IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 2894 OF 2011
&
CIVIL APPEAL No. 7226 OF 2011

IN THE MATTER OF:

MOHAMMAD HASHIM (DEAD) ....APPELLANT

VERSUS

MAHANT SURESH DAS & ORS. .....RESPONDENTS

SUBMISSIONS AND CASE LAWS
BY MS. MEENAKSHI ARORA, SENIOR ADVOCATE

ADVOCATE ON RECORD: **MR. M.R.SHAMSHAD**

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 2894/ 2011

IN THE MATTER OF:

MOHAMMAD HASHIM (DEAD)
THROUGH LRs ... APPELLANT

VERSUS

MAHANT SURESH DAS & ORS. ... RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF MS. MEENAKSHI ARORA (SENIOR ADVOCATE)

1. In the present case, the Plaintiffs in O.O.S. No. 5/ 1989 (hereinafter, "**Suit No. 5**") *inter alia* prayed for "*a declaration that the entire premises of Sri Rama Janma Bhumi at Ayodhya ... belong to the plaintiff Deities.*" **[p. 258, Vol 72]**. One of the averments made by the Plaintiffs in Suit No. 5 in order to obtain the said relief is as follows:

> "*23. That the books of history and public records of unimpeachable authenticity establish indisputably that there was an ancient Temple of Maharaja Vikramaditya's time at Sri Rama Janma Bhumi, Ayodhya. That temple was destroyed partly and an attempt was made to raise a mosque thereat, by the force of arms, by Mir Baqi, a commander of Baber's hordes. ... In 1528 Babar came to Ayodhya and halted therefor a week. He destroyed the ancient temple and on its site built a mosque, still known as Babar's mosque. ...*" **[p. 245-246, Vol 72]**

2. The relevant issues framed by the Hon'ble High Court in this regard are as follows:

   (a) Issue No. 1(b) in Suit No. 4

   "*Whether the building had been constructed on the site of an alleged Hindu temple after demolishing the same as alleged by defendant no. 13? If so, its effect?*" **[p. x, Vol 1 of the Impugned Judgment]**

(b) Issue No. 14 in Suit No. 5

"*Whether the disputed structure claimed to be Babri Masjid was erected after demolishing Janma Sthan temple at its site*" **[p. xv, Vol 1 of the Impugned Judgment]**

3. To prove the above issues, the following facts need to be proved:

(a) That there was a Janma Sthan temple (Ram temple) at the disputed site prior to the Babri Masjid; and

(b) That the said Janma Sthan temple was demolished in order to build the Babri Masjid.

4. Since the above facts are being asserted by the Plaintiffs in Suit No. 5 in support of their claim to title, the burden of proving the same lies on the Plaintiffs in Suit No. 5, in accordance with Sections 101 to 103 of the Indian Evidence Act, 1872 (hereinafter, the "**Evidence Act**"). Accordingly, the Plaintiff *inter alia* led oral evidence of its witnesses and experts and also produced certain books/ travelogues and Gazetteers with a view to prove the above facts in issue.

5. Though no application was filed nor request was made on behalf of any party in this regard, the Hon'ble High Court *suo motu* decided to direct a GPR Survey as well as an excavation by the Archaeological Survey of India (hereinafter, "**ASI**") at the disputed premises. This was done at a stage when the Plaintiffs in O.O.S. No. 4/ 1989 (hereinafter, "**Suit No. 4**") had closed their evidence and the Plaintiffs in Suit No. 5 had examined several witnesses [**p. 223, Vol 1 of the Impugned Judgment**].

6. It is this ASI Report that has been primarily relied on by two Ld. Judges of the High Court while arriving at a finding on the above issues. It is submitted that such reports are weak evidence and based on certain presumptions and cannot be relied on to arrive at a categorical finding on either the existence of a Janma Sthan Temple at the disputed premises or its demolition.

The GPR Survey Report

7. The Hon'ble High Court, by way of its orders dated 01.08.2002 and 23.10.2002 directed the ASI to get the disputed site surveyed by Ground Penetrating Radar or Geo-Radiology (hereinafter, "**GPR**"), and to submit a report. **[p. 219-223, Vol 1 of the Impugned Judgment]**

8. The object of conducting the survey, as per the order dated 23.10.2002 was as follows:

> "*The nature of super structure to a great extent is related to the foundations. ... If any foundation is existing of any construction, it may throw light as to whether any structure existed and if so what would have been the possible structure at that time. ...*" **[p. 220, Vol 1 of the Impugned Judgment]**

9. Despite the fact that the ASI was reluctant to undertake a GPR Survey on the ground that no agency in the country was competent to undertake the same, the Hon'ble High Court, on 26.11.2002, permitted M/s Tojo Vikas International Pvt. Ltd., a Delhi based company, to submit a report. **[p. 224, Vol 1 of the Impugned Judgment]**

10. The said GPR Survey Report submitted on 17.02.2003 had found various anomalies at different depths but was inconclusive about their nature and recommended archaeological excavation at the site to determine the same. It *inter alia* concluded as follows:

> "*9. In conclusion, the GPR Survey reflects in general a variety of anomalies ranging from 0.5 to 5.5 metres in depth that could be associated with ancient and contemporaneous structures such as pillars, foundations walls slab flooring, extending over a large portion of the site. However, the exact nature of those anomalies has to be confirmed by systematic ground truthing, such as provided by the archeological trenching.*" **[p. 224-225, Vol 1 of the Impugned Judgment]**

11. It is an admitted position that out of the 184 anomalies detected by the GPR Survey, only 39 were confirmed and as many as 74 were not located despite

digging to the required depth, 27 could not be located at all and it was not possible to verify the remaining 44. [**p. 31, Vol. 83**] Further, a number of items, such as floors and walls were not detected in the GPR Survey and the ASI itself, in its Brief Report dated 21.03.2003 notes that, "*Thus, the present GPR Survey seems to be contradictory at certain points and creates confusion also*" [**p. 233-234, Vol 1 of the Impugned Judgment**]. This makes the inaccuracy of the GPR Survey apparent.

12. The GPR Survey does not give any finding in support of the issue of whether there was a temple at the disputed site which was demolished to build a mosque. Further, the fact that the GPR Survey Report was inaccurate and contradictory to the ASI's own findings on excavation, coupled with the fact that the ASI itself did not believe that there was any competent agency to conduct a GPR Survey in India, leads to the irresistible conclusion that the GPR Survey Report was unreliable, and hence could not have been used to arrive at any finding on the facts in issue.

Report of the Archaeological Society of India

13. After considering the GPR Survey Report, the Hon'ble High Court, vide order dated 05.03.2003 directed the ASI to excavate the site with a view to determine the following issue: "*Whether there was any temple/ structure which was demolished and a mosque was constructed on the disputed site*". [**para 3673, p. 2142, Vol 2 of the Impugned Judgment**]

14. The ASI, in the extraordinarily brief period of 5 months, submitted its Final Report dated 22.08.2003, in which it opined as follows:

> "*Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, amalaka, kapotapali doorjamb with semi-circular pilaster, broken*

octagonal shaft of black schist pillar, lotus motif, circular shrine having pranala (waterchute) in the north, fifty pillar bases in association of the huge structure, are ***indicative of remains which are distinctive features found associated with the temples of north India.*** **[p. 349, Vol 84]**

Significantly, the ASI, in its report, does not render any opinion on whether the remains of the purported temple were indicative of it having been demolished.

15. It is submitted that the ASI Report is merely an opinion of an expert body, and is not direct evidence of a fact. It is inherently speculative and inconclusive, since it is based on inferences drawn from certain objects found during the excavation. Therefore, by itself, the ASI Report is a very weak type of evidence, and hence cannot be relied upon to decide the facts in issue or the issue of title.

The ASI Report is Merely an "Opinion"

16. A witness of "fact" is different from a witness who merely expresses his "opinion" as to certain facts, as the former deposes on what he has directly perceived, but the latter deposes on his view on certain issues/ queries based on his study and knowledge. An opinion, by itself, is not a fact in terms of Section 3 of the Evidence Act, which defines the word "fact" as follows:

> *"'Fact' means and includes-*
> *(1) any thing, state of things, or relation of things, capable of being perceived by the senses;*
> *(2) any mental condition of which any person is conscious."*

17. In view of the above, typically opinions of persons are irrelevant as evidence, unless specifically provided for under the Evidence Act. Once such exception is the opinion of an expert, which has been deemed to be a "relevant fact" under Section 45 of the Evidence Act, which reads as follows:

> *"When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that*

point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts."

In addition, any fact which is inconsistent with such expert opinion is also a "relevant fact" under Section 46.

18. Justice Agarwal, in his separate opinion, has acknowledged the above in the following words:

> "*Basically, a witness is to be examined for what he has seen or directly heard in relation to a fact in issue or relevant fact. Formation of opinion within the set of facts placed is within the exclusive domain and prerogative of the Court. Generally opinions and beliefs of third persons are inadmissible in evidence. However, there may be certain issues where the Court may feel the necessity of expert opinion. These are outside the legal and judicial fields. A Judge is not supposed to possess the expert knowledge in such fields. Probably, it is for this reason that the law of evidence provides for expert opinion, to be adduced as evidence, subject to certain conditions prescribed in the Act. It is Section 45 which renders the opinion of such experts as relevant fact. ...*" [**para 3558, p. 2053, Vol 2 of the Impugned Judgment**]

19. Expert evidence is therefore evidence merely of the expert's opinion, which is inconclusive and liable to change, rather than direct evidence of a fact, which is immutable. It is for this reason, that this Hon'ble Court, in *Prem Sagar Manocha* v. *State (NCT of Delhi)*, (2016) 4 SCC 571, while declining to initiate proceedings against an expert witness for giving false evidence under Section 340, Indian Penal Code, 1860, has observed as follows:

> "20. Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. *But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on*

facts, but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion:

21. In *National Justice Compania Naviera S.A.* v. *Prudential Assurance Co. Ltd. (the Ikarian Reefer)* [*National Justice Compania Naviera S.A.* v. *Prudential Assurance Co. Ltd. (the Ikarian Reefer)*, (1995) 1 Lloyd's Rep 455 (CA)], the Queen's Bench (Commercial Division) even went to the extent of holding that *the expert has the freedom in such a situation to change his views*..."

20. Therefore, while the ASI, as an organization, may be an "expert" in the field of archaeology, its Report is merely an "opinion" as to the existence of a north Indian temple at the disputed site, and cannot be treated as a conclusive fact of the existence of a Ram temple or even any other temple at the disputed site.

The ASI Report is Hypothetical and based on Inferences

21. Archaeology is a social science, rather than a natural science, and hence is not of a precise or exact nature. Natural sciences, such as physics and chemistry, provide verifiable hypotheses and are considered to be more objective and accurate. For instance, DNA testing, which relies on application of the natural sciences, is treated as practically correct and extremely reliable. On the other hand, social sciences, such as sociology and psychology, are inherently subjective and considered less precise. Further, an archaeologist, in order to arrive at his conclusions, draws from a variety of other subjects and disciplines such as history, sociology and anthropology, which are also subjective social sciences, leading to multiple layers of subjectivity creeping into these conclusions.

22. An archaeological report therefore does not provide verifiable conclusions but is only an inference drawn from data/ objects found during excavation as well as historical accounts of the area and the perception and interpretation of the

archaeologist, which are inherently subjective. Different archaeologists may draw different conclusions from the same set of data or, the data taken as a whole may not, by itself, be sufficient to draw a concrete conclusion.

23. However, Justice Agarwal, in his separate opinion, without appreciating the subjective nature of archaeology, has opined as follows:

> *"Archaeology provides scientific factual data for reconstructing ancient historical material culture, understanding, archaeology for the past is a multidisciplinary scientific subject and requires a team of workers for effective results. ... As a scientific discipline it uses scientific methods in its working. ..."* **[para 3896, p. 2375, Vol 2 of the Impugned Judgment]**

24. The above passage is contradicted by expert witnesses of both sides, who have testified that inferences, interpretation and conjectures are a part of archaeological findings.

(a) Mr. Jayanti Prasad Srivastav, D.W. 20/5, who retired as Superintending Archaeologist, ASI **[p. 11649, Vol 62]**, and was an expert witness supporting the ASI Report, has stated as follows:

> *"... Interpretation is an important aspect in excavation. ..."* **[p. 11689, Vol 62]**
>
> *"... By the word conjure, I mean conjectural picture which could be based on the available evidence and it is very much in the practice in archaeological diggings. ..."* **[p. 11716, Vol 63]**
>
> *"... Related evidence means what was noticed during the course of excavation at the disputed site and also the evidence exhibited in the Ayodhya Shodh-Sansthan, which also based on local traditions and published works on the same. ..."* **[p. 11759, Vol 63]**

(b) Mr. R. Nagaswami, OPW 17, who retired as Director of Archaeology, Government of Tamil Nadu **[p. 2607, Vol 26]**, and was an expert witness for the Plaintiffs in Suit No. 5, has stated as follows:

"*... I will not say that the excavators have failed to discharge their duty but they have given the basic data as required by the court with in the stipulated time and then interpretation has to be taken up in the context in which it is required.*

...

... I have said that the excavator is the best judge in certain aspects of digging like layer, relating structure etc but certain works are taken out and examined in laboratory and by experts to give their opinion which is perfectly normal in archaeological excavations and reporting. In the sentence of para 3 on page 121 of the above report ASI has given the data and their opinion but it is left to the experts to interpret." **[p. 2842, Vol 27]**

"*... In archaeology data collected in excavation needs to be interpreted from the context and reference to related textual material from known authentic sources. If we are to repeat what is mentioned in the excavation report,* ***the purpose of excavation which is reconstruction of the History,*** *is not possible.* ..." **[p. 2850, Vol 27]**

"*In historical and archaeological studies local information and memory is an important source of history...*" **[p. 2902, Vol 27]**

(c) Prof. Dr. Shereen F. Ratnagar, PW 27, who has a Ph.D. in archaeology, and retired as Professor of Archaeology, JNU, **[p. 6160, Vol 40]**, and was an expert witness for the Plaintiffs in Suit No. 4, has testified as follows:

"*Q. Whether a fact finding discipline on a particular fact by one Archaeologist may differ from another Archaeologist or not?*

A. What constitutes a fact itself can be disputed. However, if the fact is established, there may be two opinions on the fact by two Archaeologists. ..." **[p. 6180, Vol 40]**

(d) Dr. Supriya Varma, PW 32, who was an Associate Professor (Archaeology) in the Department of History, School of Social Sciences, University of Hyderabad **[p. 6975 & 6977, Vol 43]**, and appeared as an expert witness on behalf of the Plaintiffs in Suit No. 4, deposed as follows:

"*... When archaeologists excavate and find archaeological material which can include pottery and bones inference and interpretation are made by archaeologists on the basis of the context in which these finds are exposed. The*

data does not speak for itself. Inferences are made on the basis of certain principles and methods that are followed in archaeology. ..." **[p. 7035, Vol 44]**

"*... It is true that archaeologists make inferences on the basis of evidence and context. ...*" **[p. 7089, Vol 44]**

25. Further, the depositions of the expert witnesses of both sides show that the ASI Report itself was based on interpretation and conjectures.

(a) Mr. Arun Kumar Sharma, OPW 18, who retired as Superintending Archaeologist, ASI, and was a member of the Central Advisory Board of Archaeology **[p. 2992, Vol 27]**, and was an expert witness for the Plaintiffs in Suit No. 5, testified as follows:

"*... Figure 23B gives an isometric view of the excavated site with conjectured columns (pillars).*

Q. Was it possible to prepare drawing like figure 23B without having an idea about all the so called pillar bases said to have been found on the disputed site?

A. Yes it is possible, to prepare an isometric view with conjectured columns/ pillars on the basis of pillar bases exposed in the excavation and some of the pillars itself recovered on the disputed site." **[p. 3318, Vol 29]**

"*Figure 23 on page 42A is an isometric view drawn imaginary ... An imaginary isometric view need not express the exact position at the site.*" **[p. 3423-3424, Vol 29]**

(b) Mr. R. Nagaswami, OPW 17, an expert witness for the Plaintiffs in Suit No. 5, has stated as follows:

"*... The ASI people have stated in page 55 that from the excavation it could be inferred that there were 17 rows of pillar bases from north to south each row having 5 pillar bases. It is only an inference. This is an inference of ASI people they have not shown all the 85 pillar bases which have been mentioned at page 55 as it is an inference they have not shown in figure 3A ... In the excavation they have not obviously exposed the remaining 35 pillars which have been inferred at page 55...*" **[p. 2732-33, Vol 26]**

"... Definitely I cannot say that the observations of ASI are absolutely correct – it may be correct or it may be wrong but as I said earlier I believe it to be correct." **[p. 2954-55, Vol 27]**

(c) Dr. Ashok Datta, PW31, who was a Senior Lecturer in the Department of Archaeology, University of Calcutta **[p. 6665, Vol 42]**, and an expert witness for the Plaintiffs in Suit No. 4, has stated as follows:

"Since this figure 23 (page 42-A) of ASI Report vol I does not contain the scale as well as the elevation of different floor levels, it may be considered purely conjectural in nature. ..." **[p. 6771, Vol 43]**

"My intention to place these facts was that this isometric figure can be avoided by ASI people because this picture of isometric figure presents an impression that as if this is the outcome of the excavation ... I do not accept this view that there have been a very huge structure earlier on the basis of the so called pillar bases and the conjectured columns as shown in this figure are highly hypothetical in nature and do not have any ground reality. ..." **[p. 6774-75, Vol 43]**

"... Without getting any direct evidence of temple the ASI has concluded that possibly there existed a north Indian temple. This is a gross violation in the sense that without having any ground plan of the temple no-one can conclude about the evidence of a temple below the disputed structure." **[p. 6814, Vol 43]**

26. Further, the differences in the views and opinions of expert witnesses on both sides only goes to show that different archaeologists can form different opinions from the same set of data as their interpretations would be different.

(a) While OPW 17 and DW 20/5 insisted that there existed a massive Hindu temple at the disputed site, Dr. Supriya Varma, PW 32, who appeared as an expert witness on behalf of the Plaintiffs in Suit No. 4, deposed as follows:

"...I agree with the finding of the ASI regarding existence of the structure underneath the disputed structure but I disagree with the interpretation arrived at by ASI. ... I think, very categorically it is very difficult to say that

some of the finds of ASI relate to Hindu religious structures because these finds could well have been part of palaces, Budhist structure, Jain structure and Islamic structure. ..." **[p. 7131, Vol 44]**

(b) There are a number of differences in opinion amongst the ASI team members themselves in the different chapters authored by them in the ASI Report. To illustrate, while a human figurine recovered from Layer 2 below Floor 2 of Trench G5 has been attributed to the Mughal Period in Chapter VII of the ASI Report **[Sl. no. 50, p. 259, Vol 84]**, the same figurine has been ascribed to the Medieval Period in Chapter III of the Report **[p. 51, Vol 84]**. Similarly, an animal figurine recovered from Layer 5 of Trench E8 has been attributed to the Medieval Period in Chapter VII **[Sl. No. 52, p. 267, Vol 84]** and to Period V (post Gupta-Rajput) in Chapter III of the Report **[p. 57, Vol 83]**. These differences have been set out in detail separately.

27. The reliability of the opinion of an expert on any question is contingent on the reliability and accuracy of the science or scientific process behind the same. The more imprecise the science or the scientific process, the more caution that the Court has to exercise as the risk of the opinion being inaccurate or erroneous is higher. For instance, the evidence of a handwriting expert is considered to be less reliable than that of a fingerprint or DNA expert, because the former is considered to be more fallible than the latter. It is submitted that archaeology, much like handwriting comparison, is an imprecise and fallible science, and a high degree of reliance cannot be placed on an archaeological report.

27.1 Hon'ble Justice H.R. Khanna, in *Bhagwan Kaur* v. *Maharaj Krishan Sharma*, (1973) 4 SCC 46, had opined as follows:

> "26. ... The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert. In *Sri Sri Sri Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat* [AIR 1954 SC 316 : 1954 SCR 919 : 1954 SCJ 395] this Court observed that conclusions based upon mere

comparison of handwriting must at best be indecisive and yield to the positive evidence in the case."

27.2 In *Murari Lal* v. *State of Madhya Pradesh*, (1980) 1 SCC 704, this Hon'ble Court has held as follows:

> "4. ... True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the quality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher..."

27.3 This Hon'ble Court, in *State of Maharashtra* v. *Sukhdev Singh*, (1992) 3 SCC 700, has observed as follows:

> "29. ... But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the court should also be fully satisfied about the competence and credibility of the handwriting expert. ... True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. There is no absolute rule of law or even of prudence which has ripened into a rule of law that in no case can the court base its findings solely on the opinion of a handwriting expert but the imperfect and frail nature of the science of identification of the author by comparison of his admitted handwriting with the disputed ones has placed a heavy responsibility on the courts to exercise extra care and caution before acting on such opinion. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is for this

reason that the courts are wary to act solely on the evidence of a handwriting expert..."

28. In view of the above case law and witness depositions it is clear that the conclusions arrived at in the ASI Report are only an inference or interpretation of certain objects found during the course of excavation and cannot be taken as concrete proof as to the existence of any Hindu temple at the disputed site. The objects recovered could belong to any other religious or non-religious structure. Further, archaeology, in itself is not an exact science and cannot produce accurate or verifiable results, rendering the probability of an opinion based on archaeological excavation being erroneous to be high. As a consequence, it would be very risky for the Court to rely heavily on such an opinion to arrive at a finding on the existence of a Hindu temple below the disputed structure or of title to the site, as the same would be tantamount to giving a judgment based on assumptions and presumptions.

The ASI Report is Weak Evidence and Requires Corroboration

29. A plethora of judgments have treated expert opinions to be a weak type of evidence, as they are not substantive in nature, and hence proceeded with caution while relying on the same if it is not corroborated by other direct and substantive evidence.

29.1 In *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529, a Constitution Bench of this Hon'ble Court has held as follows:

"21. ...Besides it is necessary to observe that expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence..."

29.2 In *Chennadi Jalapathi Reddy* v. *Baddam Pratapa Reddy*, 2019 SCC Online SC 1098, a 3 Judge Bench of this Hon'ble Court has recently held as follows:

> "11. By now it is well settled that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive in nature. It is also settled that it may not be safe to rely upon such evidence, and the Court may seek independent and reliable corroboration in the facts of a given case. Generally, mere expert evidence as to a fact is not regarded as conclusive proof...
>
> ...
>
> 15. In our considered opinion, the decisions in Murari Lal (supra) and Alamgir (supra) strengthen the proposition that it is the duty of the Court to approach opinion evidence cautiously while determining its reliability and that the Court may seek independent corroboration of such evidence as a general rule of prudence. Clearly, these observations in Murari Lal (supra) and Alamgir (supra) do not go against the proposition stated in Sashi Kumar Banerjee (supra) that the evidence of a handwriting expert should rarely be given precedence over substantive evidence."

29.3 This Hon'ble Court, in *S.P.S. Rathore* v. *CBI*, (2017) 5 SCC 817, has observed as follows:

> "33. In this regard, the law is very clear that a fact should be proved by the best available evidence. The witnesses had identified the signatures of Ms Ruchika on the memorandum, therefore, the evidence of the handwriting expert cannot be considered to be safe and it requires corroboration from independent witnesses. As already stated, the signatures of Ms Ruchika have been proved by the witnesses who have signed the memorandum and are direct, primary and best available evidence in the case and, therefore, the same can be relied upon.
>
> ...
>
> 47. ... we are of the opinion that expert evidence as to handwriting is only opinion evidence and it can never be conclusive. Acting on the evidence of any expert, it is usually to see if that evidence is corroborated either by clear, direct or circumstantial evidence. The sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. ... The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held by this Court in a catena of cases that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing. It is opinion evidence and it can

rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence.

...

50. It is thus clear that uncorroborated evidence of a handwriting expert is an extremely weak type of evidence and the same should not be relied upon either for the conviction or for acquittal. The courts, should, therefore, be wary to give too much weight to the evidence of handwriting expert. It can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence."

29.4 In *S. Gopal Reddy* v. *State of Andhra Pradesh*, (1996) 4 SCC 596, it has been observed as follows:

"28. ... The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering 'conclusive' proof and therefore safe to rely upon the same without seeking independent and reliable corroboration..."

29.5 This Hon'ble Court, in *State of Maharashtra* v. *Sukhdev Singh*, (1992) 3 SCC 700, has observed as follows:

"29. ... It is indeed true that by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. That is why we come across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. It is, therefore, necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. ..."

30. In the present case, the ASI Report is not corroborated by any other piece of direct or substantive evidence regarding the existence of a temple at the disputed site, and hence could not have been relied upon by the Court in arriving at a finding on the facts in issue.

30.1 The oral depositions of the expert witnesses who support the ASI Report are also merely opinions under Section 45 and not substantive evidence, and are based on the ASI Report itself. Further, the testimonies of these witnesses are inconsistent and contradictory and go even beyond what the ASI has said in its report in terms of the size and nature of the structure as well as its demolition. Therefore, these expert witnesses cannot and do not corroborate the ASI Report.

30.2 The oral evidence of witnesses of the Plaintiffs in Suit No. 5, who are not experts, is also not substantive direct evidence as it is based on hearsay, and is therefore inadmissible as per Sections 59 and 60 of the Evidence Act. This view is also endorsed by Justice Agarwal, who has held as follows:

> "*...The parties have produced lots of witnesses to prove the facts one way or the other way but most of such witnesses of fact, we find, their evidence inadmissible in view of the above provisions on the historical facts in issue.*" [**para 3557, p. 2053, Vol 2 of the Impugned Judgment**].

Therefore, all witnesses of fact led by the Plaintiffs in Suit No. 5 can also not corroborate the ASI Report.

30.3 The historical accounts written in Gazetteers and Books also cannot be used to corroborate the ASI Report as these accounts are so varied that the High Court felt it necessary to direct a scientific investigation. Justice Agarwal, in his separate opinion, has observed as follows:

> "3672. *What lie underneath? This question is of extreme complication ranging in a period of more than 500 years' of history. No clear picture emerges from various history books etc. In fact, the contemporary record did not answer the issues, one or the other way, with certainty, but some records authored about 200 years i.e. 18th Century state about existence of a temple, its*

demolition, and the construction of the disputed building, while some well known historians dispute it and some history books are silent. ...

3673. *... In the peculiar circumstances, this Court decided to appoint an Expert body for scientific investigation, well recognized in the field of archaeology/ history and ordered ASI to go for excavation at the site and submit report. ...*" **[p. 2142, Vol 2 of the Impugned Judgment]**

30.4 In addition, the accounts recorded in these books and Gazetteers are not personal experiences of the authors themselves but based on hearsay. None of the authors personally witnessed a Ram temple on the site or the demolition thereof by Muslims. Rather, their writings are, at best, based on myths and stories they heard from the local populace, which are completely subjective, and would also not constitute direct or substantive evidence so as to corroborate the ASI Report.

30.5 Justice Agarwal has, in his separate opinion, treated the GPR Survey Report as corroborating the ASI Report to the extent of pillar bases, and observed as follows:

"In this case, ASI did not work on an unknown subject and site but was backed by a scientific investigation report of GPR Survey which is a well known scientific system used in such matters. The survey has pointed out a number of anomalies underneath. The actual excavation needed to confirm and verify those anomalies and their exact nature to avoid any doubt. Regarding Pillar Bases a number of such anomalies were already pointed out by GPR Survey and ASI simply found the existence of pillar bases so as to confirm the anomalies pointed out by GPR Survey at those places. ..." **[para 3899, p. 2876, Vol 2 of the Impugned Judgment]**

30.6 As stated in paragraphs 11 and 12 hereinabove, the GPR Survey Report was inconclusive and inaccurate and was sought to be verified by excavation. Not only was the same clearly not confirmed by the ASI during excavation, the ASI itself doubted its correctness and accuracy. Therefore, the GPR Survey, which is itself an incorrect and unreliable report, and also not a substantive piece of evidence, cannot be used to corroborate the ASI Report.

The ASI Report does not answer the Query Posed

31. The opinion expressed by the ASI in the Summary portion of its Report clearly shows that it has not given any opinion on the facts in issue or the query put to it, and hence is irrelevant for the purposes of arriving at any finding on the issues by the Hon'ble Court.

32. The first fact in issue is whether a Ram/ Janam Sthan temple existed at the disputed site. Nevertheless, the query put to the ASI by the Hon'ble High Court was only regarding a temple or structure, and not a Ram temple. Therefore, the query itself was framed in such a broad manner that the ASI was not required to give its opinion on whether the temple or other structure was a Ram temple or even a Hindu temple. Eventually, the ASI Report only infers the presence of a north Indian temple at the disputed site and does not opine on whether this temple was a Ram/ Janam Sthan/ Hindu temple. Therefore, the ASI Report is of no assistance in deciding the actual fact in issue *i.e.* the existence of a Ram temple at the disputed site.

33. There is other material and evidence on record to show that the structure below the disputed structure could belong to any other religion.

(a) The purported temple could also be a Jain temple as per the deposition of Mr. Jayanti Prasad Srivastav, D.W. 20/5, an expert witness who supported the ASI Report, who has stated as follows:

"*... Amongst Jains, big temples are found but architectural pattern is the same i.e. North Indian Shikhar style ...*" [**p. 11675, Vol 62**].

(b) Further, Dr. Supriya Varma, PW 32, has deposed that:

"*I think, very categorically it is very difficult to say that some of the finds of ASI relate to Hindu religious structures because these finds could well have been part of palaces, Budhist structure, Jain structure and Islamic structure. ...*" [**p. 7131, Vol 44**]

(c) Even if we assume, for the sake of argument, that the supposed temple was Hindu, there is no concrete material or evidence to show that it was a Ram temple. Rather, some of the finds during excavation which are being relied upon by the Plaintiffs in Suit No. 5, such as the alleged circular shrine, supposed makar pranala and the purported divine couple, which Mr. Jayanti Prasad Srivastava, D.W. 20/5 identifies as a Shiva-Parvati figurine [**p. 11779, Vol 63**], indicate that the temple, if any, was possibly dedicated to Lord Shiva. None of this shows the possible existence of a Ram temple at the disputed site.

34. The second fact in issue is whether such temple was demolished to build the Babri Masjid. The issue in light of which ASI was directed to carry out an excavation categorically asks the question of whether a temple was demolished and a mosque built in its place. However, the ASI has chosen not to answer this part of the issue/ query at all, and its Report is categorically silent on the aspect of demolition. Once again, therefore, the ASI Report is of no assistance in deciding the actual fact in issue *i.e.* the demolition of a Ram temple to build a mosque.

35. Had there been a demolition and a subsequent structure was built on the same site, this would have surely left certain tell tale signs.

(a) Justice Khan, in his separate opinion, has observed as follows in this regard:

> "*... in case some temple had been demolished for constructing the mosque then the superstructure material of the temple would not have gone inside the ground. It should have been either reused or removed. No learned counsel appearing for any of the Hindu parties has been able to explain this position. ... Only in case of severe earthquake or in case of flood of very high magnitude superstructure immediately goes down inside the ground otherwise remains of a ruined building go inside the ground after centuries and not immediately after falling down of the building. ...*" [**p. 103, Vol 1 of the Impugned Judgment**]

(b) Mr. Jayanti Prasad Srivastav, D.W. 20/5, Plaintiff in Suit No. 5's witness, has stated as follows in his deposition:

> *"I don't recollect about any such excavation in which explicit evidence of demolishing the existing structure might have been discovered. If fire is put to any building while demolishing it or due to some reason fire is there at the time of demolition then deposit of ash and burnt clay or wood will be found at that place. If the building to be demolished is made of thatched roof or timber structure in that case burning facilitates that demolition. If that site is excavated later on then there is like hood of finding above remains such as ash, burnt wood pieces etc."* [**p. 11827, Vol 63**]

In view of the above, the silence of the ASI Report on the aspect of demolition, even though a query in this respect was specifically raised by the High Court, implies that the ASI found no signs or evidence of demolition. Therefore, rather than supporting the Plaintiffs in Suit No. 5, the ASI Report could be taken as supporting the case of the Plaintiffs in Suit No. 4 that there was no demolition.

36. In view of the above, the ASI Report could not have been relied on by the High Court in order to decide the issues at hand.

The ASI Report is not binding on the Court

37. Expert evidence is not binding on the Court but merely advisory in nature. The role of the expert is not to give a finding of fact. Rather, he merely provides his opinion on certain queries raised, with material supporting such opinion, with a view to assist the Court so that it can, on the examination of all materials and evidence on record, itself come to a conclusion on the facts in issue. An expert opinion can be rejected if the witness is not credible or does not inspire confidence or if it is not supported by data or reasons or is arrived at by following an improper procedure.

37.1 In *Ramesh Chandra Aggarwal* v. *Regency Hospital*, (2009) 9 SCC 709, this Hon'ble Court has held as follows:

> "19. It is not the province of the expert to act as Judge or Jury. It is stated in *Titli* v. *Alfred Robert Jones* [AIR 1934 All 273] that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.
>
> 20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions...
>
> 21. In *State of Maharashtra* v. *Damu* [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : AIR 2000 SC 1691] , it has been laid down that without examining the expert as a witness in court, no reliance can be placed on an opinion alone. In this regard, it has been observed in *State (Delhi Admn.)* v. *Pali Ram* [(1979) 2 SCC 158 : 1979 SCC (Cri) 389 : AIR 1979 SC 14] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him".
>
> 22. ... The evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be crosschecked. Therefore, the emphasis has been on the data on the basis of which opinion is formed. The same is clear from the following inference:
>
> "Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

37.2 This Hon'ble Court, in *Dayal Singh* v. *State of Uttaranchal*, (2012) 8 SCC 263, has observed as follows:

> "40. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court."

37.3 In *Murari Lal* v. *State of Madhya Pradesh*, (1980) 1 SCC 704, it was held that:

> "4. ...An expert deposes and not decides. His duty "is to furnish the Judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the Judge to form his own independent judgment by the application of these criteria to the facts proved in evidence" [Vide Lord President Cooper in *Davis* v. *Edindurgh Magistrate*, 1953 SC 34 quoted by Professor Cross in his Evidence]."

37.4 In *State (Delhi Administration)* v. *Pali Ram*, (1979) 2 SCC 158, it was observed that:

> "31. ... Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, *strictly* speaking, such issues are for the court or jury to determine..."

38. In the present case, Justices Agarwal and Sharma, rather than treating the ASI Report as one of the many pieces of evidence in the matter, and forming their

independent opinion on the facts in issue after considering all the material and evidence, have indiscriminately relied on ASI Report, without evaluating the materials or reasons in support of the Report or the omissions and inconsistencies therein, which is contrary to the mandate of the aforementioned case law.

39. While both Justices Agarwal **[p. 2053-2063, Vol 2 of the Impugned Judgment]** and Sharma **[p. 2962- 2965, Vol 3 of the Impugned Judgment]** have devoted some space to discussing the law on Section 45, including the weak and fallible nature of such evidence, there is no application of the same to the ASI Report itself. Rather, the ASI Report has been considered to be sacrosanct and binding, while the onus has erroneously been placed on the Plaintiffs in Suit No. 5 to discredit or disprove the same.

40. Justice Sharma has proceeded on the erroneous assumption that the ASI Report itself is substantive evidence, which is contrary to settled law that it is an opinion and ought not to be relied upon without corroboration by substantive evidence. The relevant paragraph of Justice Sharma's opinion is as follows:

> *"ASI submitted report for the perusal of the Court. This report is data based. It is a piece of evidence which comes within the substantive evidence. High Court has appointed ASI to inspect the spot and to make investigation and submit a report. Thus the High Court is entitled to accept the same and base its finding on such material for want of any other evidence to contradict the same even without examination of the Commissioner."* **[p. 2961, Vol 3 of the Impugned Judgment]**

41. Further, Justice Sharma, in two places, records that the archaeologists in the ASI Report *"record their inferences"* **[p. 2953, Vol 3 of the Impugned Judgment]**. Nevertheless, he then goes on to treat the Report as scientifically accurate merely because it is based on some data, thereby completely ignoring the fact that the conclusions reached by ASI are merely inferences drawn from such data. On the other hand, all other expert evidence led against the ASI Report, which is at par with the ASI Report under Section 45, is treated as conjectural and unscientific, without providing any reasons for the same. The following passages of his opinion are relevant in this respect:

"Thus from all angles on flimsy grounds not based on any scientific report to contradict the report of A.S.I. and this Court has to rely over this scientific report. There is nothing on record to contradict the report of A.S.I. ...

...

The evidence adduced by the plaintiffs against ASI report is based on surmises and conjectures and in a non-scientific manner. Data based report cannot be contradicted by adducing oral evidence without any scientific investigation. There was no request from the side of the plaintiff to re-check the scientific report by another body of the experts. Probably, this was not done by the plaintiff for the reasons that it was not possible for them to contradict the data based report." **[p. 2967, Vol 3 of the Impugned Judgment]**

42. Justice Agarwal, on the other hand, applies the test of Section 45 to the expert Historians and concludes as follows:

"A perusal of the above statements and in particular that of PW 16, 20, OPW 9 and 6, the Court finds the opinions of the Expert Historians so varying that no definite conclusion can be drawn therefrom." **[para 3635, p. 2117, Vol 2 of the Impugned Judgment]**

43. However, he fails to apply the same test to the ASI Report in light of the evidence of other expert archaeologists. Rather, he presumes the ASI Report to be correct and places the burden on the Plaintiffs in Suit No. 5 to show that it is incorrect, as is apparent from the following passages:

"... The report of the Commissioner appointed to make investigation together with the evidence enclosed therewith is an evidence in the suit. The parties having grievance, have two kinds of remedies. Firstly, they can file an objection to the report and secondly, they can also lead evidence to show that what has been said in the report is not correct." **[para 3750, p. 2169, Vol 2 of the Impugned Judgment]**

"... This is suffice to draw an inference that there was a structure over land in question where disputed structure was constructed and that structure related to religious purposes and not non religious purposes. The only thing which was to be seen, whether it could be a temple or not. By the process of elimination since it was never a case of Muslim parties that there existed any Islamic religious structure at the place in dispute before construction of the disputed structure or that there existed a religious structure other than Hindus, it leads to an inference as suggested by ASI and mere titbits and minor infirmities in it, even it exist, in our

view, are of no consequence, if any." **[para 3977, p. 2436, Vol 2 of the Impugned Judgment]**

"*... Minor mistakes and irregularities in ASI Report, if any, do not shake the basic finding that the disputed structure claimed was not raised on a virgin land or unoccupied land but there existed a structure and using some part thereof either in the form of foundation or using the material thereof, the disputed structure was created. Whether lime mortar or lime plaster from a particular period or not, whether glazed ware were Islamic or available in Hindustan earlier are all subsidiary questions ... .*" **[para 3985, p. 2442, Vol 2 of the Impugned Judgment]**

44. Therefore, Justice Agarwal has considered only the objections to the ASI Report, which he rejects in a very cursory manner, rather than evaluate the ASI Report on its own merits. Further, the depositions of the expert archaeologists of the other side, some of who have also disagreed with some portions of the ASI Report, have not been examined by him. To the contrary, he opines as follows:

"*Since they have supported the ASI Report, we have not mentioned their statements in detail for the reason that we intended to test the objections raised against the ASI Report in the light of what the witnesses of plaintiffs (Suit-4) have deposed and only when we would have some doubt we would refer and compare the statement that of OPW 17 to 19. ...*" **[para 3958, p. 2420, Vol 2 of the Impugned Judgment]**

45. Justice Khan, even though he does not discuss the law on Section 45, has rightly refused to place reliance on the ASI Report because, on an overall conspectus, it is in conflict with the other pieces of evidence in the matter. He observes as follows:

"*Conclusions of A.S.I. Report 2003, already quoted, are not of much help in this regard for two reasons. Firstly, the conclusion that "evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure' is directly in conflict with the pleadings, gazetteers and history books. Neither it has been pleaded by any party nor mentioned in any gazetteer or most of the history books that after construction of temples by Vikramadittya in first Century B.C. (or third or fourth century A.D., according to some) till the construction of the mosque in question in around 1528 A.D. any construction activity was carried out at the site of the premises in dispute or around that. ...*

... It is also important to note that neither there is any requirement nor practice that even in the foundations of temple, there must be such items, which may denote the nature of the superstructure." **[p. 103, Vol 1 of the Impugned Judgment]**

46. In addition, some crucial supporting material to the ASI Report was never even made available, which would have been extremely important in evaluating the Report. This is also a requirement under Order 26 Rule 10A read with Rule 10 of the Code of Civil Procedure, 1908.

46.1 The notes prepared by the ASI team from their field note books/ day to day registers and the discussions held by the team members for the preparation of the Final Report as well as the draft Report were never supplied by the ASI. When asked for the same, the ASI claimed that these materials had been destroyed. This is evident from one of the objections raised against the ASI Report, which is as follows:

"*3. That in spite of clear cut directions of this Court to file all the papers-documents relating to the excavation, the ASI not only delayed the filing of certain relevant documents, but also destroyed the notes prepared by it at the time of study/ analysis of various finds/ architectural objects, which raises a grave doubt about the veracity of the report;*" **[para 242, p. 252, Vol 1 of the Impugned Judgment]**

46.2 These notes and discussions are of utmost importance to determine the validity of the process by which the ASI reached its conclusions from the objects/ artefacts discovered by it during excavation and prepared its Final Report. To illustrate, one of the artefacts is termed as "divine couple stone" in the Final ASI Report, but such nomenclature does not find mention in any of the supporting material provided by the ASI. In the absence of the notes/ discussions leading up to the preparation of the Final Report it is impossible to know the methods and reasoning by which the artefact came to be termed as a "divine couple" despite admittedly being heavily mutilated, and thereby precludes a proper examination and evaluation of the ASI Report. This objection too was taken against the ASI Report, and reads as follows:

> *"11. That ASI has, without any firm basis, characterized mutilated stone sculpture (plates 235 of Vol II of the report) as "divine couple' and appears to have invented it at some later stage, as reference to it does not find in corresponding Site note-book or Day to Day Register;"* **[p. 253, Vol 1 of the Impugned Judgment]**

46.3 Similarly, vide order dated 03.02.2005, the High Court, instead of deciding the objections to the Report at that stage, decided that the ASI Report shall be subject to the objections and evidences of the parties in the suit and all this shall be dealt with when the matter is finally decided [**para 244, p. 253, Vol 1 of the Impugned Judgment**]. Despite this, the above objections were not decided at the time of final hearing.

47. In view of the above, it is submitted that Justices Agarwal and Sharma have not considered the ASI Report or evaluated it properly in light of the other materials/ evidence on record in the matter as well as the law laid down under Section 45.

The Court Cannot itself Become an Expert

48. As stated in paragraphs 31 to 36 hereinabove, the ASI Report does not give any opinion on whether there was any *Hindu* temple at the site or answer the query of whether such temple was demolished to build a mosque, despite being an expert body. Nevertheless, the Hon'ble High Court in the present case, though not an expert, has gone beyond the ASI Report in giving findings on these issues. It is submitted that the same is impermissible in law.

49. Though a Court is not bound by the opinion of the expert, and must form its own conclusion based on the material on record, the Court cannot itself take upon the role of an expert or supplement the report of the expert with its own opinions, particularly on a subject with respect to which the Court itself may not be conversant. This Hon'ble Court, in *Ajay Kumar Panwar* v. *State of Rajasthan*, (2012) 12 SCC 406, has opined as follows:

"28. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it..."

50. In fact, Justice Sharma, in his separate opinion, has reproduced an entire passage on the Court acting as an expert, the relevant portion of which is as follows:

> *"The opinion of the Court, itself untrained in medicine and without trained assistance, on questions of medicine is valueless. On questions of handwriting also, the practice of the Court itself acting as an expert has been disapproved. ..."* [p. **2965, Vol 3 of the Impugned Judgment**]

51. However, both Justices Agarwal and Sharma, without having any specialized knowledge of the subject, have effectively assumed the mantle of experts in archaeology and architecture, in coming to the conclusion that there existed a Hindu religious structure at the site which was demolished by the Muslims, even though the ASI stopped short of opining on the same. It is pertinent to note that while these Ld. Judges arrive at findings which have no basis in the ASI Report, they purport to place reliance on the ASI Report itself.

52. The relevant passages of the opinion of Justice Agarwal are as follows:

> *"The Report of the Archaeological Survey of India, which is a report of an expert in excavation, contains all the details including details of stratigraphy, artifacts, periodization as well as details of structures and walls. The pillar bases mentioned in the report establish beyond all doubt the existence of a huge structure. In*

addition to above, existence of circular shrine, stone slabs in walls with Hindu motifs and more particularly sign of Makar Pranal in wall no. 5 (wall of disputed structure), divine couple and other temple materials etc. conclusively proves the existence of a Hindu religious structure beneath the disputed structure. ..." **[para 3979, p. 2439, Vol 2 of the Impugned Judgment]**

"*3988. It is contented that the ASI Report does not answer the question framed by this Court, inasmuch as, neither it clearly says whether there was any demolition of the earlier structure if existed and whether that structure was a temple or not.*

3989. In our view, the conclusion drawn by the ASI in the project accomplished within an extra-ordinary brief period and with such an excellence precision and perfection deserve commendation and appreciation instead of condemnation. It normally happens when an expert body tenders an opinion, the party, who finds such opinion adverse to his interest, feels otherwise and tries to rid of such opinion by taking recourse to all such measures as permissible but in the present case we hoped a better response particularly when the expert body involved is a pioneer and premier archaeological body of this country having international repute. We are satisfied that the report of ASI not only deserve to be accepted but it really helps this Court in forming its opinion on an important issue in this regard. All the objections against ASI, therefore, are rejected.

3990. ASI, in our view, has rightly refrained from recording a categorical finding whether there was any demolition or not for the reason when a building is constructed over another and that too hundreds of years back, it may sometimes be difficult to ascertain as to in what circumstances building was raised and whether the earlier building collapsed on its own or due to natural forces or for the reason attributable to some persons interested for its damage. Sufficient indication has been given by ASI that the building in dispute did not have its own foundation but it was raised on the existing walls. If a building would not have been existing before construction of the subsequent building, the builder might not have been able to use foundation of the erstwhile building without knowing its strength and capacity of bearing the load of new structure. The floor of the disputed building was just over the floor of the disputed building. The existence of several pillar bases all show another earlier existence of a sufficiently bigger structure, if not bigger than the disputed structure then not lessor than that also."

