which is not accomplice in character. A bare reading of the statement of Kashinath made before the Court and corroborated by his earlier statement to the Customs Authorities (except in two particulars already considered) leaves one convinced that he is speaking the truth. We are not seeking corroboration of the accomplice from his own statements because that does not advance accomplice evidence any further. We are only looking into the previous statement to see if it discloses any variation which would put us on further inquiry. The real check comes when one compares these two statements with that made by Bengali. A remarkable degree of agreement is found there also.

In fact they are so consistent that Mr Nuruddin Ahmad sought to make a point and said that they must be the result of collusion. Apart from the fact that there was no time to collude, there are extra details in the different statements which also receive independent corroboration. Further, although Noor Mohammad's statement was not used by the High Court and we have reluctantly left it out of consideration also, nothing was shown to us to destroy the conclusion about the truth of accomplice evidence. If it was, we would have considered seriously whether we should not take it into consideration. Further Haroon himself was also served with a notice like others. He was unwilling to make a statement till he had seen what the others had said. This may well be regarded as peculiar conduct in a man who now claims that he was not concerned with the smuggling.

14. The High Court has very searchingly examined the evidence of Kashinath and applied to it the checks which must always be applied to accomplice evidence before it is accepted. There is corroboration to the evidence of Kashinath in respect of Haroon from the confession of Bengali given independently and in circumstances which exclude any collusion or malpractice. Regard being had to the provisions of Section 133 of the Evidence Act, we do not think that we should interfere in this appeal by special leave, particularly as we hold the same opinion about the veracity of Kashinath.

15. The appeal, therefore, fails and is dismissed. Appellant to surrender to his bail.

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Ravinder Singh v. State of Haryana

(1975) 3 SCC 742 : AIR 1975 SC 856

GOSWAMI, J. - In July 30, 1968, Bimla, a hale and hearty young girl (19), indeed, by her right, legitimate wife of the accused, Ravinder Singh (23), accompanied on a rail journey her husband, who, after enjoying two months' furlough at home, returned to his Air Force Station at Sirsa without her and without the least concern. She was found next morning nearby a wayside distant railway station with acid burns on her face and on other parts of the body with multiple injuries, incapacitated by the shock and affliction, to tell her gruesome story to the few persons who came by her. The only unchallenged thing was that she was pronounced dead in a hospital on July 31, 1968, at 8.45 p.m.

2. Did the husband cause the murder of his wife, is for a final judicial solution before us. The accused husband being charged under Section 302/34, I. P. C., along with some others obtained an acquittal from the trial Judge. Government's conscience was roused and the High Court on the State's appeal entered his conviction under Section 302, I. P. C., shrinking, however, from administering the extreme penalty under the law. That is how the lifer is before us in this appeal as a matter of right under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

3. The entire story as given below is revealed by a friend of the accused, approver Jasbir Inder Singh (21) (PW 5), who was arrested along with the accused on August 13, 1968. Accused Ravinder Singh and the approver were employed in the Air Force Department at Sirsa and were good friends. Bhanu Parkash Singh, since acquitted, is the cousin of the accused. Satinder Kumar (11) is the accused's brother. During his stay at Sirsa, when his wife Bimla was not there, the accused developed intimacy with a girl, Balbir Kaur, who was insisting on marriage which, however, the accused posing to be a bachelor was putting off holding out hopes to her. Both the accused and the approver took two months' leave, the former to construct his house at village Komri. The accused and the approver with Satinder Kumar reached Komri on June 3, 1968, when Bimla was in her parents' house. On June 12 or 13, the accused and the approver went to bring her back from her father's house, but on account of a son being born to her brother's wife, a few days earlier, the father-in-law said that he would send her after some days. This led to some exchange of hot words. However, after seven or eight days, Bimla returned to her husband's home with her father and brother, Lekh Raj Singh (PW 18). The accused went in early July to see Bhanu Parkash Singh, his cousin, who was employed as Health Visitor at Amod Dispensary and returned after eight or ten days. The approver was in the accused's house during the period. The accused asked his wife that she should agree to a divorce, but she would not. The accused used to say that he would finish his wife one day. On July 29, 1968, Bhanu Parkash Singh came to the accused's house. On the same day the approver also returned from Lucknow where he had gone seven or eight days back. On July 30, the accused told the approver in the presence of Bhanu Parkash Singh that he would kill his wife that day. Bhanu Parkash Singh replied that he had brought acid with him and it would help in expediting her death. On July 30, 1968, the accused, his wife Bimla, the approver, Bhanu Parkash Singh and Satinder Kumar left for Sirsa by train from Sasni railway station which is at a distance of four or five miles from Komri.