[p. 2445-2446, Vol 2 of the Impugned Judgment]

Justice Agarwal eventually concludes that the temple was demolished based on inferences drawn from the ASI Report as well as certain history books/ Gazetteers **[paras 4055-4057, p. 2507, Vol 2 of the Impugned Judgment]**, despite having himself held earlier that no clear picture emerged from historical records as there was a lot of difference between historians **[paras 3672-3673, p. 2142, Vol 2 of the Impugned Judgment]**.

53. The relevant passages from the opinion of Justice Sharma are as follows:

> *"... The massive structure theory was not based on imagination. Evidence of bones found from different levels postulate that Hindus also used to perform sacrifices of animals to please Gods. About pillar bases there is nothing on record to suggest as to how the construction can be disbelieved. The main thrust of the plaintiffs that there was a structure which was not a Hindu religious structure is not believable for the reasons that certain images were found on the spot were there. Hundreds of artefacts which find mention in the report were recovered during the excavation that denote the existence of Hindu religious structure."* **[p. 2965, Vol 3 of the Impugned Judgment]**
>
> *".. Certain data based findings of ASI is available to establish that there was a temple and a place of worship of Hindus. ..."* **[p. 2968, Vol 3 of the Impugned Judgment]**
>
> *"Vis-a-vis in the sequence of events, referred to above, and on the basis of the report, it can conclusively be held that the disputed structure was constructed on site of old structure after demolition of the same. There is sufficient evidence to this effect that the structure was a Hindu massive religious structure. ..."* **[p. 2970, Vol 3 of the Impugned Judgment]**

54. It is respectfully submitted that the above findings are based on no evidence. Rather, the Ld. Judges have donned the garb of an expert and arrived at these conclusions on the basis of assumptions and presumptions. The ASI Report does not support such findings. The expert witnesses led by the Plaintiffs in Suit No. 4 have stated that the objects/ artefacts recovered during excavation could belong to any other religious or non-religious structure.

55. In fact, the Hon'ble High Court's Order dated 23.10.2002 itself records a passage from the book 'History of Mughal Architecture' by Shri R. Nath, which states that there are no architectural norms for construction of mosques. Therefore, it cannot be conclusively said that the artefacts recovered with different motifs cannot belong to mosques. The relevant excerpt of the said book is as follows:

> *"It is surprising that though they built large and magnificent mosques in Syria, Iraq, Iran, Turkey, Egypt and Spain, the Muhammedans have no written text as to the construction of their sacred architecture. Except the universal law that the congregation would face the Ka'ba (in Mecca) in accordance with the Quranic injunction and the Qiblah would mark its direction, there are no prescribed rules and absolutely no norms for its making. ..."* **[para 214, p. 220, Vol 1 of the Impugned Judgment]**

56. Hence, the findings on there being a *Hindu religious* structure beneath the disputed structure and its demolition are completely untenable in law. In any event, the burden on the Plaintiffs in Suit No. 5 was to establish that there existed a Ram Janam Sthan temple at the disputed site, and not any Hindu temple. Therefore, even the above findings do not answer Issue No. 14 in Suit No. 5.

33

(2016) 4 Supreme Court Cases 571

(BEFORE DR T.S. THAKUR, C.J. AND KURIAN JOSEPH, J.)

PREM SAGAR MANOCHA .. Appellant;

Versus

STATE (NCT OF DELHI) .. Respondent.

Criminal Appeals Nos. 9-10 of 2016†, decided on January 6, 2016

A. Penal Code, 1860 — S. 193 — Perjury — Change of stand by expert witness in his oral evidence from that taken in his written opinion, whether to help accused — If deliberate, or, based on insistence of trial court — Conclusive opinion not expressed by expert at any stage — Relevance — If change of stand in present case amounted to perjury by such expert witness

— Where ballistic expert in his report indicated that his opinion that two empty cartridges were fired from same firearm was based on insufficient material available and that definite opinion could be given only on availability of crime weapon for examination, such opinion cannot be treated as conclusive — If in his oral evidence, he then gave a non-specific and non-definite different opinion that two cartridges were fired from two different firearms, on insistence of trial court for him to give an opinion without examining the firearm, but in his cross-examination (on being declared hostile witness), he reiterated that definite opinion could be given only on crime weapon being made available for examination, he cannot be alleged to have shifted his stand from that taken in his report with a view to help person who committed crime by using crime weapon — Thus, it was not even his voluntary, let alone deliberate deposition, before the court — Therefore, it is unjust, if not unfair, to attribute any motive to the appellant that there was a somersault from his original stand in the written opinion — Criminal Procedure Code, 1973 — S. 340 — Proceedings against expert for perjury — Evidence Act, 1872 — S. 45 — Criminal Trial — Injuries, Wounds and Weapons — Firearm/Gunshot injuries/wounds/Ballistics/Ballistic expert — Change in opinion by expert — When perjurious

B. Evidence Act, 1872 — S. 45 and Ss. 59 to 61 — Expert opinion vis-à-vis testimony of facts — Difference, explained — Being based on his knowledge, may be subject to change on coming across any authentic material subsequently — Opinion of expert witness is different from testimony of witness of fact — Duty of expert is to render his opinion along with reason and relevant material — It would then be for court to see correctness of opinion and reach its conclusion accordingly

C. Evidence Act, 1872 — S. 45 — Expert — Impartial opinion — Government scientific expert stands on different footing from expert called by a party in support of its stand

D. Criminal Procedure Code, 1973 — S. 340 — Proceeding against expert witness under — Not warranted merely because of rejection of his opinion by court — Evidence Act, 1872, S. 45

† Arising out of SLPs (Crl.) Nos. 7153-54 of 2013

34

E. **Criminal Procedure Code, 1973 — S. 340(1)(a) — Recording of finding by court after preliminary inquiry regarding commission of offence not mandatory — Court only required to record finding in respect of preliminary inquiry, for forming opinion that it is expedient in the interest of justice that an inquiry should be made in respect of offence which appears to have been committed**

In connection with the investigation of FIR registered in respect of a murder case, the police sought an expert opinion from the State Forensic Science Laboratory inter alia on the question whether two empty cartridges had been fired from the same firearm or otherwise. The appellant, who at the relevant time was working as Deputy Director of the Laboratory forwarded a report that no definite opinion could be given on the two empty cartridges in order to link the firearm unless the suspected firearm was made available for examination. The trial court in the appellant's examination in court insisted that for reply to the said question *the presence of the firearm was not necessary.* The appellant then responded in his deposition that the two cartridges appeared to have been fired from two different firearms. On further examination, the appellant clearly stated in his deposition: "I have already stated these two cartridge cases appear to have been fired from two different firearms. Definite opinion would have been given once the weapon is given to me for examination."

During the trial the Sessions Court examined several witnesses, including the appellant for the prosecution. The trial court acquitted all the accused in that case. But the High Court convicted all of them and the conviction was upheld by the Supreme Court. Disturbed by the conduct of many of the witnesses turning hostile, the High Court, in the appeal against acquittal, initiated suo motu proceedings under Section 340 CrPC, against the appellant and some other witnesses. After considering the appellant's reply, he was directed to be proceeded against. The High Court was of the opinion that the oral evidence tendered by the appellant reflected a shift in stand from that of the written opinion which was apparently to help the accused, and hence, Section 193 IPC was attracted. Therefore, what is to be seen is whether the High Court is justified in forming the opinion on commission of the offence under Section 193 IPC.

Allowing the appeal, the Supreme Court

Held:

The appellant has all through been consistent that as an expert, a definite opinion in the case could be given only if the suspected firearm was made available for examination. It is nobody's case that scientifically an expert can give a definite opinion by only examining the cartridges as to whether they have been fired from the same firearm. It was the trial court which insisted for an opinion without the presence of the firearm, and in that context only, the appellant gave the non-specific and indefinite opinion. The appellant's opinion that the cartridges appeared to have been fired from different firearms was based on the court's insistence to give the opinion without examining the firearm. In other words, it was not even his voluntary, let alone deliberate deposition, before the court. An expert, in such a situation, could not probably have given a different opinion. Therefore, it is unjust,

35

if not unfair, to attribute any motive to the appellant that there was a somersault from his original stand in the written opinion. (Paras 15 and 23)

Merely because an expert has tendered an opinion while also furnishing the basis of the opinion and that too without being conclusive and definite, it cannot be said that he has committed perjury so as to help somebody. And, mere rejection of the expert evidence by itself may not also warrant initiation of proceedings under Section 340 CrPC. (Para 22)

In Pakistan the expert is often called by a party after ascertaining that the expert holds a view in favour of that party. That is not the situation or scheme under the Evidence Act, 1872. And, in any case, a government scientific expert certainly stands on a different footing. (Para 19)

National Justice Compania Naviera S.A. v. *Prudential Assurance Co. Ltd. (the Ikarian Reefer)*, (1995) 1 Lloyd's Rep 455 (CA), *relied on*

Umeed Ali Khan v. *Sultana Ibrahim*, LEX/SCPK/0483/2006, *distinguished*

Yaqoob Shah v. *State*, PLD 1976 SC 53 (Pak); *Abdul Majeed* v. *State*, PLD 1976 Karachi 762; *Syed Ali Nawaz Gardezi* v. *Lt. Col. Mohd. Yousuf*, PLD 1963 SC 51 (Pak), *cited*

Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts, but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion. (Para 20)

Manu Sharma v. *State (NCT of Delhi)*, (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385; *State (Delhi Admn.)* v. *Pali Ram*, (1979) 2 SCC 158 : 1979 SCC (Cri) 389; *Ramesh Chandra Agrawal* v. *Regency Hospitals Ltd.*, (2009) 9 SCC 709 : (2009) 3 SCC (Civ) 840, *relied on*

The proceedings under Section 340 CrPC can be successfully invoked even without a preliminary inquiry since the whole purpose of the inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. Section 340 CrPC, prior to amendment in 1973, was Section 479-A in the 1898 Code and it was mandatory under the pre-amended provision to record a finding after the preliminary inquiry regarding the commission of offence; whereas in the 1973 Code, the expression "shall" has been substituted by "may" meaning thereby that under the 1973 Code, it is not mandatory that the court should record a finding. What is now required is only recording the finding of the preliminary inquiry which is meant only to form an opinion of the court, and that too, opinion on an offence "which

appears to have been committed", as to whether the same should be duly inquired into. (Paras 12 and 11)

Pritish v. *State of Maharashtra*, (2002) 1 SCC 253 : 2002 SCC (Cri) 140, *relied on*

Har Gobind v. *State of Haryana*, (1979) 4 SCC 482 : 1980 SCC (Cri) 98, *distinguished*

State (Govt. of NCT of Delhi) v. *Sidhartha Vashisht*, 2013 SCC OnLine Del 2118 : (2013) 201 DLT 657, *reversed*

State v. *Sidhartha Vashisht*, 2006 SCC OnLine Del 1599 : (2006) 135 DLT 502; *Court on its Own Motion, In re*, 2006 SCC OnLine Del 1593 : (2006) 135 DLT 505, *referred to*

Advocates who appeared in this case :
K.V. Viswanathan, Senior Advocate (Abhishek Atrey, Advocate) for the Appellant;
D.S. Mahra, Advocate, for the Respondent.

Chronological list of cases cited *on page(s)*

The Judgment of the Court was delivered by

KURIAN JOSEPH, J.— Leave granted. The appellant is aggrieved by the proceedings initiated by the High Court of Delhi against him under Section 340 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") which culminated in the impugned order dated 22-5-2013[1] whereby the High Court directed its Registrar General to file a complaint against the respondent.

Short facts

2. In connection with the investigation of FIR No. 287 of 1999 registered at Police Station Mehrauli (Jessica Lal murder case), the police sought an expert opinion from the State Forensic Science Laboratory, Rajasthan by letter

1 *State (Govt. of NCT of Delhi)* v. *Sidhartha Vashisht*, 2013 SCC OnLine Del 2118 : (2013) 201 DLT 657

37

dated 19-1-2000. The expert opinion was in respect of the following three questions:

"*1.* Please examine and opine the bore of the two empty cartridges present in the sealed parcel.

2. Please opine whether these two empty cartridges have been fired from a pistol or a revolver.

3. Whether both the empty cartridges have been fired from the same firearm or otherwise." (emphasis supplied)

3. The appellant at the relevant time was working as the Deputy Director of the Laboratory. He forwarded a report dated 4-2-2000 with the following result of examination:

"(*i*) The calibre of two cartridge cases (C/1 and C/2) is .22.

(*ii*) These two cartridge cases (C/1 and C/2) appear to have been fired from pistol.

(*iii*) *No definite opinion could be given on two .22 cartridge cases (C/1 and C/2) in order to link firearm unless the suspected firearm is available for examination.*" (emphasis supplied)

4. During the trial before the Sessions Court, New Delhi, 101 witnesses were examined for the prosecution. The appellant was PW 95. The trial court acquitted all the ten accused of all the charges. In *State* v. *Sidhartha Vashisht*[2], by judgment dated 20-12-2006, the High Court convicted all of them. The conviction was upheld by this Court in judgment dated 19-4-2010 The decision is reported in *Manu Sharma* v. *State (NCT of Delhi)*[3].

5. Disturbed by the conduct of many of the witnesses turning hostile, the High Court, in the appeal against acquittal, initiated suo motu proceedings, by notice dated 20-12-2006[4] against 32 witnesses including the appellant. After considering their replies, the proceedings against a few of them were dropped. However, the appellant and a few others were directed to be proceeded against. The Court was of the opinion that the oral evidence tendered by the appellant reflected a shift in stand from that of the written opinion which was apparently to help the accused, and hence, Section 193 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC") was attracted.

6. In order to appreciate the factual position a little more in detail, which is necessary for the purpose of this appeal, we shall extract the relevant portion of the deposition:

"And after examination the report was prepared with reference to the queries. My report is Ext. PW-95/2 which was typed at my dictation and bears my sign at Point A. *On examination I came to the conclusion as under*:

2 2006 SCC OnLine Del 1599 : (2006) 135 DLT 502
3 (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385
4 *Court on its Own Motion, In re*, 2006 SCC OnLine Del 1593 : (2006) 135 DLT 505

38

(*i*) In answer to Query 1, in Ext. PW-95/1B regarding the bore of two empty cartridges I came to the conclusion that the calibre of two cartridge cases (marked C/1 and C/2) examined by me is .22 bore.

(*ii*) Regarding Query 2 the two cartridge cases in Question 1 I came to the conclusion that these two cartridges appear to have been fired from pistol. The query at No. 2 was 'please opine whether these two empty cartridges have been fired from pistol or revolver'.

(*iii*) *Query 3 was 'whether both the empty cartridges have been fired from the same firearm' which had not been sent for examination in order to link the cartridge cases with that. So my conclusion was that no definite opinion could be given on two .22 bore cartridge cases (C/1 and C/2) in order to link with the firearm unless the suspected firearm is available for examination.*

Court question

Q. For reply to Query 3 the presence of the firearm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments?

Ans. The question is now clear to me. I can answer the query here and now. These two cartridge cases were examined physically and under sterio and comparison microscope to study and observe and compare the evidence and the characteristic marks present on them which have been printed during firing. *After comparison I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different firearms*." (emphasis supplied)

7. The witness was declared hostile, and in cross-examination, the following question and its answer were tendered:

"*Q*. Is it correct that according to your own notings at Point C to C on worksheet you were of the view that definite opinion as to whether the fired cases C1 and C2 have been fired from the same firearm i.e. one firearm or from two different weapons can be given only if the firearm involved in question is produced otherwise not?

Ans. I have already stated that these two cartridge cases appeared to have been fired from two different firearms. Definite opinion would have been given once the weapon is given to me for examination." (emphasis supplied)

8. Shri K.V. Viswanathan, learned Senior Counsel appearing for the appellant, contended that being an expert and a professional, the appellant only tendered his opinion in response to the specific question put by court and that does not amount to even a borderline case of perjury.

9. Perjury falls under Chapter XI IPC— "Of False Evidence and Offences Against Public Justice". As per Section 193 IPC,

"**193.** ***Punishment for false evidence.***—Whoever intentionally gives false evidence in any stage of a judicial proceeding or fabricates false evidence

39

for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

10. Section 340 CrPC falls under Chapter XXVI of the Code— "Provisions as to Offences Affecting the Administration of Justice". Either on an application or otherwise, if any court forms an opinion that it is expedient in the interests of justice that an inquiry should be made in respect of an offence referred to under Section 195 CrPC which appears to have been committed in relation to a proceeding in that court, the court after such preliminary inquiry, enter a finding and make a complaint before the Magistrate of competent jurisdiction. It is this jurisdiction which has been invoked suo motu by the High Court in the criminal appeal, leading to the impugned order.

11. Section 340 CrPC, prior to amendment in 1973, was Section 479-A in the 1898 Code and it was mandatory under the pre-amended provision to record a finding after the preliminary inquiry regarding the commission of offence; whereas in the 1973 Code, the expression "shall" has been substituted by "may" meaning thereby that under the 1973 Code, it is not mandatory that the court should record a finding. What is now required is only recording the finding of the preliminary inquiry which is meant only to form an opinion of the court, and that too, opinion on an offence "which appears to have been committed", as to whether the same should be duly inquired into.

12. We are unable to appreciate the submission made by the learned Senior Counsel that the impugned order is liable to be quashed on the only ground that there is no finding recorded by the court on the commission of the offence. Reliance placed on *Har Gobind* v. *State of Haryana*[5] is of no assistance to the appellant since it was a case falling on the interpretation of the pre-amended provision of CrPC. A three-Judge Bench of this Court in *Pritish* v. *State of Maharashtra*[6] has even gone to the extent of holding that the proceedings under Section 340 CrPC can be successfully invoked even without a preliminary inquiry since the whole purpose of the inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. To quote: (*Pritish case*[6], SCC pp. 258-59, para 9)

> "9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held.

5 (1979) 4 SCC 482 : 1980 SCC (Cri) 98
6 (2002) 1 SCC 253 : 2002 SCC (Cri) 140

40

Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. *If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.*" (emphasis supplied)

13. In the impugned order[1], the High Court did form an opinion after the inquiry. To quote: (*Sidhartha case*[1], SCC OnLine Del para 90)

"*90.* It was argued on behalf of the State by the learned Standing Counsel that the ballistic expert's deposition, Ext. PW 95 was calculated to let the accused Manu Sharma off the hooks. It was submitted that the witness had stated that no definite opinion could be given whether the two empty cartridges were fired from the same weapon. However, on the basis of the same material, he took a somersault and gave a completely contrary opinion in the Court saying that they appear to have been fired from different weapons. It was submitted that by the time this witness stepped on to the box, the defence had formed its definite plan about a 'two-weapon theory'. The deposition of this witness was sought to support the 'two-weapon theory'. That this Court and the Supreme Court rejected the theory did not in any way undermine the fact that PW 95 gave false evidence."

14. Therefore, what is to be seen is whether the High Court is justified in forming the opinion on commission of the offence under Section 193 IPC. The stand of the appellant in his report (Ext. PW-95/2) dated 4-2-2000, and while deposing before the court at the trial, it is to be noted, was consistent. Query 3 was whether both the empty cartridges were fired from the same firearm or otherwise. Since there was no recovery of the firearm, the same was not sent along with the cartridges for the examination by the expert. Therefore, the opinion tendered was that he was unable to give any definite opinion in answer to Query 3, "unless the suspected firearm is available for examination".

1 *State (Govt. of NCT of Delhi)* v. *Sidhartha Vashishu*, 2013 SCC OnLine Del 2118 : (2013) 201 DLT 657

41

It was at that juncture, there was a court question. According to the court, "*for reply to Query 3, the presence of the firearm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments.*" To that question, the appellant responded that "*after comparison, I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different firearms*". It is not a clear, conclusive, specific and definite opinion. In further examination, the appellant has clearly stated that "*I have already stated these two cartridge cases appear to have been fired from two different firearms. Definite opinion would have been given once the weapon is given to me for examination.*"

15. We fail to understand how the stand taken by the appellant, as above, attracts the offence of perjury. As we have already observed above, the appellant has all through been consistent that as an expert, a definite opinion in the case could be given only if the suspected firearm is available for examination. It is nobody's case that scientifically an expert can give a definite opinion by only examining the cartridges as to whether they have been fired from the same firearm. It was the trial court which insisted for an opinion without the presence of the firearm, and in that context only, the appellant gave the non-specific and indefinite opinion. An expert, in such a situation, could not probably have given a different opinion.

16. In fact, this Court, in the decision rendered on the appeal filed by the accused and reported in *Manu Sharma* v. *State (NCT of Delhi)*[3], has specifically dealt with the issue explaining, and in a way, justifying the stand of the appellant. To quote: (SCC p. 73, para 180)

> "*180.* Similar is the case with the expert opinion of PW 95 which is again inconclusive. *There is no evidence on record to suggest that PW 95 gave an opinion to oblige the prosecution.* On the contrary, his response to the court question reveals that he was extremely confused as to the issue which had to be addressed by him in the capacity of an expert. In the concluding part of his testimony he reaffirms the opinion given by him which is that without test firing the empties from the weapon of offence no conclusive opinion can be given." (emphasis supplied)

17. This Court in *State (Delhi Admn.)* v. *Pali Ram*[7] held that: (SCC p. 169, para 31)

> "*31.* ... *the real** function of the *expert* is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the

3 (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385
7 (1979) 2 SCC 158 : 1979 SCC (Cri) 389
* Ed.: Emphasis supplied.

42

issues, whether of law or fact, because, *strictly* speaking, such issues are for the court or jury to determine." (emphasis in original)

18. In *Ramesh Chandra Agrawal* v. *Regency Hospitals Ltd.*[8], this Court has dealt with the difference between an "expert" and "a witness of fact": (SCC pp. 715-16, para 20)

"*20.* An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."

19. Mr Vishwanathan, learned Senior Counsel has invited our attention and has placed heavy reliance on a judgment of the Supreme Court of Pakistan in *Umeed Ali Khan* v. *Sultana Ibrahim*[9]. While dealing with the issue of perjury by expert witnesses, it was observed as follows:

"*6.* We have also dilated upon the import and significance of the Handwriting Expert report by whom it was opined that the "receipt" was signed by Dr Sultana Ibrahim. It is well settled by now that Expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence-inspiring and worthy of credence evidence is available. In this regard we are fortified by the dictum as laid down in *Yaqoob Shah* v. *State*[10]. There is no doubt that the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner and can be rebutted by overwhelming independent evidence. In this regard reference can be made to *Abdul Majeed* v. *State*[11]. It is always risky to base the findings of genuineness of writing on Expert's opinion. In this behalf we are fortified by the dictum as laid down in *Syed Ali Nawaz Gardezi* v. *Lt. Col. Mohd. Yousuf*[12]. It hardly needs any elaboration that expert opinion must always be received with great caution, especially the opinion of Handwriting Experts. An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is

8 (2009) 9 SCC 709 : (2009) 3 SCC (Civ) 840
9 LEX/SCPK/0483/2006
10 PLD 1976 SC 53 (Pak)
11 PLD 1976 Karachi 762
12 PLD 1963 SC 51 (Pak)

unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interest. Although such evidence has to be received with "great caution", yet such evidence, and reasons on which it is based, are entitled to careful examination before rejection and non-acceptance by court of expert's evidence does not mean that the expert has committed perjury. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence."

We are afraid that the decision is of no assistance to the appellant, since according to that Court, the expert is often called by a party after ascertaining that the expert holds a view in favour of that party. That is not the situation or scheme under the Evidence Act, 1872. And, in any case, a government scientific expert certainly stands on a different footing.

20. Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts, but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion.

21. In *National Justice Compania Naviera S.A.* v. *Prudential Assurance Co. Ltd. (the Ikarian Reefer)*[13], the Queen's Bench (Commercial Division) even went to the extent of holding that the expert has the freedom in such a situation to change his views. It was stated that

> *"if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."*

13 (1995) 1 Lloyd's Rep 455 (CA)

22. Hence, merely because an expert has tendered an opinion while also furnishing the basis of the opinion and that too without being conclusive and definite, it cannot be said that he has committed perjury so as to help somebody. And, mere rejection of the expert evidence by itself may not also warrant initiation of proceedings under Section 340 CrPC.

23. It is significant to note that the appellant's opinion that the cartridges appeared to have been fired from different firearms was based on the court's insistence to give the opinion without examining the firearm. In other words, it was not even his voluntary, let alone deliberate deposition, before the court. Therefore, it is unjust, if not unfair, to attribute any motive to the appellant that there was a somersault from his original stand in the written opinion. As a matter of fact, even in the written opinion, the appellant has clearly stated that a definite opinion in such a situation could be formed only with the examination of the suspected firearm, which we have already extracted in the beginning. Thus and therefore, there is no somersault or shift in the stand taken by the appellant in the oral examination before court.

24. The impugned proceedings initiated against the appellant under Section 340 CrPC are hence quashed. The appeals are allowed.

———

45

acts were said to have caused panic and terror in the locality. Neither of the grounds, however, suggested that the petitioner or any one of his associates used bombs in perpetrating the crime, nor was it suggested that the acts were done in pursuance of or for promoting a certain political ideology as in some cases which have recently come up before this Court, so that other persons of the locality not subscribing to that cult or ideology might feel apprehensive that they would next become the targets of similar attacks in future and thus disturb the even tempo of the life of the community in that locality. Every assault in a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all of such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed. There is nothing in the two incidents set out in the grounds in the present case to suggest that either of them was of that kind and gravity which would jeopardise the maintenance of public order. No doubt bombs were said to have been carried by those who are alleged to have committed the two acts stated in the grounds. Possibly that was done to terrify the respective victims and prevent them from offering resistance. But it is not alleged in the grounds that they were exploded to cause terror in the locality so that those living there would be prevented from following their usual avocations of life. The two incidents alleged against the petitioner, thus, pertained to specific individuals, and therefore, related to and fell within the area of law and order. In respect of such acts the drastic provisions of the Act are not contemplated to be resorted to and the ordinary provisions of our penal laws would be sufficient to cope with them.

5. In the circumstances the petition must be allowed and the release of the petitioner directed. Order accordingly.

(1973) 4 Supreme Court Cases 46

(From Delhi High Court)

[BEFORE H. R. KHANNA AND Y. V. CHANDRACHUD, JJ.]

SMT. BHAGWAN KAUR ... Appellant;

Versus

SHRI MAHARAJ KRISHAN SHARMA AND OTHERS ... Respondents.

Criminal Appeal No. 205 of 1969, decided on October 25, 1972

Evidence Act, 1872 (1 of 1872)—Section 45—Expert's evidence—Handwriting expert—Evidentiary value.

Medical Jurisprudence—Acid—Use for homicidal purposes unlikely—Death caused by drinking acid—Direct evidence lacking—Inference of suicide upheld.

Held, that evidence of a handwring expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert. The conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case. (Para 26)

Sri Sri Sri Kishore Chandra Singh Deo v. *Babu Ganesh Prasad Bhagat*, 1954 SCR 919: AIR 1954 SC 316: 1954 SCJ 395, *relied upon*.

Appeal *dismissed*

46

The Judgment of the Court was delivered by

Khanna, J.—Maharaj Krishan Sharma (34) and his mother Shanti Devi (55) were convicted by the Additional Sessions Judge, Delhi, under Section 302, read with Section 34, Indian Penal Code on the allegation that they caused the death of Shanti Devi alias Prem Lata (25), wife of Maharaj Krishan accused, by forcibly pouring sulphuric acid in her mouth, and were sentenced to undergo imprisonment for life. On appeal the Delhi High Court acquitted the two accused by giving them the benefit of doubt. The present appeal was thereafter filed by Bhagwan Kaur, mother of Shanti Devi deceased, by special leave against the acquittal of the two accused respondents.

2. The prosecution case is that Shanti Devi deceased was the daughter of P. W. 5 Dayal Das, Sub-Inspector C. I. D. of Delhi. The deceased was married to Maharaj Krishan accused, who is a science teacher in a Delhi school, on February 20, 1963. The accused, it is stated, did not feel happy with the dowry brought by the deceased. The relations of the deceased with her husband became strained and the deceased complained of ill-treatment by the two accused. On account of the strained relations the deceased on occasions would go to her father's house and stay there for some time, but as it was she would again come back to the house of the accused. A report was also once lodged with the police by the deceased against the accused for ill-treatment. In May, 1964, Maharaj Krishan accused obtained a writing from the deceased in which she stated that she wanted divorce.

3. Maharaj Krishan accused also ran a private college known as N. C. College at his residence in C/96, New Rajinder Nagar, New Delhi. On January 13, 1965, Hanuman Singh peon of that college purchased for the college from the shop of Lajpat Rai (P. W. 10) one quart of sulphuric acid with a concentration of 98.9 per cent. in a bottle.

4. Towards the end of June, Maharaj Krishan accused sent a message through the deceased to his father-in-law that he wanted some money for going to the United Kingdom as he had obtained an employment voucher from the United Kingdom. Maharaj Krishan was, however, told by his mother-in-law Bhagwan Kaur (P. W. 1) that his demand for money could not be met. On July 21, 1965, it is stated, Shanti Devi deceased sent a telephonic message to her mother Bhagwan Kaur from the house of the accused that she was being beaten by her husband. Bhagwan Kaur then went to the house of the accused. Dayal Das also reached there. Shanti Devi then told her parents while weeping that she had been beaten by her husband as he wanted money for going abroad. Maharaj Krishan accused then admonished the deceased and again made a demand for money for going to the United Kingdom. Maharaj Krishan was, however, told by the parents of the deceased that they could not pay him anything.

5. The present occurrence took place on July 23, 1965. On that day near about noon time, according to the prosecution case, Shanti Devi accused went to the house of Sushila Devi (P. W. 9). The house of Sushila Devi is opposite to that of the accused. Shanti Devi accused then asked Sushila Devi to accompany her to the house of the accused. Sushila Devi went to that house after a few minutes and found the deceased lying on a carpet in the room. The deceased was crying and screaming at that time. Sushila Devi felt burning sensation below her feet when she approached near the deceased. She also felt burning sensation when she sat on the sofa. Shanti Devi accused then abused the deceased. Sushila Devi noticed froth coming

47

out of the mouth of the deceased. The deceased uttered twice the word "Radhaswami", which was the name of her Guru and thereafter she became unconscious. Maharaj Krishan accused was also present in the house at that time and was busy in making telephonic call to a Doctor and asking him to come immediately to see his wife.

6. Dr. Tilak Raj Chadha (P. W. 30), homeopathic physician, is the old family Doctor of the accused. According to this Doctor, at about 2 p. m. on that day he received a telephonic message from Maharaj Krishan accused that there was a serious case and that the Doctor must reach his (Maharaj Krishan's) house at once. Dr. Chadha was having his lunch and told Maharaj Krishan that he would come after finishing the lunch. Maharaj Krishan, however, requested Dr. Chadha not to finish the lunch but to come at once as the case was very serious. Dr. Chadha, who resides at a distance of only a furlong from the house of the accused, immediately went to the house of the accused. Maharaj Krishan, who was standing at the entrance of the house, then told Dr. Chadha that the deceased had taken something and that Maharaj Krishan had just come from the school. Dr. Chadha went inside and saw that the deceased was lying on the carpet and some saliva was coming out from her mouth. Acid was found on the carpet near the head of the deceased. Dr. Chadha then told the accused to place the deceased on a cot and remove her to the hospital as the case was beyond his control. Dr. Chadha also informed the police telephonically from the house of the accused that there was a case of acid poisoning and Police should reach at once. The deceased was semi-conscious at that time and was crying. Her tongue was charred and she could not speak. A taxi was then brought and the deceased was put in that taxi and taken to the Willingdon Hospital. Head Constable Sita Ram (P. W. 29) arrived at the house of the accused when the deceased was being taken in the taxi to the Willingdon Hospital. Head Constable Sita Ram also went in the taxi along with Dr. Chadha, Maharaj Krishan accused and the deceased to the Willingdon Hospital.

7. On arrival in the hospital, Head Constable Sita Ram made an application to the doctor for recording the statement of the deceased, but the doctor said that she was unfit to make a statement. A. S. I. Hem Raj (P. W. 30), on coming to know of the telephonic message, first went to the house of the accused and, on being told that the deceased had been removed to the Willingdon Hospital, went there. The Assistant Sub-Inspector met Maharaj Krishan accused in the hospital and found him to be very much upset.

7-A. At about 4.30 p. m. on that day Dayal Das (P. W. 5) received a telephone message from Rajinder Nagar police station that his daughter had been admitted in the Willingdon Hospital in a serious condition. Dayal Das, accompanied by his wife Bhagwan Kaur, then went to the hospital and found the deceased lying in the casualty Department with serious burns over her face and chest. Maharaj Krishan accused was also present at that time outside the hospital. Keshava Nand, who is cousin of Bhagwan Kaur, and his wife Kamla (P. W. 2) also reached the hospital. At about 11 p. m. on that night Shanti Devi deceased was removed to the female ward. Bhagwan Kaur went with the deceased to the ward. Kamla sat in the verandah of that ward.

8. At about mid-night hour, it is alleged, Shanti Devi deceased regained consciousness and opened her eyes. Bhagwan Kaur asked the deceased as to what had happened, but the deceased could not speak and

48

made a gesture indicating that she would like to write something Bhagwan Kaur then went to the Doctor's room and found nobody present there. Bhagwan Kaur picked up a piece of paper which was lying on the floor of that room. She also picked up a pan lying on the table. Bhagwan Kaur on return supported the deceased by sitting by her side and the deceased started writing on the paper. Bhagwan Kaur put a spit-pan upside down under the paper with a view to support it. After writing something the deceased shook the pen indicating that there was no more ink in it. Bhagwan Kaur then brought another pen from the table in the Doctor's room and with that pen, the deceased wrote something more. After the deceased had completed the writing, Bhagwan Kaur took the pen back to the doctor's room and placed it on the table. The writing of the deceased is P. W. 1/A and is in Hindi. It was signed in Hindi by the deceased as Shanti Devi. The deceased also appended her signature on it in English. The writing was to the following effect:

> "I am in senses now. A quarrel took place at my house yesterday and my husband asked me that he had no connections with me and that I should go to my parents. I did not go. Thereupon my (husband) caught hold of my hands forcibly and my mother-in-law put some drug in my mouth forcibly with her hands, some of which got into (my mouth) and some scattered at the ground.
>
> Written by:
> Shani Sharma
> (Shanti Sharma Maharaj)
> Shanti Devi Sharma c/o Maharaj Krishan Sharma
> (Husband Name)."

9. Bhagwan Kaur, according to the prosecution case, is illiterate and could not read what had been written by Shanti Devi deceased. When Bhagwan Kaur insisted upon the deceased speaking something, the deceased told Bhagwan Kaur that the two accused had put acid on her tongue. Bhagwan Kaur then started weeping whereupon Kamla came inside. Kamla too was told by Shanti Devi deceased that she had been forcibly given something in her mouth and that she had given a writing to her mother. Soon thereafter Bhagwan Kaur became unconscious and regained consciousness at 5 a. m.

10. The condition of Shanti Devi deceased deteriorated in the morning, and she died at about 10.45 a. m.

11. A. S. I. Hem Raj first prepared inquest report (P. W. 5/J) in the presence of the two accused. In the aforesaid inquest report, the Assistant Sub-Inspector recorded the statements of the two accused. Maharaj Krishan accused, in the course of his statement in the inquest report, stated that there used to take place petty quarrels between him and his wife, who had not given birth to any child, but the matter used to be patched up. On July 23, 1965, according to Maharaj Krishan, he told the deceased at the time he was taking meals about his proposed visit to England. Shanti Devi accused was also present at that time. The deceased then tried to dissuade Maharaj Krishan from going to England hut he advised her to complete her studies and pass B. A. B. T. examination during the period he remained abroad. Shanti Devi accused then went out. Maharaj Krishan also went towards the kitchen to leave the utensils there. Maharaj Krishan then heard cries of the deceased. Both he and his mother rushed to the spot where the deceased was present. The deceased then pointed towards a bottle containing

49

acid lying in the almirah and told the accused that she had taken acid out of that. Maharaj Krishan also noticed some stains of acid scattered in the room. Maharaj Krishan immediately rang up Dr. Chadha. The Doctor sent a report to the police station with the consent of Maharaj Krishan. The deceased was then taken to Willingdon Hospital. To similar effect was the statement of Shanti Devi accused.

12. According to A. S. I. Hem Raj, at about 2.45 p. m. Bhagwan Kaur made a statement (P. W. 1/B) to him. In the course of that statement Bhagwan Kaur referred to the previous strained relations of the accused with the deceased. Bhagwan Kaur also made reference to the writing of dying declaration (P. W. 1/A) by the deceased during the night as well as to the oral statement of the deceased to Bhagwan Kaur. Bhagwan Kaur at the same time handed over dying declaration (P. W. 1/A) to A. S. I. Hem Raj. The Assistant Sub-Inspector then prepared another inquest report (P. W. 5/D) in which he recorded the statements of Bhagwan Kaur and Dayal Das. A case was registered on the basis of statement (P. W. 1/B) of Bhagwan Kaur at Police Station Rajinder Nagar at 3.25 p. m.

13. Post-mortem examination on the body of Shanti Devi deceased was performed by Dr B. L. Handa at 2.30 p. m. on July 25, 1965. The Doctor expressed the opinion that the death of the deceased was due to corrosive poisoning probably by acid. He also expressed the view that the acid of that much quantity could not be forced into the stomach by somebody else. The case was thereafter investigated by A. S. I. Hem Raj (P. W. 33) and Inspector Jagdish Kumar (P. W. 35). Writing (P. W. 1/A) was sent to Dr. S. K. Sharma, Government Examiner of questioned Documents. Dr. Sharma expressed the opinion that there was similarity in writing (P. W. 1/A) and other documents containing the admitted writing of Shanti Devi deceased.

14. On February 17, 1966 the police submitted a report to the magistrate that the case should be cancelled as the evidence indicated that the death of the deceased was the result of suicide. Shri Jagmohan Magistrate then passed an order in accordance with that report. On July 1, 1966, Bhagwan Kaur filed a complaint against the accused under Section 302 read with Section 34, Indian Penal Code on the above allegations.

15. At the trial the two accused, while not denying the strained relations with the deceased, stated that the deceased had died because she had herself swallowed sulphuric acid. According to the accused, the sulphuric acid was not administered to her. No evidence was produced in defence.

16. Learned Additional Sessions Judge held that the death of Shanti Devi deceased was caused by the accused in the manner stated by her in dying declaration (P. W. 1/A). Evidence about the oral dying declaration of Shanti Devi deceased to Bhagwan Kaur and Kamla was not accepted.

17. On appeal the learned Judges of the High Court referred to the different circumstances of the case and found that those circumstances pointed to the conclusion that the deceased had died as a result of suicide. As regards the dying declaration (P. W. 1/A), the learned Judges took the view that there were inherent weaknesses and improbabilities which furnished intrinsic evidence against the acceptance of the dying declaration. Those weaknesses were enumerated as under:

"(1) It starts with the words 'At this time I am in sense'. It is

50

rather unusual that a person in that condition would extend that type of assurance or declaration which appears to be an effort to lend a colour of genuineness

(2) The details about her husband having asked her to go to her parents also brings in an el-ment of doubt because normally a person in that condition will avoid details.

(3) The letter contains the word 'Lekhak' which means "the writer". The signatures in Hindi are not complete as it is only signed as "Shani Sharma". Against the Hindi signatures there is bracket and then she is alleged to have signed in English "Shanti Sharma Maharaj". Again at the back of the letter she has signed in English as Shanti Devi Sharma c/o Maharaj Krishan Sharma (Husband Name). The last of the abovementioned writing shows the meticulous care with which the identity of the husband is sought to be established. I find it difficult to accept that a patient in that ageny would add the words such as 'the writer', repeat her signatures in English, and the word 'Maharaj' also which is not found in any of her admitted letters such as Exhibits (P. W. 5/G), P. M. and (P. W. 5/F), and write what is written at the back of the paper.

(4) The writing in the letter is in a firm hand which is inconsistent with the writing of a person in Shanti Devi's condition.

(5) The incomplete signatures as 'Shani Sharma' cast a doubt in my mind because a person who could write so much would not have normally made a mistake in putting down complete Hindi signatures."

18. We have heard in this Court, Mr. Ghurcharan Singh on behalf of the appellant and Mr. Noordin on behalf of the respondents and are of the opinion that the present appeal is devoid of any merit.

19. It is the common case of the parties and is proved by the evidence of Dr. Handa that Shanti Devi deceased died due to corrosive acid poisoning. Dr. Handa, who arrived at this conclusion, found at the time of post-mortem examination that both the lips of the deceased showed acid burns. Two streaks of acid, each 2" long and 1/3" broad, were found present on either side of the chin. Small acid burns were present on the forehead, left cheek and chest. On internal examination, the doctor found that the inner aspect of the lips, the lining of the oral cavity and tongue were corroded. The teeth were chalky white. Food pipe showed corrosion of mucus. Stomach was charred black and corroded. It had three perforations and the acid was found to have gone to the peritoneal cavity, leaving burns on the surface of the liver and adjacent structures. Stomach wall was friable and was empty. Duodenum was also partly corroded. Reaction of the burns was strongly acidic. The quantity of acid poured into the mouth, in the opinion of the doctor, might be between half an ounce to one ounce.

20. According to the prosecution case, it were the accused who forcibly poured acid into the mouth of the deceased. As against that, the defence version was to the effect that the deceased committed suicide by drinking acid. The High Court on appreciation of the evidence came to the conclusion that the various circumstances of the case pointed to the inference that the death of the deceased was the result of suicide. This Court in an appeal under Article 136 of the Constitution does not normally reappraise evidence unless it finds some glaring infirmity in the judgment of the High Court as

51

might have resulted in miscarriage of justice. No such infirmity has been brought to our notice. On the contrary, we find that the High Court has properly appraised the evidence and has arrived at its conclusion in a well-reasoned judgment.

21. No eye-witness of the occurrence has been produced by the prosecution because, according to it, no one else was present at the time the acid was forcibly poured into the mouth of the deceased. To bring the charge home to the accused, the prosecution has, however, relied upon the dying declaration (P. W. 1/A) alleged to have been written by the deceased at about mid-night hour in the female ward of Willingdon Hospital after the deceased had regained consciousness. The prosecution has further relied upon the oral dying declaration said to have been made by the deceased at first to her mother Bhagwan Kaur (P. W.) and thereafter to Kamla (P. W.) in the female ward of the hospital during the night. The evidence about the oral dying declaration was rejected by both the trial court as well as the High Court. Regarding the written dying declaration, the trial court accepted the prosecution evidence, but the High Court found the same to be full of infirmities and improbabilities, which have already been enumerated earlier. Nothing cogent has been brought to our notice to take a view different from the High Court.

22. Apart from the infirmities and improbabilities pointed out by the High Court, we find that the salient features of the evidence all point to the conclusion that the death of the deceased was the result of suicide and was not homicidal. We may now refer to those features.

23. According to Dr. Handa, who performed post-mortem examination on the body of the deceased, the quantity of acid which was found in the stomach of the deceased was so much that it could not be poured by someone else. The Doctor added that the cases of homicidal administration of sulphuric acid by force were very rare. If the victim, according to Dr. Handa, is overpowered forcibly and a third person pours acid mechanically by pulling the tongue out to the acid can reach the stomach but not the extent so as to reach the stomach and beyond, as was the case with the deceased. The acid poured into the mouth of the deceased was not to less than half an ounce. The doctor also did not find any marks of injuries on the body of the deceased other than the burns. If the deceased had been held forcibly by one of the accused and the other accused had poured acid into her mouth, the deceased, in our opinion, must have offered some resistance. In such an event, some injuries in the nature of abrasions or scratches must have been found on the body of the deceased. The evidence of Dr. Handa shows that no such injuries were found on the body. The material on the record also indicates that no such injuries were found on the person of the accused. The medical evidence thus belies the prosecution version of the occurrence.

24. The opinion of Dr. Handa that it was a case of suicide and not homicide is in consonance with the views expressed in standard books on medical jurisprudence. In Taylor's Principles and Practice of Medical Jurisprudence, Twelfth Edition, at Page 235 it is said that sulphuric acid is used for suicidal purposes and accidents occur as a result of it having been mistaken for some other liquid. According to Modi's Medical Jurisprudence and Toxicology, Fifteenth Edition, Page 481, acid may be taken for suicidal purposes. It is further stated:

"Owing to its acid taste and physical changes brought about in the

52

food it is not possible to use it for homicidal purposes, unless the victim happens to be a child or an adult who is drunk or helpless."

According to observations on Page 709 of Gonzales Legal Medicine Pathology and Toxicoloy, Second Edition, "Sulphuric acid, due to its severe corrosive action, has rarely been given by mouth for homicidal purposes except to children It is sometimes thrown on a person to disfigure the face, and it may cause death from the severe burns inflicted on the skin. Most of the cases are suicidal, due to the ingestion of the acid. Some cases are accidental, the acid having been ingested in mistake for a medicine, or mixed with food, or poured into the ear, or injected into the rectum by error instead of a therapeutic drug, or injected into the vagina for the purpose of causing abortion".

25. The conduct of the accused immediately after the occurrence is consistent with the hypothesis of their innocence rather than with that of their guilt. It is inconceivable that Shanti Devi accused would have called her neighbour Sushila Devi (P. W.) to her house if Shanti Devi accused along with the other accused shortly before that had forcibly poured acid into the mouth of the deceased. It is also most unlikely that Maharaj Krishan accused would have made frantic telephonic calls to Dr. Chadha to immediately rush to his house if Maharaj Krishan along with his mother had poured acid into the mouth of the deceased. It is further extremely improbable in that event that Maharaj Krishan would have allowed Dr. Chadha to use Maharaj Krishan's telephone to call the police. Maharaj Krishan would also in that event have not taken the deceased to the hospital. On the contrary, Maharaj Krishan would have, if he and his mother had been the real culprits, waited for the time till the deceased died rather than take the risk of the deceased regaining consciousness in the hospital and making a dying declaration regarding their complicity.

26. So far as the dying declaration (P. W. 1/A) is concerned, we are of the opinion that the evidence about the writing of that document by the deceased is of a most unconvincing character. The High Court has referred to a number of circumstances which militate against the acceptance of the evidence regarding the aforesaid dying declaration, and we find no cogent ground to take a different view. It is no doubt true that the prosecution led evidence of handwriting expert to show the similarity of handwriting between (P. W. 1/A) and other admitted writings of the deceased, but in this respect, we are of the opinion that in view of the main essential features of the case, not much value can be attached to the expert evidence. The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed The courts should, therefore, be vary to give too much weight to the evidence of handwriting expert. In *Sri Sri Sri Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat and Others*,[1] this Court observed that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case.

27. According to Bhagwan Kaur, Shanti Devi deceased wrote the dying declaration soon after mid-night hour. Question then arises as to why Bhagwan Kaur did not immediately go out of the female ward and tell her husband Dayal Das that the deceased had been forcibly administered sulphuric acid by the accused. Bhagwan Kaur has tried to explain this omission by saying that she was illiterate and did not know about the

1. 1954 SCR 919 : AIR 1954 SC 316 : 1954 SCJ 395.

53

contents of writing (P. W. 1/A). Bhagwan Kaur, however, admits that soon after the deceased had written dying declaration (P. W. 1/A), the deceased told Bhagwan Kaur that the two accused had forcibly poured sulphuric acid into her mouth. It cannot, therefore, be said that Bhagwan Kaur remained unaware after 1 or 2 a. m. on the night between July 23 and 24 that it were the accused who had poured acid into the mouth of the deceased. The immediate reaction of Bhagwan Kaur, if the prosecution story were correct, would have been to go out and apprise her husband, who is a Police Sub-Inspector, so that the latter might inform the police regarding the complicity of the two accused. Bhagwan Kaur has tried to explain this omission by stating that she became unconscious. There is, however, no explanation as to why Kamla, who too professes to have been told by the deceased regarding the forcible administering of acid to the deceased, kept quiet and did not convey that information to Dayal Das. It is further admitted by Bhagwan Kaur that she regained her consciousness at 5 a. m. If Bhagwan Kaur had been handed over a dying declaration by the deceased and had also been told by the deceased regarding the forcible administering of acid to her by the accused, Bhagwan Kaur in that event could not have failed to convey that information to Dayal Das soon after regaining consciousness. Dayal Das in that event would have immediately reported the matter to the police. The fact that no such intimation was given to the police till 2.45 p. m., as deposed by A. S. I. Hem Raj, creates considerable doubt regarding the authenticity of dying declaration (P. W. 1/A) as well as about the testimony of Bhagwan Kaur and Kamla regarding the oral dying declaration of Shanti Devi deceased.

28. Another significant circumstance which emerges from the evidence on record is that Maharaj Krishan came out with the version of suicide at the earliest stage. According to Dr. Chadha, he was told by Maharaj Krishan immediately on arrival of Dr. Chadha that the deceased had taken something. Maharaj Krishan and his mother also gave account of suicide by the deceased in their statements recorded in the inquest report (P. W. 5/J). As against that, the evidence of A. S. I. Hem Raj shows that Bhagwan Kaur came out with the story of dying declaration at a subsequent stage.

29. In our opinion, the various circumstances of the case irresistibly point to the conclusion that the deceased committed suicide by taking sulphuric acid. The appeal consequently fails and is dismissed.

(1973) 4 Supreme Court Cases 54

(Original Jurisdiction)

[BEFORE J. M. SHELAT, I. D. DUA AND H. R. KHANNA, JJ.]

ARUN KUMAR SINHA ... Petitioner;

Versus

THE STATE OF WEST BENGAL ... Respondent.

Writ Petition No. 117 of 1972, decided on July 31, 1972

Preventive Detention—Maintenance of Internal Security Act, 1971 (26 of 1971) —Sub-section (1), read with sub-section (2) of Section 3—Subjective satisfaction of District Magistrate—Counter-affidavit filed on behalf of the State by Deputy Secretary, Home (Special) Department of the Government—Propriety.

54

clause (v) which provides for "establishing and maintaining primary schools". Under Section 124 "a Council may, at its discretion, provide either wholly or partly out of the municipal property and fund, for all or any of the following matters, namely, (c) furthering educational objects". Thus establishment and running of Higher Secondary Schools by Municipal Councils are envisaged under the Act and the lecturers and teachers appointed in the various schools are undoubtedly the officers and servants of the Municipal Councils.

5. For the reasons stated above we hold that the State Government had the power to transfer the respondents. But it is not clear why the power was exercised in the case of the respondents. In any event, learned counsel for the appellant assured us that the State is more anxious for the correct interpretation of the law engrafted in Section 94(7) of the Act than to enforce the order of transfer against the respondents. In the result while clarifying the position of law, we dismiss the appeals but make no order as to costs.

(1980) 1 Supreme Court Cases 704

(BEFORE R. S. SARKARIA AND O. CHINNAPPA REDDY, JJ.)

MURARI LAL .. Appellant;

Versus

STATE OF MADHYA PRADESH .. Respondent.

Criminal Appeal No. 125 of 1975†, decided on November 21, 1979

Evidence Act, 1872 — Sections 45, 46, 73 and 3 — Evidence of handwriting expert — Held, need not be invariably corroborated — It is for the court to decide whether to accept such an uncorroborated evidence or not — Court should approach the question cautiously and after examining the reasonings behind the expert opinion and considering all other evidence should reach its conclusion — Even where there is no expert court has power to compare the writings itself and decide the matter — On facts, courts below on such comparison concurring with the expert's view and the defence raising no doubts against the reasons given by the expert for his opinion — Held, opinion-evidence acceptable without any corroboration

Evidence Act, 1872 — Sections 114 and 24(a) — Recovery of stolen goods about 7 months after the commission of robbery and murder — Explanation given by accused unacceptable — Handwritten note left at the place of occurrence proved to be that of the accused — Even though the recovery was too remote in point of time, in the circumstances of the case, held, it can be linked with the commission of the offence raising a presumption against the accused

Criminal Trial — Circumstantial evidence — Conviction under Sections 302/34, 460/34 and 394/397 based on two circumstances, viz.: (a) recovery of a stolen wrist-watch belonging to the deceased at the instance of the accused, and (b) handwritten note left at the scene of occurrence — Explanation given by the accused for the recovery not acceptable and the handwritten note proved to be that of the accused — Conviction upheld — Penal Code, 1860, Sections 302, 394, 397, 460 and 34

†Appeal by Special Leave from the Judgment and Order dated January 15, 1974 of the Madhya Pradesh High Court in Criminal Appeal No. 903 of 1973

55

The deceased was murdered in his room at night and some of his goods including a wrist-watch were stolen. A handwritten note was recovered from his room which indicated that the offence was the handiwork of some frustrated and unemployed young graduates. After about 7 months of the incident the wrist-watch was recovered from a person's house at the instance of the accused-appellant. The expert gave his opinion that the handwritten note and the specimen writings of the accused were the same. In view of the two circumstances viz. the recovery of the wrist-watch and his handwriting suggesting his presence in the house of the deceased on the night of the murder, the accused was convicted under Section 302, IPC and sentenced to death. He was also sentenced under Section 460 read with Section 34 and Section 394 read with Section 397, IPC to RI for 7 years on each count. On appeal the High Court altered the conviction from Section 302, IPC to Section 302 read with Section 34, IPC and substituted the sentence of imprisonment for life for the sentence of death. Dismissing the appeal of the accused the Supreme Court

Held :

The hazard in accepting the opinion of any expert is not because they are unreliable witnesses but because all human judgment is fallible. While the science of identification of finger prints has attained near perfection and the risk of an incorrect opinion is practically non-existent, the science of identification of handwriting is not nearly so perfect and the risk is higher. Therefore, on the facts of a particular case, a court may require corroboration of a varying degree of the evidence of the handwriting expert. There can, however, be no hard and fast rule in this regard. (Paras 4 and 6)

But there is nothing to justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. An expert is not an accomplice and therefore, corroboration of his evidence is not always essential. (Para 6)

An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of those criteria to the facts proved in evidence. Therefore, the approach of the court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it. (Paras 4 and 6)

Section 73 of the Evidence Act enjoins the court to compare the disputed writings itself and this duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbooks and the court's own experience and knowledge. (Para 12)

Magan Bihari Lal v. *State of Punjab*, AIR 1977 SC 1091 : (1977) 2 SCC 210 : 1977 SCC (Cri) 313, must be understood as referring to the facts of the particular case

Ram Chandra v. *U. P. State*, AIR 1957 SC 381 : 1957 Cri LJ 559; *Ishwari Prasad Misra* v. *Mohammad Isa*, (1963) 3 SCR 722 : AIR 1963 SC 1728; *Shashi Kumar* v. *Subodh Kumar*, AIR 1964 SC 529 and *Fakhruddin* v. *State of M. P.*, AIR 1967 SC 1326 : 1967 Cri LJ 1197, *explained* and *relied on*

Davis v. *Edinburgh Magistrate*, 1953 SC 34 quoted by Professor Cross in his Evidence and *Buckley* v. *Rice-Thomas*, (1554) 1 Plowden 118, *relied on*

In the present case the reasons given by the handwriting expert for his opinion were not doubted by the defence party. Both the Sessions Court and the High Court compared the disputed writing with the admitted writings

56

and found, in conjunction with the opinion of the expert, that the author was the same person viz. the accused-appellant. The Supreme Court also found no ground for disagreeing with the finding. (Para 13)

Although the court might have found it difficult to link the recovery of the watch with the robbery and the murder due to considerable time-lag between the two, but in view of the other vital circumstances that a writing made by the appellant was left on the deceased's table that night and that the deceased's watch was recovered at the instance of the appellant, are sufficient in the absence of any acceptable explanation, to hold the appellant guilty of the offences of which he has been convicted. (Para 15)

R-UV/4643/CR

Advocates who appeared in this case:

R. C. Kohli, Senior Advocate (*S. K. Gambhir* and *Miss B. Ramrakhiani*, Advocates, with him), for the Appellant;

H. K. Puri and *V. K. Bahl*, Advocates, for the Respondent.

The Judgment of the Court was delivered by

Chinnappa Reddy, J.—Murari Lal, who was accused 2 before the Sessions Judge, Jabalpur, was convicted under Section 302 I.P.C. and sentenced to death. He was also convicted under Section 460 read with Sections 34, 457, 380, 392, 394 and 397 I.P.C. but sentenced under Section 460 read with Section 34 and Section 394 read with Section 397 only to rigorous imprisonment for a period of 7 years on each count. On appeal by Murari Lal and on reference by the learned Sessions Judge, the High Court of Madhya Pradesh altered the conviction from Section 302 I.P.C. to Section 302 read with 34 I.P.C. and substituted the sentence of imprisonment for life for the sentence of death. Otherwise the appeal was dismissed. Murari Lal has preferred this appeal by special leave of this Court.

2. H. D. Sonewala (the deceased) used to live alone in one of the two 'quarters' in the compound of the Parsi Dharmshala at Jabalpur. He was the Area Organiser of Charak Pharmaceuticals Company of Bombay. On the night of July 12, 1972 he went out to dinner at the house of PW 2 and returned home at about midnight. He retired for the night. Next morning, his driver PW 9 and his servant PW 6 came to the house in the usual course to attend to their duties. The gate was found locked. They called out to their master but there was no response. PW 6 who also had a key opened the lock and went inside. Sonewala was found murdered in his bed. A first information report was given at the police station Omti, Jabalpur. The Station House Officer, PW 28, came to the scene, found things in the room strewn about in a pell-mell condition. He seized various articles. One of the articles so seized was a prescription pad Ex. P 9. On pages A to F of Ex. P.9, there were writings of the deceased but on page G, there was a writing in Hindi in pencil which was as follows:

नौकरी नही मिलने के कारण हम लोग बी० ए० पास हैं। फिर भी कोई देख रेख नहीं है। यह नतीजा निकलेगा। हस्ताक्षर बल्ले सिंह.

Translated into English it means: "Though we have passed B.A., we have not secured any employment because there is none to care. This is the consequence. Sd./- Balle Singh". The dead body of Sonewala was sent to

57

the Medical Officer for post-mortem examination. There was an incised wound on the neck 7½" long, the maximum width of which was 2" of tissues and vessels up to the trachea were cut. Trachea was also cut. For several months after the discovery of the murder, the investigation made no progress till February 18, 1973. On that day pursuant to information received in connection with some other case of theft in which one Roop Chand appeared to be involved, the Station House Officer secured the presence of Patrick (A-1) and questioned. Patrick made a statement and led them to his room from which two choppers and as many as 234 items of stolen property were seized. We may mention that out of the 234 items so seized, only two were alleged to belong to Sonewala, one was a tie-pin and the other was a cheque-book. Thereafter, the house of Patrick's father Gabrial was also searched and 310 items of stolen property were recovered, none of which has anything to do with this case. On February 19, 1973 Murari Lal (A-2) said to be a friend of Patrick was questioned. He made a statement and led them to the house of his maternal uncle Suraj Prasad (A-4). Murari Lal asked his uncle to produce the wrist-watch, which was done. The wrist-watch had some special characteristic of its own and it was later duly identified by unimpeachable evidence as belonging to the deceased. Specimen writings Ex. P. 41 to Ex. P. 54 of Murari Lal were obtained. They were sent to a handwriting and finger-print expert PW 15 along with the prescription pad Ex. P. 9, for his opinion. The expert gave his opinion that the writing in Hindi at page G of Ex. P. 9 and the specimen writings of P. 41 to P. 54 were made by the same person. Patrick. Murari Lal, Gabrial and Suraj Prasad were tried by the learned Sessions Judge. Suraj Prasad was acquitted. Gabrial was convicted under Section 411. Patrick and Murari Lal were both convicted under Section 302 I.P.C and sentenced to death as already mentioned. The sentence of death passed on Patrick and Murari Lal was altered to imprisonment for life by the High Court. Patrick has not further appealed but Murari Lal has.

3. The two vital circumstances against Murari Lal were: (1) the recovery of a wrist-watch which belonged to the deceased Sonewala. and (2) the writing in Hindi at page G of Ex. P. 9 which was found to be in his handwriting indicating his presence in the house of the deceased on the night of the murder and his participation in the commission of the offences. Shri R. C. Kohli, learned counsel for the appellant, argued that the recovery of the wrist-watch was too remote in point of time to connect the appellant with the crime. He further argued that the High Court fell into a grave error in concluding that the writing at page G of Ex. P. 9 was that of the appellant. He submitted that the evidence of PW 8 who claimed to be familiar with the handwriting of the appellant was wholly unacceptable, that it was not permissible in law to act upon the uncorroborated opinion-evidence of the expert PW 15 and that the High Court fell into a serious error in attempting to compare the writing in Ex. P. 9 with the admitted writing of the appellant.

4. We will first consider the argument, a stale argument often heard, particularly in criminal courts, that the opinion-evidence of a handwriting expert should not be acted upon without substantial corroboration. We shall presently point out how the argument cannot be justified on principle or

58

precedent. We begin with the observation that the expert is no accomplice. There is no justification for condemning his opinion-evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the quality of credibility or incredibility being one which an expert shares with all other witnesses —, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides His duty 'is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence'[1].

5. From the earliest times, courts have received the opinion of experts. As long ago as 1553 it was said in **Buckley** v. **Rice-Thomas**[2]:

> If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.

6. Expert testimony is made relevant by Section 45 of the Evidence Act and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person 'specially skilled' 'in questions as to identity of handwriting' is expressly made a relevant fact. There is nothing in the Evidence Act, as for example like illustration (b) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the court in assuming that a handwriting expert's opinion in unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tells us that 'a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it

1. Vide Lord President Cooper in *Davis* v. *Edinburgh Magistrate*, 1953 SC 34 quoted by Professor Cross in his Evidence
2. (1554) 1 Plowden 110

59

exists'. It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we set an artificial standard of proof not warranted by the provisions of the Act. Further, under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts of the particular case. It is also to be noticed that Section 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it.

7. Apart from principle, let us examine if precedents justify invariable insistence on corroboration. We have referred to Phipson on Evidence, Cross on Evidence, Roscoe on Criminal Evidence, Archibald on Criminal Pleadings, Evidence and Practice and Halsbury's Laws of England but we were unable to find a single sentence hinting at such a rule. We may now refer to some of the decisions of this Court. In **Ram Chandra** v. **U. P. State**[3], Jagannadhadas, J. observed: "It **may** be that **normally** it is not safe to treat expert evidence as to handwriting as sufficient basis for conviction" (emphasis ours). "May" and "normally" make our point about the absence of an inflexible rule. In **Ishwari Prasad Misra** v. **Mohammad Isa**[4] Gajendragadkar, J. observed: "Evidence given by experts can never be conclusive, because after all it is opinion-evidence", a statement which carries us nowhere on the question now under consideration. Nor, can the statement be disputed because it is not so provided by the Evidence Act and, on the contrary, Section 46 expressly makes opinion-evidence challengeable by facts, otherwise irrelevant. And as Lord President Cooper observed in **Davis** v. **Edinburgh Magistrate**[1]: "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert".

8. In **Shashi Kumar** v. **Subodh Kumar**[5], Wanchoo, J., after noticing various features of the opinion of the expert said:

> We do not consider **in the circumstances of this case** that the evidence of the expert is conclusive and can falsify the evidence of the attesting witnesses and also the circumstances which go to show that this will must have been signed in 1943 as it purports to be. Besides it is necessary to observe that expert's evidence as to handwriting is opinion-evidence and it can rarely, if ever, take the place of substantive evidence Before acting on such evidence **it is usual** to see if it

3. AIR 1957 SC 381 : 1957 Cri LJ 559
4. (1963) 3 SCR 722 : AIR 1963 SC 1728
5. AIR 1964 SC 529

60

is corroborated either by clear direct evidence or by circumstantial evidence. In the present case the probabilities are against the expert's opinion and the direct testimony of the two attesting witnesses which we accept is wholly inconsistent with it.

So, there was acceptable direct testimony which was destructive of the expert's opinion; there were other features also which made the expert's opinion unreliable. The observations regarding corroboration must be read in that context and it is worthy of note that even so the expression used was 'it is usual' and not 'it is necessary'.

9. In **Fakhruddin** v. **State of M. P.**[6], Hidayatullah, J. said:

> Both under Section 45 and Section 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.

These observations lend no support to any requirement as to corroboration of expert testimony. On the other hand, the facts show that the Court ultimately did act upon the uncorroborated testimony of the expert though these judges took the precaution of comparing the writings themselves.

10. Finally, we come to **Magan Bihari Lal** v. **State of Punjab**[7], upon which Sri R. C. Kohli, learned counsel, placed great reliance. It was said by this Court:

> . . . but we think it would be extremely hazardous to condemn the appellant merely on the strength of opinion-evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule

6. AIR 1967 SC 1326: 1967 Cri LJ 1197
7. AIR 1977 SC 1091: (1977) 2 SCC 210, 1977 SCC (Cri) 313

61

> of law. It was held by this Court in **Ram Chandra** v. **State of U. P.**[3], that it is unsafe to treat expert handwriting opinion as sufficient basis for conviction, but it may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in **Ishwari Prasad** v. **Mohammad Isa**[4] that expert evidence of handwriting can never be conclusive because it is, after all, opinion-evidence, and this view was reiterated in **Shashi Kumar** v. **Subodh Kumar**[5], where it was pointed out by this Court that expert's evidence as to handwriting being opinion-evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in **Fakhruddin** v. **State of M. P.**[6] and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial.

The above extracted passage, undoubtedly, contains some sweeping general observations. But we do not think that the observations were meant to be observations of general application or as laying down any legal principle. It was plainly intended to be a rule of caution and not a rule of law as is clear from the statement 'it has **almost** become a rule of law'. "Almost", we presume, means "not quite". It was said by the Court there was a "profusion of precedential authority" which insisted upon corroboration and reference was made to **Ram Chandra** v. **State of U. P.**[3], **Ishwari Prasad** v. **Mohammad Isa**[4], **Shashi Kumar** v. **Subodh Kumar**[5] and **Fakhruddin** v. **State of M. P.**[6]. We have already discussed these cases and observed that none of them supports the proposition that corroboration must invariably be sought before opinion-evidence can be accepted. There appears to be some mistake in the last sentence of the above extracted passage because we are unable to find in **Fakhruddin** v. **State of M. P.**[6] any statement such as the one attributed. In fact, in that case, the learned Judges acted upon the sole testimony of the expert after satisfying themselves about the correctness of the opinion by comparing the writings themselves. We do think that the observations in **Magan Bihari Lal** v. **State of Punjab**[7], must be understood as referring to the facts of the particular case.

11. We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallised into a rule of law, that opinion-evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons f r the opinion must be carefully probed and examined All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight. We have said so much

62

because this is an argument frequently met with in subordinate courts and sentences torn out of context from the judgments of this Court are often flaunted.

12. The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two* voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that **Shashi Kumar** v. **Subodh Kumar**[5] and **Fakhruddin** v. **State of M. P.**[6] were cases where the Court itself compared the writings.

13. Reverting to the facts of the case before us, Sri Kohli had not a word of criticism to offer against the reasons given by the expert PW 15, for his opinion. We have perused the reasons given by the expert as well as his cross-examination. Nothing has been elicited to throw the least doubt on the correctness of the opinion. Both the Sessions Court and the High Court compared the disputed writing at page G in Ex. P. 9 with the admitted writings and found, in conjunction with the opinion of the expert, that the author was the same person. We are unable to find any ground for disagreeing with the finding.

14. We may at this juncture consider the argument of Sri Kohli that the internal evidence afforded by the document showed that the appellant was not its author. He argued that the appellant was not even a matriculate whereas the author of the document had described himself as a graduate. And, what necessity was there for a murderer and robber to write a note like that, questioned Mr. Kohli. It appears to us that the note was designed to lay a false trail by making it appear that the murder and the robbery were the handiwork of some frustrated and unemployed young graduates, expressing their resentment against the world which had shown no regard for their existence.

15. The other important circumstance against the appellant was the recovery of the deceased's watch at the appellant's instance. That the deceased was the owner of the watch was not disputed before us. That the watch was recovered at the instance of the appellant was also not disputed before us. What was urged was that there was no reason to reject the explanation given by the appellant in his statement under Section 313 CrPC that he had purchased the watch from Roop Chand. Apart from his statement, there is

* Vide Correction slip No. F. 3/79 (Ed.J) dt. 21-8-80

63

nothing in the evidence to substantiate his case. On the other hand, we think that, having come to know that the statement of Roop Chand in connection with the investigation into another theft case had led the police to interrogate Patrick, the appellant very cleverly tried to foist previous possession of the watch on Roop Chand. We are not prepared to accept the appellant's explanation. Even so, it was urged, the recovery was too remote in point of time to be linked with the robbery and the murder. It is true that there was a considerable time-lag. We might have found it difficult to link the recovery of the watch with the robbery and the murder had this been the only circumstance. But, we have the other vital circumstance that a writing made by the appellant was left on the deceased's table that night. That circumstance coupled with the recovery of the dead man's watch at the instance of the appellant, are sufficient, in our opinion, in the absence of any acceptable explanation, to hold the appellant guilty of the offences of which he has been convicted. The appeal is dismissed.

(1980) 1 Supreme Court Cases 713

(BEFORE P. N. SHINGHAL AND E. S. VENKATARAMIAH, JJ.)

HARJIT SINGH MANN .. Appellant;

Versus

S. UMRAO SINGH AND OTHERS .. Respondents.

Civil Appeal No. 720 of 1978†, decided on December 14, 1979

Election — Nomination Paper — Filing of — Held on facts, that nomination paper of election petitioner was filed beyond time — Held, failure to file nomination paper within time is a defect of a substantial character, rendering nomination paper liable to be rejected — Representation of the People Act, 1951, Sections 33(1), 36(2)(b) and (4) **(Para 7)**

Rogers on ELECTIONS, 21st Edn. Vol. III, page 74; *Cutting* v. *Windsor*, 40 TLR 395, Parker's CONDUCT OF PARLIAMENTARY ELECTIONS, 1970, page 137 and A Norman Schofield: PARLIAMENTARY ELECTIONS, 2nd Edn., pages 149-150, *relied on*

Election — Nomination paper — Filing of — Oath or affirmation — On facts, held election petitioner had not taken oath before Returning Officer at the time of presentation of nomination paper — Requirement of taking oath, held, mandatory — Constitution of India, Article 173(a) — Representation of the People Act, 1951 — Section 36(2)(a) **(Paras 10, 11 & 12)**

HANDBOOK FOR RETURNING OFFICERS, *relied on*

Election — Corrupt Practice — Bribery — Held, acts allegedly constituting bribery, even if proved would not constitute corrupt practice when committed at a time when the respondent was not yet a validly nominated candidate — Held also, that mere delivery

†Appeal under Section 116-A of the Representation of the People Act, 1951 from the Judgment and Order dated February 7, 1978 of the Punjab and Haryana High Court in E. P. No. 15 of 1977

64

lands vacated. In the nature of the provisions of Section 22 of the Act the proceedings under various sub-sections have to be initiated and action taken by the same authority. The proceedings under Section 22 of the Act being quasi-judicial the authority entrusted with the powers of the Collector has to be invested with the powers under all the sub-sections to enable the said authority to proceed in accordance with the scheme of the Act. In that view of the matter there is no scope for conferring some of the powers under Section 22 on the tehsildars and remaining to be left with the Collector. The High Court assumed that part of the powers and functions of the Collector under Section 22 of the Act can be delegated under Section 2(*i*)(*a*) of the Act. It was on that assumption that the High Court came to the conclusion that the powers and functions under Section 22 which were being conferred upon the tehsildars should have been mentioned before or after the word "such" in the notification. We do not agree with the High Court's reasoning. The manifest intention of the Government, which can be spelled-out from the notification, is that all the powers under Section 22 of the Act have been delegated and conferred on the Colonisation Tehsildars in the State of Rajasthan. The expression 'such' used in the notification twice, only indicates that the Colonisation Tehsildars, who have been given all the powers of the Collector under Section 22 of the Act, may exercise 'such' of these powers as are necessary to be exercised in a given case before them. In any case while dealing with a notification of the type before us, it is permissible to iron out the creases to clarify the manifest intention of the State Government in issuing the notification. We, therefore, hold that the notification dated May 30, 1978 appointing the Colonisation Tehsildars in the State of Rajasthan to perform the functions and to exercise the powers of Collector under Section 22 of the Act is legal and valid. The High Court was not justified in reaching a different conclusion.

7. We allow the appeals, set aside the judgment of the learned Single Judge and also of the Division Bench of the High Court and dismiss the writ petitions filed by the respondents-petitioners before the High Court. There shall be no orders as to costs.

(1992) 3 Supreme Court Cases 700

(BEFORE A.M. AHMADI AND K. RAMASWAMY, JJ.)

Death Reference Case No. 1 of 1989

STATE OF MAHARASHTRA .. Complainant;

Versus

SUKHDEV SINGH AND ANOTHER .. Accused.

65

With

Criminal Appeal No. 17 of 1990[1]

STATE OF MAHARASHTRA THROUGH CBI .. Appellant;

Versus

SUKHDEV SINGH ALIAS SUKHA AND OTHERS .. Respondents.

Death Reference Case No. 1 of 1989 and Criminal Appeal No. 17 of 1990, decided on July 15, 1992

Penal Code, 1860 — Ss. 302, 307 and 34 — Having regard to the nature of confession made by the accused persons in their statements under S. 313 CrPC held, trial court rightly convicted accused 1 under S. 302 IPC and accused 5 under S. 302/34 on charge of assassination of General Vaidya to avenge the alleged desecration of Akal Takht in Golden Temple, Amritsar caused in Operation Blue Star conducted by the deceased — Death sentence confirmed — Conviction and sentence under Ss. 307 and 307/34 also upheld — Terrorist and Disruptive Activities (Prevention) Act, 1985, S. 12(4)

General A.S. Vaidya, the then Chief of the Armed Forces was assigned the task of flushing out militants who had taken refuge in the Golden Temple at Amritsar. During this operation, known as the Blue Star Operation, some militants were killed and a part of the Golden Temple known as Harminder Saheb was damaged. Gen. Vaidya had, therefore, incurred the wrath of the Punjab militants for what they called desecration of the Golden Temple. After retirement on January 31, 1986, Gen. Vaidya and his wife settled in Pune. According to the prosecution case on August 10, 1986 Gen. Vaidya along with his wife and security guard went for shopping in his car which he was himself driving. While on return when he slowed down his vehicle to negotiate a sharp turn a red Ind-Suzuki motor cycle came parallel to the car on the side of Gen. Vaidya and the person occupying the pillion seat of the motor cycle fired three shots from close range at the head of General Vaidya. Before his wife and securityman could realise what had happened, Gen. Vaidya slumped on the shoulder of his wife and died. His wife also received injuries. Accused 1, 5 and others were charged under Ss. 3(2)(*i*), (*ii*) and 3(3) of the TADA Act read with Rule 23(4) of the Rules framed thereunder as also under Ss. 120-B, 465, 468, 471, 419, 302, 307 read with S. 34 IPC. All the accused denied the charge and claimed to be tried. However, subsequently accused 1 expressed his desire on September 19, 1988 to make a statement before the court admitting to have killed Gen. Vaidya. He made the statement in open court and the Presiding Judge of the Designated Court gave him eight days' time to reflect and make a detailed written statement thereafter, if he so desired. On September 26, 1988 when the accused were once again arraigned before the Designated Court Accused 1 submitted a written statement admitting to have fired four bullets at Gen. Vaidya and to have killed him. Accused 5 also in his statement recorded under Section 313 of the Criminal Procedure Code admitted that he was the person driving the black (not red) Indu-Suzuki motor cycle with Accused 1 in

[1] From the Judgment and Order dated October 21, 1989 of the Pune Designated Court in Terrorist Sessions Case No. 2 of 1987

the pillion seat, and that it was he who brought his motor cycle in line with the car driven by Gen. Vaidya to facilitate Accused 1 to shoot the General. The Designated Court came to the conclusion that the prosecution had failed to prove beyond reasonable doubt that the accused had entered into a criminal conspiracy to commit murder of the General. The Designated Court, however, held that Accused 5 was driving the motor cycle with Accused 1 on the pillion seat and it was the latter who fired the shots from close range killing Gen. Vaidya and injuring his wife and that thus the crime in question was committed in furtherance of the common intention of Accused 1 and Accused 5 to cause the murder of Gen. Vaidya. The Court also found that the two accused were guilty of attempt to commit murder of the wife of Gen. Vaidya in furtherance of the common intention. Accordingly, it convicted Accused 1 under Sections 302 and 307, IPC for the murder of Gen. Vaidya and for attempting to take the life of his wife and Accused 5 under Section 302 and Section 307, both read with Section 34, IPC. It sentenced both Accused 1 and Accused 5 to death subject to confirmation of sentence by the Supreme Court. For the offence under Section 307 he sentenced both Accused 1 and Accused 5 to rigorous imprisonment for 10 years. Both the substantive sentences were ordered to run concurrently. He acquitted both Accused 1 and Accused 5 of all the other charges levelled against them. It also acquitted all the other accused (2, 3 and 4) of all the charges. Before the Supreme Court the prosecution case had two elements, the first relating to the charge of criminal conspiracy and the various criminal acts done in furtherance thereof and the second relating to the actual murder of General Vaidya. The prosecution also invoked Sections 3 and 4 of TADA. Agreeing with the decision of the Designated Court

Held :

The decision of the trial Judge is based on sound reasons and is unassailable. Therefore, the conviction of Accused 1 under Sections 302 and 307, IPC and Accused 5 under Sections 302 and 307, IPC, both read with Section 34, IPC and the sentence of death awarded to both of them are confirmed. There is no merit in the State's appeal against the acquittal of the other accused persons of all the charges levelled against them and accused 1 and 5 on the other counts with which they were charged. (Para 58)

Criminal Procedure Code, 1973 — Ss. 313, 229, 228 and 226 — Accused pleading guilty — Conviction can be founded upon confession/admission of guilt made by accused at any stage including the stage of making statement under S. 313 — However, while acting upon the plea of guilt of accused, court must approach with caution and circumspection to ensure that the plea is clear and unqualified and the admission of facts constitutes the offence — Terrorist and Disruptive Activities (Prevention) Act, 1985, S. 12(4)

Held :

Since no oath is administered to the accused, the statements made by the accused under S. 313 will not be evidence stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. But sub-s. (4) says that the answers given by the accused in response to his examination under Section 313 can be taken into consideration

67

in such inquiry or trial. Sub-section (4) is a verbatim reproduction of sub-s. (3) of the corresponding S. 342 of the old Code of Criminal Procedure. In the context of the old sub-s. (3) the Supreme Court in *Hate Singh Bhagat Singh case* held that an answer given by an accused under Section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness and in *Narain Singh case* it held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him. These decisions apply with equal force in the case of the new sub-s. (4) also. (Para 51)

Hate Singh Bhagat Singh v. *State of M.B.*, AIR 1953 SC 468: 1953 Cri LJ 1933; *Narain Singh* v. *State of Punjab*, (1963) 3 SCR 678: (1964) 1 Cri LJ 730, *applied*

Under Section 12(4) of the TADA Act a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session. The procedure for the trial of Session cases is outlined in Chapter XVIII of the Code. S. 229 of the Code provides that if the accused pleads guilty the Judge has to record the plea and thereafter decide whether or not to convict the accused. The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt. If, however, the accused does not plead guilty or the Judge does not act on his plea he must fix a date for the examination of the witnesses i.e. the trial of the case. There is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of the trial. But before the trial Judge accepts and acts on that plea he must administer the same caution unto himself. This plea of guilt may also be put forward by the accused in his statement recorded under Section 313 of the Code. (Para 52)

In the present case both the accused 1 and 5 have unmistakably, unequivocally and without any reservation whatsoever admitted the fact that they were responsible for the murder of Gen. Vaidya. Apart from the confession of accused 1, Accused 5 has himself admitted that he was driving the motor cycle with Accused 1 on the pillion seat and to facilitate the crime he had brought the motor cycle in line with the car so that Accused 1 may have an opportunity of firing at his victim from close quarters. There is, therefore, no doubt whatsoever that both Accused 1 and 5 were acting in concert, they had a common intention to kill Gen. Vaidya and in furtherance of that intention Accused 1 fired the fatal shots. Therefore, the trial Judge was justified in holding that Accused 1 was guilty under Section 302 and Accused 5 was guilty under Section 302/34 IPC. (Para 52)

Asokan v. *State of Kerala*, 1982 Cri LJ 173 (Ker HC); *State of Maharashtra* v. *R.B. Chowdhari*, AIR 1968 SC 110: (1967) 3 SCR 708: 1968 Cri LJ 95, *distinguished*

68

Penal Code, 1860 — Ss. 302, 307 and 34 — Death sentence — Rarest of the rare case — Assassination of Gen. Vaidya who conducted Operation Blue Star for clearing militants from Golden Temple, Amritsar and causing injuries to his wife — Considering the case to be similar to Kehar Singh case being of rarest of the rare category where accused persons instead of showing remorse or repentance felt proud of their act, held, award of death sentence proper — No extenuating circumstance to depart from the ratio of Kehar Singh case shown (Para 54)

Kehar Singh v. *State (Delhi Administration)*, (1988) 3 SCC 609: 1988 SCC (Cri) 711, *followed*

Terrorist and Disruptive Activities (Prevention) Act, 1985 (31 of 1985) — Ss. 10, 12(4) and 17(3) — Two accused charged under Ss. 3(2)(i) or (ii) and 3(3) of the Act r/w R. 23(4) of the Rules made thereunder as also under Ss. 120-B, 465, 468, 471, 419, 302, 307 r/w 34 IPC — Designated Court acquitting accused from charges under the Act and Rules and convicting them only under Ss. 302 and 307 and Ss. 302/34 and 307/34 IPC respectively — Held, conviction being outside the provisions of the Act, it was open under S. 10 of the Act to the Designated Court to convict and award such sentence as provided under IPC — Penal Code, 1860, Ss. 302, 307 and 34 — Terrorist and Disruptive Activities (Prevention) Act, 1987, S. 12 (Para 54)

Criminal Procedure Code, 1973 — Ss. 309(2) third proviso and 235(2) — Effect of the third proviso to S. 309(2) — Held, the proviso does not prohibit grant of adjournment for the purpose of affording opportunity of hearing to the parties before pronouncing sentence in compliance with mandatory provisions of S. 235(2)

Constitution of India — Art. 21 — Covers right to expeditious disposal of criminal case and fair opportunity to place all relevant material before court

Held:

The third proviso to S. 309(2) must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the Court is equally the requirement of the said Article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so. (Para 56)

Allauddin Mian v. *State of Bihar*, (1989) 3 SCC 5: 1989 SCC (Cri) 490; *Malkiat Singh* v. *State of Punjab*, (1991) 4 SCC 341: 1991 SCC (Cri) 976: JT (1991) 2 SC 190, *referred to*

Jumman Khan v. *State of U.P.*, (1991) 1 SCC 752: 1990 Supp 3 SCR 398: 1991 SCC (Cri) 283, *distinguished*

Criminal Procedure Code, 1973 — S. 235(2) — Requirement of affording pre-sentence hearing — Conviction and sentence of death pronounced on the same day — Where accused persons had already resolved to kill the deceased (Gen. Vaidya who had conducted Operation Blue Star to clear the Golden Temple from terrorists) and were prepared to sacrifice their lives for the cause even before making their confessional statements in examination under S. 313 and executed their resolve in a planned manner without ever praying for lesser sentence despite being aware of the death sentence granted in Kehar Singh case, held, accused were mentally prepared for the extreme penalty and hence requirement of S. 235(2) satisfied in letter and spirit — Penal Code, 1860, Ss. 302, 307, 34

Held :

Both the accused had mentally decided to own their involvement in the murder of Gen. Vaidya before their statements were recorded under Section 313 of the Code. Not only that, their attitude reveals that they had resolved to kill him as they considered him an enemy of the Sikh community since he was alleged to have desecrated the Akal Takht. They also told the trial court that they were proud of their act and were not afraid of death and were prepared to sacrifice their lives for the article of their faith, namely, the realisation of their dream of a separate State of Khalistan. It is thus apparent that before they made their statements admitting their involvement they had mentally prepared themselves for the extreme penalty and, therefore, if they desired to place any material for a lesser sentence they had ample opportunity to do so. But after the decision of the Supreme Court in *Kehar Singh case* and having regard to the well planned manner in which they executed their resolve to kill Gen. Vaidya, they were aware that there was every likelihood of the Court imposing the extreme penalty and they would have, if they so desired, placed material in their written statements or would have requested the Court for time when their statements under Section 313 of the Code were recorded, if they desired to pray for a lesser sentence. Their resolve not to do so is reflected in the fact that they have not chosen to file any appeal against their convictions by the Designated Court. Therefore, the requirements of Section 235(2) of the Code have been satisfied in letter and spirit and no prejudice is shown to have occurred to the accused. (Para 57)

Kehar Singh v. *State (Delhi Administration)*, (1988) 3 SCC 609: 1988 SCC (Cri) 711, *referred to*

Criminal Procedure Code, 1973 — S. 313(1)(b) — Examination of accused under — Mandatory — Purpose and stage of examination — If any incriminating material against accused appears on the conclusion of the prosecution evidence, court would be duty-bound to solicit accused's explanation therefor irrespective of how weak or scanty the prosecution evidence was in that respect

70

— Natural justice — Audi alteram partem — Applicability in criminal trial — Provision in S. 313, CrPC for

Held :

Section 313 embodies the fundamental principle of fairness based on the maxim *audi alteram partem*. The purpose of the examination of the accused under Section 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The stage of examination of the accused under clause (*b*) of sub-section (1) of Section 313 is reached only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. The trial Judge is not expected before he examines the accused under Section 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution under Section 314 of the Code. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the court finds that no incriminating material has surfaced that the accused may not be examined under Section 313 of the Code. If there is material against the accused he must be examined. In the instant case it is not correct to say that no incriminating material had surfaced against the accused. Therefore, the trial court was justified in examining the accused under Section 313. (Para 50)

Jit Bahadur Chetri v. *State of Arunachal Pradesh*, 1977 Cri LJ 1833 (Gau HC); *Asokan* v. *State of Kerala*, 1982 Cri LJ 173 (Ker HC), *referred to*

Evidence Act, 1872 — S. 45 — Opinion of handwriting expert — Normally courts do not place implicit reliance on such opinion evidence and insist on corroboration — But need of corroboration is not an inflexible rule and it depends upon facts and circumstances of each case — Quality of opinion would depend on soundness of reasons on which it is based — But before acting upon the opinion evidence court must be satisfied about the genuineness of the specimen or admitted handwriting of the accused and competence and dependability of the expert — Opinion of handwriting expert compared with that of finger print expert

Held :

Evidence regarding the identity of the author of any document can be tendered (*i*) by examining the person who is conversant and familiar with the handwriting of such person or (*ii*) through the testimony of an expert who is qualified and competent to make a comparison of the disputed writing and the admitted writing on a scientific basis and (*iii*) by the court comparing the disputed document with the admitted one. (Para 29)

71

A handwriting expert is a competent witness whose opinion evidence is recognised as relevant under the provisions of the Evidence Act and has not been equated to the class of evidence of an accomplice. It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded. But the court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one as compared to the science of identification of fingerprints; courts have, therefore, been wary in placing implicit reliance on such opinion evidence. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. But that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the court has to decide in each case on its own merits what weight it should attach to the opinion of the expert. If there exist numerous striking peculiarities and mannerisms which stand out to identify the writer, the court can act on the expert's evidence. (Paras 30 and 29)

However, before a court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (*i*) the genuineness of the specimen/admitted handwriting of the concerned accused and (*ii*) the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence. Prudence demands that before acting on such opinion the court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the court should also be fully satisfied about the competence and credibility of the handwriting expert. Though by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. Therefore, before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is, therefore, necessary to exercise extra care and caution in evaluating their opinion bef re accepting the same. (Paras 28 and 29)

Ram Narain v. *State of U.P.*, (1973) 2 SCC 86: 1973 SCC (Cri) 752; *Bhagwan Kaur* v. *Maharaj Krishan Sharma*, (1973) 4 SCC 46: 1973 SCC (Cri) 687; *Murari Lal* v. *State of M.P.*, (1980) 1 SCC 704: 1980 SCC (Cri) 330, *relied on*

In the present case the trial court found that the evidence on record in regard to the natural handwriting of the accused was not satisfactory and did not inspire confidence. The trial court also found that it was hazardous to rely on his evidence as he had betrayed bias against the accused and in favour of the prosecution as "he also belongs to the Police Department". On a consideration of the expert evidence it does not appear that the view taken by the trial court is unsustainable or perverse. Even otherwise having regard to the facts and circumstances of the case and the nature of evidence tendered and the quality of

72

evidence of the expert the prosecution has not succeeded in establishing beyond reasonable doubt the so-called conspiracy. (Paras 28 and 31)

Evidence Act, 1872 — S. 73 — Court would be slow on reaching its own conclusion by itself comparing the disputed writing with the specimen/admitted writing on record especially where genuineness of the specimen/admitted writing is not beyond doubt

Held:

Although Section 73 specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. (Para 32)

Evidence Act, 1872 — S. 9 — Identification of accused persons in court for the first time after a long lapse of time — No TI parade held — Accused altering their appearance during the course of time — Accused also total strangers to witnesses who got only fleeting glimpse of the accused — Witnesses not entirely independent and unbiased — Held, it would be risky to place reliance on such identification without proper corroboration

Held:

Great care must be exercised before acting on a belated identification in court by a witness who cannot be said to be an independent and unbiased person. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. In the present case it was all the more difficult as indisputably the accused persons had since changed their appearance. Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in Court after a long lapse of time and that too of persons who had changed their appearance. (Paras 17 and 25)

Kanan v. *State of Kerala*, (1979) 3 SCC 319: 1979 SCC (Cri) 621, *relied on*

Supreme Court Rules, 1966 — Or. 21 R. 8(2) — Amicus curiae — Advocates appearing as amicus curiae making twenty trips from Pune to Delhi to attend the case and devoting their valuable professional hours at considerable personal inconvenience — Out of Rs 29,000 spent by them, they received only Rs 5000 — Appreciating their devotion and dedication which enhance the image and prestige of the legal procession, State Govt. directed to pay them the outstanding amount of Rs 24000 which they had spent for travel, lodging and boarding and also to pay a further sum of Rs 25,000 by way of professional fees for rendering service as amicus curiae

R-M/T/11425/CR

73

Advocates who appeared in this case :

Altaf Ahmed, Additional Solicitor-General, V.V. Vaze, Senior Advocate (M/s S.B. Takawane, S.M. Jadhav, A.S. Bhasme and Ms A. Subhashini, Advocates, with them) for the Complainant/Appellant;

R.S. Sodhi, Harshad Nimbalkar, P.G. Sawarkar and I.S. Goel, Advocates, for the Accused/Respondent.

The Judgment of the Court was delivered by

AHMADI, J.— General A.S. Vaidya, the then Chief of the Armed Forces was, on the orders of the then Prime Minister Smt Indira Gandhi, assigned the difficult and delicate task of flushing out militants who had taken refuge in the Golden Temple at Amritsar. During this operation, known as the Blue Star Operation, some militants were killed and a part of the Golden Temple known as Harminder Saheb was damaged. Both the then Prime Minister Smt Indira Gandhi and General Vaidya had, therefore, incurred the wrath of the Punjab militants for what they called the desecration of the Golden Temple. They, therefore, vowed to avenge the deaths of their colleagues and punish all those who were responsible for the damage to the Golden Temple. After the assassination of Smt Gandhi on October 31, 1984, it is the prosecution case, they waited for General Vaidya to retire on January 31, 1986 so that the security cover which would then stand reduced may not be difficult to penetrate. After his retirement General Vaidya decided to settled down in Pune in the State of Maharashtra.

2. After his retirement on January 31, 1986, General Vaidya and his wife Bhanumati left Delhi for Pune. As their bungalow at Pune was still under construction, they shared bungalow No. 20 at Queens Garden, Pune, occupied by Major-General Y.K. Yadav. General Vaidya owned a Maruti car bearing registration No. DIB 1437 which reached Pune on the next day i.e. February 1, 1986. Between February 4 and 16, 1986 General Vaidya and his wife went to Goa for a brief holiday. They returned to Pune on February 16, 1986. They continued to reside in the bungalow occupied by Major-General Y.K. Yadav. General Vaidya was required to be hospitalised from March 24 to April 7, 1986 as he was suspected to be suffering from jaundice. During his stay in bungalow No. 20, Queens Garden, two Police Sub-Inspectors were available on security duty, one for himself and another for Major-General Yadav but after his discharge from the hospital and on their shifting to their bungalow at 47/3, Koregaon Park with effect from May 26, 1986 only one armed Head Constable, Ramchandra Kshirsagar, was on security duty with him. Although the name-plate of General Vaidya was displayed on one of the two posts of the entrance gate to bungalow No. 20 at Queens Garden, no such name-plate was displayed at bungalow No. 47/3, Koregaon Park.