The father of the accused came to see them off at the railway station. The accused booked a cycle at Sasni railway station and purchased two tickets for his wife and Bhanu Parkash Singh, but did not purchase any ticket for Satinder Kumar. Both the accused and the approver had Military Railway Warrants for travel.

4. After leaving Sasni at 12 noon, they arrived at Delhi railway station at 6.30 p.m. and changed for Bhatinda railway station. They reached Rewari railway station at about 10-30 p.m. At Rewari their bogie was attached to the train bound for Sirsa-Bhatinda. When the train left Rewari at 2.15 a.m. on July 31, 1968, there was no other passenger in the compartment except the above five persons. The train stopped for some time at the next railway station. When it again started, the accused threw his wife Bimla on the floor of the compartment by catching hold of her by the neck. When she fell down in the compartment the approver caught hold of her by the feet and Bhanu Parkash Singh "threw acid in her mouth". Satinder Kumar did not take any part. The accused removed the *pazebs* from her feet and gold *jhumkas* from her ears. The accused threw Bimla from the running train in between the first and the second railway stations beyond Rewari. Some acid drops fell on the hands of the accused and Bhanu Parkash Singh and on their pants and on the accused's shirt. When the train reached Bhiwani the accused got down for purchasing two tickets for Bhanu Parkash Singh and Satinder Kumar, but the Ticket Collector, Raghbir Singh (PW 29) detained him and he missed the train. Three of the aforesaid company reached Sirsa at 9.00 a.m. on July 31, 1968. When asked about the accused, the approver told Bansilal (PW 25) and Yudhishter Kumar (PW 26) that the accused had missed the train at Bhiwani and would be coming by the next train. The accused arrived at Sirsa at 1.30 p.m. on July 31. Bhanu Parkash Singh left for Aligarh in the evening of August 1. The accused and the approver resumed their duties at the Air Force Station on August 2, 1968.

5. On August 3, 1968, the mother of the accused and her nephew, Malkhan Singh, came to Sirsa and she told that Bimla had been admitted in the Civil Hospital, Rewari, and suggested that they should register their presence in the Air Force Station at Sirsa in order to save themselves. On August 4, the accused and the approver went to the Medical Assistant at the Air Force Station and the accused showed the burns on his hands and the Medical Assistant (PW 50) made a note in his register. They decided to leave their house at New Mandi and again started living in the barracks of the Air Force from August 8. Both of them were arrested from the Air Force barracks on August 13, 1968. This is as disclosed by the approver (PW 5).

6. Let us now turn to the fate of Bimla thrown from the running train. She was picked up, semi-conscious, by Udmi (PW 10) and another person from a railway track between Jatusana and Kosli railway stations, and taken to Railway Hospital, Rewari, where Doctor (Miss) K. Dass (PW 3) and Miss V.K. Sharma, Nurse (PW 2) attended upon her. She could speak out a little before Miss Sharma, gave her name as Bimla, wife of the accused and daughter of Narain Singh, and indicated that she was travelling with her husband by train. She was later sent to the Civil Hospital, Rewari, where she was received by Dr Manocha (PW 1). She was not in a position to make a statement at the Civil Hospital and she expired at 8.45 p.m. on July 31, 1968.

8. The Additional Sessions Judge disbelieved the approver and also held that his statement was not corroborated in material particulars. He held that motive was not established nor was the dying declaration proved. The High Court, however, found that the approver, who was admittedly a friend of the accused, was a reliable witness and his statement did not suffer from any defect whatsoever. The High Court further held that the approver's statement was corroborated in material particulars by other evidence connecting the accused with the crime.

9. Since the accused has come in appeal against the judgment of the High Court as a matter of right, we have heard his learned Counsel at length and also examined the evidence with care. We are unable to hold that the High Court committed any error or injustice in interfering with the acquittal in this case.