74

3. On the morning of August 10, 1986, General Vaidya and his wife left their bungalow with the securityman Ramchandra Kshirsagar for shopping in their Maruti car No. DIB 1437 at about 10.00 a.m. The car was being driven by General Vaidya with his wife sitting in the front seat to his left and the securityman sitting in the rear seat just behind her. After the shopping spree was completed at about 11.30 a.m. and while they were returning to their residence via Rajendrasinghji Road, the car had to take a turn to the right at the square in front of 18 Queens Garden at the intersection of Rajendrasinghji and Abhimanyu roads. To negotiate this turn General Vaidya who was driving the vehicle slowed down. At that point of time a red Ind-Suzuki motor cycle came parallel to the car on the side of General Vaidya and the person occupying the pillion seat of the motor cycle fired three shots from close range at the head of General Vaidya. Before his wife and securityman could realise what had happened, General Vaidya slumped on the shoulder of his wife Bhanumati. The motor cyclists drove away and could not be located. An autorickshaw passed by. As General Vaidya lost control over the vehicle the car surged towards a cyclist Digambar Gaikwad. The latter, in order to save himself, jumped off the cycle. The cycle came under the Maruti car and as a result the car stopped at a short distance in front of a compound wall. Immediately thereafter the securityman stepped out of the vehicle and went in search of some bigger vehicle to carry General Vaidya to the hospital. A green matador van which was passing by was fetched by the securityman in which the injured General Vaidya was carried to the Command Hospital where he was declared dead.

4. The securityman immediately informed the L.I.B. Office about the incident which information was received by Police Inspector Garad. On receipt of the information the Commissioner of Police and his Deputy arrived at the hospital and questioned the securityman who narrated the incident to them. Thereupon the securityman was asked to go to the Control Room. On reaching the Control Room he received a message from Inspector Mohite requiring him to return to the place of the incident where his formal complaint was recorded by Inspector Mohite. A panchnama of the scene of occurrence was drawn up by Inspector Mohite in the presence of witnesses and the empty cartridges and other articles were recovered therefrom.

5. As stated earlier, the assailants of General Vaidya had made good their escape from the scene of occurrence after the incident. On September 7, 1986, two persons riding a red Ind-Suzuki motor cycle collided with a truck. They were thrown off the motor cycle and sustained injuries. A bag containing arms and ammunition was also thrown off but they hurriedly collected the spilled articles. When members of the public

75

who had collected there immediately after the accident went to assist them they behaved in an abrasive manner and one of them, later identified as Accused 1 Sukhdev Singh @ Sukha, raised his revolver and threatened to shoot, which raised the suspicion of the crowd prompting one Narayan Bajarang Pawar to report the matter to Inspector A.I. Pathan of Pimpri Police Station. Inspector Pathan swung into action and along with the informant and his staff members, including Sub-Inspector Nimbalkar, went in search of the two motor cyclists. Inspector Pathan went to the Pimpri Railway Police Station and asked P.S.I. M.K. Kadam of that Police Station to immediately go to the place of the accident and guard the same until further orders. Inspector Pathan, on return, noticed two persons passing by Vishal Talkies and as one of them was limping his suspicion was aroused whereupon he drove his vehicle near them and pounced on one of them, later identified as Accused 2 Nirmal Singh @ Nimma. Accused 1 Sukha tried to run away but P.S.I. Nimbalkar gave a chase and caught hold of him and brought him to Inspector Pathan. Before he was overpowered, it is the prosecution case, that Accused 1 Sukha unsuccessfully tried to fire a shot at P.S.I. Nimbalkar to make good his escape. It may here be mentioned that both Accused 1 and Accused 2 were charge-sheeted under Section 307 IPC, for that incident and were ultimately convicted and sentenced.

6. After both Accused 1 and Accused 2 were apprehended by Inspector Pathan and P.S.I. Nimbalkar they were searched and weapons like pistol and revolver along with live cartridges were recovered from them. They were also carrying certain papers concerning the red Ind-Suzuki motor cycle and they too were attached. As a sizeable crowd had gathered on the road Inspector Pathan thought it wise to cause the seizure memorandum to be recorded at the Pimpri Police Station. The prosecution case is that while the two persons were being taken in a jeep to the Pimpri Police Station they raised slogans of "Khalistan Zindabad" and proudly proclaimed that they were the assailants of General Vaidya. After reaching the Police Station all the articles which were found in the possession of these two persons were attached under a seizure memorandum. Inspector Pathan suspected that the pistol which was found from them may have been the weapon used for killing General Vaidya and hence he sent the weapons as well as the cartridges attached from the scene of occurrence to the ballistic expert who reported that the cartridges found from the place where General Vaidya was shot were fired from the pistol which was recovered from the possession of these two persons after their arrest on September 7, 1986. In the course of investigation it came to light that besides Accused 1 and 2 certain other persons described as terrorists, namely, Accused 3 Yadvinder Singh,

Accused 4 Avtar Singh, Accused 5 Harjinder Singh and absconding accused Sukhminder Singh @ Sukhi, Daljit Singh @ Bittu @ Sanjeev Gupta, Jasvinder Kaur and Baljinder Singh @ Raju were involved in the conspiracy allegedly hatched for assassinating General Vaidya immediately after his retirement and on depletion of the security cover. Accused 1 and 2 and others named hereinabove were charge-sheeted on August 14, 1987 under Sections 120-B, 302, 307, 465, 468, 471 and 212, IPC, Sections 3 and 4 of Terrorist and Disruptive Activities (Prevention) Act, 1985, hereinafter called 'TADA', and Section 10 of the Passport Act, 1967.

7. In regard to the charge of conspiracy, forgery, etc., the prosecution case is that absconding accused Sukhi hired a flat sometime in October-November 1985 at 7, Antop Hill, Bombay. Thereafter he came to Pune and stayed in Dreamland Hotel in the assumed name of Rakesh Sharma. On January 26, 1986 he shifted to and registered himself as Ravinder Sharma in Hotel Gulmohar on the pretext that he was visiting the city for business purposes. He was accompanied by another person. They gave a false address that they were residents of 307, Om Apartments, Bombay. While in Pune an advertisement appeared in the local daily Maharashtra Herald offering a flat No. G-21, Salunke Vihar, Pune on hire. This flat was in the possession of Major A.K. Madan and he was desirous of letting it out to repay the instalments of the loan taken for meeting the construction cost of the said flat. He had entrusted this work of finding a suitable tenant to one V.R. Hallur and had given a power-of-attorney to him for that purpose. The said V.R. Hallur approached the Estate Agent Mr Bhavar Sanghvi and disclosed that he was desirous of letting out the flat on a rent ranging between Rs 1200 and Rs 1500 with a deposit ranging between Rs 12,000 and Rs 15,000. The Estate Agents published an advertisement in the local newspaper Maharashtra Herald, in consequence whereof one person identifying himself as Ravinder Sharma approached the Estate Agent and finalised the deal by paying Rs 15,000 in cash as deposit and agreeing to pay rent at the rate of Rs 1500 per month and went on to pay advance rent for three months i.e. Rs 4500 to the said V.R. Hallur. The deal was closed on January 30, 1986. It is the prosecution case that this flat was hired as the conspirators needed an operational base in Pune to facilitate the killing of General Vaidya.

8. The prosecution case further is that on May 3, 1986 the 7, Antop Hill flat at Bombay was raided and besides arms and ammunition an English novel 'Tripple' was found on the cover page whereof someone had scribbled the number of General Vaidya's Maruti car. Clothes of different sizes were also found indicating the presence of more than one

77

person. On May 8, 1986 an Ind-Suzuki motor cycle bearing No. MFK 7548 was purchased in the name of Sanjeev Gupta from its owner Suresh Shah through R.V. Antapurkar, a salesman. Accused 1 is reported to have lived in Hotel Ashirvad, Pune on June 9, 1986. Accused 1 lived in Hotel Amir in Room No. 517 on June 11, 1986, in Hotel Jawahar in Room No. 206 on the next day and in Hotel Mayur in Room No. 702 on June 13, 1986. On the same day he is shown to have stayed in Hotel Commando, Bandra, Bombay in Room No. 402. The Union Bank robbery took place on that day. The motor cycle was sent for servicing on July 1, 1986. Sukhi left for U.S.A. on a forged passport on July 14, 1986 and was arrested there. According to the prosecution they lived in different hotels in different assumed names for drawing up a plan to kill General Vaidya.

9. Now we enter the crucial stage. According to the prosecution, in pursuance of the conspiracy hatched to kill General Vaidya, Accused 1, 2 and 5 left Ambala Cantonment for Doorg on August 3, 1986 by 138 UP Chhatisgarh Express. The form for reservation of sleeper berths dated July 29, 1986, Ex. 700, is alleged to have been filled by Accused 1, of course in an assumed name. They reached Doorg on August 5, 1986 and left for Bombay on the next day by Gitanjali Express. From Bombay the prosecution alleges that they went to Pune. Prosecution has also tendered evidence to show that on August 9, 1986, Accused 1 and 5 made inquiries concerning the whereabouts of a retired military officer in the neighbourhood of General Vaidya. After accomplishing the task Accused 1 returned to Bombay by 7.30 p.m. and stayed in Hotel Neelkanth, Khar, in the assumed name of Pradeep Kumar. On September 6, 1986, Accused 1 and 2 are stated to have stayed in Hotel Dalmond, Bandra, Bombay, in the assumed names of Ravi Gupta and Sandeep Kumar before their arrest at Pune on September 7, 1986 by Inspector Pathan. This, in brief, are the broad outlines of the alleged conspiracy perpetrated by the accused persons and the absconding accused to kill General Vaidya. To prove these circumstances a large number of documents and ocular testimony of several witnesses came to be tendered by the prosecution before the Designated Court.

10. The investigation revealed that on the date of the incident the motor cycle was driven by Accused 5 Harjinder Singh @ Jinda with Accused 1 Sukhdev Singh @ Sukha in the pillion seat. The shots were fired by Accused 1 from the pillion seat at close range after Accused 5 had brought the motor cycle in line with the front window of the driver's seat of the Maruti car. The window pane was lowered and General Vaidya was at the steering wheel with his right elbow resting on the window and the hand holding the top of the car. As stated earlier, three

78

shots were fired in quick succession and before Bhanumati and the securityman could realise what had happened the motor cyclists made good their escape. Had it not been for the accident which took place on September 7, 1986 in which the said motor cycle was involved the police would have been groping in the dark to nab the perpetrators of the crime. Accused 2, 3 and 4 were put up for trial as co-conspirators. The other co-conspirators could not be placed for trial as they could not be traced since they were absconding. All the five accused denied the charge and claimed to be tried. However, after the charge was framed Accused 1 Sukhdev Singh @ Sukha expressed his desire on September 19, 1988 to make a statement expressed his desire on September 19, 1988 to make a statement before the court admitting to have killed General Vaidya. He made the statement in open court and the learned Presiding Judge of the Designated Court, Pune gave him eight days' time to reflect and make a detailed written statement thereafter, if he so desired. On September 26, 1988 when the accused were once again arraigned before the Designated Court Accused 1 submitted a written statement, Ex. 60-A, admitting to have fired four bullets at General Vaidya and to have killed him. He also stated in that statement that he had accidentally injured Bhanumati Vaidya although he did not intend to do so. According to him since she was sitting close to General Vaidya one of the bullets strayed and caused injury to her. So far as Accused 5 Harjinder Singh @ Jinda is concerned, he, in his statement recorded under Section 313 of the Criminal Procedure Code, 1973, admitted that he was the person driving the black (not red) Indu-Suzuki motor cycle with Accused 1 in the pillion seat. It was he who brought his motor cycle in line with the Maruti car driven by General Vaidya to facilitate Accused 1 Sukha to shoot the General. It was only thereafter that Accused 1 fired the bullets which caused the death of General Vaidya.

11. The learned Presiding Judge of the Designated Court, Pune, framed the points for determination and came to the conclusion that the prosecution had failed to prove beyond reasonable doubt that the accused before him and the absconding accused had entered into a criminal conspiracy to commit the murder of General Vaidya. He, however, came to the conclusion that Accused 5 was driving the motor cycle with Accused 1 on the pillion seat and it was the latter who fired the shots from close range killing General Vaidya and injuring his wife who was seated next to him. He came to the conclusion that the crime in question was committed in furtherance of the common intention of Accused 1 and Accused 5 to cause the murder of General Vaidya. He also came to the conclusion that the said two accused persons were guilty of attempt to commit the murder of Bhanumati in furtherance of their

79

common intention. After a detailed and elaborate judgment running into over 300 typed pages, the learned Judge of the Designated Court, Pune, convicted Accused 1 under Sections 302 and 307, IPC for the murder of General Vaidya and for attempting to take the life of his wife Bhanumati. He convicted Accused 5 under Section 302 and Section 307, both read with Section 34, IPC. He sentenced both Accused 1 and Accused 5 to death subject to confirmation of sentence by this Court. For the offence under Section 307 he sentenced both Accused 1 and Accused 5 to rigorous imprisonment for 10 years. Both the substantive sentences were ordered to run concurrently. He acquitted both Accused 1 and Accused 5 of all the other charges levelled against them. So far as Accused 2, 3 and 4 are concerned he acquitted them of all the charges levelled against them and directed that they be set at liberty at once.

12. The facts of which we have given a brief resume make it crystal clear that broadly speaking the prosecution case has two elements, the first relating to the charge of criminal conspiracy and the various criminal acts done in furtherance thereof and the second relating to the actual murder of General Vaidya. The prosecution has also invoked Sections 3 and 4 of TADA.

13. Now according to the prosecution as soon as it became known to the militants that General Vaidya planned to settle down at Pune after his retirement from Army service, wheels began to move to kill him as soon as the security cover available to him was reduced. The prosecution tendered evidence, both oral and documentary, to show that the conspiracy was hatched between January 23, 1986 and May 3, 1986. The first step taken in this direction was to hire a flat in Block No. G-21, Salunke Vihar, Pune, to create an operational base to work out and implement the alleged criminal conspiracy. This flat was hired by one Ravinder Sharma whom the prosecution identifies as absconding accused Sukhi. Now according to the prosecution after acquiring this base, Sukhi left the country on July 14, 1986 and did not participate further in the execution of the alleged conspiracy. Accused 2 Nirmal Singh became privy to the conspiracy later on. To prove this part of the prosecution case evidence has been tendered to show that two persons Raj Kumar Sharma and Rakesh Sharma came and stayed in Hotel Dreamland, Pune, from January 23 to 26, 1986 and contacted various estate agents on telephone, including PW 20 B.D. Sanghvi, partner of M/s Estate Corporation, Pune, with a view to hiring a flat in Pune. The absconding accused Sukhi, it is contended, had stayed in that hotel under the assumed name of Rakesh Sharma. PW 3 Rajender Tulsi Pillai has been examined to show that thereafter the said accused Sukhi and his companion shifted to Hotel Gulmohar on the 26th at about 2.20 p.m. and stayed there till 10.00 a.m.

of the 29th. Therefore, according to the prosecution Rakesh Sharma and Ravinder Sharma were one and the same person and the evidence of the handwriting expert PW 120 M.K. Kanbar establishes that the said person was none other than the absconding accused Sukhi. The entries identified as Q. 3 and Q. 4 from the register of Dreamland Hotel and Q. 5 and Q. 6 from the register of Gulmohar Hotel are, in the opinion of PW 120, to be of Sukhi. It is indeed true that while discussing this part of the prosecution evidence the learned trial Judge has committed certain factual errors and has wrongly read the evidence as if PW 120 had opined that the said entries were made by Accused 1 Sukha. That is probably on account of similarity of names; he seems to have substituted Sukha for Sukhi. We have, however, corrected this error while appreciating the prosecution evidence. But it must be remembered that because Sukhi had fled from the country he could not be produced for identification by the hotel staff. No one has, therefore, identified him as Rakesh Sharma or Ravinder Sharma. The question of identity, therefore, rests solely on the evidence of the handwriting expert PW 120.

14. Then we come to the evidence of PW 20 B.D. Sanghvi and PW 22 G.H. Bhagchandani who figured in the transaction concerning the letting out of the G-21, Salunke Vihar flat at Pune, to one Ravinder Sharma. According to the prosecution this Ravinder Sharma had met PW 20 and it was PW 22 who had shown the flat to him. Both these witnesses had, therefore, an occasion to see Ravinder Sharma from close quarters. It was in their presence that the said Ravinder Sharma had signed the agreement to lease on January 27, 1986. PW 104 V.R. Hallur, the power-of-attorney of Major Madan and PW 105 R.J. Kulkarni who had contacted PW 20 were also concerned with the said deal. The evidence of PW 65 D.B. Bhagve reveals that one Ravinder Sharma had purchased a bank draft of Rs 15,000 from the Bank of Baroda, Pune, on January 25, 1986 in the name of Neelam Madan. The lease documents are at Exs. 598 and 599. From the evidence of the aforestated witnesses it is established that a person who gave his name as Ravinder Sharma had contacted them for hiring the flat and the deal when finalised, payments were made and documents executed between January 24 and 27, 1986 at Pune. The question is who was this Ravinder Sharma? Once again there is no direct evidence regarding his identity but the prosecution places reliance on the opinion evidence of the handwriting expert PW 120 who has deposed that all these documents are in the handwriting of the absconding accused Sukhi.

15. From the above evidence what the prosecution can at best be said to have established is that the person who signed the register of Dreamland Hotel as Rakesh Sharma and the register of Gulmohar Hotel

81

as Ravinder Sharma and the person who signed the lease documents pertaining to G-21, Salunke Vihar flat as Ravinder Sharma was one and the same person because according to the evidence of PW 120 the handwritings tally but the identity of that person has got to be established by comparing the said handwriting with the undisputed handwriting of the suspect. The prosecution seeks to attribute the authorship of the aforesaid documents to the absconding accused Sukhi but since the specimen or admitted handwriting of Sukhi could not be secured, as he had fled from this country to U.S.A. even before the conspiracy came to light, the mere opinion evidence of PW 120, even if accepted at its face value, is not sufficient to establish the identity of the author of those documents. We will have to see if this missing link is supplied by other evidence on record. We may also hasten to add that at this stage we are not examining what value can he attached to the evidence of PW 120. The find of the original bill of Hotel Gulmohar, Ex. 92-A, from the G-21, Salunke Vihar flat after the arrest of Accused 1 and 2 does not improve the matter for that by itself cannot prove that the absconding accused Sukhi was the author of the documents relied on. None of these witnesses, not even PW 62 Kantilal Shah, has identified him even from his photograph. So also the fact that the said person, whoever he was, had given a false and bogus Bombay address of 307, Om Apartments, Borivali or that the handwriting of some person who had stayed in yet another assumed name in different hotels of Pune, Ahmedabad and Bhavnagar is of no help to establish the identity. Even though the entries Exs. 416 and 417 have been relied upon the two telephone operators of Dreamland Hotel were not examined. That being so the prosecution evidence falls far short for establishing its case that all these entries were made by the absconding accused Sukhi.

16. Then we come to the evidence in regard to the activities at the Antop Hill flat, Bombay, belonging to PW 49 Sadanand Gangnaik. According to him he had let the flat to Makhni Bai but since she has not been examined the further link is not established. As pointed out earlier, according to the prosecution, that flat too was hired by the absconding accused Sukhi sometime in October-November 1985 and the same was raided on May 3, 1986. Evidence was tendered by the prosecution with the avowed purpose of showing that a group of terrorists were in occupation of the said flat and when the same was raided certain incriminating evidence was found and attached therefrom. One such important piece is stated to be a novel in English entitled 'Tripple' on the cover page whereof someone had scribbled in pencil the number of General Vaidya's car DIB-1437. On the basis of the documents referred to in the preceding paragraph, the handwriting expert PW 120 says that the scribe

82

of this number is the very person who happens to be the author of the aforesaid documents. But this piece of evidence suffers from the very same handicap from which the other evidence suffers in regard to the identity of the author of this document also. Besides, PW 48 H.S. Bhullar has contradicted himself on the authorship of the writing on the cover page of the novel 'Tripple'. In his examination-in-chief he said it was in the handwriting of Sukha but on this point he was cross-examined by the prosecution to extract a statement that it was written by Sukhi. The idea was to establish contact between Sukhi and Sukha so that the former can be connected with the crime with the aid of Section 120-B, IPC. From the fact that clothes of different sizes were recovered from the said flat it was argued that several persons were in occupation of the flat. The find of three live and one empty cartridges was a circumstance projected by counsel to support his say that the flat was used for illegal purposes.

17. From the above facts it is not possible to infer that Sukhi and Sukha were in occupation of the flat. This gap is sought to be filled through PW 48 H.S. Bhullar who claims to be a friend of the inmates of the flat. This witness deposes to have taken three prostitutes to the flat to satisfy the sexual urges of Sukhi, Sukha and another who were living therein. Now this witness is said to have identified Sukha in court. Ex. 318 dated December 8, 1988 is an application given by Accused 5 Jinda alleging that when he and Sukha were being taken to court they were shown to the prosecution witnesses. Before we examine this allegation it is necessary to bear in mind that PW 48 was apprehended by the police on May 10, 1986 and was booked as a co-accused but was later released and used as a witness. Great care must be exercised before acting on such a belated identification in court by a witness who cannot be said to be an independent and unbiased person. Corroboration is sought to be provided through the maid servant PW 49 Lalita who was working in the flat. She too had identified the accused in court only. She was candid enough to accept the fact that the accused Sukha and Jinda were shown to her and PW 48 when they were being taken to court. This admission nullifies the identification of the two accused by these two witnesses in court. No weight can be attached to such identification more so when no satisfactory explanation is forthcoming for the investigation officer's failure to hold a test identification parade. So also PW 50 Hira Sinha, one of the prostitutes, also identified him in court but she too was not called to any test identification parade to identify the inmates of the flat. She too admits that Sukha was shown to her when he was in the lock-up. The other prostitute Jaya who is said to have had sex with Sukha was not called to the witness-stand though she attended court. When PW 50 could not identify the person with whom she had sex what reliance

83

can be placed on her identification of Sukha in court after a lapse of almost two years? Besides, it is an admitted fact that there was considerable change in the appearance of the accused, earlier they were clean shaven and later they were attired like Sikhs making identification all the more difficult. No neighbour, not even the laundryman, was examined to establish their identity. In this state of the evidence if the learned trial Judge was reluctant to act on such weak evidence, no exception can be taken in regard to his approach.

18. Reliance has been placed on the evidence of PW 46 Jagdish Bhave, a policeman, who deposes that he had gone to the flat at 10.00 a.m. to make inquiries, was pulled in and locked up in the lavatory on May 3, 1986. He identifies Accused 1 Sukha as the person who had pointed a foreign make revolver at his neck. He also claims to have identified him at the test identification parade as well as in court. In regard to the identification at the test identification parade, there is some discrepancy as he seems to have initially identified a wrong person. He had also seen him in the lock-up before the identification parade. Lastly, he claims he had managed to secure help by breaking the glass panes of the rear ventilator of the lavatory. Now PW 49 Lalita deposes that she was in the flat till 11.00 a.m. If this witness was locked up and he had raised an alarm, PW 49 Lalita would certainly have learnt about the same but she is totally silent about the same. If the glass panes were broken a note thereof would have been taken in the panchnama. At least PW 158 PSI George would have spoken about the same. Besides the story given by PW 46 cannot be said to be a natural and credible one. The prosecution tried to contend that PW 49 Lalita being an illiterate woman was making a mistake on the time factor. We have no reason to so believe. Even if there is any doubt the benefit thereof would go to the defence. PW 155 M.V. Mulley who arranged the test identification parade for PW 46 supports him. But the prosecution does not explain why Inspector Ratan Singh and Sub-Inspector Govind Singh and the laundry man were not examined. Sub-Inspector Govind Singh would have explained why he could not identify Accused 1 at the test identification parade if he had been called to the witness-stand. To us it seems PW 46 was put up to supply the lacuna regarding the involvement and identification of Accused 1 in particular. The learned trial Judge was right in pointing out that several independent witnesses had not been examined and the prosecution staked its claim on an artificial and unnatural story found unacceptable put forth in the testimony of PW 49 Lalita. Even the identification of Accused 1 Sukha by PW 46 Jagdish does not carry conviction and is of no avail to the prosecution.

84

19. From the flat during the raid three live and one empty cartridges were found. One live cartridge was of .32" bore while the other two live cartridges were of .38" bore. The empty cartridge was of .38" bore. These were forwarded along with the revolver which was found from Accused 2 on September 7, 1986 at Pune, to PW 125 M.D. Asgekar, the ballistic expert. This witness has deposed that the empty cartridge was fired from the revolver found from Accused 2, which weapon, it was said, was used in the Union Bank robbery. It is further his say that the live pistol cartridge .32" bore was similar to the one used in General Vaidya's assassination. True it is, the learned trial Judge has overlooked this evidence. We will consider the impact of this evidence at a later stage.

20. A Brylcreem bottle, article 83, was found in the flat. PW 150 Vijay Tote lifted the fingerprint on that bottle which was later compared by PW 122 A.R. Angre, fingerprint-expert, with the fingerprint of Accused 1 Ex. 607 and was found to tally. PW 107 S.V. Shevde, Director of Fingerprint Bureau proves this fact.

21. The next circumstance relied upon concerns the purchase of a red Ind-Suzuki motor cycle MFK 7548 on May 8, 1986 through PW 18 Anantpurkar from PW 23 Suresh Shah, the allottee. This motor cycle was later serviced on July 1, 1986 by PW 39 Pimpalnekar. The motor cycle was purchased in the name of Sanjeev Gupta, a name allegedly assumed by absconding accused Daljit Singh alias Bittu. The evidence of PW 12 Trimbak Yeravedkar shows that it was registered in the R.T.O. in the name of S.B. Shah and was then transferred in the name of Sanjeev Gupta. PW 76, a CBI officer had attached the free service coupon Ex. 187 and the requisition slip Ex. 259. Neither bears any signature of the police officer or panch witness in token of being attached. The papers concerning a motor cycle bearing the name of Sanjeev Gupta are stated to have been recovered on September 7, 1986 from Sukha and Nimma after their arrest following an accident. Since, according to the prosecution, the said motor cycle was used for murdering General Vaidya and was later recovered from the accident site on September 7, 1986, it was argued that there was a conspiracy preceding the said murder. The owner's manual, article 10, was found from G-21, Salunke Vihar, Pune, but that does not bear any name or even the registration number of the vehicle. The find of such a document, assuming it was really there and was not planted as submitted by the defence counsel, cannot advance the prosecution case. Another link which the prosecution tried to establish was that this motor cycle was seen parked in the garage allotted to the occupant of G-21, Salunke Vihar flat. This fact is proved through PW 24 Vidyadhar Sabnis. PW 25 Lt. Col. Basanti Lal, occupant of G-23 flat, however, states that since the garage allotted to him was being used for

85

preparing his furniture in the month of May 1986, he was using the garage allotted to G-19 or G-21 flat holders for parking his car. All that his evidence shows that in the month of May 1986 one person had come inquiring about the occupants of G-21 flat and as the flat was locked he had left a message which this witness says he had slipped through the gap in the door of that flat. This is neither here nor there. Then he states that he had seen a red Ind-Suzuki motor cycle parked near the garage of G-21 flat on August 9 or 10, 1986. PW 26 Prakash Sabale, a neighbour residing in Anand Apartments, was called to depose that sometime in June 1986 he had seen a red Ind-Suzuki parked in the garage of G-21 flat. The evidence of this witness conflicts with that of PW 25 who has stated in no uncertain terms that he was parking his car in the said garage. Was there any particular reason for these witnesses to take note of the red coloured Ind-Suzuki motor cycle? No reason has been assigned by the witnesses or the investigating officer. Such red Ind-Suzuki motor cycles were not an uncommon sight in the city of Pune, at least none says so. The evidence tendered by the prosecution in this behalf betrays a laboured attempt to connect the inmates of G-21 flat with the purchase of a red Ind-Suzuki motor cycle since it was subsequently involved in an accident on September 7, 1986 and accused Sukha and Nimma were found using the same. No attempt was made to establish the identity of Sanjeev Gupta even through photographs.

22. PW 27 Hanuman Kunjir, a newspaper vendor, was examined to prove that he supplied the Indian Express newspaper to the occupants of G-21 flat. He discontinued supplying the newspaper when he found that the earlier issues which he had left in the door-gap had not been collected by anyone and there was no gap through which he could push in the newspaper. Once he had found the door open and recovered his dues under receipt Ex. 218. No attempt has been made to establish the identity of the person who asked him to supply the newspaper or the person who paid the amount of Rs 40 for which he gave the receipt Ex. 218. Hence his evidence is of no use to the prosecution.

23. The prosecution alleges that Sukhi left India on July 14, 1986. The absconding accused Bittu and Accused 1 Sukha had also secured false passports in fake names. Sukha is said to have taken out a passport in the name of Charan Singh. No expert opinion was tendered though the handwriting expert was examined to show that the application for passport was tendered by Sukha in the assumed name of Charan Singh. The learned trial Judge also points out that the photograph seems to have been tampered with and ex facie raises a grave suspicion regarding the circumstances in which and the point of time when it came to be affixed. PW 55 S.S. Kehlon has signed the index card of Charan Singh's

86

application. PW 54 Raj Rani Malhotra deposes that nothing adverse was reported by the CID officers in respect of Charan Singh. The passport was, therefore, issued to Charan Singh. From the above evidence it is difficult to ascertain who tampered with the photograph. Even PW 70 Rajkumar Mittal who dealt with the index card did not find anything suspicious at that time. PW 77 Kulbhusan Sikka had delivered the passport to Shashi Bhushan who was authorised by Charan Singh to receive the same. From the above evidence and particularly lack of expert evidence it is difficult to conclude that Accused 1 Sukha had committed forgery to secure a passport to leave India. The prosecution has tried to show that Sukhi obtained a passport in the name of Sunil Kumar, Bittu obtained a passport in the name of Harjit Sidhu and Sukha tried to obtain a passport in the name of Charan Singh. It is true that Sukhi left India on July 14, 1986, maybe on a forged passport. So also we may assume that Bittu obtained a false passport and so did Sukha. This by itself will not establish a firm link between the three as co-conspirators. As stated earlier none in the passport office suspected anything shady in regard to Charan Singh's application for grant of passport. It seems that only after the passport was issued some tampering was attempted. The manner in which the photograph is pinned raises suspicion. Who did it is the question? There is no evidence in this behalf. There is nothing on record, except suspicion, that Accused 1 was privy to it. In the absence of reliable evidence it is unwise to act on mere suspicion. We, therefore, cannot find fault with the approach of the learned trial Judge so far as this part of the prosecution case is concerned.

24. One further fact on which the prosecution places reliance in support of its case of criminal conspiracy is that Accused 1, 2 and 5 travelled by Chhatisgarh Express from Ambala to Doorg between August 3, 1986 and August 5, 1986 and from Doorg to Bombay by Gitanjali Express in assumed names. Apart from the oral evidence of PWs 126 to 135 and 151, the prosecution has placed strong reliance on the reservation forms Exs. 700 and 701 purporting to be in the handwriting of Accused 1 Sukha. There is no direct evidence as admittedly they had travelled in assumed names and none has identified them. Thus the only evidence is the opinion evidence of the handwriting expert PW 120 to the effect that the reservation forms are in the handwriting of Accused 1 Sukha. While in Bombay, the Accused 1 is stated to have given his clothes to Lily White Dry-cleaners on August 7, 1986 and received them from PW 89 Deepak Nanawani on the next day. PW 30 Arjun Punjabi has proved the two tags of the said laundry found from G-21, Salunke Vihar flat when the same was searched. But the said evidence cannot be of much use unless the identity of the person who delivered and received back the

87

clothes is established. Here also the prosecution relies on the evidence of the handwriting expert to show that Accused 1 had written his name (assumed name) on the bill prepared at the time the clothes were delivered for dry-cleaning.

25. From the facts discussed above it becomes clear that the direct evidence, if at all, regarding the identity of the persons who moved about in different assumed names is either wholly wanting or is of such a weak nature that it would be hazardous to place reliance thereon without proper corroboration. As pointed out earlier the direct evidence regarding identity of the culprits comprises (*i*) identification for the first time after a lapse of considerable time in court or (*ii*) identification at a test identification parade. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. In the present case it was all the more difficult as indisputably the accused persons had since changed their appearance. Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in Court after a long lapse of time and that too of persons who had changed their appearance. We, therefore, think that the learned trial Judge was perfectly justified in looking for corroboration. In *Kanan* v. *State of Kerala*[1] this Court speaking through Murtaza Fazal Ali, J. observed: (SCC p. 320 para 1)

> "It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation. The idea of holding T.I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court."

We are in respectful agreement with the afore-quoted observations.

26. The prosecution also led evidence to show that the accused persons were put up for test identification by the witnesses who claim to have seen them at different places before the actual incident of murder took place. We have adverted to the prosecution evidence in this behalf

1 (1979) 3 SCC 319 : 1979 SCC (Cri) 621

88

earlier and have pointed out how weak and thoroughly unreliable the said evidence is. It has been shown that some of the witnesses who claim to have identified the accused, one or more, have conceded that they had an occasion to see the accused in the Borivali lock-up earlier in point of time. This admission on the part of the witnesses has rendered the evidence in this behalf of little or no value and such evidence was rightly brushed aside by the trial court. We too, having critically examined the evidence in this behalf, find it difficult to accept the same. Therefore, the direct evidence regarding the identity of the accused is of no help to the prosecution.

27. The prosecution has then relied on the evidence of the handwriting expert PW 120 to establish the involvement of the accused, including the absconding accused, in the commission of the crime in question. In the case of the absconding accused Sukhi, PW 120 examined a host of documents marked Q.1 to Q.34, Q.55 and Q.62 to Q.91 and compared them with the two documents A-53 and A-54 marked as admitted writings of Sukhi. The expert opined that Q.1 to Q.12, Q.14 to Q.23, Q.55, Q.62 to Q.66, Q.68 to Q.70, Q.72 to Q.77, Q.79 to Q.85, Q.87 and Q.89 were in the handwriting of the author of the documents marked A-53 and A-54. In the case of Accused 1 Sukha, PW 120 examined the questioned documents marked Q.40, to Q.54, Q.60, Q.61, Q.94 and Q.95 and compared them with his specimen writings marked S-1 to S-49, S-52 to S-59, S-62 to S-64 and the admitted writings A-1 to A-53 and A-62 to A-73 and came to the conclusion that the writings Q.40, Q.54, Q.60, Q.61, Q.94 and Q.95 tallied with the specimen and admitted writings of Accused 1. So far as Q.55 is concerned an express negative opinion was obtained that it was not in the hand of Accused 1. Similarly in regard to the accused Daljit Singh @ Bittu, questioned documents marked Q.35 to Q.39 were compared with the admitted writings marked A-55 to A-59 and the expert opined that Q.35 to Q.39 showed similarities with A-55 to A-59. The handwriting of Accused 5 Jinda could not be obtained and, therefore, the question of comparing his specimen writings with the questioned writings did not arise.

28. Before a court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (*i*) the genuineness of the specimen/admitted handwriting of the concerned accused and (*ii*) the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence. In the present case since the absconding accused are not before us we are mainly concerned with the expert's opinion implicating Accused 1 Sukha. The specimen writings of this accused have been proved through the evidence of PW 5 Shaikh Zahir and PW 68 Anand Pawar. The evidence

89

shows that PW 168 S. Prasad, a police officer, had called the witness to a room where Accused 2 Nirmal Singh was present and he was required to write down what the said police officer dictated to him. The specimen writings of Nirmal Singh have been proved through the evidence of the said PW 5 and PW 41 Ramkripal Trivedi. Thereafter they went to another room where Accused 1 was present. At the instance of PW 160 M.P. Singh he was asked to sign as many as fifteen papers. The learned trial Judge has not doubted this part of the prosecution case and we may proceed on that basis. To prove the natural handwriting of Accused 1, the prosecution examined PW 84 S.K. Prachendia, a lecturer of Gyan Jyoti P.G. College. This witness claims that Accused 1 was his student and he had submitted an application in the prescribed form for admission to the P.G. Course as a private candidate. In support, reliance is placed on the photograph article 31 showing the witness in company of Accused 1. Two other registers (articles 39 & 40) have been relied upon to prove that certain replies are in the hand of Accused 1. But unfortunately for the prosecution the witness could not even identify Accused 1 in the dock nor did he state that the form and the entries in the registers were made by Accused 1 in his presence. In his cross-examination the witness admitted that he would not be able to identify the handwriting of other students who studied under him. More so in the case of Accused 1 who was only a private student. In the circumstances we agree with the learned trial Judge that the evidence on record in regard to the natural handwriting of Accused 1 is not satisfactory and does not inspire confidence. If we rule out this part of the material used by the handwriting expert for comparison we are merely left with the specimen writings/signatures of Accused 1 taken while in custody. Here also the evidence of PW 120 itself shows that the handwriting of the railway reservation form Ex. 700 does not tally with the specimen writings/signatures of Accused 1. It only highlights the fact that it would be dangerous to identify the person who travelled on the strength of the reservation form Ex. 700 by comparing the writing thereon with the specimen writings of Accused 1. The evidence of PW 30 Arjun Punjabi and PW 89 Deepak Nanwani and the find of laundry tag No. 8833 of Lily White Dry-cleaners from G-21, Salunke Vihar flat on September 7, 1986 was used to establish the fact that Accused 1 was one of the inmates of the said flat and was in Pune a couple of days before the murder of General Vaidya. This connection is sought to be established on the strength of the opinion evidence of PW 120 that the handwriting and signature on the laundry bill Ex. 547 tallied with the specimen writings/signatures of Accused 1. But the laundry tags do not bear the name of the laundry or the year of issue. It was, however, urged that the evidence of PW 89 clearly proved that

90

the number on the tags tallied with the number on the bill and the opinion evidence of PW 120 clearly established the fact that since the writing and signature on the bill tallied with the specimen writing/signature of Accused 1, it was reasonable to infer that Accused 1 resided in the G-21, Salunke Vihar flat. But what is indeed surprising is that PW 89 was neither called to the test identification parade nor asked to identify the person who had delivered the clothes for dry-cleaning from amongst the accused seated in the dock. The question then is whether implicit reliance can be placed on the opinion evidence of the handwriting expert PW 120.

29. It is well settled that evidence regarding the identity of the author of any document can be tendered (*i*) by examining the person who is conversant and familiar with the handwriting of such person or (*ii*) through the testimony of an expert who is qualified and competent to make a comparison of the disputed writing and the admitted writing on a scientific basis and (*iii*) by the court comparing the disputed document with the admitted one. In the present case the prosecution has resorted to the second mode by relying on the opinion evidence of the handwriting expert PW 120. But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the court should also be fully satisfied about the competence and credibility of the handwriting expert. It is indeed true that by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. That is why we come across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. It is, therefore, necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on

such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. There is no absolute rule of law or even of prudence which has ripened into a rule of law that in no case can the court base its findings solely on the opinion of a handwriting expert but the imperfect and frail nature of the science of identification of the author by comparison of his admitted handwriting with the disputed ones has placed a heavy responsibility on the courts to exercise extra care and caution before acting on such opinion. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is for this reason that the courts are wary to act solely on the evidence of a handwriting expert; that, however, does not mean that even if there exist numerous striking peculiarities and mannerisms which stand out to identify the writer, the court will not act on the expert's evidence. In the end it all depends on the character of the evidence of the expert and the facts and circumstances of each case.

30. In *Ram Narain* v. *State of U.P.*[2] this Court was called upon to consider whether a conviction based on uncorroborated testimony of the handwriting expert could be sustained. This Court held: (SCC p. 90 para 6)

> "[I]t is no doubt true that the opinion of handwriting 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."

A similar view was expressed in the case of *Bhagwan Kaur* v. *Maharaj Krishan Sharma*[3] in the following words: (SCC p. 53, para 26)

> "The evidence of a handwriting expert, unlike that of a finger-print expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert."

In *Murari Lal* v. *State of M.P.*[4] this Court was once again called upon to examine whether the opinion evidence of a handwriting expert needs to be substantially corroborated before it can be acted upon to base a conviction. Dealing with this oft-repeated submission this Court pointed out: (SCC pp. 708-09 para 6)

2 (1973) 2 SCC 86 : 1973 SCC (Cri) 752
3 (1973) 4 SCC 46 : 1973 SCC (Cri) 687
4 (1980) 1 SCC 704 : 1980 SCC (Cri) 330

92

"Expert testimony is made relevant by Section 45 of the Evidence Act and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person 'specially skilled' 'in questions as to identity of handwriting' is expressly made a relevant fact. There is nothing in the Evidence Act, as for example like illustration (*b*) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the court in assuming that a handwriting expert's opinion in unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tells us that 'a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we set an artificial standard of proof not warranted by the provisions of the Act. Further, under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts of the particular case. It is also to be noticed that Section 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it."

After examining the case-law this Court proceeded to add: (SCC p. 711, para 11)

"We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallised into a rule of law, that opinion-evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the

93

opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight."

What emerges from the case-law referred to above is that a handwriting expert is a competent witness whose opinion evidence is recognised as relevant under the provisions of the Evidence Act and has not been equated to the class of evidence of an accomplice. It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded. But the court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one as compared to the science of identification of fingerprints; courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the court has to decide in each case on its own merits what weight it should attach to the opinion of the expert.

31. The trial court examined the evidence of the handwriting expert PW 120 in great detail and came to the conclusion that it was hazardous to rely on his evidence as he had betrayed bias against the accused and in favour of the prosecution as "he also belongs to the Police Department". (*see* paragraph 159 of the judgment). As regards the specimen writings/signatures of Accused 1 the trial court observes in paragraph 157 as under:

> "These answers in cross-examination of this witness do show that the specimen writings of Sukhdev Singh alias Sukha (Accused 1) and the questioned writings are not written by Sukhdev Singh (Accused 1) at all."

As regards Accused 2 Nimma, the learned trial Judge points out that the specimen signature 'N. Singh' does not correspond with the questioned documents. The learned trial Judge, therefore, did not consider it wise to place reliance on the opinion of PW 120 particularly because he did not consider his opinion to be independent but found that he had betrayed a tilt in favour of the investigating machinery. Since the trial court did not consider the opinion of PW 120 to be dependable he did not deem it necessary to look for corroboration. For the same reason he did not consider it necessary to scrutinise the evidence of the expert in regard to the two absconding accused Sukhi and Bittu. No such opinion evidence is

94

relied upon in respect of the other accused. We may at once state that the quality of evidence in regard to proof of identity of Sukhi and Bittu through their so-called handwriting is weaker than that of Accused 1. We have carefully examined the opinion evidence of PW 120 and we agree with the learned trial Judge that the quality of his evidence is not so high as to commend acceptance without corroboration. Having given our anxious consideration to the expert's evidence, through which we were taken by the learned counsel for the prosecution, we do not think that the view taken by the learned trial Judge is legally unsustainable or perverse. Even otherwise having regard to the facts and circumstances of the case and the nature of evidence tendered and the quality of evidence of PW 120 the prosecution has not succeeded in establishing beyond reasonable doubt the so-called conspiracy.

32. It was then submitted, relying on Section 73 of the Evidence Act, that we should compare the disputed material with the specimen/admitted material on record and reach our own conclusion. There is no doubt that the said provision empowers the court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance of the expert opinion that the disputed writings are in the handwriting of the accused as alleged. For this purpose we were shown the enlarged copies of the two sets of writings but we are afraid we did not consider it advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the Accused 1 and 2. Although the section specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. We have already pointed out the state of evidence as regards the specimen/admitted writings earlier and we think it would be dangerous to stake any opinion on the basis of mere comparison. We have, therefore, refrained from basing our conclusion by comparing the disputed writings with the specimen/admitted writings.

33. From the above discussion of the evidence it is clear that the prosecution's effort to provide the missing links in the chain by seeking to establish the identity of the participants in the alleged conspiracy through the handwriting expert PW 120 has miserably failed. We, therefore, agree with the conclusion of the learned trial Judge in this behalf.

34. That brings us to the incident of murder of General Vaidya on the morning of August 10, 1986 at about 11:30 a.m. We have set out the

95

facts in regard to the said incident in some detail in the earlier part of this judgment and will recapitulate only those facts which are necessary to be noticed for the purpose of appreciating the evidence leading to the murder. The fact that General Vaidya died a homicidal death is established beyond any manner of doubt by the evidence of PW 157 Dr L.K. Bade who had undertaken the post-mortem examination and had opined that death was due to shock suffered following gunshot injuries. Counsel for the defence had also admitted this fact as is evidenced by Ex. 155. As this fact was not challenged before the trial court, as indeed it could not be, nor was it contested before us, we need not detain ourselves on the same and would proceed to examine the evidence with a view to fixing the responsibility for the said crime.

35. On the morning of the day of the incident General Vaidya and his wife PW 106 Bhanumati had gone out for shopping in the Maruti car DIB 1437 at about 10.00 a.m. with their securityman PW 16 Ramchandra Kshirsagar in the rear seat. When they were returning at about 11.30 a.m. with General Vaidya in the driver's seat, his wife by his side in the front and the securityman behind her, the incident in question occurred. The car had slowed down at the intersection of Rajendrasinghji and Abhimanyu roads since it had to negotiate a sharp right turn to go to the residence of General Vaidya. Taking advantage of this fact an Ind-Suzuki motor cycle came parallel to the car on the side of the driver i.e. General Vaidya and the pillion rider took out a pistol or gun and fired three shots in quick succession at the deceased. Immediately thereafter the motor cyclists sped away and the victim slumped on the shoulder of his wife who too was injured. Unfortunately the reflexes of the securityman were not fast enough and hence the culprits could make good their escape without a shot having been fired at them by the securityman. The car drifted towards the cyclist PW 14 Digambar Gaikwad who, sensing trouble, jumped off leaving the cycle which came under the front wheel of the car. Therefore, we have the testimony of three persons who can be described as witnesses to the main incident, namely, PW 16, the securityman, PW 106, the wife of the deceased and PW 14, the cyclist. In addition to the evidence of the aforesaid three witnesses, the prosecution has also placed reliance on the evidence of PW 111 G.B. Naik, PW 114 Vijay Anant Kulkarni and PW 115 B.V. Deokar, on the plea that these witnesses had also seen the incident and the culprits from the rickshaw in which they were passing at that time of the incident. The trial court has placed reliance on the first set of witnesses and has rejected the evidence tendered through the second set of witnesses as it did not accept the fact that the autorickshaw in question had actually passed by. We will discuss

96

the prosecution evidence regarding the commission of the crime in two parts.

36. The evidence of the securityman PW 16 Ramchandra Kshirsagar is that when the car was proceeding towards the intersection from where it had to turn right to go to the bungalow of General Vaidya, he saw an autorickshaw coming from the opposite side and signalled it by stretching out his hand to keep to the extreme left. Then he saw a cyclist also coming from the opposite side and signalled him also. Just then the car which had slowed down considerably began to negotiate a turn when a red Ind-Suzuki motor cycle drove along the car on the side of General Vaidya who was at the steering wheel. The pillion rider fired three shots from his weapon at the head of General Vaidya and then sped away. This witness wants us to believe that as he was busy signalling the rickshaw driver he had not seen the motor cycle approaching the car before the first shot was fired. As soon as the car came to a halt, he jumped out of the car with his service revolver but as PW 106 Bhanumati Vaidya was shouting for a conveyance he went about searching for one and found a matador van in which the injured General Vaidya was rushed to the hospital. It was after reaching the hospital that he contacted the L.I.B. Inspector Garad to whom he narrated the incident and reiterated the same to the Commissioner of Police. His detailed complaint Ex. 179 was then recorded by PW 119 Inspector Mohite in which he described the colour of the motor cycle as black and not red. Since he was sitting behind PW 106 Bhanumati, he could have seen the assailant when his attention was drawn in that direction on hearing the first shot fired from close range. It is difficult to believe that he had no opportunity to see the motor cyclists. It must be remembered that four shots were fired, albeit in quick succession, but there was a slight pause after the first shot. It is difficult to agree with the suggestion that he had no opportunity to see the assailant and his companion. In fact he states that he saw them from a distance of three or four feet only. As pointed out earlier Accused 1 and 2 were arrested on September 7, 1986 when they met with an accident. Thereafter on September 22, 1986 this witness was called at about 12 noon to the Yervada Jail. Soon thereafter a person who identified himself as a Magistrate came and gave them certain instructions regarding the identification parade about to be held. He was then called to a room in which 10 to 12 persons had lined up and he was asked if the person who had fired at General Vaidya was amongst them. He identified one person from the queue as the assailant. He identified Accused 1 as that person in Court also. The panchnama drawn up in regard to the test identification parade is at Ex. 349 duly proved by PW 51 B.S. Karkande, Special Judicial Magistrate. Except for a couple of minor contradictions there is

97

nothing brought out in his cross-examination to doubt his testimony regarding identification of Accused 1 as the person who fired the shots at General Vaidya. The presence of this witness at the time of occurrence cannot and indeed was not doubted. So also it cannot be denied that he had an opportunity to identify the assailant. We, therefore, do not see any serious infirmity in his evidence which would cast a doubt as regards his identification of Accused 1.

37. The next important witness is PW 106 Bhanumati Vaidya. She had accompanied her husband and was sitting next to him in the front seat of the car when the incident took place. She states that when the car took a turn at the intersection she heard three sounds like the misfire of a motor cycle but soon thereafter her husband's left hand slipped from the steering and his neck slumped on her shoulder. She states that the car drifted towards a cyclist who jumped off leaving the cycle which was run over by the front wheels of the motor car. She saw the motor cycle with two riders speed away and could only see the back of the pillion rider. She too had received bullet injuries on her right shoulder and was admitted in the intensive care unit of the hospital. She was operated upon for removal of the bullets from her body. Next day a Magistrate had visited the hospital and had recorded her statement. She has deposed that the pillion rider whom she had seen from behind had been noticed by her two days earlier on August 8, 1986 at about 9.00 or 9.30 a.m. with a red motor cycle opposite Gadge Maharaj School at the corner of bungalow No. 45. Two persons were standing there one of whom was the pillion rider whom she saw from behind after the shoot out. She, however, expressed her inability to identify him from amongst the accused persons in Court. Under cross-examination she stated that she could not say if it was a motor cycle or a moped. Thus her evidence proves the incident beyond any manner of doubt but her evidence is of little use on the question of identity of the assailant and his companion.

38. PW 14 Digambar Shridhar Gaikwad, the cyclist, deposes that at the time of the incident he was proceeding on his cycle towards the railway station when he heard three sounds and looked towards the Maruti car. He saw a red motor cycle by the side of the driver of the car. It sped away with two persons riding it. The pillion rider who had a bag was seen putting something therein. Since the driver of the car was wounded on his head, he lost control of the vehicle and the same came towards him whereupon he jumped off and the cycle was under the wheels of the car. In cross-examination he stated that he had not seen any other vehicle on the road, thereby ruling out the presence of any autorickshaw in regard to which PW 16 has spoken. His evidence is also not useful from the point of identity of the assailant.

98

39. The evidence of three more witnesses PW 60 Jaysing Mahadeo Hole, PW 61 Nazir Husain Ansari and PW 103 Ashok Jadhav may be noticed at this stage. PW 61 and PW 103 have deposed that on the day previous to the incident two persons had approached them and had inquired about the residence of a recently retired army General. These two persons identified Accused 1 as the person who had approached them with his companion waiting near the motor cycle. PW 60 is the chowkidar who had seen two persons sitting on their red motor cycle in the compound of Gadge Maharaj School and had driven them out. He also identified Accused 1 along with PWs 16, 61 and 103 at the test identification parade held on September 22, 1986. It is pertinent to note that PWs 61 and 103 had identified Accused 5 through his photographs articles 23 and 75. They identified him in court but Accused 5 stated in answer to question No. 135 that they did so at the behest of the police.

40. We now come to the next group of witnesses, the driver and the two passengers of the autorickshaw which the securityman PW 16 claims was seen coming from the opposite direction. PW 16 says that just as the car was turning towards the right, he saw an autorickshaw coming from the opposite direction and signalled it to move to the extreme left. True it is that PW 14, the cyclist, did not notice it but in our view that cannot cast any doubt on the credibility of PW 16. There was no need for the cyclist to take note of the autorickshaw. His attention was riveted at the car and the motor cycle after he heard the shots and there was no need for him to notice the autorickshaw. Counsel for the accused submitted that the story regarding the presence of an autorickshaw was invented by the securityman PW 16 to save his skin as he had been guilty of a serious lapse in having failed to save General Vaidya and apprehend his assailants. We may examine the evidence of the rickshaw driver PW 115 Baban Vithobha Deokar and the two passengers PW 111 G.B. Naik and PW 114 Vijay Anant Kulkarni. PW 111 had two daughters Anuradha and Anupama. Anuradha is the wife of PW 114 whereas Anupama was wedded to Arunkumar Tomar. Anupama had come to her father's house from Secunderabad on August 4, 1986 as her relations with her husband were strained. On the next day her husband who was an Education Instructor in the military had also come to Pune. While at the house of PW 111 there was a quarrel between the couple; hot words were followed by physical assault. In the course of this quarrel she was kicked in the abdomen and being pregnant complications developed within a couple of days necessitating her removal to the clinic of PW 1 Dr Sudhir Kumar on August 7, 1986. Her husband had left earlier but PW 114 who had come to Pune had assisted his father-in-law in the treatment of Anupama who was operated upon on the morning of August 10, 1986,

99

vide Ex. 82. The son of PW 111 was also a doctor in military service and in consultation with him and PW 114, PW 111 had decided to lodge a complaint against Arunkumar Tomar with the higher military authorities. After the complaint was drafted it was decided to have it typed on a stamp-paper so that sufficient copies could be taken out for being despatched to various authorities. The stamp-paper was purchased from PW 36 Mrs Gokhle. The draft was got typed at N.B. Xerox Company situate at Camp, Pune, as is evident from PW 37 Hidayat Ali. This part of the prosecution case is supported by Ex. 249, an entry from the stamp-vendor's register, evidencing the purchase of the stamp-paper Ex. 249-A proved through the stamp-vendor PW 36. The original complaint Ex. 249-A typed on the stamp-paper was forwarded to the General Officer Commanding whereas ten copies thereof taken out on an electronic typewriter were sent to different authorities under the signature of Anupama. This is also proved through the deposition of PW 37 Hidayat Ali.

41. On August 10, 1986, PW 111 and PW 114 picked up an autorickshaw outside Agakhan Palace at about 11.00 a.m. to go to Stree Clinic of Dr Sudhir Kumar. He was instructed to drive through Camp area. They passed through Bund Gardens, took the overbridge and passed via the Circuit House to Abhimanyu Road. PW 111 was sitting on the right side and his son-in-law PW 114 was to his left. A white Maruti car was noticed and then he saw a red coloured Ind-Suzuki motor cycle being driven parallel to the car on the driver's seat side. They then saw the pillion rider pump in three bullets in the head of the driver of the car. This witness deposes that the assailants were 20 or 25 years of age. When the motor cycle passed by the rickshaw, the witness had an opportunity to identify the motor cyclists. They were clean shaven then but were in turban and beard in court. Then these two witnesses got down from the rickshaw and helped others lift the body of General Vaidya to the matador van which carried him and his wife to the hospital. They then went to PW 37 Hidayat Ali, picked up the typed material and went to Stree Clinic where they discharged the rickshaw. They had narrated the incident to PW 37. PW 111 also claims to have made a note about the incident in his diary Ex. 622. It is true that the statements of these two witnesses were recorded late i.e. on October 24, 1986 presumably because their names had not surfaced earlier. The witness was shown several photographs and he could recognise one of them as the driver of the motor cycle. This photograph is marked article 148. Later both PW 111 and PW 114 had identified Accused 1 at the test identification parade held on October 29, 1986. Both the witnesses also identified Accused 1 and 5 in court. Albeit PW 111 took some time to identify

100

Accused 1 in court but that may be on account of the change in his appearance. It is said that the evidence of PW 111 and PW 114 stands corroborated by the evidence of PW 36 and PW 37 and the documentary evidence Exs. 249, 249-A and Ex. 82.

42. The rickshaw driver PW 115 has deposed that on August 10, 1986 at about 11.00 a.m. while he was waiting in front of Agakhan Palace he was engaged by PW 111 and PW 114 who instructed him that they desired to go to the Camp area and from there to the Deccan area. When his vehicle approached the Circuit House intersection and emerged on the Abhimanyu road he saw a white Maruti car and one Ind-Suzuki motor cycle taking a turn to the right of the intersection. The motor cyclists drove on the side of the driver's seat and the pillion rider fired three shots at the driver of the car. Immediately thereafter the motor cyclists sped away. He then speaks about the manner in which the cyclist jumped off and the car came to a halt after running over the cycle. He also states that thereafter the two passengers got down from his rickshaw and went near the car. He also parked his rickshaw at the corner of the intersection and joined the other two passengers. He found that the car driver was injured on the head and was bleeding profusely. A matador van arrived and the injured was lifted and placed in the van and carried to the hospital. He and the two passengers then returned to the rickshaw and proceeded towards Deccan side and from there to the Stree Clinic. Sometime after the incident i.e. on November 8, 1986, the C.B.I. officers showed him seven or eight photographs and asked him if he could recognise the photographs of the motor cyclists. He recognised the photograph of the driver of the motor cycle but he did not notice any photograph of the pillion rider. The photograph of the driver of the motor cycle is included as article 150 and his signature was obtained on the reverse of it. This photograph is stated to be of Accused 5 whom the witness later identified in court also. No test identification parade could be held as Accused 5 Jinda could not be arrested till August 30, 1987. The evidence of this witness also lends corroboration to the evidence of PWs 111 and 114.

43. There is also the evidence of PW 28 Noor Mohamad, also a rickshaw driver in whose rickshaw PW 111 and PW 114 had gone to the Jan Kalyan Blood Bank to register their name in case blood may be required at the time of Anupama's operation. He has also stated that the two passengers were talking about having witnessed a shoot-out earlier in the day as is ordinarily seen in movies.

44. The learned trial Judge discarded this part of the prosecution case for diverse reasons, some of them being (*i*) the story of the

securityman PW 16 in regard to the location of the autorickshaw is in sharp conflict with his version in the FIR; (*ii*) the presence of PW 111 and PW 114 at the place of the incident is highly doubtful for the reason that there was no cause for them to take the longer route, more particularly when Anupama was admitted to the clinic of PW 1 and was to be operated on that very day; (*iii*) the conduct of both the witnesses in maintaining sphinx-like silence for more than two and a half months when the incident had shaken the nation was highly unnatural, more so because admittedly PW 111 had met Inspector Mohite only a few days after the incident, maybe in some other connection; (*iv*) the entry in the diary of PW 111 regarding this incident was ex facie a laboured attempt made with a view to creating corroborative documentary evidence to support his false version; and (*v*) the identification of the motor cycle driver through a photograph purporting to be of Accused 5 Jinda is also an attempt to connect the said accused with the crime in question. The learned Additional Solicitor-General made a valiant attempt to question the correctness of the grounds on which the learned trial Judge brushed aside this part of the prosecution case. But for the view we are inclined to take we would have given our anxious consideration to the submissions of the learned counsel. The purpose of leading this evidence was essentially to identify the driver of the motor cycle through these witnesses. They did so by picking up one photograph from seven or eight shown to them. Whose photograph is this? Accused 5 disowns it. No test identification parade was held since Accused 5 Jinda was apprehended at Delhi a year or so later on August 30, 1987 and was taken to Pune in January 1988. Although the prosecution did not deem it wise to hold a test identification parade because of the passage of time, the witnesses examined later did not hesitate to point a finger at Accused 5 Jinda during the trial. Therefore, according to the prosecution the photograph was that of Accused 5 Jinda who was very much in court. The learned trial Judge, therefore, had the benefit of comparing the photograph with Accused 5 whose photograph it purported to be. In this connection the learned trial Judge has this to say in paragraph 342 of his judgment:

> "Firstly, in my opinion, this photograph does not appear to be that of Harjinder Singh alias Jinda (Accused 5) at all. ... [H]ow can I hold that this is the photograph of Jinda (Accused 5), when obviously to the naked eyes, it does not look similar to the face of Jinda (Accused 5)."

Proceeding further, in paragraph 343, the learned judge adds:

> "... whereas in the instant case before me, the photograph does not appear to be of Jinda (Accused 5)."

102

It will thus be seen that the learned Judge on a comparison of the photograph with the features of Accused 5 who was very much before him categorically held that the photograph pointed out by the witnesses was not of Accused 5. We cannot ignore the photograph from consideration for non-production of the negative (not traced) because that is merely an additional plank on which the trial court has ruled out this part of the prosecution case. For the above reasons the trial court refused to place reliance on the prosecution's attempt to establish the identity of Accused 5 as the driver of the motor cycle through photographs.

45. But the learned Additional Solicitor-General submitted that it is not possible to believe that the photographs relied on were not the photographs of Accused 5. He submitted that Accused 5 was apprehended in Delhi on August 30, 1987 and as his legs were fractured he was immediately admitted to a hospital and was taken to Pune in January 1988. In the meantime his photographs had appeared in various newspapers, magazines and also on television and, therefore, it is not possible to believe that the investigating officer would be so naive as to show and produce someone else's photographs. He submitted that perhaps because the appearance of Accused 5 had undergone a change in the meantime even the learned Judge had difficulty in identifying him as the person in the photographs. He submitted that this was followed by the witnesses identifying him in court. There is considerable force in this line of reasoning but at the same time we cannot overlook the opinion of the learned Judge who had the opportunity to compare the photographs with the features of Accused 5 who was very much before him. Had the evidence rested there we would have found it difficult to ignore it but we find that Accused 5 has in his statement recorded under Section 313 of the Code admitted the fact that it was he who was driving the motor cycle with Accused 1 on the pillion seat when General Vaidya was shot down. He has also admitted this fact in his written statement Ex. 922 submitted to court through the Jailer and followed it up by admitting the same in answer to question No. 249 of his statement under Section 313 of the Code. He has further stated that Accused 1 and he killed General Vaidya as he had attacked and destroyed the Akal Takht in the Golden Temple at Amritsar. He then adds that the Sikhs are fighting for a separate State of Khalistan and will continue to fight till the goal is achieved. Lastly, he says "we Sikhs are not afraid of death". It was, therefore, submitted by the learned Additional Solicitor-General that this statement is sufficient to prove his involvement in the commission of the crime and in any event it lends corroboration to the prosecution evidence in this behalf. Accused 1 has also made a statement on similar lines admitting his involvement in the crime and the fact that he had fired the fatal shots at

103

General Vaidya from the pillion seat of the motor cycle. So far as Accused 1 is concerned there is evidence tendered by the prosecution of witnesses who identified him at the test identification parade, in court, through photographs and by the eyewitness the securityman PW 16 and his statement lends corroboration thereto. The question then is can a conviction be based on such an admission of guilt made in the written statements followed by the oral statement under Section 313 of the Code?

46. The charge was framed on September 2, 1988. Both Accused 1 and 5 along with others pleaded not guilty to the charges levelled against them and claimed to be tried. After recording the plea, the proceedings were adjourned to September 19, 1988 on which date Accused 1 orally informed the learned trial Judge that he had killed General Vaidya and he did not desire to contest the case. The Accused 1 has later explained in his statement under Section 313 of the Code that according to him killing General Vaidya was not a crime and that is why he had not pleaded guilty. Be that as it may, the learned trial Judge gave Accused 1 time up to September 26, 1988 to reflect. On that date Accused 1 presented a written statement Ex. 60-A wherein he admitted to have fired four shots at General Vaidya and killed him. He further stated that he had learnt that he had injured his wife also but that was wholly unintentional. Even later when his statement was recorded under Section 313 of the Code, he owned the statement Ex. 60-A and did not try to wriggle out of it. He departs from the prosecution case, in that, he says he was riding a black (not red) motor cycle and that Accused 5 was not the driver but one Mathura Singh was driving the motor cycle. That betrays an attempt on his part to keep out Accused 5. Even after this statement was filed the learned trial Judge did not convict him straightaway but proceeded to complete the prosecution evidence before recording his statement under Section 313 of the Code. He followed this up by yet another statement Ex. 919 admitting his guilt.

47. Accused 5 Jinda pleaded not guilty to the charge. He did not make any such statement till the conclusion of the evidence when he sent Ex. 922 through jail. However, at the conclusion of the prosecution evidence when Accused 5 was examined under Section 313 of the Code, he admitted that he was the driver of the motor cycle and Accused 1 was his pillion rider. He also admitted that Accused 1 had fired the fatal shots at General Vaidya while sitting on the pillion seat. In answer to the usual last question Accused 5 said that on the date of the incident he was driving a black motor cycle with Accused 1 on the pillion seat and it was the latter who fired at and killed General Vaidya. This being an admission of guilt, the question is whether the court can act upon it. He has supported

104

this by his written statement Ex. 922. It will thus be seen that both the Accused 1 and 5 made written as well as oral admissions regarding their involvement in the commission of the crime.

48. It is manifest from the written statements of both Accused 1 and 5 and from their oral statements recorded under Section 313 of the Code that they firmly believed that since General Vaidya was responsible for conducting operation Blue Star which had damaged a sacred religious place like the Akal Takht of the Golden Temple at Amritsar and had also hurt the religious feelings and sentiments of the Sikh community, he was guilty of a serious crime, the punishment for which could only be death, and, therefore, they had merely executed him and in doing so had not committed any crime whatsoever. As stated earlier it is on this notion that the accused continued to plead not guilty while at the same time admitting the fact of having killed General Vaidya. It may be mentioned that when the eyewitness account was put to him, Accused 1 admitted that he was the pillion rider who had fired four shots at General Vaidya. His answers to the various circumstances pointed out to him in his statement under Section 313 of the Code reveal that he unhesitatingly admitted the entire eyewitness account and also owned responsibility for the crime. Even in his written statement Ex. 60-A he admitted "Maine Vaidya Sabko Mara Hain" meaning "I have killed Vaidya Saheb". So far as Accused 5 is concerned he too admitted the correctness of the eyewitness account of the incident leading to the ultimate death of General Vaidya. When he was asked if he had anything else to say, he referred to his statement Ex. 922 and admitted that it was in his own handwriting, its contents were correct and he had signed it. He also admitted that he was driving the motor cycle when his pillion rider fired at General Vaidya and injured him. It is in this background that we must examine the impact of their admissions in their statements under Section 313 of the Code.

49. Section 313 of the Code is intended to afford a person accused of a crime an opportunity to explain the circumstances appearing in evidence against him. Sub-section (1) of the section is in two parts : the first part empowers the court to put such questions to the accused as it considers necessary at any stage of the inquiry or trial whereas the second part imposes a duty and makes it imperative on the court to question him generally on the prosecution having completed the examination of its witnesses and before the accused is called on to enter upon his defence. Counsel for Accused 5 submitted that since no circumstance had surfaced in evidence tendered by the prosecution against the said accused, there was nothing for him to explain and hence the learned trial Judge committed a grave error in examining the said accused under Section 313 of the Code. He submitted that since the examination has to be made

105

under the said provision after the prosecution has examined all its witnesses and rested, it is obligatory on the learned Judge to decide which circumstance he considers established to seek the explanation of the accused. He submitted that the obligation to question the accused is a serious matter and not a mere idle formality to be gone through by the trial court without applying its mind as to the evidence and circumstances necessitating an explanation by the accused. Therefore, counsel submitted, if there is no evidence or circumstance appearing in the prosecution evidence implicating the accused with the commission of the crime with which he is charged, there is nothing for the accused to explain and hence his examination under Section 313 of the Code would be wholly unnecessary and improper. In such a situation the accused cannot be questioned and his answers cannot be used to supply the gaps left by witnesses in their evidence. In such a situation counsel for Accused 5 Jinda strongly submitted that his examination under Section 313 should be totally discarded and his admissions, if any, wholly ignored for otherwise it may appear as if he was trapped by the court. According to him the rules of fairness demand that such examination should be left out of consideration and the admissions made in the course of such examination cannot form the basis of conviction. Counsel for the Accused 1 also contended that the evidence adduced by the prosecution against the accused was so thin and weak that even if it was taken as proved the court would not have been in a position to convict him and, therefore, it was unnecessary to examine him under Section 313 of the Code. Strong reliance was placed on *Jit Bahadur Chetri* v. *State of Arunachal Pradesh*[5] and *Asokan* v. *State of Kerala*[6]. We do not see any merit in these submissions.

50. Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxim *audi alteram partem*. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of the examination of the accused under Section 313 is to give the accused

5 1977 Cri LJ 1833 (Gau HC)
6 1982 Cri LJ 173 (Ker HC)

106

an opportunity to explain the incriminating material which has surfaced on record. The stage of examination of the accused under clause (*b*) of sub-section (1) of Section 313 is reached only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement under Section 313, the learned Judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After the Section 313 stage is over he has to hear the oral submissions of counsel on the evidence adduced before pronouncing on the evidence. The learned trial Judge is not expected before he examines the accused under Section 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the court finds that no incriminating material has surfaced that the accused may not be examined under Section 313 of the Code. If there is material against the accused he must be examined. In the instant case it is not correct to say that no incriminating material had surfaced against the accused, particularly Accused 5, and hence the learned trial Judge was not justified in examining the accused under Section 313 of the Code.

51. That brings us to the question whether such a statement recorded under Section 313 of the Code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements made by the accused will not be evidence stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. Then comes sub-section (4) which reads:

> "313. (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

Thus the answers given by the accused in response to his examination under Section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. See *State of*

107

Maharashtra v. *R.B. Chowdhari*[7]. This Court in the case of *Hate 'Singh Bhagat Singh* v. *State of M.B.*[8] held that an answer given by an accused under Section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In *Narain Singh* v. *State of Punjab*[9] this Court held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three Judge bench answered the question it would be advantageous to reproduce the relevant observations at pages 684-685:

> "Under Section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation — if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may 'be taken into consideration' at the enquiry or the trial. *If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the court may, relying upon that confession, proceed to convict him,* but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety." (emphasis supplied)

Sub-section (1) of Section 313 corresponds to sub-section (1) of Section 342 of the old Code except that it now stands bifurcated in two parts with the proviso added thereto clarifying that in summons cases where the presence of the accused is dispensed with his examination under clause (*b*) may also be dispensed with. Sub-section (2) of Section 313 reproduces the old sub-section (4) and the present sub-section (3) corresponds to the old sub-section (2) except for the change necessitated on account of the abolition of the jury system. The present sub-section (4) with which we are concerned is a verbatim reproduction of the old sub-section (3). Therefore, the aforestated observations apply with equal force.

7 (1967) 3 SCR 708 : AIR 1968 SC 110 : 1968 Cri LJ 95
8 1953 Cri LJ 1933 : AIR 1953 SC 468
9 (1963) 3 SCR 678 : (1964) 1 Cri LJ 730

108

52. Even on first principle we see no reason why the court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under Section 313 of the Code. Under Section 12(4) of the TADA Act a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session, albeit subject to the other provisions of the Act. The procedure for the trial of Session cases is outlined in Chapter XVIII of the Code. According to the procedure provided in that Chapter after the case is opened as required by Section 226, if, upon consideration of the record of the case and the documents submitted therewith, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused for reasons to be recorded. If, however, the Judge does not see reason to discharge the accused he is required to frame in writing a charge against the accused as required by Section 228 of the Code. Where the Judge frames the charge, the charge so framed has to be read over and explained to the accused and the accused is required to be asked whether he pleads guilty of the offence charged or claims to be tried. Section 229 next provides that if the accused pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon. The plain language of this provision shows that if the accused pleads guilty the Judge has to record the plea and thereafter decide whether or not to convict the accused. The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt. If, however, the accused does not plead guilty or the learned Judge does not act on his plea he must fix a date for the examination of the witnesses i.e. the trial of the case. There is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of the trial. But before the trial Judge accepts and acts on that plea he must administer the same caution unto himself. This plea of guilt may also be put forward by the accused in his statement recorded under Section 313 of the Code. In the present case, besides giving written confessional statements both Accused 1 and

109

Accused 5 admitted to have been involved in the commission of murder of General Vaidya. We have already pointed out earlier that both the accused have unmistakably, unequivocally and without any reservation whatsoever admitted the fact that they were responsible for the murder of General Vaidya. It is indeed true that Accused 1 did not name Accused 5 as the driver of the motor cycle, perhaps he desired to keep him out, but Accused 5 has himself admitted that he was driving the motor cycle with Accused 1 on the pillion seat and to facilitate the crime he had brought the motor cycle in line with the Maruti car so that Accused 1 may have an opportunity of firing at his victim from close quarters. There is, therefore, no doubt whatsoever that both Accused 1 and Accused 5 were acting in concert, they had a common intention to kill General Vaidya and in furtherance of that intention Accused 1 fired the fatal shots. We are, therefore, satisfied that the learned trial Judge was justified in holding that Accused 1 was guilty under Section 302 and Accused 5 was guilty under Section 302/34 IPC.

53. As pointed out earlier, learned counsel for Accused 1 and 5 contended that although a statement recorded under Section 313 of the Code can be taken into consideration in an inquiry or trial since it is not 'evidence' stricto sensu and not being under oath, it has little probative value. Reliance was placed on *R.B. Chowdhari case*[7] in support of this proposition. The two decisions of the High Courts to which our attention was drawn do not in fact militate against the view which we are inclined to take in regard to the admission of guilt made by the two accused in their statements recorded under Section 313 of the Code. In the case of *Jit Bahadur Chetri*[5] only one witness was examined and immediately thereafter the statement of the accused was recorded under Section 313 of the Code. The deposition of the sole witness did not reveal that he had seen the accused causing the injury in question. The question that was framed was not consistent with this evidence and hence the High Court found that the trial court had acted illegally. It was held that such an answer cannot be construed as pleading guilty within the meaning of the provisions of the Code and hence the learned Magistrate had acted contrary to law in convicting and sentencing the accused on the basis of that plea. It will thus be seen that the Court came to the conclusion that the accused could not be stated to have pleaded guilty and hence the conviction was set aside. In the other case of *Asokan*[6] the High Court of Kerala pointed out that in a criminal case the burden of establishing the guilt beyond reasonable doubt lies on the prosecution and that burden is neither taken away, nor discharged, nor shifted merely because the accused sets up a plea of private defence. It was pointed out that if the prosecution has not placed any incriminating evidence such an admission

110

made by the accused will be of no avail unless the admission constitutes an admission of guilt of any offence. In that case also the admission made by the accused read as a whole did not constitute an admission of guilt of the offence charged. On the contrary it was in the nature of a plea of private defence. In such circumstances, the High Court came to the conclusion that in the absence of a unequivocal, unmistakable and unqualified plea of guilt, the Court could not have convicted the accused on the statement made by him under Section 313 of the Code. This decision also does not, therefore, help the defence.

54. The accused were inter alia charged under Sections 3(2)(*i*) or (*ii*) and 3(3) of TADA Act read with sub-rule (4) of Rule 23 of the rules framed thereunder. Section 3 provides the punishment for terrorist acts. Section 10 lays down that when trying any offence a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. It is obvious that where an accused is put up for trial for the commission of any offence under the Act or the Rules made thereunder he can also be tried by the same Designated Court for the other offences with which he may, under the Code, be charged at the same trial provided the offence is connected with such other offence. In the instant case, the accused were tried under the aforesaid provisions of TADA Act and the Rules made thereunder along with the offences under Sections 120-B, 645, 468, 471, 419, 302 and 307 IPC. They were also charged for the commission of the aforesaid offences with the aid of Section 34 IPC. As pointed out earlier under Section 12(4) the procedure which the Designated Court must follow is the procedure prescribed in the Code for the trial before a Court of Session. Accordingly, the two accused persons were tried by the Designated Court since they were charged for the commission of offences under the TADA Act. The Designated Court, however, came to the conclusion that the charge framed under Section 3 of the TADA Act read with the relevant rules had not been established and, therefore, acquitted the accused persons on that count. It is not necessary for us to examine the correctness of this finding as we also come to the conclusion that capital punishment is warranted. It also acquitted all the accused persons of the other charges framed under the Penal Code save and except Accused 1 and 5, as stated earlier. The accused were also convicted under Section 307 and 307/34 respectively for the injury caused to PW 106 Bhanumati Vaidya. Thus the conviction of Accused 1 and 5 is outside the provisions of TADA Act and, therefore, it was open to the Designated Court to award such sentence as was provided by the Penal Code. Section 17(3) of the TADA Act makes Sections 366 to 371 and Section 392 of the Code applicable in relation to a

case involving an offence triable by a Designated Court. The Designated Court having come to the conclusion that this was a case falling within the description of 'the rarest of a rare' awarded the extreme penalty of death to both Accused 1 and 5 for the murder of General Vaidya. In doing so, the trial court placed strong reliance on the decision of this Court in *Kehar Singh* v. *State (Delhi Administration)*[10]. The learned trial Judge took the view that since the murder of General Vaidya was also on account of his involvement in the Blue Star Operation his case stood more or less on the same footing and hence fell within 'the rarest of a rare' category. We think that this line of reasoning adopted by the learned trial Judge is unassailable. We may also point out that the accused persons had no remorse or repentance, in fact they felt proud of having killed General Vaidya in execution of their plan and hence we find no extenuating circumstance to make a departure from the ratio of *Kehar Singh case*[10].

55. Lastly, placing reliance on the decision of this Court in *Allauddin Mian* v. *State of Bihar*[11] the learned defence counsel submitted that in the present case also since the conviction and sentence were pronounced on the same day, the capital sentence awarded to the accused should not be confirmed. In the decision relied on, to which one of us (Ahmadi, J.) was a party and who spoke for the Court, it was emphasised that Section 235(2) of the Code being mandatory in character, the accused must be given an adequate opportunity of placing material bearing on the question of sentence before the Court. It was pointed out that the choice of sentence had to be made after giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the Court for otherwise the Court's decision may be vulnerable. It was then said in paragraph 10 at page 21:

> "We think as a general rule the trial courts should after recording the conviction adjourn the mater to a further date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

The above decision was rendered on April 13, 1989 whereas the present decision was pronounced on October 21, 1989. Yet, contended learned counsel for the accused the Court did not appreciate the spirit of Section 235(2) of the Code. The ratio of *Allauddin Mian case*[11] was affirmed in *Malkiat Singh* v. *State of Punjab*[12].

10 (1988) 3 SCC 609 : 1988 SCC (Cri) 711
11 (1989) 3 SCC 5 : 1989 SCC (Cri) 490
12 (1991) 4 SCC 341 : 1991 SCC (Cri) 976 : JT (1991) 2 SC 190, para 18

112

56. On the other hand the learned Additional Solicitor-General invited our attention to a subsequent decision of this Court in *Jumman Khan* v. *State of U.P.*[13] That decision turned on the facts of that case. In that case the Court refused to entertain the plea on the ground that it was not raised in the courts below and was sought to be raised for the first time in the apex court. That decision, therefore, does not assist the prosecution. Reliance was then placed on the third proviso to Section 309 of the Code which reads as under:

> "Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said Article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so.

57. But in the instant case we find that both the accused decided to plead guilty. Accused 1 had done so at the earlier stage of the trial when he filed the statement Ex. 60-A. Accused 5 had also made up his mind when he filed the statement Ex. 922 even before his examination under Section 313 of the Code. Accused 1 had reiterated his determination when he filed the statement Ex. 919. Thus both the accused had mentally decided to own their involvement in the murder of General Vaidya before their statements were recorded under Section 313 of the Code. Not only that their attitude reveals that they had resolved to kill him as they considered him an enemy of the Sikh community since he had desecrated the Akal Takht. They also told the trial court that they were

13 (1991) 1 SCC 752 : 1991 SCC (Cri) 283 : 1990 Supp 3 SCR 398

proud of their act and were not afraid of death and were prepared to sacrifice their lives for the article of their faith, namely, the realisation of their dream of a separate State of Khalistan. It is thus apparent that before they made their statements admitting their involvement they had mentally prepared themselves for the extreme penalty and, therefore, if they desired to place any material for a lesser sentence they had ample opportunity to do so. But after the decision of this Court in *Kehar Singh case*[10] and having regard to the well planned manner in which they executed their resolve to kill General Vaidya, they were aware that there was every likelihood of the Court imposing the extreme penalty and they would have, if they so desired, placed material in their written statements or would have requested the Court for time when their statements under Section 313 of the Code were recorded, if they desired to pray for a lesser sentence. Their resolve not to do so is reflected in the fact that they have not chosen to file any appeal against their convictions by the Designated Court. We are, therefore, of the view that in the present case the requirements of Section 235(2) of the Code have been satisfied in letter and spirit and no prejudice is shown to have occurred to the accused. We, therefore, reject this contention of the learned counsel for the accused.

58. For the above reasons, we are of the opinion that the decision of the learned trial Judge is based on sound reasons and is unassailable. We, therefore, confirm the conviction of Accused 1 under Sections 302 and 307, IPC and Accused 5 under Sections 302 and 307, IPC, both read with Section 34, IPC and the sentence of death awarded to both of them. We see no merit in the State's appeal against the acquittal of the other accused persons of all the charges levelled against them and accused 1 and 5 on the other counts with which they were charged and accordingly dismiss the State's Criminal Appeal No. 17 of 1990. The Death Reference No. 1 of 1989 will stand disposed of as stated above.

59. Before we part we must express our deep sense of gratitude for the excellent assistance rendered to us by the learned Additional Solicitor-General, the learned counsel for the State of Maharashtra and the learned Advocates appointed as amici curiae to represent the accused persons. But for their excellent marshalling and analysis of the evidence which runs into several volumes we may have found it difficult to compress the same and reach correct conclusions. A word of special praise is due to the learned advocates Shri H.V. Nimbalkar and Shri I.S. Goyal both of whom sacrified their practice at Pune and attended to this case from time to time devoting their valuable professional hours at considerable personal inconvenience. Their devotion and dedication is also evident from the fact that apart from making twenty trips to Delhi they

spent a sizeable amount of Rs 29,000 from their own pockets as against which they have received a sum of Rs 5,000 only on October 29, 1991. At one point of time they had also difficulty in procuring accommodation in Maharashtra Sadan till we passed orders in that behalf. Such devotion and dedication enhances the image and prestige of the legal profession. Apart from the time actually spent on the aforesaid twenty occasions in this Court one has to merely imagine the number of hours they must have devoted for preparing the defence. We direct the State of Maharashtra to pay the outstanding amount of Rs 24,000 which they have spent for travel and lodging and boarding expenses and we also direct that they together be paid a further sum of Rs 25,000 by way of professional fees for rendering service as amici curiae. The said amount will be paid to them within one month from today.

(1992) 3 Supreme Court Cases 750

(BEFORE S. RANGANATHAN, V. RAMASWAMI AND B.P. JEEVAN REDDY, JJ.)

COMMISSIONER OF SALES TAX, U.P. AND OTHERS .. Appellants;

Versus

M/s BAKHTAWAR LAL KAILASH CHAND ARHTI AND OTHERS .. Respondents.

Civil Appeal Nos. 4560-62 of 1990† etc., etc., decided on August 5, 1992

Sales Tax — Inter-State sale — What constitutes — Movement of goods from one State to another must be the incident of sale — Sale and movement of goods must form parts of the same transaction — Property in goods must pass in either State — Sale may precede or follow the inter-State movement — Tests to be satisfied on facts in each case — Stipulation in the contract for inter-State movement of goods may be express or implied — Ex-U.P. principals contracting with assessee dealer of agricultural products in State of U.P. for purchase of goods by assessee on their behalf in U.P. as commission agent and despatch of the goods to such principals to ex-U.P. destination on payment of commission — Assessee purchasing the goods from cartmen and agriculturists in U.P. and despatching them to ex-U.P. principals in fulfillment of the contract within three days of the purchase as soon as wagons available — Held, transaction constituted inter-State sale — Central Sales Tax Act, 1956, S. 3(a)

Held:

According to clause (*a*) of Section 3, an inter-State sale or purchase is one which occasions the movement of goods from one State to another. The movement of goods from one State to another must be the necessary incident — the necessary consequence — of sale or purchase. It must be case of cause and effect — the cause being the sale/purchase and the effect being the movement of

† From the Judgment and Order dated October 8, 1984 of the Allahabad High Court in Sales Tax Revision Nos. 446, 447 and 448 of 1983

115

MANU/SC/0278/1963

Equivalent Citation: AIR1964SC529

IN THE SUPREME COURT OF INDIA

Appeal (civil) 295 of 1960

Decided On: 13.09.1963

Appellants: **Shashi Kumar Banerjee and Ors.**
Vs.
Respondent: **Subodh Kumar Banerjee since deceased and after him his legal representatives and Ors.**

Hon'ble Judges/Coram:
P.B. Gajendragadkar, K. Subba Rao, K.N. Wanchoo, N. Rajagopala Ayyangar and J.R. Mudholkar, JJ.

Case Note:
Family - Genuineness of Will - District Judge held in favour of Appellants that due execution and attestation of will was proved - However, High Court reversed judgment of District Judge and rejected Petition for probate - Hence, this Appeal - Whether, High Court was right in reversing order of District Court - Held, it was not quite so firm as some other signatures made later in month of September - On whole Court were not accepted that signature at bottom of will could not possibly was made in August 1943 and must had been made late in 1946 - Therefore, evidence of expert was conclusive and could falsify evidence of attesting witnesses and also circumstances which go to showed that this will must had been signed in 1943 as it purports to be - Thus, all probabilities were against expert's opinion and direct testimony of two attesting witnesses which was wholly inconsistent with it - Hence, on review of entire evidence that due execution and attestation of will in dispute was proved as alleged by propounders and so Appellants were entitled to probate with copy of will attached - Hence, set aside order of High Court and restored order of District Judge - Appeal allowed.

JUDGMENT

K.N. Wanchoo, J.

1 . This is an appeal on a certificate granted by the Calcutta High Court. The appellants are the sons of Ramtaran Banerjee deceased (hereinafter referred to as the testator). They had been appointed executors under a will purported to have been executed by the testator on August 29, 1943. The testator was about 97 years old when he died on April 1, 1947. The appellants applied for probate of the will in the court of the District Judge in June 1947. Their case was that the will in dispute was the last will and testament of the testator and had been duly executed. The petition was opposed by Subodh Kumar Banerjee and Sukumar Banerjee who are also sons of the testator as well as by the descendants of Sushil Kumar Banerjee and Sanat Kumar Banerjee, two other sons of the testator who had predeceased him. The main ground of opposition was that the will had not been properly executed and attested, though it was also contended that it was not genuine, and the testator did not have testamentary capacity at the time of signing the alleged will and that the execution of the will had been obtained by undue influence, fraudulent misrepresentation and coercion.

116

2. Four main issues arose on these pleadings, namely,--

(1) Is the will genuine?

(2) Has the will been properly executed and attested?

(3) Had the testator testamentary capacity at the time of the signing of the alleged will ?

(4) Was the execution of the will obtained by undue influence, fraudulent representation and coercion, as alleged ?

The District Judge held on the evidence that though the testator might have been enfeebled in body, he retained a sound and disposing mind almost upto the last moment of his life, and one of the last documents executed by the testator which was attested by one of the caveators himself, was dated March 3, 1947. The issue as to undue influence, fraudulent misrepresentation and coercion was abandoned and was thus answered in favour of the appellants. The District Judge also held that due execution and attestation of the will had been proved and that the will was genuine. In consequence he granted probate with a copy of the will attached to the appellants.

3. The present respondents then went in appeal to the High Court, and the only issue that was urged before the High Court was with respect to the due execution and attestation of the will. The main contention in that behalf was that though the will appeared to be dated August 29, 1943, the signature of the testator appearing at the bottom of the will could not have been made in 1943, and reliance in this connection was placed on the evidence of a handwriting expert. The High Court first examined the evidence of the handwriting expert as to the date on which the signature appearing at the bottom of the will could have been made. The High Court differed from the trial court which had also considered the evidence of the expert and had refused to rely upon it in preference to the evidence of the attesting witnesses and came to the conclusion, relying on the evidence of the expert, that the signature could not have been put at the foot of the will in the year 1943 and similarly the names on the plan attached to the will could not have been written in 1943. Therefore having come to this conclusion, the High Court held that that was the end of the case of the propounders and the attesting witnesses must also be held to have deposed falsely. Having reached this conclusion, the High Court then went on to consider the evidence of the attesting witnesses and said that independently however of the view expressed by it as to the evidence of the expert it was not possible to rely on the evidence of the - two attesting witnesses and consequently found that due execution and attestation of the will had not been proved. On this finding, the High Court reversed the judgment of the District Judge and rejected the petition for probate. As the High Court's judgment was one of reversal and the amount involved was over rupees twenty thousand, the High Court granted a certificate of fitness to enable the appellants to appeal to this Court; and that is how the matter has come up before us.

4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, MANU/SC/0115/1958 : AIR1959SC443 and Rani Purnima Devi v. Khagendra Narayan Dev, MANU/SC/0020/1961 : [1962]3SCR195).

The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the

execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.<mpara> It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested.

5. Before we consider the evidence as to attestation, there are certain preliminary facts which are not in dispute and which may be set out. The testator was a man of great wealth and a well known lawyer of Calcutta. Though he retired from the Bar in 1935, he continued to be the elected President of the Alipore Bar Association till the end of 1946. He died at the very advanced age of 97 and was about 93 years old when the will in dispute is said to have been executed. He was the head of a large family, having seven sons, five daughters and numerous grand-children. His wife died on July 2, 1945. Two of his sons, Sushil and Sanat had predeceased him. Before his death the testator had already made provision for his heirs by executing a number of documents. The scheme he used was to grant a perpetual lease of the property in favour of the person whom he wanted to benefit; ultimately the reversionary interest in the leased property which the testator had was also conveyed to the same child. In this manner he had disposed of property worth about rupees sixty lacs, half to the propounders, (namely, the appellants) and half to the caveators (namely, the respondents). The will in dispute refers to the remaining property which is said to be valued at rupees three lacs only. It is witnessed by two persons, namely, Manmathanath Mookerjee and Sambhunath Munshi. The entire will is in the handwriting of the testator and has been corrected in various places and the corrections have been initialled by the testator. It is not in dispute that the body of the will was written out by the testator between January and March 1943, leaving some blanks here and there, particularly in relation to the numbers of immovable properties disposed of and also in some cases the name of the particular legatee to whom the properties were to go. It also appears that the testator suffered from a severe illness in July 1943 and at one time his life was despaired of. It was after recovery from this serious illness that the will in dispute is alleged to have been signed by him on August 29, 1943. It is also not in dispute that the signature at the bottom of the will is the signature of the testator. Further though at one time there was dispute whether the date under the signature was written by the testator, the respondents have failed to prove that the date "29-8-1943" is not in the handwriting of the testator. The dispositions in the will are in favour of the various sons and grandsons of the testator and also of his wife, and wherever the testator had deprived any of his descendants of benefit under the will he has given reasons for the same. Further the will recites at the end that the testator had signed it in the

presence of the attesting witnesses and that the attesting witnesses had seen the testator signing it and that the attesting witnesses had attested it in the presence of the testator and of each other. In view of these facts the High Court had also to recognize that the will could by no means be said to be an unnatural document. There is no evidence to show that the propounders (namely, the appellants) had taken any part in the execution of the will. We shall later refer to the evidence of the attesting witnesses which shows that the testator had cautioned them not to speak of the will and to keep the fact of their having attested it secret. The issue as to undue influence, fraudulent misrepresentation and coercion was, according to the District Judge, "clearly, categorically and unconditionally abandoned" by the respondents. There can also be no doubt that on the evidence, the testator was in a sound and disposing state of mind and had full testamentary capacity not only on August 29, 1943 when the will purports to have been executed but even almost upto the last day of his life, for he had executed many documents in 1944, 1945 and 1946 and the last of such documents was executed on March 3, 1947 to which one of the caveators was an attesting witness. In the High Court no argument appears to have been addressed against the finding of the District Judge that the testator had full testamentary capacity almost upto the last day of his death. Further the fact that the will is a holograph will and admittedly in the hand of the testator and in the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and! the witnesses had signed it in his presence and in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any suspicious circumstance attached to this will and it will in our opinion require very little evidence to prove due execution and attestation of the will.