10. The most important material aspect in the case is with regard to the accused accompanying the deceased in the train on July 30, 1968. This is not only disclosed by the statement of the approver but is corroborated by evidence *aliunde*. The very fact that she was found away from her home at a distant place by a wayside railway track is consistent with her travelling in the train on the fateful day. The defence of the accused that he left "for Delhi on July 29, 1968 and "my wife followed me with large gold and silver ornaments on her person and she was robbed and killed on the way" is most unnatural and improbable and can safely be characterised as false. The accused was anxious to bring his wife home from her father's house. He was returning to a distant place by train after enjoying his leave and there was no earthly reason to leave the young wife behind to travel alone in the train with "gold and silver ornaments" with attendant risks. Then again there is the evidence of Miss V. K. Sharma (PW 2) to the effect that she "also understood from her (deceased's) talks that she was proceeding to Sirsa with her husband". She is an absolutely independent witness and there is no reason to disbelieve her statement. She has no animus against the accused nor can it be accepted that she had been tutored by the police to give evidence in this case against the accused. The fact that this information was not recorded in the note Ext. PA/2 would not affect the veracity of the witness since her comprehension of the deceased's talk was not otherwise challenged. Nothing has been pointed out to show that this witness either had not mentioned about this fact to the Investigating Officer earlier or had stated something inconsistent with the same. Then we have the evidence of Raghbir Singh (PW 29), Ticket Collector, Bhiwani. It appears from his evidence that the accused was detained on July 31, 1968, by him at the station when he returned from the booking office after purchasing 3 tickets which according to the accused were necessary for some passengers travelling in the train. From his evidence it also appears that the accused had return-journey Railway Warrant. Besides, when money was demanded from the accused for travelling without tickets of those 3 persons from Sasni to Bhiwani, he gave a writing, Ext. PL dated July 31, 1968 to him. This witness is also an independent witness and has no enmity against the accused. We have no reason to think that he will falsely implicate the accused after being tutored by the police, as suggested. Further we have the evidence of Yudhishter Kumar (PW 26) who states about the approver, Satinder Kumar and Bhanu Parkash Singh coming to him at Sirsa on July 31 at about 10.30 a.m. without the accused. He also stated that the accused came there at about 1.30 p.m. the same day. His evidence, which is not even challenged, establishes the story about the three persons arriving

at Sirsa without the accused who had already missed the train at Bhiwani. The evidence of Shakti Parshad Ghosh (PW 17) A.S.M., Sasni railway station, proves that the accused booked his cycle No. RK-162872 make Road King from Sasni to Sirsa on July 30, 1968, as per the forwarding note, Ext. PW 16/A (original Ext. 17/A) which fact is also proved by PW 16, Surinder Kumar, A.S.M. PW 17 categorically states that the accused came to him for booking the cycle and filled in the forwarding note. It is pointed out that PW 17 did not see the accused at the railway station at the arrival of the train as he went to the brake-van direct. It was not at all natural for the witness to follow the movements of the accused after he had booked the cycle. There is, therefore, nothing unusual in his not noticing the accused later on the arrival of the train.

11. We also find from the approver's evidence that the accused went to the doctor of the Air Force on August 4 to show the bums on his hands. This fact is deposed to by PW 50, Sergeant R. N. Singh, who worked as a Medical Assistant in the unit of the First Aid Post at the Air Force Unit. According to him the accused came to him on August 4, 1968, at about 7.00 a.m. and reported that both his hands had acid burns. He also proved the endorsement to that effect in the register (Ext. PT) maintained in the First Aid Post. This fact is not denied by the accused and according to him, he had these bums as he, being a storeman, had to deal with batteries and some acid fell on his hands, and that is why he went to PW 50 for treatment. In his statement in the court recorded on April 25, 1969, after admitting the above facts the accused also asserted that "there are no marks of acid bums on my hands now". In cross-examination of Dr Manocha (PW 1) it was elicited that "the sulphuric acid bums if superficial and not infected and treated immediately in due course may not leave a mark, otherwise it should leave a mark". In view of this medical evidence there is no significance attached to the accused not having marks of the injuries on his hands after about nine months. The injuries due to a few accidental drops may even be superficial. It is significant that PW 50 was not even cross-examined with regard to the bums being caused by acid from batteries. The accused's explanation that the acid from the battery caused these bums on his hands is absolutely an after-thought.

12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected *brevi manu*. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based.

13. The approver here was a constant companion of the accused. He was arrested along with the accused on August 13. He was in police custody till August 27 when he was sent to the jail thereafter. He wrote through the Jail Superintendent to the Magistrate on August 29 expressing willingness to give evidence as “*sultani gawa*” (originally King’s witness). He was then granted conditional pardon on September 6 and was examined thereafter as a prosecution witness. Every approver comes to give evidence in some such manner seeking to purchase his immunity and that is why to start with he is an unreliable person and the rule of caution calling for material corroboration is constantly kept in mind by the court by time-worn judicial practice.

14. Ignoring for a moment that PW 5 is an approver, there is nothing in his evidence to show that his statement otherwise is unreliable, unnatural or improbable. There is nothing to show that he had on any earlier occasion made any contradictory statement on any material point. It is true that an approver is a person of low morals for the reason that he being a co-participator in the crime has let down his companion. As pointed out above it is for this reason that a rule of caution has grown whereby the Court has to see if his evidence is corroborated in material particulars connecting the accused with the crime.

16. To mention a few, the fact that the accused was accompanied by the deceased wife is proved by the statement of PW 2, Miss Sharma. That the accused got down at Bhiwani railway station, missed the train and, therefore, had to arrive at Sirsa later in the afternoon is corroborated by PW 26. That the accused came by train on July 30, 1968 and not on July 29, 1968, is also established by the evidence of PWs 16 and 17. The accused booked his cycle at Sasni railway station on July 30, 1968 (vide PWs 16 and 17) and took delivery of the same at Sirsa railway station on August 1 (vide PW 20). Then again the accused reported to PW 50 about his acid burns on both the hands on August 4, 1968. These are some material aspects in the case having great relevance to the crime committed by the accused and are disclosed by independent and reliable witnesses. It was not possible for the approver if he had not actually accompanied the accused to make such a detailed statement as he has done, some material parts of which find support from the evidence of the aforesaid witnesses. We are, therefore, clearly of opinion that the approver’s evidence is not only reliable but the same stands corroborated in several material parts by other reliable evidence from an independent source. We are also prepared to believe that the motive for the crime was the illegitimate intimacy with Balbir Kaur.

17. It was then submitted by the appellant that in a separate trial Bhanu Parkash Singh was acquitted by the High Court. He also produced the judgment of that case which was pronounced on the same day as in the present case. The learned Counsel for the appellant, however, frankly stated that the High Court acquitted the accused, Bhanu Prakash Singh, since the approver’s evidence was not found to be corroborated in material particulars. That acquittal, therefore, cannot at all influence the decision against the present accused when the approver’s evidence is amply corroborated in material particulars against him.

18. The learned Counsel for the appellant relied upon the decision of this Court in *Lalta v. State of U.P.* [AIR 1970 SC 1381], to support his submission that on the principle of issue-estoppel conviction of the appellant cannot be sustained because of the acquittal of Bhanu Parkash Singh, a co-accused, although in a separate trial. The crux of the principle of issue-

estoppel may be stated in the words of Dixon, J. in *King v. Wilkes* [77 CLR 511, 518] as follows:

Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is to be brought in issue on a second criminal trial of the same prisoner..... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner.

19. In order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reargued in the subsequent trial.

20. In the present case the parties are the State and the accused, Ravinder Singh. In the other case relied upon, the parties were the State and the accused Bhanu Parkash Singh. Besides, as even admitted by Counsel, the approver was not held to be unreliable in that case while deciding the case of Bhanu Parkash Singh. There is no inconsistency between the finding that the approver's statement there was not materially corroborated by other evidence against Bhanu Parkash Singh and the contrary finding in the affirmative in the present case against Ravinder Singh. As has been observed by this Court in *Manipur Administration v. Thokchom, Bira Singh* [AIR 1965 SC 87]:

(I) Issue-estoppel does not prevent the trial of an offence as does *autre fois acquit* but only precludes evidence being led to prove a fact-in-issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction.

There is, therefore, no substance in the submission of the learned Counsel on the basis of issue-estoppel in this case.