There is no doubt about the genuineness of the signature of the testator, for it is admitted that the signature at the foot of the will is his. The condition of the testator's mind is also not in doubt and he apparently had full testamentary capacity right upto March 1947, even though he was an old man of about 97 when he died on April 1, 1947. The dispositions made in the will are by no means unnatural and where the testator has deprived any of his descendants of any share of his remaining property he has given reasons for it. Besides he had already disposed of the large bulk of his property worth about rupees sixty lacs and the will only deals with a small residue worth about rupees three lacs. There is nothing to show that the dispositions were not the result of the free will and mind of the testator. Further, the propounders (namely, the appellants) had nothing to do with the execution of the will and thus there are really no suspicious circumstances at all in this case. All that was required was to formally prove it, though the signature of the testator was admitted and it was also admitted that the whole will was in his handwriting. It is in the background of these circumstances that we have to consider the evidence of the two attesting witnesses and of the handwriting expert on whose opinion alone practically the High Court has held that the will was not duly executed and attested.

6. Before we come to the evidence of these three witnesses mentioned above we should like to refer to one other circumstance, which appears in this case. The evidence is that some time after the will had been executed it was handed over by the testator to his son Soshi. The will was in a closed envelope and on the top of that the testator had written "Soshi preserve this my will" and had signed that. It is not in dispute that the writing and the signature on this envelope are also in the hand of the testator. Soshi kept this envelope with him and after the death of the testator, he and his brother Sunil went with it to Birendra Nath Lahiri, an advocate. When the advocate saw the envelope it was closed. He did not open it. He advised them to give notice to all the heirs of the testator and fix a date and place for the opening of the envelope. They therefore asked him to issue the notice and gave him the names of all

the heirs. He then issued a notice to all the heirs including the caveators respondents telling them that the last will and testament of the testator had been handed over to him, that he would open it on May 8, 1947 between 7 p.m. and 7-30 p.m. and requested them to be present at his place either in person or through some agent in order to witness the opening of the envelope. In reply to this notice, two of the heirs, namely, Sukumar Banerjee and Provat Kumar sent replies; but they did not attend at the time and place fixed by Lahiri. The only persons to attend were the three appellants and one Kartick Mukherjee, who is a son-in-law of the testator and husband of one of the daughters named Nihar Bala. Thereafter the envelope was opened and it is no one's case that at that time the will was not in the same condition in which it was when it was filed in court along with the probate application. Therefore when the will was opened on May 8, 1947, it bore the signature of the testator as well as the attestation of the attesting witnesses. This again is a very important circumstance in favour of the genuineness and due execution and attestation of the will and is perhaps the reason why the respondents did not come forward with a positive case as to the will having been attested after the death of the testator.

7. This brings us to the main question which has been debated before us, namely, the due execution and attestation of the will. The respondents' case in this connection appears to be that the date which appears on the will as the date of execution thereof is not the date on which the will was executed by the testator but that it was executed at a much later date and was thus not duly executed and attested. We have therefore to examine the evidence of the attesting witnesses in this connection and what the learned counsel for the appellants calls intrinsic evidence in the will itself to show that it must have been executed and attested on August 29, 1943 as it purports to be, for the fact that the will is in the handwriting of the testator and bears his signature is not in dispute. The respondents mainly relied on the evidence of the handwriting expert and their case as based on that evidence was that in 1943, 1944 and 1945 there was no tremor in the handwriting of the testator and that tremor appeared in his handwriting from 1946 and went on increasing till his death in 1947. The expert's evidence further is that the writing in the body of the will is without tremor while the signature at the bottom of it and initials in the margin on the corrections showed tremor and therefore! the will must have been signed after 1945 and not in August 1943, as it purports to be. We shall deal with the evidence of the expert later but it is pertinent to point out here that we cannot understand when the testator admittedly signed the will even according to the respondents, though sometime in 1946 why he should have antedated it to August 1943. It is in this connection that the finding of the District Judge that the testator was possessed of full testamentary capacity almost upto the moment of his death, certainly upto March 1947, which does not appear to have been challenged before the High Court, assumes great importance. If the testator had not signed this will in 1943 as it purports to be and if he was possessed of full testamentary capacity in 1946 as he must in our opinion be held to be and was in fact signing this will in 1946, we fail to see why he should not put on it the date in 1946 on which according to the respondents he actually signed the will and get it attested on that date. The whole argument therefore based on the theory of tremor put forward by the handwriting expert appears to us to be of no help to the respondents; for the testator having retained full mental capacity and power of judgment till almost the! last moment of his life, it does not stand to reason that he would antedate the will if he really signed it late in 1946. Once therefore it is admitted that the signature on the will is that of the testator, the theory that it is antedated by him can be accepted only if the expert's evidence is so convincing that the extreme improbability attaching to the said theory can be safely rejected.

8. Turning now to the intrinsic evidence in the will itself, to which reference has been made on behalf of the appellants, we find that there are as many as six circumstances which go to show that the date on which the will purports to have been executed, namely, August 29, 1943, must be the correct date and that a will containing the provisions which this will contains could not have been executed late in 1946. The first circumstance to which reference may be made is that it makes provision for the wife of the testator and provides for consultation with her in case there is any dispute between the three executors. Now it is not in dispute that the wife of the testator died in 1945; as such it would certainly be strange--if not impossible--to find a provision in the will for the wife and also a provision to the effect that the wife should be consulted whenever there was a dispute between the executors appointed under the will.

9. The next circumstance is that while providing for a monthly allowance for his daughter Sushila, the testator says that she was living with her sons in her house. It is admitted that Sushila came to live with her father in 1945, shortly before the death of her mother and stayed on till the testator died. In such circumstances it is extremely unlikely that the testator who had made corrections in the will before he signed it would not correct this part of it.

10. The third circumstance which is re lied on is with respect to Nihar Bala, a daughter of the testator, to whom a bequest was made in the will and who is the wife of Kartick Mukherjee. The testator said in the will that her husband was a Senior Stock Varifier on a monthly pay of Rs. 300/-. Now it is in evidence that Kartick retired early in 1946 and his wife Nihar Bala asked in January 1947 for a monthly allowance which the testator provided for her. It is said that if this will was signed by the testator late in 1946 he would not say therein that his son-in-law was getting Rs. 300/- per mensem when in fact he had retired.

11. The fourth circumstance which is re lied on is that the will says that Shivendra, a son of another daughter Rani Devi alias Renuke is preparing for his B.A. examination. Now it is not disputed that Shivendra had passed his B.A. Examination in 1944. Therefore it is said that if this will was signed in 1946 it could not have contained this recital about Shivendra and in consequence it must have been signed in 1943, which it purports to be.

12. The fifth circumstance which is re lied on is that the will mentions that Sukumar's wife was alive for the testator when depriving Sukumar of any share in the property has said that he and his wife have no children and Sukumar's income is more than sufficient to maintain him and his wife in ease and comfort. Now there is no dispute that Sukumar's wife died in October 1943. It is therefore said that if this will was being signed in 1946, the testator could not have used words in it to indicate that Sukumar's wife was alive; this could only happen if the will was really signed in August 1943.

13. Lastly, the will devised premises No. 76 Hazara Road in favour of Sashi, but on January 26, 1946, the testator had given away this property to Bimal. Consequently it is said that if the will was really signed in late 1946, such a bequest could not possibly appear there in.

14. These circumstances afford in our opinion intrinsic evidence of the fact that the will must have been signed in August 1943. On that basis all these recitals in the will would be correct and appropriate. In reply however it is urged on behalf of the respondents that most of these circumstances do not go to the root of the matter inasmuch as they do not affect the dispositions made by the will. It is said that the

will was undoubtedly written out between January and March 1943 at which time these recitals would be correct and that it may be that the testator did not worry to make any correction therein when he actually signed the will late in 1946. These explanations though technically possible are hardly satisfactory. We are of opinion that it is most unlikely that the testator would not correct these recitals in the will if he was really signing it in 1946 as he did make some corrections and the probabilities therefore indicate that the will was signed in 1943 as it purports to be. Further it was admitted in the High Court that it was not possible for the respondents to explain how all these recitals came to be in the will; if that is so and if the respondents are unable to explain how all these recitals came to be in the will, they in our opinion clearly support the case oÂ£ the appellants that the will was written out between January to March 1943 and signed in August 1943. In any case though some of the recitals are of a minor nature, there are two matters which in our opinion could not have appeared in a will signed late in 1946. These two matters are, namely, (1) provision for the wife when she undoubtedly died in 1945, and (2) the disposition of property No. 76 Hazara Road. We cannot accept the argument that these matters might have escaped the attention of the testator when he signed the will late in 1946 for there was nothing wrong with him till late 1946 which would allow such defects to creep into this will. We therefore agree with the contention on behalf of the appellants that these circumstances tend to show that the will must have been signed in August 1943 as it purports to be.

15. This brings us to the oral evidence of two attesting witnesses and the handwriting expert. We must, with respect, say that the High Court was not right in first considering the evidence of the expert and holding on its basis that the will could not have been signed in 1943, in a case of this kind where there were practically no suspicious circumstances and where all the circumstances point to the due execution and attestation of the will. It is true that after having considered the evidence of the expert and having said that there was an end of the case of the propounders and the attesting witnesses must also be held to be untruthful once the evidence of the expert was believed, the High Court has gone on to consider the evidence of the attesting witnesses and has said that it was doing so independently of the view expressed by it as to the evidence of the expert. We propose therefore to take the evidence of the two attesting witnesses first to see whether in the circumstances of this case when we are dealing with a holograph will and when there are practically no suspicious circumstances and the intrinsic evidence in the will itself points to its execution when it purports to have been executed we can rely on that evidence. The two attesting witnesses are Manmathanath Mookerjee and Sambhunath Munshi. Manmathanath Mookerjee is the father-in-law of Sunil, one of the propounders and to that extent he is certainly interested in supporting the propounders' case. It may also be conceded that in, certain respects he has not been as straight forward as he should have been, particularly with respect to his dealings with his son-in-law. But he is a respectable man and his son-in-law was not in any way concerned with the execution of this will and did not get any great advantage out of it except that one of the sons Sukumar was disinherited by this will and this had increased his share a little; but that was also the case with the shares of the other descendants of the testator. Manmathanath Mookerjee was examined on commission and was cross-examined at inordinate length, sometimes on matters which were not very relevant to the point on which he was giving evidence, namely, the attestation of the will in dispute. But in spite of the interest he has in his son-in-law, Sunil and in spite of his unsatisfactory replies with respect to his dealings with Sunil, it seems to us that there is really no sufficient reason to disbelieve him when he says that he attested this will at the instance and in the presence of the testator and that the testator signed it in his presence and that of Sambhunath Munshi and that they signed it in his presence and in each other's presence.

16. Let us therefore examine the reasons which led the High Court to place no reliance on the evidence of Manmathanath Mookerjee and Sambhunath Munshi. Manmathanath's statement is that he happened to go that day to inspect a house belonging to his father's de-butter estate at Rustomjee Street which is near where the testator used to live. Therefore he went to see the testator because his usual practice was that whenever he was in the locality in which the testator lived and he had time at his disposal he always went round to see him. Similarly the evidence of Shambhunath Munshi was that he went to see the testator in order to hand over Glucose and Horlicks which he was asked to procure for the testator as in those days Glucose and Horlicks were difficult to get. Thus it was by chance that the two attesting witnesses happened to be there when the testator asked them to attest the will. The argument on behalf of the respondents is that if the testator wanted to execute the will tie would have sent for these witnesses and it is too much to believe that they happened to be there and the testator took advantage of their presence. It may be that it is more usual for witnesses to be called when a person is intending to execute a will; even so there is nothing impossible in advantage being taken of the accidental presence of witnesses in this connection. Further if these two witnesses were not witnesses of truth they could easily have stated that they were called by the testator and in the circumstances of this case nobody would have been able to disprove that statement. It seems to us clear therefore that the testator took advantage of the accidental presence of these two witnesses whom he knew well from before and asked them to attest the will. Nor do we think there was any such relationship between Shambunath Munshi and Manmathanath Mookerjee or between Shambhunath Munshi and Sunil and Sashi as to impel Shambunath to give false evidence as an attesting witness.

17. Stress however has been laid on a slight discrepancy in the evidence of the two attesting witnesses as to the time of the execution of the will. According to Sambhunath the will is said to have been executed at about 3-0 p.m. and it took about 45 minutes for the testator to complete the will by filling up the blank spaces therein and correcting it here and there. Sambhunath's statement also is that he arrived about noon at the house of the testator and shortly thereafter Manmathanath Mookerjee arrived. On the other hand, the evidence of Manmathanath is that he arrived at about 3-30 p.m. and thereafter the testator brought the will, filled up the blanks and made corrections in it and then the execution and attestation took place. So according to this statement the will must have been executed and attested at about 4-30 p. m. Further, according to Sambhunath Munshi, he stayed at the place for 2 1/2 hours and Manmathanath Mookerjee came only a short time after he arrived. There is no doubt that there are these discrepancies as to time. But we are of opinion that the discrepancies are not so serious as to make us distrust the evidence of the two attesting witnesses. That evidence in substance shows that the will was executed and attested sometime in the afternoon of August 29, 1943. Sambhunath would place it somewhere between 1 p.m. and 3-30 p.m. while Manmathanath places it somewhere between 3 p.m. and 5 p.m. Considering that these witnesses were giving evidence almost 8 or 9 years after the execution of the will, this discrepancy in time is not so serious as to destroy the value of their evidence. In substance, it shows that the execution of the will took place in the afternoon according to both the witnesses; this is not a case where one witness says that execution took place in the morning while the other ways that it took place in the evening, which of course may introduce some infirmity in, the evidence.

18. It was also urged that it was most unlikely that Manmathanath Mookerjee would go to inspect his house in Rustomjee Street on an afternoon in the month of August, as it would be a most inconvenient time for a person of his status. But if the time would Be inconvenient to a person of status, we fail to see why we should not

believe such a person when he says that he actually did go for a particular purpose to a particular place at a particular time. Some criticism was also made about Manmathanath's statement that he did not know in which room his daughter used to live in the testator's house. We fail to see how this statement affects the credibility of the witness, for it is not disputed that the witness being the father-in-law of the testator's son used to go to the testator's house as and when occasions arose. Some criticism was also made as to whether Manmathanath wrote the word "witness" on the plan attached to the will. When asked about it he stated that he did not remember, which seems to us to be a perfectly understandable answer in connection with a matter about which evidence was being given after 8 or 9 years. Stress was also laid on some discrepancies between the evidence of Manmathanath and Sambhunath Munshi as to whether some children had come during the time they were there and if so when. These are however matters of such minor detail that they cannot affect the main evidence of these two witnesses.

19. Further so far as Sambhunath Munshi is concerned, he was obviously on good terms with the testator whom he had known for some years. All that has been said against him is that he was a tenant of Manmathanath. But he was a tax collector of the Calcutta Corporation and as such we do not think that he would be under the thumb of Manmathanath or his son-in-law simply because he was a tenant in Manmathanath's house. Otherwise there is no reason except for the discrepancies to which we have already referred and which in our opinion do not detract from the substantial truth of his statement, why his evidence should be disregarded. Taking therefore a broad view of the evidence of these two witnesses in the circumstances of this case to which we have already refer red, we are of opinion that the evidence is reliable and does prove execution and attestation, of the will in dispute.

20. This brings us to the evidence of the handwriting expert. In his report, the expert said that the testator's pen control in spite of his advanced years was well maintained in 1943 and the specimens of the testator's writing in that year showed strength and ease and perfect control over the pen which was scarcely seen in the hand of an old man of about 92 years. Further the report said that the change in the testator's pen control between the years 1943 and was so slight as to be scarcely noticeable. But in 1946 all of a sudden the pen control gave way and the hand shook and this resulted in deviations in the natural path of the strokes. The report further said that the main body of the will which is said to have been written in 1943 showed strength in pen control and pressure which is found in the specimens of 1943 but the additions and the signature at the bottom of the will as well as in the margin showed that they must have been written late in 1946 after the testator had lost pen control. In his evidence the expert made some changes in his opinion. He said that deterioration in the signature of the testator began from March 1946 and this he said because he had to admit that! many signatures of January 1946 did not disclose any tremor. Further though in the report he had said that tremors began suddenly in 1946, in his evidence he admitted that in old- age tremors appeared gradually and increased with passage of time. Further he was cross- examined with respect to certain signatures of the testator of the period before 1946 which showed tremors and also with respect to certain signatures after 1946 which did not show tremors. He had to admit that some of these signatures shown to him did not conform to the pattern, namely, that there was pen control upto March 1946 and thereafter pen control was lost. He however explained these deviations from the pattern by reference to what he called "pen pressure" and "angularities" which according to him were different from loss of pen control. There is however no doubt that there are some signatures of the period upto March 1946 which show tremors and there are some signatures of the period after March 1946 which do not show much tremor. We may in this connection refer to Ex. E-36 and Ex. 23/1 of 1943, Ex. C/21 and Ex. E.53 of 1944 and Ex.E-75 of 1945

which clearly show tremors. Further Ex.C-38 of January 30, 1946 also clearly shows tremor and these are all before March from which time according to the expert tremor started. On the other hand Ex. E-100 of June 1946 is admitted by the expert himself as showing not much tremor. We must not also forget that the testator was an old man of about 93 even in 1943 and therefore if sometimes his signatures were not as set as usual, that may be explained partly by his extreme old-age. We agree with the District Judge that no two signatures written by a person in the ordinary course of writing are precisely alike and differences may arise from various factors such as diversity in the makes of the pen, the level of the signatures the space it occupies etc. and therefore it is difficult to generalise and it will indeed be dangerous to base a decision upon such inconclusive data. All that can be said after a review of all the signatures from 1943 is; that as the testator's age increased his writing became more shaky, though as we have said before, there are examples of shaky signatures before 1946 and also examples of not so shaky signatures after 1945.

21. This conclusion is in our opinion borne out by the various signatures on the will and the various writings therein which were made to fill in the blanks after the main body of the will had been written in January to March 1943. The full signature at the foot of the will does show some tremor but there are a number of signatures on the margin of the will which are not full and some of them do not show much tremor though some do. Further according to the evidence of the attesting witnesses, the plan attached to the will was also signed at the same time as the will and the expert admitted in his evidence that the signature of the testator on the plan showed superior control and was not like the signature at the bottom of the will which according to the expert showed failing pen control. If both these signatures were made on the same day--and there is no reason why they should not have been, whether in 1943 or late in 1946--, it is remarkable that the one on the will, according to the expert, shows failing pen control while the one on the plan does not disclose any tremor. The evidence of the expert therefore in these circumstances is not conclusive and cannot prove that the signature at the bottom of the will could not possibly have been made on August 29, 1943 on which date it purports to have been made. Besides it must not be forgotten that the will was executed in August 1943 soon after the testator had recovered from a serious illness and if there is some tremor here and there in his writing on that day, his illness may partly explain it. In this connection however our attention was drawn to some signatures made on September 1, 1943 only three days later which do not show much tremor: (see Ex. C/15). As we see the signature of September 1, 1943, we find that it is not quite so firm as some other signatures made later in the month of September. On the whole therefore we are not prepared to accept that the signature at the bottom of the will could not possibly have been made in August 1943 and must have been made late in 1946.

We do not consider in the circumstances of this case that the evidence of the expert is conclusive and can falsify the evidence of the attesting witnesses and also the circumstances which go to show that this will must have been signed in 1943 as it purports to be. Besides it is necessary to observe that expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by . circumstantial evidence. In the present case all the probabilities are against the expert's opinion and the direct testimony of the two attesting witnesses which we accept is wholly inconsistent with it.

22. Again it is not in dispute that the envelope containing the will bears the signature of the testator and the endorsement on it to the effect "Soshi, preserve this my will."

According to Soshi, this closed envelope was given to him towards the end of December 1945 or beginning of January 1946. It would be safe to presume that both the signature and the endorsement on it were made at the same time. But if one looks at the endorsement one finds some tremor or deviation in the words "Soshi" and "preserve" while there is very little tremor or deviation in the signature of the testator. This shows that sometime even in the writing written at the same time tremor appeared in some words, even though other words did not have tremor. It may be that towards the latter part of 1946 and in 1942 the tremor became rather pronounced and was usually present all the time.

23. Finally we may point out that the expert admitted in his evidence that it was only by a chemical test that it could be definitely stated whether a particular writing was of a particular year or period. He also admitted that he applied no chemical tests in this case. So his opinion cannot on his own showing have that value which it might have had if he had applied a chemical test. Besides we may add that Osborn on "Questioned Documents" at p. 464 says even with respect to chemical tests that "the chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no reliable data upon which a definite opinion can be based". In these circumstances the mere opinion of the expert cannot override the positive evidence of the attesting witnesses in a case like this where there are no suspicious circumstances.

24. On the whole therefore it seems to us that it has not been established by the evidence of the expert that the signature at the bottom of the will could not be made on August 29, 1943 as deposed to by the attesting witnesses. In the circumstances of this case, the view taken by the District Judge of the evidence of the expert, namely, "it would be in deed dangerous to base a decision upon such inconclusive data" appears to us to be correct. We hold therefore on a review of the entire evidence that due execution and attestation of the will in dispute has been proved as alleged by the propounders and so the appellants are entitled to probate with a copy of the will attached. We therefore allow the appeal, set aside the order of the High Court and restore that of the District Judge. The appellants will get their costs throughout.

126

Civil Appeal Nos. 7818-7819 of 2009

Chennadi Jalapathi Reddy v. Baddam Pratapa Reddy

2019 SCC OnLine SC 1098

In the Supreme Court of India

(BEFORE N.V. RAMANA, MOHAN M. SHANTANAGOUDAR AND AJAY RASTOGI, JJ.)

Chennadi Jalapathi Reddy ..... Appellant;

v.

Baddam Pratapa Reddy (Dead) Thr Lrs. and Another ..... Respondents.

Civil Appeal Nos. 7818-7819 of 2009
Decided on August 27, 2019

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.:— These appeals are directed against the impugned judgment dated 12.06.2008 passed by the High Court of Andhra Pradesh at Hyderabad in Appeal Suit No. 1404 of 2004 and Cross-Objection (SR) No. 50168 of 2004.

2. By the impugned judgment, the High Court has reversed the judgment of the Trial Court dated 05.12.2003 passed by the IIIrd Additional District Judge at Karimnagar in O.S. No. 91 of 1996, in which the Trial Court had decreed the suit.

3. A suit for specific performance was filed by the plaintiff, Chennadi Jalapathi Reddy (the appellant herein) in respect of the agreement of sale dated 20.04.1993 pertaining to House No. 1-5-266 (new) situated at Kaman Road, Karimnagar. It is his case that the first defendant in the suit, Baddam Pratapa Reddy (the first respondent herein, now deceased) agreed to sell the suit schedule house in his favour; that he was always ready and willing to perform his part of the contract; and though he had sufficient money to get the sale deed registered and had brought the availability of money to the notice of the first defendant, the latter did not execute the sale deed in his favour. The first defendant and his brother, Baddam Ram Reddy, sold their respective shares in the suit house in favour of the second defendant, Neethi Satyanarayana (the second respondent herein) after execution of the agreement of sale in favour of the plaintiff. The suit was initially filed against the first defendant. The second defendant was impleaded subsequently. It is relevant to note here that the plaintiff purchased half of the suit property from the second defendant after the impugned judgment was passed by the High Court.

4. The defendants in their written statement denied the case of the plaintiff, specifically alleging that the agreement of sale is forged.

5. On evaluation of the material on record, the Trial Court decreed the suit. Vide the impugned judgment, the High Court dismissed the suit and disposed of the appeal and cross-objections arising out of the judgment of the Trial Court. Hence, the instant appeals have been preferred before this Court.

6. During the trial, the agreement of sale Ext. A-1 was sent for obtaining expert opinion on the genuineness of the signature of the first defendant thereon. DW-2 is the expert who examined it and his report is at Ext. B-2. He opined that the admitted signatures of the first defendant and the disputed signature do not tally, thereby meaning that it is forged. The Trial Court considered this expert opinion, but preferred not to rely on it, inasmuch as it ruled that the expert opinion was not corroborated by

any reliable evidence. It also held that the evidence of the attesting witnesses (PWs 2 and 3) is cogent and reliable, and there is no reason why their evidence should be disbelieved to give way to the expert opinion.

7. Per contra, the High Court solely relied upon the expert opinion and dismissed the suit by concluding that the signature of the first defendant on the agreement of sale Ext. A-1 is forged.

8. From the discussion of the High Court in arriving at this conclusion, we find that it has not assigned any valid reason for disbelieving the attesting witnesses PWs 2 and 3. In fact, with respect to their evidence, the High Court made certain observations which are against the evidence on record. Similarly, with respect to PW-1, the High Court observed that he had not deposed as to the presence of the third attestor, Krishna Murthy, at the time of execution of the agreement of sale. However, it is clear from the evidence of PW-1 that he has specifically deposed about the presence of Krishna Murthy at that time. It was also wrongly observed by the High Court that PWs 1 and 2 are silent as to the time and place of the execution of the agreement. However, in his examination-in-chief, PW-2 has clarified that the first defendant executed this agreement at the suit schedule house, at a time when he was residing there and the plaintiff was residing in the western side of the house, etc. From the aforementioned facts, it is clear that the High Court disbelieved the evidence of the plaintiff (PW1) and the attestors (PWs 2 and 3) on mere assumptions and wrong reasons.

9. In any case, to satisfy our conscience, we have gone through the evidence of PWs 1, 2, and 3. As rightly observed by the Trial Court, there is no reason to disbelieve these witnesses, whose evidence is consistent, cogent, and reliable. Though they were subjected to lengthy cross-examination, nothing noteworthy has been brought out from their deposition to discard their evidence. Thus, the evidence of PWs 1, 2, and 3 fully supports the case of the plaintiff and in our considered opinion, the High Court was not justified in rejecting their evidence.

10. As mentioned supra, the High Court mainly relied upon the opinion evidence of DW-2, the handwriting expert, who opined that the signature of the first defendant on the agreement of sale Ext. A-1 did not tally with his admitted signatures.

11. By now, it is well-settled that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive in nature. It is also settled that it may not be safe to solely rely upon such evidence, and the Court may seek independent and reliable corroboration in the facts of a given case. Generally, mere expert evidence as to a fact is not regarded as conclusive proof of it. In this respect, reference may be made to a long line of precedents that includes *Ram Chandra and Ram Bharosey* v. *State of Uttar Pradesh*, AIR 1957 SC 381, *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529, *Magan Bihari Lal* v. *State of Punjab*, (1977) 2 SCC 210, and *S. Gopal Reddy* v. *State of Andhra Pradesh*, (1996) 4 SCC 596.

12. We may particularly refer to the decision of the Constitution Bench of this Court in *Shashi Kumar Banerjee* (supra), where it was observed that the evidence of a handwriting expert can rarely be given precedence over substantive evidence. In the said case, the Court chose to disregard the testimony of the handwriting expert as to the disputed signature of the testator of a Will, finding such evidence to be inconclusive. The Court instead relied on the clear testimony of the two attesting witnesses as well as the circumstances surrounding the execution of the Will.

13. On the other hand, in *Murari Lal* v. *State of Madhya Pradesh*, (1980) 1 SCC 704, this Court emphasised that reliance on expert testimony cannot be precluded merely because it is not corroborated by independent evidence, though the Court must still approach such evidence with caution and determine its creditworthiness after

considering all other relevant evidence. After examining the decisions referred to supra, the Court was of the opinion that these decisions merely laid down a rule of caution, and there is no legal rule that mandates corroboration of the opinion evidence of a handwriting expert. At the same time, the Court noted that Section 46 of the Indian Evidence Act, 1872 (*hereinafter* "the Evidence Act") expressly makes opinion evidence open to challenge on facts.

14. In *Alamgir* v. *State (NCT, Delhi)*, (2003) 1 SCC 21, without referring to Section 46 of the Evidence Act, this Court reiterated the observations in *Murari Lal* (supra) and stressed that the Court must exercise due care and caution while determining the creditworthiness of expert evidence.

15. In our considered opinion, the decisions in *Murari Lal* (supra) and *Alamgir* (supra) strengthen the proposition that it is the duty of the Court to approach opinion evidence cautiously while determining its reliability and that the Court may seek independent corroboration of such evidence as a general rule of prudence. Clearly, these observations in *Murari Lal* (supra) and *Alamgir* (supra) do not go against the proposition stated in *Shashi Kumar Banerjee* (supra) that the evidence of a handwriting expert should rarely be given precedence over substantive evidence.

16. In light of these principles, it is necessary to evaluate the correctness of the findings of the High Court as to the genuineness of the signature of the first defendant on Ext. A-1.

17. As mentioned earlier, Ext. A-1 is the agreement of sale entered into by the plaintiff and the first defendant. Ext. A-2 is the receipt evidencing the payment of earnest money of Rs. 61,200/- in pursuance of this agreement of sale. The receipt bears the signature of the first defendant on the revenue stamps affixed thereon. Curiously, Ext. A-2 was not sent for obtaining expert opinion. At the same time, no reliable material was brought on record that the first defendant has not received the amount under Ext. A-2. In the absence of any challenge to the first defendant's signature on Ext. A-2, and in the absence of any reliable material produced by the first defendant to deny the receipt of such earnest money, the High Court, in our considered opinion, should have relied upon this receipt. In fact, we find that the High Court has not considered Ext. A-2 in its entire judgment. As a matter of fact, Ext. A-1 and Ext. A-2 go hand in hand, and Ext. A-2 should not have been ignored by the High Court.

18. Moreover, merely because the plaintiff's signature was not present on the agreement of sale, this would not ipso facto nullify the agreement altogether. This is because the agreement was signed by the first defendant and clearly reveals that he had agreed to sell the property to the plaintiff for a due consideration of Rs. 1,20,000/-. This agreement was followed by Ext. A-2, which shows the payment and receipt of the earnest money. In addition to the signature of the first defendant, this receipt bears the signature of the plaintiff on revenue stamps. As mentioned earlier, Ext. A-1 and Ext. A-2 are part of the same transaction. Thus, the contention that absence of the plaintiff's signature on Ext. A-1 nullifies the agreement altogether, cannot be accepted.

19. In addition to this, the evidence of DW-3 (the brother of the first defendant) belies the allegation of the first defendant that the signature found on Ext. A-1 is forged. DW-3 specifically admitted during his cross-examination that he could identify the signature of the first defendant, who is his elder brother. He has further admitted that Ext. A-1 and Ext. B-1 bears the signature of the first defendant. It may be noted here that a partition had taken place between the first defendant and DW-3 in the year 1980, and such partition was effected through Ext. B-1, an unregistered partition deed. Crucially, the first defendant has also admitted his signature on Ext. B-1 in his cross-examination. Thus, it is clear that such admitted signature and the disputed

signature of the first defendant have been identified by his brother as those of the first defendant himself.

20. Undoubtedly, the opinion of a handwriting expert is a relevant fact under Section 45 of the Evidence Act. Under Section 47 of the Evidence Act, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is also a relevant fact.

21. Per the explanation to Section 47 of the Evidence Act, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purported to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

22. A reading of Section 47 of the Evidence Act makes it clear that this provision is concerned with the *relevance* of the opinion of a person who is acquainted with the handwriting of another person. The Explanation to this Section goes on to enumerate the circumstances in which a person may be said to have such acquaintance.

23. In the matter at hand, DW-3, in his cross-examination, has identified the disputed signature of the first defendant (his elder brother) on Ext. A-1. He also stated that the suit schedule house was constructed when he was 25 years old; a partition was effected in 1980, after which he and the first defendant occupied their respective shares in the house; and that he finally sold his share in 1996 (when he was aged about 58 years). This goes on to show that DW-3 lived and resided with the first defendant in the same house for over three decades. Moreover, as mentioned earlier, DW-3 identified the first defendant's signature on Ext. B-1 (the partition deed), which has been admitted by the first defendant himself. In light of this, and given that DW-3 came in to support the case of his brother, the first defendant before the Court, it can be inferred that their relations were cordial even after partition and that DW-3 would have seen the latter write on multiple occasions in normal course of family affair. Thus, it is clear that, he was acquainted with the handwriting of the first defendant in terms of the Explanation to Section 47 of the Evidence Act. This makes his opinion as to the disputed handwriting a relevant fact under Section 47.

24. At this juncture, it would be apposite to observe that the *weight* to be accorded to such an opinion depends on the extent of familiarity shown by the witness with the disputed handwriting. This, in turn, depends on the frequency with which the witness has had occasion to notice and observe the handwriting, his own power of observation, and how recent such observations were. In light of the facts discussed above, which go on to show the familiarity of DW-3 with the handwriting of the first defendant, we conclude that the testimony of DW-3 may safely be relied upon, and must be accorded similar, if not greater, weight than the expert evidence adduced by the defendants to advance their case. This conclusion is further strengthened by the fact that the first defendant neither challenged DW-3's admission nor his acquaintance with the disputed handwriting, although it was open for him to do so by way of re-examination.

25. The admission by DW-3 is further supported by the cogent and consistent testimony of the plaintiff (PW-1) and attesting witnesses (PWs 2 and 3), and the fact that the first defendant has not denied his signature on Ext. A-2 (the receipt of payment of earnest money). Having regard to the totality of the facts and circumstances, we conclude that the disputed signature of the first defendant on Ext. A-1 is genuine. Moreover, keeping in mind the principle that expert evidence should not be given precedence over substantive evidence, in our considered opinion, the High Court was not justified in giving precedence to the opinion of the expert (DW-2) and solely relying upon his testimony to set aside the judgment and decree of the Trial Court.

26. In any case, to satisfy our conscience, we have examined the admitted and disputed signatures ourselves, and find that the signatures are virtually the same. However, in this case, it is unnecessary for us to rely on our own comparison in light of the material on record, as discussed above. We hasten to emphasize that we have not been prejudiced by our own comparison in appreciating the evidence and reaching our conclusion.

27. There is another reason why we are not inclined to place reliance on the opinion of the expert DW-2. From a perusal of his report Ext. B-2, it is evident that barring the signature on a written statement in a prior suit, all other admitted signatures of the first defendant are of a period subsequent to the filing of the plaint (i.e. on the vakalatnama and the written statement filed in this suit itself). These admitted signatures taken subsequent to the filing of the suit could not have been used as a valid basis of comparison, and their use for this purpose casts serious doubt on the reliability of the entire report Ext. B-2. Thus, the report was liable to be discarded on this ground alone, and was wrongly relied upon by the High Court.

28. Moreover, the High Court has wrongly observed that the plaintiff has not produced any evidence to prove that he demanded the performance of sale after the execution of the agreement of sale. The filing of a suit for specific performance of an agreement of sale is governed by Section 16(c) of the Specific Relief Act, 1963, read with Article 54 of the Schedule of the Limitation Act, 1963. In addition to this, Forms 47 and 48 of Appendix A of the Code of Civil Procedure, 1908 prescribe the format of the plaint for such a suit. Thus, a plaint which seeks the relief of specific performance of an agreement/contract must comply with all these requirements. In the matter at hand, the plaintiff has specifically averred in his plaint that he was ready and willing to perform his part of the contract under the agreement of sale dated 20.04.1993. It was also specifically stated that the plaintiff had been demanding that the first defendant receive the balance consideration of Rs. 58,800/- and execute a regular registered sale deed at his cost, but the first defendant had been avoiding the specific performance of the agreement of sale. In light of this, in our considered opinion, all the formalities which are to be pleaded and proved by the plaintiff for getting a decree of specific performance have been fulfilled. Moreover, there cannot be any proof of oral demand. Be that as it may, we are satisfied from the evidence that the plaintiff had sufficient money to pay the balance consideration to the first defendant and was ready and willing to perform his part of the contract.

29. In view of the aforementioned reasons, the impugned judgment of the High Court is liable to be set aside. Accordingly, the judgment and decree passed by the Trial Court stands restored. The appeals are allowed accordingly.

———

131

(2017) 5 Supreme Court Cases 817

(BEFORE V. GOPALA GOWDA AND R.K. AGRAWAL, JJ.)

S.P.S. RATHORE .. Appellant;

Versus

CENTRAL BUREAU OF INVESTIGATION AND ANOTHER .. Respondents.

Criminal Appeal No. 2126 of 2010†, decided on September 23, 2016

A. Penal Code, 1860 — S. 354 — Molestation of a girl about 15 yrs of age — Conviction of accused — Validity of — Essential ingredients of offence under S. 354 IPC, summarised

— Appellant-accused being IG of Police — He running a Lawn Tennis Association, of which victim was a member — Incident of molestation happening in the office room of accused in the association building, which was witnessed by victim's friend (PW 13), who was also a member of the association — Conviction of accused under S. 354 IPC, by all the courts below, confirmed — Victim had afterwards committed suicide, but charge under S. 306 IPC added by trial court was set aside by High Court, which was affirmed by Supreme Court

— Held, act of molestation was very well proved from deposition of PW 13, being eyewitness to the incident — No reason present for her to depose falsely — Evidence of victim's father (PW 15) corroborates PW 13's evidence — Fact regarding molestation by appellant, stated on oath by father of victim and parents of eyewitness as well as other prosecution witnesses — Number of persons, mostly players and their parents, giving memorandum to Secretary (Home) of the State, and its copies to other authorities, for bringing aforesaid incident to the notice of higher authorities, including the CM of State, after signing it, which was also signed by the victim — All witnesses identified their signatures as well as that of victim when they were examined in court — DGP of relevant time, who was directed by State Government to hold enquiry into the allegations levelled against appellant in the memorandum, and who concluded that allegation was based on true facts and cognizable case was made out against appellant, was the authority competent to investigate fact in question and statements given by witnesses before him are admissible in evidence, irrespective of time-gap between the time when the incident occurred and the date on which statements were given — Delay of about 6 days in presenting the complaint has been fully explained

— Claim of appellant that present case was fabricated and a result of rivalry between HLTA (his tennis association) and HTA (another tennis association formed later on by IAS group with *D* as its President and patronage of *O*) and *D* and *O* colluded with PW 1 (father of PW 13) against appellant and that PW 1 has derived professional benefit from such exercise besides venting his long-

† From the Judgment and Order dated 1-9-2010 of the High Court of Punjab and Haryana at Chandigarh in Crl. Revision No. 1558 of 2010 : *S.P.S. Rathore* v. *CBI*, 2010 SCC OnLine P&H 8195

132

standing grudge against the appellant, does not stand to logic having regard to Indian social set up, where any father (here PW 15) would not let his daughter's honour and reputation be damaged merely because one of his associates (here PW 1) has his own agenda against appellant — Further, there is no evidence on record to substantiate the allegations that the two officers *D* and *O*, were in any way instrumental in preparation of memorandum or implicating appellant in the case — There is also no evidence on record to suggest any nexus of the two officers with PWs 1 and 15 — There is no evidence to suggest any enmity between appellant and PW 1 to implicate him in a fabricated case

— On aforesaid facts, it is clear that PW 13 (eyewitness, victim's friend) withstood her testimony from beginning till the end and her deposition was found reliable and corroborative with other prosecution witnesses — Hence, both courts below were right in upholding conviction of appellant under S. 354 IPC (Paras 30 to 56)

B. **Evidence Act, 1872 — Ss. 45, 47 and 60 — Handwriting expert — Evidentiary value of — Direct evidence of persons having witnessed a person signing a document vis-à-vis contrary evidence of handwriting expert — Role of court — Principles explained**

— Held, sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not — A court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings — It may not be safe for a court to record a finding about a person's writing in a certain document merely on basis of expert comparison, but a court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard — It is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing — It is opinion evidence and it can rarely, if ever, take the place of substantive evidence — It is thus clear, that uncorroborated evidence of a handwriting expert is an extremely weak type of evidence and the same should not be relied upon either for the conviction or for acquittal — Courts should, therefore, be wary to give too much weight to the evidence of handwriting expert — Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence

— In instant case of molestation of a girl by appellant-accused an IG of Police, number of persons gave memorandum to Secretary (Home) of the State, and its copies to other authorities, for bringing aforesaid incident to the notice of higher authorities, including the CM of State, after signing it, which was also signed by the victim *R* — All witnesses identified their signatures as well as that of victim, when they were examined in court — Appellant disputed genuineness of signatures of *R* — He tried to substantiate his contention by examining handwriting expert — Held, contention of appellant is not tenable as the witnesses who were examined by prosecution and in whose presence the memorandum was signed, have identified the signatures of *R* — In such regard, the law is very clear that a fact should be proved by the best available evidence

133

— The witnesses had identified the signatures of *R* on memorandum, therefore, the evidence of the handwriting expert cannot be considered to be safe and it requires corroboration from independent witnesses — As the signatures of *R* have been proved by the witnesses who have signed the memorandum and are direct, primary and best available evidence in the case, therefore, the same can be relied upon — Penal Code, 1860, S. 354 (Paras 33 and 47 and 50)

C. **Evidence Act, 1872 — Ss. 157 and 6 — Scope of S. 157 — "Authority legally competent to investigate matter" — Who is — Delay in making of such statements — Effect on admissibility — Difference in position re statement made to an authority and to a non-authority, in the context of S. 157, explained**

— Held, S. 157 envisages two categories of statements of witnesses, which can be used for corroboration — First is the statement made by a witness to any person at or about the time when the incident took place — Second is the statement made by a witness to any authority legally competent to investigate the matter, and such statement made to such authority gains admissibility, no matter that it was made long after the incident — But if the statement was made to non-authority with delay, it loses its probative value due to lapse of time

— Instant case of molestation of a girl about 15 yrs of age by appellant-accused, an IG of Police — DGP *Rr* at the relevant time was asked by the State Government to enquire into the facts given in the memorandum given by number of persons regarding the incident, and report thereon — Contention of appellant, that the statement recorded by *Rr* cannot be used by prosecution for the purpose of corroboration under S. 157, Evidence Act — Held, contention of appellant is not tenable at all — *Rr* was an authority legally competent to investigate the incident — He was asked by State Government to enquire into the facts given in the memorandum and report thereon — To make a person an authority legally competent to investigate, it is not necessary that he should be having authority which flows from a statute — It is sufficient that such person was authorised legally by State Government to investigate the matter — Hence, *Rr* was the authority competent to investigate the fact in question and the statements given by the witnesses before him are admissible in evidence under S. 157 for the purpose of corroboration, irrespective of the time gap between the time when the incidents occurred and the date on which the statements were given — *Rr* was in fact competent to investigate the matter since the enquiry conducted by him was merely a fact-finding enquiry — Penal Code, 1860, S. 354 (Paras 37 to 39)

D. **Criminal Procedure Code, 1973 — S. 154 — Delay in lodging/filing FIR — Duly explained — Instant case of molestation of a girl about 15 yrs of age by appellant-accused, an IG of Police — Held, delay of about 6 days in presenting complaint to the SHO has been duly explained**

— In a tradition-bound non-permissive society in India, it would be extremely reluctant to admit that any incident which is likely to reflect upon chastity of a woman had occurred, being conscious of danger of being ostracised by society or being looked down by society — Herein, victim

134

R, who was member of lawn tennis association of appellant, not informing about the incident of her molestation by appellant to her parents under the circumstances that appellant, who being a very senior police officer of the State, was reasonable, and it would not have been an easy decision for her to speak out — In the normal course of human conduct, unmarried minor girl would not like to give publicity to the traumatic experience she has undergone and felt terribly embarrassed in relation to the incident to narrate it to her parents and others, overpowered by a feeling of shame, and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy — After informing the incident to her parents, the follow-up action was immediately taken by the residents and the fellow players and a memorandum containing allegations against appellant was prepared and submitted before the then Secretary (Home) — Therefore, giving due consideration to appellant, once the victim and her family members got assurance of justice from the superior authorities, they lodged a formal complaint against the appellant — Penal Code, 1860, S. 354 (Para 46)

E. **Penal Code, 1860 — S. 354 — Intention to molest/outrage modesty — Nature and extent of proof necessary — Intention or knowledge, being one of the ingredients of any offence — Proof of**

— Held, in order to constitute the offence under S. 354 IPC, mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object — If intention or knowledge is one of the ingredients of any offence, it has got to be proved like other ingredients for convicting a person — But, it is also equally true that those ingredients being state of mind may not be proved by direct evidence — Therefore, they may have to be inferred from the attending circumstances of a given case — In instant case of molestation of girl by appellant-accused, the sequence of events, indicates that appellant had requisite culpable intention for the crime committed — Evidence Act, 1872 — Ss. 14 and 15 — Proof of intention or knowledge (Paras 42 to 45)

F. **Criminal Trial — Witnesses — Generally — If a particular number of witnesses are required for proving a certain fact — Determination of — Adverse inference, if warranted due to non-examination of certain witnesses**

— Held, no particular number of witnesses are required for proving a certain fact — It is quality and not quantity of witnesses that matters — Evidence is weighed and not counted — Evidence of even a single eyewitness, truthful, consistent and inspiring confidence, is sufficient for maintaining conviction — It is not necessary that all those persons who were present at the spot of incident must be examined by the prosecution in order to prove guilt of accused — Having examined all witnesses, even if other persons present nearby are not examined, evidence of eyewitness cannot be discarded

— Instant case of molestation of a girl about 15 yrs of age by appellant-accused — Victim *R* was member of lawn tennis association of appellant — Contention of appellant, that non-examination of two important site witnesses viz. *P*, the ball picker and *T*, the Coach, leads to adverse inference against

135

the prosecution — Held, High Court has rightly held that adverse inference against prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence — Moreover, aforementioned witnesses were not in any way connected with the actual commission of offence and even in their absence, commission of offence of molestation by appellant, stands well proved by unimpeachable testimony of the eyewitness (PW 13) to the incident — Penal Code, 1860 — S. 354 — Evidence Act, 1872, Ss. 135 and 144 Ill. (g) (Paras 52 to 54)

G. **Penal Code, 1860 — S. 354 — Molestation of a girl of about 15 yrs of age by accused — Defence plea of false implication — Tenability of — Duty of court in cases relating to crime against women**

— Held, there is devastating increase in cases relating to crime against women in the world and India is also no exception to it — Although statutory provisions provide strict penal action against such offenders, it is for the courts to ultimately decide whether such incident has occurred or not — The courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds — Herein, by the consistent evidence of PW 13 (eyewitness), the prosecution has proved beyond reasonable doubt the offence committed by the appellant-accused under S. 354 IPC — A charge under S. 354 IPC is one which is very easy to make and is very difficult to rebut — It is not on account of alleged enmity between appellant and *D* and *O*, that he was falsely implicated — It would, however, be unusual in a conservative society, that a woman would be used as a pawn to wreak vengeance — When a plea is taken by appellant that he was falsely implicated, the courts have a duty to make deeper scrutiny of evidence and decide the acceptability or otherwise of accusations made against him — In the instant case, both trial court and High Court have done that — There is no scope for taking a different view from the view already been taken by courts below — Occurrence of overt act is well proved by the unimpeachable testimony of eyewitness (PW 13) (Para 41)

H. **Penal Code, 1860 — S. 354 — Reduction of sentence — Consideration of mitigating factors like old age, health ailments, etc. of accused, and sentence imposed by trial court vis-à-vis enhanced sentence imposed in appeal**

— Molestation of a girl about 15 yrs of age by appellant-accused — His conviction under S. 354 IPC, confirmed by Supreme Court — Held, with regard to sentence of appellant, certain mitigating factors were pointed out, which are old age of appellant, health ailments, responsibility of looking after his unmarried daughter suffering from congenital heart disease, past meritorious service record and prolonged trial — Keeping in view the aforementioned factors, especially the old age and physical condition of appellant, it is not expedient to put him back in jail — While findings as to guilt of appellant is upheld, sentence of appellant is reduced to the period already undergone by him of more than six months (which was the sentence imposed by trial court) as a special case considering his very advanced age, instead of enhanced sentence of 1½ yrs imposed by appellate court (Para 55 and footnote 7)

136

In the present case, the appellant-accused, a member of the prestigious service of India (being IG of Police), was on deputation with Bhakhra Beas Management Board (BBMB), Chandigarh as Director (Vigilance & Security) at the relevant time. He also founded the Haryana Lawn Tennis Association (HLTA) in the year 1988 at Panchkula. The office of HLTA was established in the garage of an under construction building owned by the appellant. HLTA enrolled several member players, who were mostly nearby residents of Panchkula, on payment of monthly subscription.