21. The trial Court's reasons for disbelieving the approver did not find favour with the High Court and rightly so. If the incident described by the approver had taken place, as stated, there is nothing improbable or impossible about it, if, judged by the standard of a cool person, the crime could not have been perpetrated in the manner disclosed. It is evident there was some hatching for the crime and that the opportunity to perpetrate it was availed of in the manner done, cannot be dismissed as a fib. The trial Court disbelieved the evidence of Sampat (PW 8) with regard to the dying declaration of Bimla implicating her husband. The trial Court also observed that "there is no doubt in my mind that the story of dying declaration is not genuine". Even so the trial Court relying upon the statement of Sampat (PW 8) with regard to the dying declaration observed that "the statement of the approver, in my opinion, does not seem to be true". Once the evidence of Sampat has been rejected by the Court it should not be made a basis for judging the veracity of other evidence by the yardstick of that unreliable evidence. The trial Court fell into that error. Again the reason given by the trial Court for the rejection of the evidence of the Ticket Collector is also tenuous. There is no reason why the Ticket Collector would spin a story of his own if not given by the accused, particularly so when, even according to the trial Court, it does not fit in with the number of tickets actually

needed for the journey. This absence of any attempt at padding of the evidence goes rather to establish the truth of the testimony of the Ticket Collector. The Ticket Collector only established the presence of the accused at Bhiwani railway station coming by the connecting train for Sirsa-Bhatinda. Because of these patent infirmities in the approach of the case and appreciation of the evidence, the High Court was right in interfering with the order of acquittal passed by the trial Court.

23. We have considered the case from both the standpoints — whether the High Court was right in interfering with the acquittal and also whether we would be justified to take the same view as the High Court after examination of the evidence afresh. In addition to what we have found above if the accused came in the train with his wife on the date in question, about which we have not the slightest doubt, his subsequent conduct is a true tell-tale of his guilty mind. We are absolutely satisfied that the accused has been rightly convicted by the High Court. In the result the appeal fails and is dismissed.

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State of Bihar v. Laloo Prasad
(2002) 9 SCC 626

K.T. THOMAS and S.N. VARIAVA, JJ. - 2. A witness was sought to be treated as hostile by a Public Prosecutor on the ground that he gave answers in favour of the defence during cross-examination. The trial Judge declined to permit the Public Prosecutor to cross-examine the witness as per an order passed by him. CBI which was prosecuting the case took up the matter before the High Court. By the impugned judgment the High Court declined to interfere. Hence this appeal by special leave.

3. We read the copy of the deposition of PW 39 (Baleshwar Choudhary) on whose evidence the present controversy has arisen. He mentioned about a document executed in 1993 styling the same as a sale deed executed. After referring to the same in the chief examination, the same witness further stated that he received the consideration thereof in 1983. The said last part of the chief examination is obviously not in consonance with the prosecution case. But the Public Prosecutor did not choose to seek permission of the trial court to put questions to the witness which might be put in cross-examination by the adverse party. Hence the examination proceeded to the cross-examination by the adverse party. It was in the cross-examination that the witness said further details of how he received the consideration. At the said stage the Public Prosecutor requested for permission (after cross-examination was over) to treat the said witness as hostile.

5. Learned counsel for the appellant invited our attention to the decision of this Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat* [AIR 1964 SC 1563] in support of his contention that it is open to the party who calls the witness to seek the permission of the court (as envisaged in Section 154 of the Evidence Act) at any stage of the examination.

6. Nonetheless, a discretion has been vested with the court whether to grant the permission or not. Normally when the Public Prosecutor requested for permission to put cross-questions to a witness called by him the court used to grant it. Here if the Public Prosecutor had sought permission at the end of the chief examination itself the trial court would have no good reason for declining the permission sought for. But the Public Prosecutor did not do so at that stage. That is precisely the reason why the trial Judge declined to exercise his discretion when the permission was sought for after the cross-examination was over. The witness has said only the details in cross-examination regarding the matter which he said in the chief examination itself. It would have been a different position if the witness stuck to his version he was expected to say by the party who called the witness, in the examination-in-chief, but he showed propensity to favour the adverse party only in cross-examination. In such case the party who called him has a legitimate right to put cross-questions to the witness. But if he resiled from his expected stand even in the chief examination the permission to put cross-questions should have been sought then.