R (since deceased), daughter of PW 15 and *A* (PW 13), daughter of PW 1 and *M* (PW 2, the complainant), both aged about 15 years, residents of Panchkula, got themselves enrolled as members of HLTA. Both of them were good friends and used to go together for practice at the tennis court. The appellant was also a frequent visitor to the said tennis court. One day, when *R* informed the appellant about her plan to go abroad, the appellant met her father PW 15 on 11-8-1990 in order to persuade him to not to send his daughter out of the country for specialised tennis coaching and promised that special coaching would be arranged for her at HLTA itself and also asked him to send *R* to his office on the very next day in connection with the same. PW 15 informed the same to his daughter *R* and asked her to meet the appellant in his office on 12-8-1990.

On 12-8-1990, *R* visited the house of *A* and told her about the visit of the appellant to her house and also that he had called her in his office. When both of them were practising in the tennis court, *P*, the ball picker, informed *R*, that the appellant had called her in his office. Accordingly, *R* along with *A*, went to meet the appellant who was standing outside the office at that particular point of time. The appellant insisted them to come inside the office. On his insistence, both the girls went inside the office. The appellant got fetched one chair which was occupied by *A* and *R* kept standing while the appellant sat in his chair which was on the other side of the table. The appellant requested *A* to call for *T*, the Coach. Accordingly, *A* went outside leaving behind the appellant and *R* in the office. *A* asked the person who fetched the chair for her in the office to inform the coach to come to the office of the appellant. However, the coach refused to come.

Immediately thereafter, when *A* returned to the office, she witnessed that *R* was in the grip of the appellant, who was holding one hand of *R* in his hand and his other hand was around her waist. The appellant was pulling her towards his chest so as to embrace her and *R* was trying to push him back with her free hand.

On seeing *A* (PW 13), the appellant got frightened and released *R* and fell on his chair. The appellant asked *A* to go out of his room again and personally bring the coach with her. The appellant insisted *R* to stay in his room, but she somehow managed to escape. Thereafter, *R* narrated the whole incident to *A*. After discussion, both the girls decided not to inform the same to their parents as the appellant, being IG of Police, could involve or harass them and their parents.

On 14-8-1990, *R* along with *A* went to the lawn tennis court at about 4:30 p.m., instead of their usual timing, in order to avoid the appellant, who used to visit the court in the evening. When both the girls were about to return, at about 6:30 p.m., *P*, the ball picker, came out of the court and told *R* that the appellant had called her in his office. However, *R* refused to meet him and pointed out to *A* that since they had not informed their parents about the misbehaviour of the appellant on 12-8-1990, the appellant was feeling emboldened and had again called her to his office with a view to molest her. Thereafter, both of them decided to disclose the

137

incident that took place on 12-8-1990 to their respective parents. Accordingly, *R* narrated the incident of her molestation at the hands of the appellant to her father. Also, the parents of *A* were made aware of the entire incident.

On hearing such fact, PW 15 gathered the residents of the locality, who were mostly parents of trainee boys and girls, and they went to HLTA office to meet the appellant, but they were informed that the appellant had already left for Chandigarh. On 15-8-1990, a memorandum/petition, duly signed by *R*, *A*, PW 1 and PW 2, was presented to the then Secretary (Home), Haryana. After the approval of the Home Minister, *Rr*, the then DGP, was directed to hold an inquiry into the allegations levelled against the appellant in the memorandum/petition.

After conducting the enquiry into the incident, *Rr* concluded that the allegation of molestation is based on true facts and a cognizable case is made out against the appellant under the provisions of IPC and forwarded his enquiry report dated 3-9-1990 to the Secretary (Home), Government of Haryana.

During investigation, it was also revealed that after the incident of molestation, *R* confined herself in her house. Later, on 28-12-1993, she committed suicide by consuming poison and died on 29-12-1993.

When no action was taken by the State Government, PW 2 (the complainant/ Respondent 2) filed a criminal writ petition before the High Court. The High Court, issued direction to the Superintendent of Police, Panchkula, that after registration of the case, the investigation shall be handed over to the Central Bureau of Investigation (CBI) and the same shall be conducted by an officer not below the rank of DIG, which was upheld by the Supreme Court, which culminated into registration of FIR against the appellant.

The trial court held the appellant guilty under Section 354 IPC and sentenced him to suffer RI for six months along with a fine of Rs 1000. The appellate court enhanced the sentence to RI for 1½ years (one and a half), but sentence of fine remained unchanged, which was affirmed by High Court in criminal revision preferred by the appellant. Hence the instant appeal.

Confirming the conviction of the appellant under Section 354 IPC, while modifying the sentence to the period already undergone, the Supreme Court

Held :

In order to constitute the offence under Section 354 IPC, mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

(*i*) that the person assaulted must be a woman;

(*ii*) that the accused must have used criminal force on her; and

(*iii*) that the criminal force must have been used on the woman intending thereby to outrage her modesty. (Paras 42 and 43)

Vidyadharan v. *State of Kerala*, (2004) 1 SCC 215 : 2004 SCC (Cri) 260, *relied on*

It is undoubtedly correct that if intention or knowledge is one of the ingredients of any offence, it has got to be proved like other ingredients for convicting a

is not necessary that he should be having authority which flows from a statute. It is sufficient that such person was authorised legally by the State Government to investigate the matter. Hence, *Rr* was the authority competent to investigate the fact in question and the statements given by the witnesses before him are admissible in evidence irrespective of the time-gap between the time when the incidents occurred and the date on which the statements were given. *Rr* was in fact competent to investigate the matter since the enquiry conducted by him was merely a fact-finding enquiry. (Para 39)

Y-D/57545/CR

Advocates who appeared in this case :

K.V. Viswanathan, Senior Advocate (Ms Priyanjali Singh, Dhananjay Ray and Mehul M. Gupta, Advocates) for the Appellant;

Ms Vibha Datta Makhija, Senior Advocate (Rajiv Nanda, Ajay Sharma, B.V. Balaram

138

person. But, it is also equally true that those ingredients being state of mind may not be proved by direct evidence and may have to be inferred from the attending circumstances of a given case. The sequence of events detailed earlier, indicates that the appellant had the requisite culpable intention. (Paras 44 and 45)

Tarkeshwar Sahu v. *State of Bihar*, (2006) 8 SCC 560 : (2006) 3 SCC (Cri) 556; *Mobarik Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857 : 1957 Cri LJ 1346; *Bhagwan Kaur* v. *Maharaj Krishan Sharma*, (1973) 4 SCC 46 : 1973 SCC (Cri) 687, *relied on*

S.P.S. Rathore v. *CBI*, 2010 SCC OnLine P&H 8195, *modified*

Madhu v. *State of Haryana*, 1998 SCC OnLine P&H 1016 : (1998) 4 RCR (Cri) 854; *S.P.S. Rathore* v. *Madhu*, (2017) 5 SCC 843; *S.P.S. Rathore* v. *CBI*, 2001 SCC OnLine P&H 428 : (2001) 4 RCR (Cri) 239; *S.P.S. Rathore* v. *CBI*, 2002 SCC OnLine P&H 146 : (2002) 2 RCR (Cri) 174; *Madhu Prakash* v. *S.P.S. Rathore*, SLP (Cri) No. 1528 of 2002, order dated 12-4-2002 (SC); *S.P.S. Rathore* v. *CBI*, SLP (Cri) No. 8042 of 2010, order dated 11-11-2010 (SC), *referred to*

Kishore Chandra Singh Deo v. *Babu Ganesh Prasad Bhagat*, AIR 1954 SC 316, *cited*

Rr had conducted the enquiry under the orders of the Government of Haryana, therefore, he was competent to investigate/enquire into the allegations made in the memorandum. As such, all the statements recorded by him are admissible under Section 157 of the Evidence Act for the purpose of corroboration. It is further the case of the appellant that the statement recorded by *Rr* cannot be used by the prosecution for the purpose of corroboration under Section 157. Section 157 envisages two categories of statements of witnesses, which can be used for corroboration. First is the statement made by a witness to any person at or about the time when the incident took place. The second is the statement made by him to any authority legally competent to investigate the matter. Such statements gain admissibility, no matter that it was made long after the incident. But if the statement was made to non-authority, it loses its probative value due to lapse of time. (Paras 37 and 38)

Rr was an authority legally competent to investigate the incident. He was asked by the State Government to enquire into the facts given in the memorandum and report thereon. To make a person an authority legally competent to investigate, it is not necessary that he should be having authority which flows from a statute. It is sufficient that such person was authorised legally by the State Government to investigate the matter. Hence, *Rr* was the authority competent to investigate the fact in question and the statements given by the witnesses before him are admissible in evidence irrespective of the time-gap between the time when the incidents occurred and the date on which the statements were given. *Rr* was in fact competent to investigate the matter since the enquiry conducted by him was merely a fact-finding enquiry. (Para 39)

Y-D/57545/CR

Advocates who appeared in this case :

K.V. Viswanathan, Senior Advocate (Ms Priyanjali Singh, Dhananjay Ray and Mehul M. Gupta, Advocates) for the Appellant;

Ms Vibha Datta Makhija, Senior Advocate (Rajiv Nanda, Ajay Sharma, B.V. Balaram Das, Arvind Kr. Sharma, Vikas Mehta and Ms Anushree Menon, Advocates) for the Respondents.

Chronological list of cases cited *on page(s)*

1. (2017) 5 SCC 843, *S.P.S. Rathore* v. *Madhu* 827*g*
2. 2010 SCC OnLine P&H 8195, *S.P.S. Rathore* v. *CBI* 825*d*, 828*f-g*
3. SLP (Cri) No. 8042 of 2010, order dated 11-11-2010 (SC), *S.P.S. Rathore* v. *CBI* 829*a*
4. (2006) 8 SCC 560 : (2006) 3 SCC (Cri) 556, *Tarkeshwar Sahu* v. *State of Bihar* 839*a*
5. (2004) 1 SCC 215 : 2004 SCC (Cri) 260, *Vidyadharan* v. *State of Kerala* 838*d-e*
6. 2002 SCC OnLine P&H 146 : (2002) 2 RCR (Cri) 174, *S.P.S. Rathore* v. *CBI* 828*c*, 828*c-d*
7. SLP (Cri) No. 1528 of 2002, order dated 12-4-2002 (SC), *Madhu Prakash* v. *S.P.S. Rathore* 828*c*
8. 2001 SCC OnLine P&H 428 : (2001) 4 RCR (Cri) 239, *S.P.S. Rathore* v. *CBI* 828*b*
9. 1998 SCC OnLine P&H 1016 : (1998) 4 RCR (Cri) 854, *Madhu* v. *State of Haryana* 827*f-g*, 827*g*
10. (1973) 4 SCC 46 : 1973 SCC (Cri) 687, *Bhagwan Kaur* v. *Maharaj Krishan Sharma* 841*a*
11. AIR 1957 SC 857 : 1957 Cri LJ 1346, *Mobarik Ali Ahmed* v. *State of Bombay* 840*b-c*
12. AIR 1954 SC 316, *Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat* 841*b-c*

The Judgment of the Court was delivered by

R.K. AGRAWAL, J.— This appeal has been filed against the judgment and order dated 1-9-2010 passed by the High Court of Punjab and Haryana at Chandigarh in *S.P.S. Rathore* v. *CBI*[1] whereby the learned Single Judge of the High Court dismissed the revision petition filed by the appellant herein.

Brief facts

2. S.P.S. Rathore, the appellant-accused, a member of the prestigious service of the country, was on deputation with Bhakhra Beas Management Board (BBMB), Chandigarh as Director (Vigilance & Security) at the relevant time. He also founded the Haryana Lawn Tennis Association (HLTA) in the year 1988.

3. The office of HLTA was established in the garage of House No. 469, Sector 6, Panchkula, an under construction building owned by the appellant-accused which was divided into three portions wherein front portion was being used as the office of HLTA and the other two portions were being utilised by T. Thomas and Kuldeep Singh, Coach and Manager respectively of the Association for residential purposes. HLTA enrolled several member players who were mostly nearby residents of Panchkula on payment of monthly subscription.

4. Ms Ruchika (since deceased), daughter of Shri S.C. Girhotra and Ms Aradhana alias Reemu, daughter of Shri Anand Prakash and Madhu Prakash (the complainant), both aged about 15 years, residents of Panchkula got themselves enrolled as members of HLTA. Both of them were good friends and used to go together for practice at the tennis court. The appellant-accused was also a frequent visitor to the said tennis court. One day, when Ms Ruchika

1 2010 SCC OnLine P&H 8195

140

informed the appellant-accused about her plan to go abroad, the appellant-accused met her father, Shri S.C. Girhotra on 11-8-1990 in order to persuade him to not to send his daughter out of the country for specialised tennis coaching and promised that special coaching would be arranged for her at HLTA itself and also asked him to send Ruchika to his office on the very next day in connection with the same. Shri Girhotra informed the same to his daughter Ruchika and asked her to meet the appellant-accused in his office on 12-8-1990.

5. On 12-8-1990, Ms Ruchika visited the house of Ms Aradhana and told her about the visit of the appellant-accused to her house and also that he had called her in his office. When both of them were practising in the tennis court, Paltoo, the ball picker, informed Ms Ruchika that the appellant-accused had called her in his office. Accordingly, Ms Ruchika along with Ms Aradhana went to meet the appellant-accused who was standing outside the office at that particular point of time. The appellant-accused insisted them to come inside the office. On his insistence, both the girls went inside the office. The appellant-accused got fetched one chair which was occupied by Ms Aradhana and Ms Ruchika kept standing on the right side of Ms Aradhana while the appellant-accused sat in his chair which was on the other side of the table. The appellant-accused requested Ms Aradhana to call for Mr Thomas, the coach. Accordingly, Ms Aradhana went outside leaving behind the appellant-accused and Ms Ruchika in the office. Ms Aradhana asked the person who fetched the chair for her in the office to inform the coach to come to the office of the appellant-accused. However, the coach refused to come.

6. Immediately thereafter, when Ms Aradhana returned to the office, she witnessed that Ms Ruchika was in the grip of the appellant-accused, who was holding one hand of Ruchika in his hand and his other hand was around her waist. The appellant-accused was pulling her towards his chest so as to embrace her and Ruchika was trying to push him back with her free hand.

7. On seeing Ms Aradhana (PW 13), the appellant-accused got frightened and released Ms Ruchika and fell on his chair. The appellant-accused asked Ms Aradhana to go out of his room again and personally bring the coach with her. The appellant-accused insisted Ruchika to stay in his room, but she somehow managed to escape. When Aradhana was about to go behind Ruchika, the appellant-accused told her "Ask her to cool down, I will do whatever she will say". After listening to this, Ms Aradhana also ran behind Ms Ruchika to enquire about the matter. Thereafter, Ruchika narrated the whole incident to her. After discussion, both the girls decided not to inform the same to their parents as the appellant-accused, being IG of Police, could involve or harass them and their parents.

8. On 14-8-1990, Ms Ruchika along with Ms Aradhana went to the lawn tennis court at about 4.30 p.m., instead of their usual timing, in order to avoid the appellant-accused, who used to visit the court in the evening. When both the girls were about to return, at about 6.30 p.m., Mr Paltoo the ball picker, came out of the court and told Ms Ruchika that the appellant-accused had called her in his office. However, Ms Ruchika refused to meet him and pointed

141

out to Ms Aradhana that since they had not informed their parents about the misbehaviour of the appellant-accused on 12-8-1990, the appellant-accused was feeling emboldened and had again called her to his office with a view to molest her. Thereafter, both of them decided to disclose the incident that took place on 12-8-1990 to their respective parents. Accordingly, Ruchika narrated the incident of her molestation at the hands of the appellant-accused to her father, Shri S.C. Girhotra. Also, the parents of Ms Aradhana were made aware of the entire incident.

9. On hearing this, Shri S.C. Girhotra gathered the residents of the locality who were mostly parents of trainee boys and girls and they went to HLTA office to meet the appellant-accused but they were informed that the appellant-accused had already left for Chandigarh. On 15-8-1990, a memorandum/petition, duly signed by Ms Ruchika, Ms Aradhana, Mr Anand Prakash and Ms Madhu Prakash, father and mother of Ms Aradhana, was presented to the then Secretary (Home), Haryana. After the approval of the Home Minister, Shri R.R. Singh, the then DGP was directed to hold an inquiry into the allegations levelled against the appellant-accused in the memorandum/petition.

10. After conducting the enquiry into the incident, Shri R.R. Singh concluded that the allegation of molestation is based on true facts and a cognizable case is made out against the appellant-accused under the provisions of the Penal Code, 1860 (in short "IPC") and forwarded his enquiry report dated 3-9-1990 to the Secretary (Home), Government of Haryana.

11. During investigation it was also revealed that after the incident of molestation, Ms Ruchika confined herself in her house. Later, on 28-12-1993, she committed suicide by consuming poison and died on 29-12-1993.

12. The enquiry report by Shri R.R. Singh was examined by the Legal Division of the Government of Haryana in 1990 and 1992 which also recommended for registration of a case against the appellant-accused. Madhu Prakash, the complainant/Respondent 2 herein requested several authorities in the Government of Haryana for registration of a case but no action was taken on which she filed a criminal writ petition being No. 1694 of 1997 before the Punjab and Haryana High Court. The High Court, vide order dated 21-8-1998[2], issued direction to the Superintendent of Police, Panchkula that after registration of the case, the investigation shall be handed over to the Central Bureau of Investigation (CBI) and the same shall be conducted by an officer not below the rank of DIG. This Court, by its order dated 14-12-1999[3], upheld the order of the High Court dated 21-8-1998[2] which culminated into registration of a first information report (FIR) being No. 516 of 1999 under Sections 354 and 509 IPC at Police Station Panchkula, Haryana against the appellant-accused.

2 *Madhu* v. *State of Haryana*, 1998 SCC OnLine P&H 1016 : (1998) 4 RCR (Cri) 854
3 *S.P.S. Rathore* v. *Madhu*, (2017) 5 SCC 843

142

13. CBI filed charge-sheet dated 16-11-2000 before the Court of Special Judicial Magistrate, CBI, Ambala under Section 354 IPC. A petition under Section 473 of the Code of Criminal Procedure, 1973 (in short "the Code") was filed by CBI for condoning the delay in filing the charge-sheet and for taking cognizance which was allowed by the Court of Special Judicial Magistrate by his order dated 5-12-2000. Being aggrieved by the order dated 5-12-2000, the appellant-accused preferred writ petition (Criminal) being No. 46381 of 2000 before the High Court challenging the condonation of delay. The High Court by its order dated 18-4-2001[4] dismissed the petition with a direction to the trial court to dispose of the case preferably within six months.

14. Further, a petition was filed for addition of Section 306 IPC in the charge-sheet which was allowed by an order of the trial court dated 23-10-2001. Being aggrieved by the order dated 23-10-2001, the appellant-accused preferred criminal miscellaneous petition being No. 44697-M/2011 before the High Court. The High Court, by its order dated 12-2-2002[5], set aside the order dated 23-10-2001 passed by the trial court. In appeal, this Court also upheld[6] the order dated 12-2-2002[5] passed by the High Court.

15. The Court of Chief Judicial Magistrate, Chandigarh, by its judgment and order dated 21-12-2009 in Challan Nos. 3/17-11-2000, 12 T/10-4-2006 RBT191/17-11-2009, held the appellant-accused guilty of the offence under Section 354 IPC and sentenced him to suffer rigorous imprisonment (RI) for six months along with a fine of Rs 1000. Being aggrieved by the judgment and order dated 21-12-2009, the appellant-accused preferred criminal appeal being No. 5 of 12-1-2010 before the Court of Additional Sessions Judge, Chandigarh. CBI and Madhu Prakash, Respondent 2 herein also preferred criminal appeals being Nos. 26 of 12-1-2010 and 22 of 5-2-2010 respectively, before the Court for enhancement of sentence. The learned Additional Sessions Judge, Chandigarh, by his order dated 25-5-2010 dismissed the appeal filed by the appellant-accused while allowing the appeals filed by CBI and Madhu Prakash for inadequacy of the sentence and for enhancement of sentence of imprisonment and the appellant-accused was awarded with rigorous imprisonment for 1½ years (one-and-a-half) for committing the offence under Section 354 IPC. The sentence of fine remained unchanged.

16. Being aggrieved of the judgment and order dated 25-5-2010, the appellant-accused preferred criminal revision being No. 1558 of 2010 before the High Court. The High Court, by its order dated 1-9-2010[1], dismissed the revision filed by the appellant-accused.

---

4 *S.P.S. Rathore* v. *CBI*, 2001 SCC OnLine P&H 428 : (2001) 4 RCR (Cri) 239

5 *S.P.S. Rathore* v. *CBI*, 2002 SCC OnLine P&H 146 : (2002) 2 RCR (Cri) 174

6 *Madhu Prakash* v. *S.P.S. Rathore*, SLP (Cri) No. 1528 of 2002, order dated 12-4-2002 (SC), wherein it was directed:

"Heard. The special leave petition is dismissed."

1 *S.P.S. Rathore* v. *CBI*, 2010 SCC OnLine P&H 8195

143

17. Aggrieved by the abovesaid order, the appellant-accused has preferred this petition by way of special leave before this Court. This Court, by its order dated 11-11-2010[7], has allowed the petition filed by the appellant-accused for bail.

18. Heard Shri K.V. Viswanathan, learned Senior Counsel for the appellant-accused and Ms Vibha Datta Makhija, learned Senior Counsel for CBI and Shri Vikas Mehta, learned counsel for Respondent 2.

Rival contentions

19. The learned Senior Counsel for the appellant-accused contended that given the situation of HLTA makeshift office in a garage at the relevant point of time along with the presence of a number of people including labourers, it would be impossible to even try for such an act, knowing well that the act can be seen by others. The learned Senior Counsel further contended that the prosecution story is absolutely false and frivolous and the appellant-accused has been framed in the present case by the complainant party and the high level officers of the State with an ulterior motive. The appellant-accused neither

---

7 *S.P.S. Rathore* v. *CBI*, SLP (Cri) No. 8042 of 2010, order dated 11-11-2010 (SC), wherein it was directed:

"1. Heard both sides. Leave granted. Hearing expedited.

2. The petitioner was convicted and sentenced to six months' rigorous imprisonment and a fine of Rs 1000 for an offence punishable under Section 354 of the Penal Code by the trial court. Both the petitioner as well as the State filed an appeal before the Sessions Court. The Sessions Court enhanced the sentence to one year and six months which was confirmed by the High Court in the revision filed by the petitioner. Against the order of the High Court the petitioner has filed the special leave petition before this Court and on 1-10-2010 this Court issued notice.

3. When the bail application was taken up on the last date of hearing i.e. 27-10-2010, the learned Additional Solicitor General appearing on behalf of Respondent 1 CBI raised an objection by drawing our attention to the pendency of three FIRs. Today the learned Additional Solicitor General has informed us that CBI has filed two closure reports on 10-11-2010. It is also brought to our notice insofar as the third FIR is concerned, by an order dated 25-1-2010 the High Court of Punjab and Haryana has permitted CBI to continue with the investigation but the final report shall not be presented.

4. Apart from the above factual information, it is not in dispute that the petitioner had served more than six months out of the enhanced sentence of one year and six months. Taking note of all these aspects and in view of the information furnished by CBI we feel that the petitioner deserves to be released on bail. Accordingly, the petitioner is ordered to be released on bail subject to the condition that he shall not leave the country without specific permission of the Chief Judicial Magistrate, Chandigarh. Accordingly, Criminal Miscellaneous Petition No. 20386 of 2010 application for bail is allowed.

5. It is brought to our notice that the petitioner's passport has already been surrendered and it stands deposited before the Additional Sessions Judge, Chandigarh. The above statement is recorded."

144

visited the house of Shri S.C. Girhotra nor asked for a meeting with Ruchika on 12-8-1990 in HLTA office.

20. It was further argued that the memorandum/petition has been drafted after prolonged consideration and deliberation by several interested persons including some senior police officers of the State of Haryana. The name of the players who were allegedly accompanying Ms Ruchika at the relevant time has not been mentioned in the memorandum intentionally and later on Ms Aradhana has been planted as "Sathi Khiladi". It was contended that the words "Sathi Khiladi" have been mentioned in the memorandum for the purpose of introducing an eyewitness of choice. The learned Senior Counsel further contended that the signatures of Ms Ruchika on the alleged memorandum are false and forged and on this ground, the document cannot be relied upon. This document does not disclose the details of the incident and merely suggests that the appellant-accused misbehaved with Ms Ruchika which does not attract Section 354 IPC.

21. The learned Senior Counsel further contended that no complaint was filed by Ms Ruchika or her father Shri S.C. Girhotra or Shri Ashu, elder brother of Ms Ruchika or Mrs Madhu Prakash (PW 2) or Shri Anand Prakash (PW 1) or by Ms Aradhana (PW 13) in the police station. Even after 14-8-1990, when Ms Ruchika and Ms Aradhana allegedly informed their parents, none of them approached the police to get the FIR registered. The police post, Sector 6, Panchkula is at a distance of 300 yd only from the tennis court. It is situated very near to the house of Shri S.C. Girhotra also. In this way undue and unexplained delay resulted in manipulations and proper version could not be put forth before the court.

22. The learned Senior Counsel for the appellant-accused further contended that the inquiry conducted by Shri R.R. Singh was without jurisdiction as the appellant-accused, at the relevant point of time, was on deputation with BBMB and was not under the administrative control of the Government of Haryana. He further contended that the IAS lobby in the Government of Haryana was entirely against the appellant-accused and it had colluded with Shri Anand Prakash (PW 1) and others against the appellant-accused. He further pointed out the reason that there was rivalry between the two tennis associations, one headed by the appellant-accused and one formed later on by the IAS group with Shri J.K. Duggal, Secretary (Home) as its President with the patronage of Shri B.S. Ojha.

23. It was further contended from the side of the appellant-accused that before forming the Haryana Tennis Association (HTA), the IAS lobby pressurised the appellant-accused to step down from the Presidentship of HLTA in favour of Shri B.S. Ojha to which the appellant-accused refused which annoyed Shri B.S. Ojha, who had strong reasons for ordering the enquiry by Shri R.R. Singh and police officers working under him had organised the drafting of the said memorandum against the appellant-accused. The enquiry conducted by Shri R.R. Singh cannot be relied upon because no enquiry could be marked to him and also he has not held the enquiry in proper manner.

145

24. It was further submitted by the learned Senior Counsel that the media has played a negative role in the present case and published the selective news items only in collusion with the complainant party. The material witnesses like ball picker, Paltoo and Coach K.T. Thomas, who were allegedly present at the place of the alleged incident, have not been examined by the prosecution. Further, the witnesses have made a lot of improvements and there are other discrepancies also in the statements of witnesses and therefore, the same could not have been relied upon by the courts below. The learned Senior Counsel finally contended that the case of the prosecution is false and frivolous, the net result of which is that the prosecution has failed to prove its case and the appellant-accused is entitled to be acquitted.

25. Per contra, the learned Senior Counsel for CBI submitted that the occurrence is well proved by the unimpeachable testimony of Ms Aradhana (PW 13). The eyewitness stood with her testimony till the end and therefore, the contention urged on behalf of the appellant-accused with regard to the above evidence has no relevance or substance. On a careful examination of the statement of PW 13, it can be very easy to arrive at the conclusion that there was every possibility that Ms Ruchika could have been embraced by the appellant-accused in the manner that the eyewitness eventually described in her deposition before the trial court. Even Shri S.C. Girhotra, father of Ms Ruchika has categorically deposed that the appellant-accused met him and requested him not to send his daughter abroad and also insisted to meet her in his office on 12-8-1990 which gets corroboration from the statement of PW 13 that both the girls went to meet the appellant-accused at his office at HLTA.

26. With regard to the claim of signatures on the memorandum as well as on the application given to the SHO, the learned Senior Counsel for CBI submitted that as far as the signatures of Ms Ruchika on the document are concerned, Ms Ruchika has signed the alleged memorandum in the presence of others and the same is established by the witnesses like Ms Aradhana, Mrs Madhu Prakash and Shri Anand Prakash in whose presence she signed the documents, which is a direct evidence. The evidence of expert witness cannot be considered conclusive proof of the charge and it requires independent and reliable evidence for its corroboration. She further submitted that Ms Ruchika was the best person to depose about the genuineness of her signatures, but as she is no more, therefore, she could not appear in the witness box to depose about the genuineness of her signatures on the alleged memorandum. In her absence, the persons in whose presence she signed the document are the best witnesses to prove the genuineness of the signatures of the victim. The strong direct evidence on record cannot be rebutted by weak type of evidence of handwriting expert upon which reliance is placed by the learned Senior Counsel on behalf of the appellant-accused.

27. With regard to the contention urged by the appellant-accused that Ms Aradhana was the "Sathi Khiladi" as mentioned in the memorandum, on the basis of which FIR got registered, was manipulated, the learned Senior Counsel submitted that a perusal of the contents of the memorandum reveals that it merely gives a sequence of events which had happened from the very

146

beginning and no manipulation appears to be made out. Merely on the ground that Shri C.P. Bansal, the then DIG and Shri Sham Lal Goyal, the then DSP were present on the spot, it cannot be said that they actively participated in its drafting and certain unnecessary and unwarranted facts were added to it. If experienced police officers would have participated in its drafting then it should have been in the form of FIR and the evidence must have been specifically pointed out in it. But the language of the memorandum is like that the people have tried to show their resentment against the alleged act and demanded action against the accused. The reason for not mentioning the name of Ms Aradhana in the memorandum is that she could have been harassed by the accused, who being a high-ranking police officer. Because of this reason only, Ms Ruchika or Ms Aradhana or their parents did not approach the local police to lodge the FIR. They were fully aware that the appellant-accused, being a seniormost police officer, holding a key post in the State, would definitely hamper the investigation or may not allow the police officers to cooperate with the complainant party.

28. The learned Senior Counsel for CBI further pointed out that Shri R.R. Singh was an authority legally competent to investigate the facts of the memorandum and he was asked by the Government of Haryana to enquire into the facts given in the memorandum and to submit a report to it. To make a person an authority legally competent to investigate, it is not necessary that he should be having authority which flows from a statute. It is sufficient that such person was authorised legally by the State Government to investigate the fact. As such, Shri R.R. Singh was the competent authority to investigate the facts in question and the statements given by the witnesses before him are admissible in evidence irrespective of time gap between the time when the incidents occurred and the date on which the statements were given.

29. The learned Senior Counsel for CBI finally submitted that the alleged rivalry between HLTA and HTA as well as the arguments advanced by the learned Senior Counsel for the appellant-accused regarding the credibility of Shri Anand Prakash (PW 1) and Shri S.C. Girhotra (PW 15) have no bearing on the case at hand and the prosecution has made out a case for conviction of the appellant-accused under Section 354 IPC.

Discussion

30. It is not disputed that HLTA was floated in 1988-1989 at Panchkula, Haryana. The appellant-accused was the President of HLTA. Its office was established in the garage of an under construction house at Sector 6, Panchkula owned by the appellant-accused. It is also an admitted fact that Ms Aradhana (PW 13), Mr Manish Arora (PW 3), Mr Vipul Chanana (PW 4) and Ms Ruchika (since deceased) were the members of the Association and used to play tennis in its court. It is the case of the prosecution that on 11-8-1990, the appellant-accused visited the house of Shri S.C. Girhotra (PW 15) and requested him not to send his daughter to Canada for coaching as he would arrange special coaching for her at HLTA itself. This fact has been well proved by Shri S.C. Girhotra (PW 15) in his statement. He has deposed before the trial court that on

147

11-8-1990, the appellant-accused visited his house at about 12.00 noon and had asked him not to send his daughter to Canada and that he would arrange special coaching for her. The appellant-accused further asked him to send his daughter on 12-8-1990, at about 12.00 noon, in his office to discuss about the training. At that particular point of time Ms Ruchika was not present at her house. On her return, PW 15 informed the same to her and also asked her to meet the appellant-accused on 12-8-1990 in his office at 12.00 noon. This fact finds corroboration from the statement of Ms Aradhana (PW 13). She has deposed that on 12-8-1990, at about 11.00 a.m., Ms Ruchika came to her house and she very excitedly told her that on 11-8-1990, the appellant-accused had visited her house and requested her father not to send her abroad and that he would arrange special coaching for her at HLTA itself as she was a promising player. She further informed Ms Aradhana that the appellant-accused had asked her to meet him on 12-8-1990, at 12.00 noon, at HLTA office. The very same fact finds place in the memorandum also which was signed by Ms Ruchika along with others. The evidence of PW 15 corroborates with the evidence of PW 13 in order to substantiate the fact that the appellant-accused visited the house of Shri S.C. Girhotra on 11-8-1990 and asked him to send Ms Ruchika to his office on 12-8-1990 at 12.00 noon.

31. Ms Ruchika (since deceased) and Ms Aradhana went to play at lawn tennis court on 12-8-1990 and while they were playing Shri Paltoo, the ball picker came there and told Ms Ruchika that the appellant-accused had called her to his office at 12.00 noon. Accordingly, Ms Ruchika and Ms Aradhana went to his office. The appellant-accused asked Ms Aradhana to fetch the Coach Shri T. Thomas. While Ms Aradhana had left the place, the appellant-accused molested/outraged the modesty of Ms Ruchika. When Ms Aradhana returned to the office, she witnessed the appellant-accused molesting Ms Ruchika. Ms Aradhana, in her statement, has categorically deposed that on that day when both of them i.e. Ms Ruchika and Ms Aradhana were playing tennis, Shri Paltoo, the ball picker, came and informed Ms Ruchika that the appellant-accused had called her in HLTA office. They saw that the appellant-accused was standing outside his office. On seeing them, the appellant-accused asked them to come to his office. Though Ms Ruchika requested the appellant-accused to talk to her outside the office, but he insisted upon them to come to his office. On his insistence, they followed him towards his office. On being asked by the appellant-accused, a chair was brought on which Ms Aradhana (PW 13) sat down while Ruchika remained standing on her right side. Immediately thereafter, the appellant-accused asked Ms Aradhana to fetch the Coach Mr T. Thomas. When she went outside to call the coach, she found him standing at a distance on the other side of the house across the road. She asked the ball picker, Paltoo to go and fetch the coach. Mr Thomas, on being informed about the same by Mr Paltoo, waved his hand towards Ms Aradhana expressing his inability to come at that moment. Thereafter, Ms Aradhana returned and when she entered the office, she saw that the appellant-accused was holding one hand of Ms Ruchika and his other hand was around her waist. Ms Ruchika was trying hard to get herself released by pushing him away with her other hand. On seeing

148

Ms Aradhana (PW 13), the appellant-accused became nervous and released Ms Ruchika and fell down on his chair. When she informed the appellant-accused that the coach has refused to come to his office, the appellant-accused rudely ordered her to go again and call the coach personally. In the meantime, Ms Ruchika came to her side and went out of the office. When PW 13 was trying to follow her, the appellant-accused told her "ask her to cool down, I will do whatever she will say". Thereafter, PW 13 followed Ms Ruchika and when she reached near her, Ruchika started weeping loudly. When she asked Ms Ruchika as to what had happened, she narrated that as soon as she left to fetch the coach, the appellant-accused caught hold of her hand which she got released with great difficulty, but he again caught hold of her hand and with his other hand the appellant-accused caught hold of her waist and dragged her towards him and embraced her. She further told her that in the meantime when PW 13 reached there, he got scared and immediately released her. After discussion as to whether the incident be disclosed to their parents or not, both of them decided not to inform their parents about the incident as the appellant-accused, being a high-ranking police officer, could harm their families. The molestation of Ms Ruchika at the hands of the appellant-accused is very well proved from the deposition of PW 13. There was no reason for Ms Aradhana (PW 13) to depose falsely. In fact, she witnessed the actual act of molestation of Ms Ruchika at the hands of the appellant-accused. Further, the fact regarding molestation of Ms Ruchika by the appellant-accused has been stated on oath by Shri Anand Prakash (PW 1), Mrs Madhu Prakash (PW 2), Mr Manish Arora (PW 3), Mr Vipul Chanan (PW 4) and Shri S.C. Girhotra (PW 15). There is no reason as to why PW 13 and other aforementioned prosecution witnesses would falsely implicate the appellant-accused in the case.

32. Ms Ruchika and Ms Aradhana visited the lawn tennis court on 14-8-1990, at 4.30 p.m., instead of their usual timing deliberately in order to avoid confrontation with the appellant-accused, who usually used to visit the court in the evening daily. At about 6.30 p.m., when they were about to return after practice, Shri Paltoo, the ball picker, came over the lawn tennis court and told Ms Ruchika that the appellant-accused had called her in his office immediately. However, Ms Ruchika refused to go there and told Ms Aradhana that since they had not informed about the incident which took place on 12-8-1990 to their parents that has emboldened the appellant-accused. Thereupon, they decided to inform about the overt act of the appellant-accused to their parents. They went to the house of Ms Ruchika where they met Shri S.C. Girhotra, father of Ms Ruchika. Ms Ruchika started narrating the incident of molestation to her father, however, she could not narrate the entire incident and broke down, whereupon her father told Ms Aradhana to take Ms Ruchika to her mother. They went to the house of Ms Aradhana where Mrs Madhu Prakash (PW 2) and Shri Anand Prakash (PW 1) were present. Ms Ruchika disclosed the entire incident to PW 2, who further informed her husband about the said incident. Thereafter, Ms Ruchika, Ms Aradhana, Shri Anand Prakash, Mrs Madhu Prakash and Shri S.C. Girhotra and other persons went to HLTA

court to meet the appellant-accused wherefrom they came to know that the appellant-accused had already left for Chandigarh.

33. On 15-8-1990, a number of persons, who were mostly players and their parents, gathered at the residence of Shri Anand Prakash. They decided that the incident should be brought to the notice of higher authorities including the Chief Minister of Haryana. Accordingly, a memorandum was prepared. A number of copies of this memorandum were prepared for being handed over to different authorities. This memorandum was signed by Shri Anand Prakash, Ms Ruchika, Mrs Madhu Prakash, Meenu, Sangeet, Aradhana, Anirudh, Beenu, Naresh Mittal, C.S. Gupta and Shri I.D. Mittal. The witnesses who were examined in the court identified their signatures as well as signatures of Ms Ruchika on the memorandum. The appellant-accused disputed the genuineness of signatures of Ms Ruchika. He tried to substantiate his contention by examining the handwriting expert. The contention of the appellant-accused is not tenable as the witnesses who have been examined by the prosecution and in whose presence the memorandum was signed, have identified the signatures of Ms Ruchika. Shri Anand Prakash has proved the preparation of memorandum. In this regard, the law is very clear that a fact should be proved by the best available evidence. The witnesses had identified the signatures of Ms Ruchika on the memorandum, therefore, the evidence of the handwriting expert cannot be considered to be safe and it requires corroboration from independent witnesses. As already stated, the signatures of Ms Ruchika have been proved by the witnesses who have signed the memorandum and are direct, primary and best available evidence in the case and, therefore, the same can be relied upon.

34. On 16-8-1990, the memorandum was given to Shri J.K. Duggal (PW 12), the then Secretary (Home) who assured them that the matter would be enquired into. He asked the persons who had presented the memorandum to him to reach the lawn tennis court where Shri S.K. Joshi, the then SDM would also be reaching. After reaching there, they found a notice dated 15-8-1990 declaring suspension of Ms Ruchika with effect from 13-8-1990 displayed on the notice board. Shri S.K. Joshi, the then SDM also reached there. Shri Kuldeep Singh, the Manager and Shri T. Thomas, the Coach were also present there. On being asked, Shri Kuldeep Singh, in the presence of witnesses, informed that he has affixed the notice on the directions of the appellant-accused. He further disclosed that Ms Ruchika has committed no act of indiscipline. On being asked, Shri Kuldeep Singh gave the same facts in writing on the notice. This fact was confirmed by the Coach, Shri T. Thomas and he signed at a point where the following words were written "I support the contents of the endorsement of Shri Kuldeep Singh". He was also asked to give it in writing, if any act of indiscipline has been committed by Ms Ruchika. On this, he made an endorsement to the effect that to the best of his knowledge Ms Ruchika has not done any act of misbehaviour or indiscipline in HLTA tennis court. This notice was produced by Shri Anand Prakash at the time of his deposition before the trial court. It has also come in his evidence that the said notice was given to him by the SDM immediately after making endorsement.

150

These facts have been proved by PW 1, PW 2, PW 3, PW 4, PW 5 and PW 13. The presence of Shri Kuldeep Singh and Shri T. Thomas on that day and time has already been proved by the then SHO, Panchkula who was on patrolling duty on that date and reached the spot on receiving verbal transmission message about the incident.

35. Shri R.R. Singh was directed by the Chief Minister and the Home Minister of the State of Haryana to conduct an enquiry into the allegations contained in the memorandum. In compliance with the said order, Shri R.R. Singh recorded the statements of the witnesses including Mrs Madhu Prakash (PW 2), Ms Aradhana (PW 13), Shri S.C. Girhotra (PW 15) and Shri Anil Kumar. The statements of Ms Ruchika and Shri Anand Prakash (PW 1) were also recorded. After the enquiry, he recommended that a case under the relevant provisions of IPC be got registered. Despite the fact that Shri R.R. Singh had recommended the registration of a case against the appellant-accused, no action was taken by the State Government. It is most surprising that no value was attached to the said report and to the recommendations made by such a high-ranking police officer i.e. Director General of Police, Haryana.

36. It has also been argued from the side of the appellant-accused that Shri B.S. Ojha and Shri J.K. Duggal were having great grudge against him. It was further contended that the relations between the appellant-accused and Shri R.R. Singh were strained since 1976. But this suggestion was denied by the witness while appearing in the court. The learned Senior Counsel for CBI has strenuously submitted that a proper report was given by Shri R.R. Singh and it is a matter of common experience that no girl or father would make a false complaint of such heinous nature even against their enemy.

37. Shri R.R. Singh had conducted the enquiry under the orders of the Government of Haryana, therefore, he was competent to investigate/enquire into the allegations made in the memorandum. As such, all the statements recorded by him are admissible under Section 157 of the Evidence Act for the purpose of corroboration. Shri J.K. Duggal and Shri B.S. Ojha are independent witnesses and they have no grudge against the appellant-accused as alleged by the learned Senior Counsel. For the sake of arguments, even if it is assumed to be correct that there was some dispute over the control of HLTA between them, it was not such a big issue which would have induced them to implicate the appellant-accused falsely. There is no evidence on record to substantiate the allegations that these two officers were in any way instrumental in preparation of memorandum or implicating the appellant-accused in the case. There is also no evidence on record to suggest any nexus of these two officers with Shri Anand Prakash (PW 1) and Shri S.C. Girhotra (PW 15). There is no evidence to suggest any enmity between the appellant-accused and PW 1 to implicate him in a fabricated case.

38. It is further the case of the appellant-accused that the statement recorded by Shri R.R. Singh cannot be used by the prosecution for the purpose of corroboration under Section 157 of the Evidence Act. The contention of the accused is not tenable at all. This section envisages two categories of statements

151

of witnesses, which can be used for corroboration. First is the statement made by a witness to any person at or about the time when the incident took place. The second is the statement made by him to any authority legally competent to investigate the matter. Such statements gain admissibility, no matter that it was made long after the incident. But if the statement was made to non-authority, it loses its probative value due to lapse of time.

39. Shri R.R. Singh was an authority legally competent to investigate the incident. He was asked by the State Government to enquire into the facts given in the memorandum and report thereon. To make a person an authority legally competent to investigate, it is not necessary that he should be having authority which flows from a statute. It is sufficient that such person was authorised legally by the State Government to investigate the matter. Hence, we are of the view that Shri R.R. Singh was the authority competent to investigate the fact in question and the statements given by the witnesses before him are admissible in evidence irrespective of the time-gap between the time when the incidents occurred and the date on which the statements were given. Shri R.R. Singh was in fact competent to investigate the matter since the enquiry conducted by him was merely a fact-finding enquiry. The undisputed fact is that nothing happened even after the submission of the report by Shri R.R. Singh because no action was taken by the State Government on the same. Further, all the witnesses including Shri J.K. Duggal and Shri B.S. Ojha examined by the prosecution are the independent witnesses and the enmity, as suggested by the appellant-accused, is not proved, as discussed above.

40. The learned Senior Counsel for the appellant-accused has contended that in the present fact situation, how a person can embrace other while standing behind the table and then suddenly fall into his chair on the entry of PW 13. In this regard, we have carefully considered the evidence given by the prosecution, especially the evidence of PW 13. She, being the sole witness to prove the *actus reus*, her evidence should receive some careful consideration and we do not find any reason for her to depose falsely against the appellant-accused. There is, thus, every possibility that Ms Ruchika could have been embraced by the appellant in the manner as described by PW 13.