7. In the above situation we are unable to hold that the trial Judge has gone wholly wrong in declining to exercise the discretion envisaged under Section 154 of the Evidence Act in favour of the appellant. Be that as it may, if the Public Prosecutor is not prepared to own the testimony of the witness examined by him he can give expression of it in different forms. One

of such forms is the one envisaged in Section 154 of the Evidence Act. The very fact that he sought permission of the court soon after the end of the cross-examination was enough to indicate his resolve not to own all what the witness said in his evidence. It is again open to the Public Prosecutor to tell the court during final consideration that he is not inclined to own the evidence of any particular witness in spite of the fact the said witness was examined on his side. When such options are available to a Public Prosecutor, it is not a useful exercise for this Court to consider whether the witness shall again be called back for the purpose of putting cross-questions to him.

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Goutam Kundu v. State of West Bengal

AIR 1993 SC 2295

MOHAN, J. - The appellant herein was, married to second respondent on 16th January, 1990 according to Hindu Rites and Customs. They lived together for sometime until second respondent left the matrimonial home to reside with her parents in order to prepare for Higher Secondary Examination which commenced on 5.4.90 and continued upto 10.5.90. In the month of April, 1990 she conceived, on coming to know that she was pregnant, the appellant and the family members did not want her to beget a child. Therefore she was forced to undergo abortion which was refused by the second respondent. During the stay she was meted out cruel treatment both physically and mentally. She came back to the matrimonial home during Durga Pooja in the month of October, 1990. A female child was born on 3.1.91. She filed a petition under section 125 Cr. P.C. before the Learned Chief Judicial Magistrate, Alipore in Misc. Case No. 143 of 1991 both for herself and the child. By an order dated 14.8.91 which was passed ex-parte he awarded a sum of Rs. 300 per mensem to the mother and Rs.200 to the child. Against that order, he moved a revision to the High Court. That revision is pending as 1837 of 1991. Thereafter the petitioner filed a Crl. Misc. Case No.143 of 1991 for blood group test of the second respondent and the child.

3. In that proceeding the petitioner herein disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. According to him if that could be established he would not be liable to pay maintenance. That application was dismissed on two grounds: (i) there were other methods in the Evidence Act to disprove the paternity (ii) moreover it is settled law that medical test cannot be conclusive of paternity.

4. Aggrieved by this order, a revision was preferred before the High Court. Dismissing the revision it was held that section 112 of the Evidence Act says where during the continuance of valid marriage if a child is born that is a conclusive proof about the legitimacy. This section would constitute a stumbling block in the way of the petitioner getting his paternity disproved by blood group test. The English law permitting blood test for determining the paternity of legitimacy could not be applied in view of section 112 of the Evidence Act. Therefore it must be concluded that section 112 read with section 4 of the said Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity.

6. It is the contention of Mr. Ashok Sen, learned counsel for the appellant that the only way for the father to disprove the paternity is by blood group test. Having regard to the development of medical jurisprudence to deny that request to the appellant will be unreasonable. As a matter of fact, in England, this is commonly resorted to as it will leave no room for doubt. In 1968 (1) All England Reports p. 20 it was held that even without the consent of the guardian ad litem, the court had power to order an infant be subjected to a blood group test. There is no justification for the court below to refuse the same on the ground that section 112 of the Evidence Act would be an obstacle in seeking relief of blood group test.

8. Before we deal with the arguments, we will examine the law as available in England. At the beginning of the century scientists established that human blood had certain characteristics which could be genetically transmitted. The first recognized system was ABO blood group. The blood group of a child is determined by the parents' genetic make-up but the number of possibilities is such, that it is not possible to prove that certain individuals are the father on the basis of comparing blood groups, only, that they are not the father. By 1930s other immunological test became available. As a result the possibility of establishing paternity increased. An attempt by way of statutory provision to make blood test compulsory in England failed in 1938. However, in 1957 the Affiliation Proceedings Act was passed. Under that Act, it was assumed that a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Failing the father's attempt, the mother's evidence had to be corroborated by facts such as blood test etc. Under the Act either party could ask for a blood test and either was entitled to refuse to take part, although only the mother can apply for maintenance.

11. The Family Reforms Act, 1969 conferred powers on the court to direct taking blood test in civil proceedings in paternity cases. Courts were able to give directions for the use of the blood test and taking blood samples from the child, the mother and any person alleged to be the father. Since the passing of 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so. Now under the Family Reforms Act, 1987 in keeping with modern thinking on the continuing and shared responsibility of parenthood, 'parentage' rather than paternity has to be determined before the court. Fathers as well as mothers can apply for maintenance. Therefore contests can include mother's denial of paternity. This Act finally removed the legal aid for corroboration of mother's statement of paternity.

12. Two cases may be usefully referred to: *Re L* Lord Denning M.R. [(1968) All England Reports p. 20] stated thus "but they can say positively that a given man cannot be the father, because the blood groups of his and the child are so different." (emphasis supplied).

13. In *B.R.B. v. J.B.* [(1968) 2 All ER 1023] applied this dictum and held as under:- "The Country court judge will refer it to a High Court Judge as a matter suitable for ancillary relief, and the High Court Judge can order the blood test. Likewise, of course, a magistrate's court has no power to order a blood test against the will of the parties. The magistrate can only do it by consent of those concerned, namely, the grown-ups and the mother on behalf of the child; but, nevertheless, if any of them does not consent, the magistrate can take that refusal into account adhere to the view which expressed in *Re L*. that:

"If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceedings) to take his refusal as evidence against him, and may draw an inference there from adverse to him. This is simple common sense."

"The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child. The judges can be

trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which judges exercise their discretion.

To object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires.”

“Having heard full argument on the case, I am satisfied beyond any reasonable doubt (to use the expression used in rebutting the presumption as to legitimacy) that Lord Denning, M.R., was right in saying that such an order may be made in any case where the child is made a party to the proceedings and in the opinion of the judge of the High Court it is in the child's best interests that it should be made.”

14. As regard United States the law as stated in Forensic Sciences edited by Cyril H. Wecht is as under:-

“Parentage testing is the major (but not the exclusive) involvement of forensic serology in civil cases. The majority of disputed parentage cases involve disputed paternity, although an occasional disputed maternity, or baby mix-up case does arise, and can be solved using the tools of forensic serology described in this chapter. Blood typing has been used to help resolve paternity cases since the mid-1920's. According to Latters, there were 3,000 cases tested in Berlin in 1924, and Schiff and Boyd said that the first case went to court in Berlin in 1924. Ottenberg, in this country published paternity exclusion tables in 1921, as did Dyke in England in 1922. It took somewhat longer to satisfy the courts, both in Europe and in country, that parentage exclusions based upon blood grouping were completely valid. Wiener said that he had obtained an exclusion in a paternity case in this country which reached the courts early in 1933. In January of 1934, Justice Steinbrink of the New York Supreme Court in *Brooklyn* ordered that blood tests be performed in a disputed paternity action, using as precedent a decision by the Italian Supreme Court of Cassation, but his order was reversed upon appeal. Soon afterward, however, laws were passed in a number of states providing the courts with statutory authority to order blood testing in disputed paternity cases.”

Paternity testing has developed somewhat more slowly in the United States than in certain of the European countries, but today the differences in the number of systems employed, and judicial acceptance of the results, are no longer that great. A number of authorities have recently reviewed the subject of paternity testing in some detail, and in some cases have summarized the results of large number of cases that they have investigated.

Walker points out that failure to exclude a man, even at the 95 percent level of paternity exclusion does not mean that the alleged father is proven to be biologic father, because absolute proof of paternity cannot be established by any known blood test available. Although this fact is well known and appreciated by workers in the field of blood grouping and by attorneys active in this area, it is not generally understood by the lay public. However, blood group serology, using proven genetic marker systems, represents the most accurate scientific information concerning

paternity and is so recognized in the United States, as well as in a number of countries abroad."

15. In India there is no special statute governing this.

Neither the Criminal Procedure Code nor the Evidence Act empowers the court to direct such a test to be made. In 1951 (1) *Mad L.J. 580 Polavarapu Venkteswarlu, minor by guardian and mother Hanwnamma v. Polavarapu Subbayya* in that case the application was preferred under section 151 of the Code of Civil Procedure invoking the inherent powers of the Court to direct a blood test. The learned judge was of the following view:-

"Section 151, Civil Procedure Code, has been introduced in to the Statute book to give effect to the inherent powers of Courts as expounded by Woodroffe, J., in *Hukum Chand Boid v. Kamalan and Singh*. Such powers can only be exercised *ex debito justitiae* and not on the mere invocation of parties or on the mere volition of courts. There is no procedure either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case. It is said by Mr. Ramakrishna for the respondent before me that in England this sort of test is resorted to by Courts where the question of non-access in connection with an issue of legitimacy arises for consideration. My attention has been drawn by learned counsel to page 69 of *Taylor's Principles and Practice of Medical Jurisprudence*, Volume 2, where it is stated thus :

"In *Wilson v. Wilson, Lancet* [(1942) 1. 570], evidence was given that the husband's group was OM, that the wife's was BM and that the child's was ABN. The Court held that the husband was not the father of child, and granted a decree for nullity."

"It is also pointed out by learned counsel that in the text books on *Medical Jurisprudence and Toxicology* by Rai Bahadur Jaising P. Moi, (8th Edition), at page 94, reference is made to a case decided by a Criminal Court at Mercare in June, 1941, in which the paternity and maternity of the child being under dispute, the Court resorted to the results of the blood grouping test." That may be.

"But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind this Court can force them to do so"

16. The same view was taken by the Kerala High Court in *Vasu v. Santha* [(1975) Ker. L.T. 533] as –

"A special protection is given by the law to the status of legitimacy in India. The law is very strict regarding the type of the evidence which can be let in to rebut the presumption of legitimacy of a child. Even proof that the mother committed adultery with any number of men will not of itself suffice for proving the illegitimacy of the child. If she had access to her husband during the time the child could have been begotten the law will not countenance any attempt on the part of the husband to prove that the child is not actually his. The presumption of law of legitimacy of a child will not be lightly repelled. It will not be allowed to be broken

or shaken by a mere balance of probability.” The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive see *Morris v. Davies* [(1837) 5 Cl. & Fin. 163]. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England to protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not their father. But, the legislature alone can change the rigor of the law and not the court. The court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted.”

There is an aspect of the matter also. Before a blood test of a person is ordered his consent is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can compel a blood test is doubtful. Here no consent is given by any of the respondents. It is also doubtful whether a guardian ad litem can give this consent. Therefore, in these circumstances, the learned Munsiff was right in refusing the prayer for a blood test of the appellant and respondents 2 and 3. The learned Judge is also correct in holding that there was no illegality in refusing a blood test. The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference (see in this connection *Subayya Gounder v. Bhoopala* [AIR 1959 Mad. 396], and the earlier decision of the same court in *Venkateswarlu v. Subbayya* [AIR 1951 Mad. 910]. Such an adverse inference which has only a very little relevance here will not advance the appellants case to any extent. He has to prove that he had no opportunity to have any sexual intercourse with the 1st respondent at a time when these children could have been begotten. That is the only proof that is permitted under Section 112 to dislodge the conclusive presumption enjoined by the Section.

17. In *Hargavind Soni v. Ramdulari* [AIR 1986 MP at 57] held as:-

“The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by Courts as a circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal.”

18. Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal.

19. In *Raghunath v. Shardabai* [1986 AIR Bom. 388], it was observed blood grouping test have their limitation, they cannot possibly establish paternity, they can only indicate its possibilities.

20. In *Bhartiraj v. Sumesh Sachdeo* [1986 AIR All 2591] held as:-

“Discussing the evidentiary value of blood tests for determining paternity, Rayden on Divorce, (1983) Vol. 1) p. 1054 has this to say "Medical Science is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect the proves most valuable in determining paternity, that is, the exclusion aspect for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity." When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher: between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.”

The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."

21. The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to section 112 of the Evidence Act. This section is based on the well known maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

23. In *Smt. Dukhtar Jahan v. Mohammed Farooq* [AIR 1987 SC 1049] this court held:

“Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be

taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at anytime when he could have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.”

24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non- existence of opportunities for sexual intercourse; it does not mean actual cohabitation.

25. The effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under section 4 of the Evidence Act.

26. From the above discussion it emerges:-

- (1) that courts in India cannot order blood test as matter of course;
- (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- (3) There must be a strong prima-facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
- (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- (5) No one can be compelled to give sample of blood for analysis.

Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly Criminal Appeal will stand dismissed. Cr.M.P.No. 2224/93 in S.L.P.(cr) No.2648/92 filed by Respondent No. 2 will stand allowed. She is permitted to withdraw the amount without furnishing any security.

T H E E N D