41. The High Court, on proper reappreciation of the entire evidence, came to the right conclusion that the prosecution was successful in proving the case beyond reasonable doubt and the offence punishable under Section 354 IPC was made out. There is devastating increase in cases relating to crime against women in the world and our country is also no exception to it. Although the statutory provisions provide strict penal action against such offenders, it is for the courts to ultimately decide whether such incident has occurred or not. The courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds. By the consistent evidence of Ms Aradhana (PW 13), the prosecution has proved beyond reasonable doubt the offence committed by the appellant under Section 354

152

IPC. A charge under Section 354 IPC is one which is very easy to make and is very difficult to rebut. It is not that on account of alleged enmity between the appellant and Shri Duggal and Shri Ojha, he was falsely implicated. It would, however, be unusual in a conservative society that a woman would be used as a pawn to wreak vengeance. When a plea is taken by the appellant-accused that he has been falsely implicated, the courts have a duty to make deeper scrutiny of the evidence and decide the acceptability or otherwise of the accusations made against him. In the instant case, both the trial court and the High Court have done that. There is no scope for taking a different view from the view already been taken by the courts below. The occurrence of the overt act is well proved by the unimpeachable testimony of the eyewitness, Ms Aradhana (PW 13).

42. In order to constitute the offence under Section 354 IPC, mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

(*i*) that the person assaulted must be a woman;

(*ii*) that the accused must have used criminal force on her; and

(*iii*) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

43. This Court, in *Vidyadharan* v. *State of Kerala*[8] held as under: (SCC p. 221, para 10)

> "*10.* Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight."

44. It is undoubtedly correct that if intention or knowledge is one of the ingredients of any offence, it has got to be proved like other ingredients for convicting a person. But, it is also equally true that those ingredients being state of mind may not be proved by direct evidence and may have to be inferred from the attending circumstances of a given case. The sequence of events which we have detailed earlier indicates that the appellant-accused had the requisite culpable intention.

8 (2004) 1 SCC 215 : 2004 SCC (Cri) 260

153

45. This Court, in *Tarkeshwar Sahu* v. *State of Bihar*[9], held as under: (SCC pp. 576-77, paras 39-40)

"*39.* So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of a woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

40. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex."

46. With regard to the delay of about 6 days in presenting the complaint to the SHO, this Court is of the view that the same has been duly explained. In a tradition-bound non-permissive society in India, it would be extremely reluctant to admit that any incident which is likely to reflect upon the chastity of a woman had occurred, being conscious of the danger of being ostracised by the society or being looked down by the society. In the instant case, the victim, Ms Ruchika not informing about the incident to the parents under the circumstances that the appellant-accused, who being a very senior police officer of the State, was reasonable and it would not have been an easy decision for her to speak out. In the normal course of human conduct, this unmarried minor girl would not like to give publicity to the traumatic experience she has undergone and felt terribly embarrassed in relation to the incident to narrate it to her parents and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. After informing the incident to her parents, the follow-up action was immediately taken by the residents and the fellow players and a memorandum containing allegations against the appellant-accused was prepared and submitted before the then Secretary (Home). Therefore, giving due consideration to the appellant-accused, once the victim and her family members got assurance of justice from the superior authorities, they lodged a formal complaint against the appellant-accused.

47. With regard to the contention of the learned Senior Counsel for the appellant-accused that the signatures of Ms Ruchika on the memorandum were forged though she signed the same in front of Shri Anand Prakash, Shri S.C. Girhotra, Ms Aradhana and Mrs Madhu Prakash and they have admitted the same, we are of the opinion that expert evidence as to handwriting is only opinion evidence and it can never be conclusive. Acting on the evidence of any expert, it is usually to see if that evidence is corroborated either by clear, direct or circumstantial evidence. The sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. A court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. It may not be safe for a court to record a finding about a person's writing in a

9 (2006) 8 SCC 560 : (2006) 3 SCC (Cri) 556

154

certain document merely on the basis of expert comparison, but a court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard. The opinion of a handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive. It has also been held by this Court in a catena of cases that the sole evidence of a handwriting expert is not normally sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing. It is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence.

48. In *Mobarik Ali Ahmed* v. *State of Bombay*[10] this Court has held as under: (AIR p. 864, para 11)

> "*11.* ... Learned counsel objected to this approach on a question of proof. We are, however, unable to see any objection. The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signatures being affixed. It may be proof of the handwriting of the contents, or of the signatures, by one of the modes provided in Sections 45 and 47 of the Evidence Act.
>
> It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signatures of the alleged sender limited though it may be, as also his knowledge of the subject-matter of the chain of correspondence, to speak to its authorship.
>
> In an appropriate case the court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. We are unable, therefore, to say that the approach adopted by the courts below in arriving at the conclusion that the letters are genuine is open to any serious legal objection. The question, if any, can only be as to the adequacy of the material on which the conclusion as to the genuineness of the letters is arrived at. That however is a matter which we cannot permit to be canvassed before us."

10 AIR 1957 SC 857 : 1957 Cri LJ 1346

155

49. In *Bhagwan Kaur* v. *Maharaj Krishan Sharma*[11] this Court held as under: (SCC p. 53, para 26)

> "*26.* ... It is no doubt true that the prosecution led evidence of handwriting expert to show the similarity of handwriting between (PW 1/A) and other admitted writings of the deceased, but in this respect, we are of the opinion that in view of the main essential features of the case, not much value can be attached to the expert evidence. The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert. In *Kishore Chandra Singh Deo* v. *Babu Ganesh Prasad Bhagat*[12] this Court observed that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case."

50. It is thus clear that uncorroborated evidence of a handwriting expert is an extremely weak type of evidence and the same should not be relied upon either for the conviction or for acquittal. The courts, should, therefore, be wary to give too much weight to the evidence of handwriting expert. It can rarely, if ever, take the place of substantive evidence. Before acting on such evidence, it is usual to see if it is corroborated either by clear, direct evidence or by circumstantial evidence.

51. It is the claim of the learned Senior Counsel for the appellant-accused that the present case is fabricated and a result of the rivalry between HLTA and HTA. Further, Shri Anand Prakash has derived professional benefit from this exercise besides venting his long-standing grudge against the appellant-accused. It does not stand to logic that having regard to the Indian social set up, any father would let his daughter's honour and reputation be damaged merely because one of his associates has his own agenda against the appellant-accused. However, each case has to be determined on the touchstone of the factual matrix thereof. In the instant case, there is nothing on record on the basis of which it can be said that the tender age of the victim was exploited for the benefit of Shri Anand Prakash (PW 1).

52. With regard to the contention of the learned Senior Counsel that non-examination of two important site witnesses viz. Shri Paltoo, the ball picker and Shri T. Thomas, the Coach draws adverse inference against the prosecution, the High Court has rightly held that adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. We are also of the opinion that they were not in any way connected with the actual commission of offence and even in their absence, the commission of the offence of molestation by the appellant-accused stands well proved by the unimpeachable testimony of the eyewitness (PW 13) to the incident.

11 (1973) 4 SCC 46 : 1973 SCC (Cri) 687
12 AIR 1954 SC 316

156

53. No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of even a single eyewitness, truthful, consistent and inspiring confidence is sufficient for maintaining conviction. It is not necessary that all those persons who were present at the spot must be examined by the prosecution in order to prove the guilt of the accused. Having examined all the witnesses, even if other persons present nearby are not examined, the evidence of eyewitness cannot be discarded.

54. In view of the foregoing discussion, we are of the opinion that Ms Aradhana (PW 13) withstood her testimony from the beginning till the end and her deposition was found reliable and corroborative with other prosecution witnesses and both the courts below were right in upholding the conviction of the appellant-accused under Section 354 IPC.

55. With regard to sentence of the appellant-accused, the learned Senior Counsel on his behalf has pointed out certain mitigating factors which are —old age of the appellant-accused, health ailments, responsibility of looking after the unmarried daughter suffering from congenital heart disease, past meritorious service and prolonged trial. Keeping in view the aforementioned factors especially the old age and physical condition of the appellant-accused, we do not think it expedient to put him back in jail. While we uphold the findings as to the guilt of the appellant-accused, we are of the opinion that the cause of justice would be best subserved when the sentence of the appellant-accused would be altered to the period already undergone. We, therefore, reduce the sentence of the appellant to the period already undergone by him as a special case considering his very advanced age.

56. In view of the foregoing discussion, we confirm the conviction of the appellant-accused under Section 354 IPC while modifying the sentence to the period already undergone. The appeal is disposed of with the above terms.

157

State appeal on 16-7-1986 has awarded the enhanced benefits under the Amendment Act 68 of 1984. Thus this appeal by special leave.

4. This appeal is only in respect of awarding of enhanced benefits under Sections 23(2), 28 and 23(1-A) of the Act. In view of the settled legal position that the award of the civil court was made long before the date of the introduction of the Amendment Act 68 of 1984, the claimant is not entitled to the enhanced benefits. That apart, it is also settled legal position that the High Court, while dismissing the appellant's appeal, had no jurisdiction to award the additional benefits since the claimants did not file any appeal for further enhancement. Therefore, in the absence of any additional compensation being awarded, the High Court has no jurisdiction to award the benefits under the provisions of the Amendment Act 68 of 1984.

5. The appeal is accordingly allowed. The order of the High Court awarding solatium, interest and additional amount under Sections 23(2), 28 and 23(1-A) stands set aside. No costs.

(1996) 4 Supreme Court Cases 596

(BEFORE DR A.S. ANAND AND M.K. MUKHERJEE, JJ.)

S. GOPAL REDDY .. Appellant;

Versus

STATE OF A.P. .. Respondent.

Criminal Appeal No. 231 of 1994†, decided on July 11, 1996

A. Dowry Prohibition Act, 1961 — S. 4 r/w S. 2 — Scope — Held, covers the very demand of dowry at the negotiation stage as a consideration for a proposed marriage — "Marriage" held includes the proposed marriage that may not have taken place — The peculiar definition of dowry in the Act specifically covers the demand made 'before' marriage

B. Dowry Prohibition Act, 1961 — Ss. 3 and 4 — Court's approach should be realistic in dealing with a case under the Act — Provisions of the Act should be interpreted in the light of the object of the Act so as to further that object — But it being a penal statute court should be cautious and careful so that suspicion, conjectures and surmise may not influence its judgment — At the same time it cannot acquit an accused merely on the basis of technicalities and minor discrepancies — Interpretation of statutes — Penal statutes

C. Constitution of India — Art. 136 — Criminal appeal — Findings of fact — General rule of reappraisal of restated

D. Evidence Act, 1872 — S. 114 Ill. (g) — Adverse presumption to be drawn from non-production of vital letter by the prosecution

E. Evidence Act, 1872 — S. 45 — Expert evidence — Nature of — Held, is a weak type of evidence which cannot be safely relied upon without independent

† From the Judgment and Order dated 16-10-1990 of the Andhra Pradesh High Court in Crl. R C No 446 of 1990

158

and reliable corroboration — On facts, the testimony of the handwriting expert was not clinching enough

F. **Evidence Act, 1872 — Ss. 67, 73 and 45 — Proof of execution of document by a particular person — Modes of — Relevance of opinion of witnesses and of opinion of handwriting expert in such situations**

G. **Interpretation of Statutes — External aids — Dictionaries — When definition of a word provided in the statute itself, dictionary meaning cannot be looked into**

H. **Interpretation of Statutes — Basic rules — Purposive construction — Provision should be construed in the context of the object the Act seeks to achieve — Mischief rule**

The prosecution case was that at the stage of negotiation of marriage of the accused-appellant, an IPS officer, with *V*, daughter of PW 1, a lawyer, the appellant's elder brother, the second accused, had demanded a house at Hyderabad, jewels, cash and clothes worth about Rs 1 lakh and a sum of Rs 50,000 in cash for purchase of car. This was agreed upon by PW 1. The date of marriage was to be fixed after consulting the appellant. However, later the second accused raised the demand from Rs 50,000 to Rs 1 lakh for purchase of the car and insisted that the said amount be paid before marriage. While the dowry talks remained inconclusive the date of marriage was fixed. Meanwhile, it was alleged that the appellant had written a letter to *V* asking her to cancel the marriage or to fulfil the demands made by his elders. When the appellant came to Hyderabad PW 1 told him about the additional demand of his elder brother. The appellant told PW 1 that he would consult his brother and inform him about it and left for his native place. It is alleged that on his return from the village, the first accused asked PW 1 to give Rs 75,000 instead of Rs 50,000 as agreed upon earlier instead of Rs 1 lakh as demanded by the second accused. According to the prosecution case this talk took place in the presence of one *N* (who was not examined). The appellant suggested that PW 1 should give Rs 50,000 immediately towards the purchase of the car and the balance of Rs 25,000 should be paid within one year after the marriage but PW 1 did not accept the suggestion. According to the prosecution case 'Varapuja' was performed by PW 1 and his other relatives at the house of the second accused. At that time PW 1 allegedly handed over to the appellant, a document purporting to settle a single-storey house in the name of *V* along with a bank pass-book showing a cash balance of Rs 50,881 in the name of *V*. It was alleged that on this the appellant flared up saying that the settlement was for a double-storeyed house and threatened to get the marriage cancelled. The effort of PW 1 to persuade the appellant failed and ultimately the marriage did not take place. The appellant then returned all the articles that had been given to him at the time of Varapuja. PW 1 thereupon sent a complaint to the Director of National Police Academy where appellant was then undergoing training and later filed a report in the concerned police station. During the investigation, various letters purported to have been written by the appellant to *V* were sent to the handwriting expert PW 3, who gave his opinion regarding the existence of similarities between the specimen writings of the first accused and the disputed writings but also said "*no definite opinion can be given on the basis of the present standards. Extensive admitted writings are required for offering definite opinion.*" Both the appellant and his elder brother were tried for offences under Section 420 IPC read with Section 4 Dowry Prohibition Act, 1961. The trial court convicted them both and sentenced them to undergo 9 months' RI and to a fine of Rs 500 each and in default to undergo SI for four months for the offence under Section 420 IPC and to RI for 6 months and a fine of Rs 1000 each and in default SI for six months for the offence under Section 4 of the Act. In appeal, the Additional Metropolitan

159

Sessions Judge held that no offence under Section 420 IPC was made out and set aside their conviction and sentence for the said offence while confirming their conviction and sentence for the offence under Section 4 of the Act. Both the convicts unsuccessfully invoked the revisional jurisdiction of the High Court. SLP filed by the appellant's brother was dismissed by the Supreme Court. The present appeal by special leave was filed by the appellant against the order of the High Court pertaining to him. Allowing his appeal and setting aside the conviction and sentence,

Held:

Any 'demand' of 'dowry' made *before, at* or *after* the marriage, where such demand is made as a *consideration for marriage* would attract the provisions of Section 4 of the Act. (Para 18)

The Dowry Prohibition Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made *before or at the time or after the marriage* where such demand *is referable to the consideration of marriage*. Keeping in view the object of the Act, "demand of dowry" *as a consideration for a proposed marriage* would also come within the meaning of the expression dowry under the Act. Thus, any 'demand' of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legally recognised claim and is *relatable only to the consideration of marriage*. Marriage in this context would include a proposed marriage also more particularly where the non-fulfilment of the "demand of dowry" leads to the ugly consequence of the marriage not taking place at all. It is not possible to subscribe to the view that it is only the property or valuable security given at the time of marriage which would bring the same within the definition of 'dowry' punishable under the Act, as such an interpretation would be defeating the very object for which the Act was enacted. The expression 'dowry' under the Act must be interpreted in the sense which the statute wishes to attribute to it. One must keep in mind the well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary. (Paras 10 to 12)

The definition of the expression 'dowry' contained in Section 2 of the Act cannot be confined merely to the 'demand' of money, property or valuable security "made at or after the performance of marriage" on the basis of the dictionary meaning of 'dowry'. Meaning of the expression 'dowry' as commonly used and understood is different than the peculiar definition thereof under the Act which applies wherever the expression is used in the Act. Where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of the expression. The definition given in the statute is the determinative factor. (Para 11)

L.V. Jadhav v. *Shankarrao Abasaheb Pawar*, (1983) 4 SCC 231: 1983 SCC (Cri) 813, *followed*

Reserve Bank of India v. *Peerless General Finance and Investment Co. Ltd.*, (1987) 1 SCC 424; *N.K. Jain* v. *C.K. Shah*, (1991) 2 SCC 495: 1991 SCC (Cri) 328: 1991 SCC (L&S) 656; *Seaford Court Estates Ltd.* v. *Asher*, (1949) 2 All ER 155 (CA), *relied on*

However, dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given *at* or *before* or *after the marriage* to the bride or the

160

bridegroom, as the case may be, of a traditional nature, which are given *not* as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Act. (Para 11)

There is an alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides. Awakening of the collective consciousness is the need of the day. For this a wider social movement is necessary. The role of the courts, under the circumstances, assumes a great importance. The courts are expected to deal with such cases in a realistic manner so as to further the object of the legislation. However, the courts must not lose sight of the fact that the Act, though a piece of social legislation, is a *penal statute*. One of the cardinal rules of interpretation in such cases is that a penal statute must be strictly construed. The courts have, thus, to be watchful to see that emotions or sentiments are not allowed to influence their judgment, one way or the other and that they do not ignore the golden thread passing through criminal jurisprudence that an accused is presumed to be innocent till proved guilty and that the guilt of an accused must be established beyond a reasonable doubt. They must carefully assess the evidence and not allow either suspicion or surmise or conjectures to take the place of proof in their zeal to stamp out the evil from the society while at the same time not adopting the easy course of letting technicalities or minor discrepancies in the evidence result in acquitting an accused. They must critically analyse the evidence and decide the case in a realistic manner. (Para 19)

In appeal by special leave the Supreme Court, generally speaking, does not interfere with the findings recorded on appreciation of evidence by the courts below except where there appears to have occurred gross miscarriage of justice or there exists sufficient reasons which justify the examination of some of the relevant evidence by the Supreme Court itself. (Para 20)

In this case at the time of initial demand of dowry as a consideration for marriage of the appellant it was *only* the brother of the appellant, the second accused, who was present and it was the second accused alone with whom the negotiations took place in the presence of PW 2, the person who introduced the parties. There was no mention about the additional demand either in the complaint or in the FIR. This story, therefore, appears to be an afterthought, made with a view to implicate the appellant with the commission of an offence under Section 4 of the Act. Therefore, this part of the story of PW 1, in absence of any independent corroboration, cannot be accepted. Further, the holding of 'Varapuja', where the demand of dowry alleged to have been repeated, appears to be highly improbable. No corroboration of any nature to support this part of the evidence of PW 1 is forthcoming on the record. (Paras 24 and 26)

There is also no satisfactory evidence on the record to show that the appellant cancelled the marriage on account of non-fulfilment of dowry demand allegedly made by him. The letter which PW 1 claims to have himself received from the appellant regarding cancellation of marriage prior to 'Varapuja' ceremony has not been produced. Reliance instead has been placed by the prosecution on a letter allegedly written by the appellant to *V* cancelling the date of marriage. An adverse presumption has to be drawn from the failure to produce this letter. The complainant PW 1 does not appear to be a wholly reliable witness. (Paras 27 and 29)

The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering 'conclusive' proof and therefore safe to rely upon the same without seeking independent and reliable corroboration. Moreover Section 67 of the Evidence Act, 1872 enjoins that before a document can be looked into, it has to be proved. Section 67, of course, does not prescribe any particular

161

mode of proof. Section 47 of the Evidence Act which occurs in the chapter relating to "relevancy of facts" provides that the opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact. Similarly, opinion of a handwriting expert is also a relevant fact for identifying any handwriting. The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. The receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document. These modes are legitimate methods of proving documents but before they can be accepted they must bear sufficient strength to carry conviction.
(Paras 28 and 29)

Here regarding the other letters alleged to have been written by the accused to *V*, keeping in view the inconclusive and indefinite nature of the evidence of the handwriting expert PW 3 and the lack of competence on the part of PW 1 to be familiar with the handwriting of the appellant, the approach adopted by the courts below to arrive at the conclusion that the disputed letters were written by the appellant to *V* on the basis of the evidence of PW 1 and PW 3 was not proper. The doubtful evidence of PW 1 could neither offer any corroboration to the inconclusive and indefinite opinion of the handwriting expert PW 3 nor could it receive any corroboration from the opinion of PW 3. The courts below appear to have taken a rather superficial view of the matter while relying upon the evidence of PW 1 and PW 3 to hold the appellant guilty. (Paras 27 to 29)

Magan Bihari Lal v. *State of Punjab*, (1977) 2 SCC 210: 1977 SCC (Cri) 313: AIR 1977 SC 1091, *relied on*

Ram Chandra v. *State of U.P.*, AIR 1957 SC 381: 1957 Cri LJ 559; *Ishwari Prasad Misra* v. *Mohd. Isa*, AIR 1963 SC 1728: 1963 BLJR 226; *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529; *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326: (1967) 2 Andh LT 38, *cited*

So it appears that the demand of dowry in connection with and as consideration for the marriage of the appellant with *V* was made by the second accused, the elder brother of the appellant and that no such demand is established to have been directly made by the appellant. The High Court rightly found the second accused guilty of an offence under Section 4 of the Act against which SLP (Criminal) No. 2336 of 1990 stands dismissed by this Court on 15-2-1991. The evidence on the record does not establish beyond a reasonable doubt that any demand of dowry within the meaning of Section 2 read with Section 4 of the Act was made by the appellant. *May be* the appellant was in agreement with his elder brother regarding 'demand' of 'dowry' but convictions cannot be based on such assumptions without the offence being proved beyond a reasonable doubt. The courts below appear to have allowed emotions and sentiments, rather than legally admissible and trustworthy evidence, to influence their judgment. The evidence on the record does not establish the case against the appellant beyond a reasonable doubt. He is, therefore, entitled to the benefit of doubt. (Para 30)

R-M/16375/CR

162

Advocates who appeared in this case :

P.P. Rao, Senior Advocate (A. Sudarshan Reddy, B. Rajeshwar Rao, Ramkrishna Reddy and Vimal Dave, Advocates, with him) for the Appellant;

Guntur Prabhakar, Advocate, for the Respondent.

Chronological list of cases cited *on page(s)*

1. (1991) 2 SCC 495: 1991 SCC (Cri) 328: 1991 SCC (L&S) 656, *N.K. Jain* v. *C.K. Shah* 608*a*
2. (1987) 1 SCC 424, *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.* 607*e*
3. (1983) 4 SCC 231: 1983 SCC (Cri) 813, *L.V. Jadhav* v. *Shankarrao Abasaheb Pawar* 604*g*, 608*g*
4. (1977) 2 SCC 210: 1977 SCC (Cri) 313: AIR 1977 SC 1091, *Magan Bihari Lal* v. *State of Punjab* 614*d-e*
5. AIR 1967 SC 1326: (1967) 2 Andh LT 38, *Fakhruddin* v. *State of M.P.* 615*a-b*
6. AIR 1964 SC 529, *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee* 614*g*
7. AIR 1963 SC 1728: 1963 BLJR 226, *Ishwari Prasad Misra* v. *Mohd. Isa* 614*f-g*
8. AIR 1957 SC 381: 1957 Cri LJ 559, *Ram Chandra* v. *State of U.P.* 614*f*
9. (1949) 2 All ER 155 (CA), *Seaford Court Estates Ltd.* v. *Asher* 608*b*

The Judgment of the Court was delivered by

DR A.S. ANAND, J.— The appellant along with his brother was tried for offences under Section 420 IPC read with Section 4 Dowry Prohibition Act, 1961. The trial court convicted them both and sentenced them to undergo 9 months' RI and to a fine of Rs 500 each and in default to undergo SI for four months for the offence under Section 420 IPC and to RI for 6 months and a fine of Rs 1000 each and in default SI for six months for the offence under Section 4 Dowry Prohibition Act, 1961 (hereinafter the Act). In an appeal against their sentence and conviction, the Additional Metropolitan Sessions Judge held that no offence under Section 420 IPC was made out and set aside their conviction and sentence for the said offence while confirming their conviction and sentence for the offence under Section 4 of the Act. Both the convicts unsuccessfully invoked the revisional jurisdiction of the High Court.

2. This appeal by special leave filed by the appellant is directed against the order of the High Court of Andhra Pradesh dated 16-10-1990 dismissing the criminal revision petition filed by the convicts. The brother of the appellant filed SLP (Crl.) No. 2336 of 1990 against the revisional order of the High Court but that SLP was dismissed by this Court on 15-2-1991.

3. The prosecution case is as follows.

4. The appellant (hereinafter the first accused) is the younger brother of the petitioner (hereinafter the second accused) in SLP (Crl.) No. 2336 of 1990, which as already noticed was dismissed on 15-2-1991 by this Court. The first accused had been selected for Indian Police Service and was undergoing training in the year 1985 and on completion of the training was posted as an Assistant Superintendent of Police in Jammu and Kashmir Police Force. His brother, the second accused, was at the relevant time working with the Osmania University at Hyderabad. PW 1, Shri G. Narayana

163

Reddy, the complainant, was practising as a lawyer at Hyderabad. PW 1 has four daughters. Ms Vani is the eldest among the four daughters. She was working as a cashier with the State Bank of India at Hyderabad. PW 1 was looking for marriage alliance for his daughter Ms Vani. A proposal to get Ms Vani married to the first accused was made by PW 2, Shri Lakshmana Reddy, a common friend of the appellant and PW 1. Later on PW 2 introduced the second accused to PW 1, who later on also met Ms Vani and approved of the match. After some time, the first accused also met Ms Vani at the Institute of Public Enterprises and both of them approved each other for marriage. It is alleged that on 6-5-1985, the second accused accompanied by PW 2 and some others went to the house of PW 1 to pursue the talks regarding marriage. There were some talks regarding giving of dowry and the terms were finally agreed between them on 7-5-1985 at the house of the second accused. The first accused was not present either on 6-5-1985 or on 7-5-1985. It is alleged that as per the terms settled between the parties, PW 1 agreed to give to his daughter (1) house at Hyderabad (2) jewels, cash and clothes worth about rupees one lakh and (3) a sum of Rs 50,000 in cash for purchase of a car. The date of marriage, however, was to be fixed after consulting the first accused. PW 1, however, later on insisted on having an engagement ceremony and contacted the first accused but the first accused persuaded PW 1 not to rush through the same as it was not possible for him to intimate the date to his friends at a short notice. The first accused came to Hyderabad from Dehradun, where he was undergoing training, on 6-8-1985 and stayed at Hyderabad till 15-8-1985. The first accused attended the birthday party of the youngest sister of Ms Vani on 15-8-1985 and later on sent a bank draft of Rs 100 as the birthday gift for her to Ms Vani. In the letter Ex. P-1 which accompanied the bank draft, some reference was allegedly made regarding the settlement of dowry. It is alleged that the first accused later on wrote several letters including Exhibits P-6, P-7, P-9 and P-10 to Ms Vani. It is the prosecution case that the second accused, on being approached by PW 1 for fixing the date of marriage, demanded Rs 1 lakh instead of Rs 50,000 for the purchase of car. The second accused also insisted that the said amount should be paid before marriage. The 'dowry' talks between the second accused and PW 1, however, remained inconclusive. Later on the date of marriage was fixed as 2-11-1985. On 1-10-1985, the first accused allegedly wrote a letter, Exhibit P-6, to Ms Vani asking her to cancel the date of marriage or to fulfil the demands made by his elders. The first accused came to Hyderabad on 20-10-1985 when PW 1 told him about the demand of additional payment of Rs 50,000 made by the second accused for the purchase of car. The first accused told PW 1 that he would consult his brother and inform him about it and left for his native place. It is alleged that on his return from the village, the first accused asked PW 1 to give Rs 75,000 instead of Rs 50,000 as agreed upon earlier instead of Rs 1 lakh as demanded by the second accused. According to the prosecution case this talk took place in the presence of Shri Narasinga Rao (not examined). The first accused suggested that PW 1 should give

164

Rs 50,000 immediately towards the purchase of the car and the balance of Rs 25,000 should be paid within one year after the marriage but PW 1 did not accept the suggestion. According to the prosecution case 'Varapuja' was performed by PW 1 and his other relatives at the house of the second accused on 30-10-1985. At that time PW 1 allegedly handed over to the first accused, a document Exhibit P-13 dated 12-10-1985, purporting to settle a house in the name of his daughter Ms Vani along with a bank pass-book, Exhibit P-12 showing a cash balance of Rs 50,881 in the name of Ms Vani. The first accused is reported to have, after examining the document Exhibit P-13, flared up saying that the settlement was for a double-storeyed house and the document Exhibit P-13 purporting to settle the house in the name of Ms Vani was only a single-storey building. He threatened to get the marriage cancelled if PW 1 failed to comply with the settlement as arrived at on the earlier occasions. The efforts of PW 1 to persuade the first accused not to cancel the marriage did not yield any results and ultimately the marriage did not take place. The first accused then returned all the articles that had been given to him at the time of 'Varapuja'. Aggrieved, by the failure of the marriage negotiations, PW 1 on 22-1-1986 sent a complaint to the Director of National Police Academy where the first accused was undergoing training. Subsequently, PW 1 also went to the Academy to meet the Director when he learnt from the personal assistant to the Director of the Academy that the first accused was getting married to another girl on 30-3-1986 at Bolaram and showed to him the wedding invitation card. PW 1, thereupon, gave another complaint to the Director on 26-3-1986, who, however, advised him to approach the police concerned for necessary action. PW 1 filed a report Ex. P-20 at Chikkadapalli Police Station on 28-3-1986. The Inspector of Police, PW 7, registered the complaint as Crime Case No. 109 of 1986 and took up the investigation. During the investigation, various letters purported to have been written by the first accused to Ms Vani were sent to the handwriting expert PW 3, who gave his opinion regarding the existence of similarities between the specimen writings of the first accused and the disputed writings. Both the first accused and his brother, the second accused, were thereafter charge-sheeted and tried for offences punishable under Section 420 IPC read with an offence punishable under Section 4 of the Act and convicted and sentenced as noticed above.

5. Mr P.P. Rao, the learned Senior Counsel appearing for the appellant, submitted that the courts below had committed an error in not correctly interpreting the ambit and scope of Section 4 of the Dowry Prohibition Act, 1961 read with the definition of 'dowry' under Section 2 of the said Act. According to the learned counsel, for 'demand' of dowry to become an offence under Section 4 of the Act, it must be made at the time of marriage and not during the negotiations for marriage. Reliance in this behalf is placed on the use of the expressions 'bride' and 'bridegroom' in Section 4 to emphasise that at the stage of pre-marriage negotiations, the boy and the girl are not 'bridegroom' and 'bride' and therefore the 'demand' made at that stage cannot be construed as a 'demand' of dowry punishable under Section

165

4 of the Act. On merits, counsel argued that reliance placed by the trial court as well as the appellate and the revisional court on various letters purporting to have been written by the first accused was erroneous since the appellant had denied their authorship and there was no satisfactory evidence on the record to connect the appellant with those letters except the 'inconclusive' and uncorroborated evidence of the handwriting expert. Mr Rao further argued that in the present case there was no unimpeachable evidence available on the record to bring home the guilt of the appellant and the failure of the prosecution to examine Ms Vani and Shri Narasinga Rao was a serious lacuna in the prosecution case. Argued Mr Rao that the evidence of PW 1, the complainant had not received any corroboration at all and since the evidence of PW 1 was not wholly reliable, conviction of the appellant without any corroboration of the evidence of PW 1 was not justified. Mr Rao urged that the complainant had exaggerated the case and roped in the appellant, whose elder brother alone had made the demand for dowry, out of anger and frustration and that let alone "demanding dowry", the first accused was not even a privy to the demand of dowry as made by the second accused, his elder brother.

6. Learned counsel for the respondent State, however, supported the judgment of the trial court and the High Court and argued that the case against the appellant had been established beyond a reasonable doubt and that this Court need not interfere in exercise of its jurisdiction under Article 136 of the Constitution of India with findings of fact arrived at after appreciation of evidence by the courts below. According to Mr Prabhakar, the interpretation sought to be placed by Mr Rao on Section 4 of the Act would defeat the very object of the Act, which was enacted to curb the practice of 'demand' or acceptance and receipt of 'dowry' and that the definition of 'dowry' as contained in Section 2 of the Act included the demand of dowry "at or before or after the marriage".

7. The curse of dowry has been raising its ugly head every now and then but the evil has been flourishing beyond imaginable proportions. It was to curb this evil, that led Parliament to enact the Dowry Prohibition Act in 1961. The Act is intended to prohibit the giving or taking of dowry and makes its 'demand' by itself also an offence under Section 4 of the Act. Even the abetment of giving, taking or demanding dowry has been made an offence. Further, the Act provides that any agreement for giving or taking of dowry shall be void and the offences under the Act have also been made non-compoundable vide Section 8 of the Act. Keeping in view the object which is sought to be achieved by the Act and the evil it attempts to stamp out, a three-Judge Bench of this Court in *L.V. Jadhav* v. *Shankarrao Abasaheb Pawar*[1] opined that the expression 'Dowry' wherever used in the Act must be liberally construed.

8. Before proceeding further, we consider it desirable to notice some of the relevant provisions of the Dowry Prohibition Act, 1961.

1 (1983) 4 SCC 231: 1983 SCC (Cri) 813

166

"2. In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly—

(*a*) by one party to a marriage to the other party to the marriage; or

(*b*) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person,

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (*Shariat*) applies.

* * *

3. *Penalty for giving or taking dowry.*— If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more:

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years (substituted for the words 'six months' w.e.f. 19th November, 1986).

* * *

4. *Penalty for demanding dowry.*— If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."

9. The definition of the term 'dowry' under Section 2 of the Act shows that any property or valuable security given or "agreed to be given" either directly or indirectly by one party to the marriage to the other party to the marriage "*at or before or after the marriage*" as a "*consideration for the marriage* of the said parties" would become 'dowry' punishable under the Act. Property or valuable security so as to constitute 'dowry' within the meaning of the Act must therefore be given or demanded "as consideration for the marriage".

10. Section 4 of the Act aims at discouraging the very 'demand' of 'dowry' as a "consideration for the marriage" between the parties thereto and lays down that if any person after the commencement of the Act, 'demands', directly or indirectly, from the parents or guardians of a 'bride' or 'bridegroom', as the case may be, any 'dowry', he shall be punishable with imprisonment which may extend to six months or with fine which may

167

extend to Rs 5000 or with both. Thus, it would be seen that Section 4 makes punishable the very *demand* of property or valuable security *as a consideration for marriage*, which demand, if satisfied, would constitute the graver offence under Section 3 of the Act punishable with imprisonment for a term which shall not be less than five years and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry whichever is more.

11. The definition of the expression 'dowry' contained in Section 2 of the Act cannot be confined merely to the 'demand' of money, property or valuable security "made at or after the performance of marriage" as is urged by Mr Rao. The legislature has in its wisdom while providing for the definition of 'dowry' emphasised that any money, property or valuable security given, *as a consideration for marriage, "before, at or after"* the marriage would be covered by the expression 'dowry' and this definition as contained in Section 2 has to be read wherever the expression 'dowry' occurs in the Act. Meaning of the expression 'dowry' as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4 of the Act, mere demand of 'dowry' is sufficient to bring home the offence to an accused. Thus, any 'demand' of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legally recognised claim and is *relatable only to the consideration of marriage*. Marriage in this context would include a proposed marriage also more particularly where the non-fulfilment of the "demand of dowry" leads to the ugly consequence of the marriage not taking place at all. The expression 'dowry' under the Act must be interpreted in the sense which the statute wishes to attribute to it. Mr P.P. Rao, learned Senior Counsel referred to various dictionaries for the meaning of 'dowry', 'bride' and 'bridegroom' and on the basis of those meanings submitted that 'dowry' must be construed only as such property, goods or valuable security which is given to a husband by and on behalf of the wife at marriage and any demand made *prior* to marriage would not amount to dowry. We cannot agree. Where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of the expression. The definition given in the statute is the determinative factor. The Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made *before or at the time or after the marriage* where such demand *is referable to the consideration of marriage*. Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given *at* or *before* or *after the marriage* to the bride or the bridegroom, as the case may be, of a traditional nature, which are given *not* as a consideration for marriage but out of love, affection or regard,

168

would not fall within the mischief of the expression 'dowry' made punishable under the Act.

12. It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary. We are unable to persuade ourselves to agree with Mr Rao that it is only the property or valuable security given at the time of marriage which would bring the same within the definition of 'dowry' punishable under the Act, as such an interpretation would be defeating the very object for which the Act was enacted. Keeping in view the object of the Act, "demand of dowry" *as a consideration for a proposed marriage* would also come within the meaning of the expression dowry under the Act. If we were to agree with Mr Rao that it is only the 'demand' made at or after marriage which is punishable under Section 4 of the Act, some serious consequences, which the legislature wanted to avoid, are bound to follow. Take for example a case where the bridegroom or his parents or other relatives make a 'demand' of dowry during marriage negotiations and later on after bringing the bridal party to the bride's house find that the bride or her parents or relatives have not met the earlier 'demand' and call off the marriage and leave the bride's house, should they escape the punishment under the Act. The answer has to be an emphatic 'no'. It would be adding insult to injury if we were to countenance that their action would not attract the provisions of Section 4 of the Act. Such an interpretation would frustrate the very object of the Act and would also run contrary to the accepted principles relating to the interpretation of statutes.

13. In *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.*[2] while dealing with the question of interpretation of a statute, this Court observed: (SCC p. 450, para 33)

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of

2 (1987) 1 SCC 424

169

the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

14. Again, in *N.K. Jain* v. *C.K. Shah*[3] it was observed that in gathering the meaning of a word used in the statute, the context in which that word has been used has significance and the legislative purpose must be noted by reading the statute as a whole and bearing in mind the context in which the word has been used in the statute.

15. In *Seaford Court Estates Ltd.* v. *Asher*[4], Lord Denning advised a purposive approach to the interpretation of a word used in a statute and observed:

"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. *He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy*, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. *A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.*" (emphasis supplied)

16. An argument, similar to the one as raised by Mr Rao regarding the use of the expressions 'bride' and 'bridegroom' occurring in Section 4 of the Act to urge that 'demand' of property or valuable security would not be 'dowry' if it is made during the negotiations for marriage until the boy and the girl acquire the status of 'bridegroom' and 'bride', *at* or *immediately* after the marriage, was raised and repelled by this Court in *L.V. Jadhav case*[1].

17. In *L.V. Jadhav case*[1] while interpreting the meaning of 'dowry' under Section 2 of the Act and correlating it to the requirements of Section 4 of the Act, the Bench observed: (SCC pp. 239-40, para 10)

"... Section 4 which lays down that 'if any person after the commencement of this Act, demands, directly or indirectly from the

3 (1991) 2 SCC 495: 1991 SCC (Cri) 328: 1991 SCC (L&S) 656
4 (1949) 2 All ER 155 (CA)

170

parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both'. According to *Webster's New World Dictionary*, 1962 Edn. bride means a woman who has just been married or is about to be married, and bridegroom means a man who has just been married or is about to be married. If we give this *strict* meaning of a bride or a bridegroom to the word bride or bridegroom used in Section 4 of the Act, property or valuable security demanded and consented to be given *prior* to the time when the woman had become a bride or the man had become a bridegroom, may not be 'dowry' within the meaning of the Act. *We are of the opinion that having regard to the object of the Act a liberal construction has to be given to the word 'dowry' used in Section 4 of the Act to mean that any property or valuable security which if consented to be given on the demand being made would become dowry within the meaning of Section 2 of the Act.* We are also of the opinion that the object of Section 4 of the Act is to discourage the very demand for property or valuable security as *consideration* for a marriage between the parties thereto. Section 4 prohibits the demand for 'giving' property or valuable security which demand, if satisfied, would constitute an offence under Section 3 read with Section 2 of the Act. There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence...."

18. Therefore, interpreting the expression 'dowry' and 'demand' in the context of the scheme of the Act, we are of the opinion that any 'demand' of 'dowry' made *before, at* or *after* the marriage, where such demand is made as a *consideration for marriage* would attract the provisions of Section 4 of the Act.

19. The alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides has always sent shock waves to the civilized society but unfortunately the evil has continued unabated. Awakening of the collective consciousness is the need of the day. Change of heart and attitude is needed. A wider social movement not only of educating women of their rights but also of the menfolk to respect and recognise the basic human values is essentially needed to bury this pernicious social evil. The role of the courts, under the circumstances, assumes a great importance. The courts are expected to deal with such cases in a realistic manner so as to further the object of the legislation. However, the courts must not lose sight of the fact that the Act, though a piece of social legislation, is a *penal statute*. One of the cardinal rules of interpretation in such cases is that a penal statute must be strictly construed. The courts have, thus, to be watchful to see that emotions or sentiments are not allowed to influence their judgment, one way or the other and that they do not ignore the golden thread passing through criminal jurisprudence that an accused is presumed to be innocent till proved guilty and that the guilt of an accused must be established beyond a reasonable doubt. They must

171

carefully assess the evidence and not allow either suspicion or surmise or conjectures to take the place of proof in their zeal to stamp out the evil from the society while at the same time not adopting the easy course of letting technicalities or minor discrepancies in the evidence result in acquitting an accused. They must critically analyse the evidence and decide the case in a realistic manner.

20. It is in the light of the scheme of the Act and the above principles that we shall now consider the merits of the present case. This Court, generally speaking, does not interfere with the findings recorded on appreciation of evidence by the courts below except where there appears to have occurred gross miscarriage of justice or there exist sufficient reasons which justify the examination of some of the relevant evidence by this Court itself.

21. There is no dispute that the marriage of the appellant was settled with Ms Vani, daughter of PW 1 and ultimately it did not take place and broke down. According to PW 1, the reason for the breakdown of the marriage was his refusal and inability to comply with the 'demand' for enhancing the 'dowry' as made by the appellant and his brother, the second accused. The High Court considered the evidence on the record and observed:

> "From the evidence of PW 1 it is clear that it is only the 2nd petitioner that initially demanded the dowry in connection with the marriage of his younger brother, the first petitioner. He alone was present when PW 1 agreed to give a cash of Rs 50,000 for purchase of car, a house, jewels, clothing and cash valued at rupees one lakh. This took place in the month of June 1985 when PW 1 approached the second petitioner for fixation of date for marriage some time in the month of September 1985. According to PW 1, the second petitioner demanded rupees one lakh for purchase of car. But, however, PW 1 persuaded the second petitioner to fix the date leaving that matter open to be decided in consultation with the first petitioner. *When the first petitioner came to Hyderabad in October 1985 PW 1 complained to him about the demand for additional dowry and that the first petitioner would appear to have told PW 1 that he would discuss with his brother and inform him. Then the first petitioner went to his native place and returned to Hyderabad and asked PW 1 to give Rs 75,000 for purchase of car.*"
>
> (emphasis supplied)

The High Court further observed:

> "*Thus the demand for dowry either initially or at a later stage emanated only from the second petitioner, the elder brother of the first petitioner.* From the evidence it would appear that the petitioners come from a lower middle class family and fortunately the first petitioner was selected for IPS and *from the tone of letters written by the first petitioner to Kum. Vani particularly from Ex. P-6 letter it would appear that he was more interested in acting according to the wishes of his elder*

172

brother who he probably felt was responsible for his coming up in life. The recitals in Ex. P-6 would show that *he did not like to hurt the feelings of the second petitioner and probably for that reason he could not say anything when his elder brother demanded for more dowry.* We cannot say how the first petitioner would have acted if only he had freedom to act according to his wishes. But the first petitioner was obliged to act according to the wishes of his elder brother in asking for more dowry. However, I feel that this cannot be a circumstance to exonerate him from his liability from demand of dowry under Section 4 of the Dowry Prohibition Act." (emphasis supplied)

22. From the above-noted observations, it appears that the High Court felt that the appellant was perhaps acting as "His Master's Voice" of his elder brother. The High Court accepted the evidence of PW 1 to hold that the appellant had demanded enhanced dowry of Rs 75,000 for purchase of car on his return from the native village and had repeated his demand at the time of 'Varapuja' and later on did not marry Ms Vani as PW 1 was unable to meet the demands as projected by the appellant and his elder brother. The High Court appears to have too readily accepted the version of PW 1 without properly analysing and appreciating the same.

23. Since, PW 1 is the sole witness, we have considered it proper to examine his evidence with caution.

24. From our critical analysis of the evidence of PW 1, it emerges that at the time of initial demand of dowry as a consideration for marriage of the appellant it was *only* the brother of the appellant, the second accused, who was present and it was the second accused alone with whom the negotiations took place in the presence of PW 2. According to PW 1, the brother of the appellant later on demanded rupees one lakh for the purchase of car as against the initial agreement of rupees fifty thousand for the said purpose. Admittedly, the first accused was not present at either of the two occasions. According to PW 1 when the appellant came to Hyderabad in October 1985 he (PW 1) complained to him about the demand for additional dowry made by his brother and the appellant told him that he would discuss the matter with his brother and inform him. It was, thereafter, according to PW 1 that when the appellant returned to Hyderabad from his native place that he asked the complainant (PW 1) to give Rs 75,000 for purchase of the car. Shri Narasinga Rao is stated to have been present at that time, but he has not been examined at the trial. The above statement of PW 1 has, however, surfaced for the first time at the trial only. There is no mention of it in the first information report, Ex. P-20 or even in the two complaints which had been sent by PW 1 to the Director, National Police Academy prior to the lodging of Ex. P-20. PW 1 admitted in his evidence "*I have not stated in Ex. P-20 and in my 161 statement that A-1 on return from his native place demanded rupees seventy-five thousand instead of rupees one lakh for purchase of car and that I said that what was agreed for purchase of car was only Rs 50,000 and not Rs 75,000.*" This story, therefore, appears to be an afterthought, made with a view to implicate the appellant with the commission of an

173

offence under Section 4 of the Act. Had this been the state of affairs, we see no reason as to why the fact would not have found mention at least in the complaints made to "the Director of the Academy" where the appellant was undergoing training. PW 1, being a lawyer, must be presumed to be aware of the importance and relevance of the statement attributed to the appellant to incorporate it in the complaints and the FIR. We find this part of the evidence of PW 1 rather difficult to accept without any independent corroboration. There is no corroboration available on the record as even Shri Narasinga Rao has not been examined.

25. According to PW 1, the demand of dowry was repeated by the appellant at the time of 'Varapuja' which was performed on 31-10-1985 at the house of the second accused also. PW 1 stated that he handed over the documents pertaining to the house, rupees fifty thousand in cash and pass-book showing the deposit of about rupees fifty thousand in the bank in the name of Ms Vani to the appellant along with other articles of 'Varapuja' and on seeing the documents the appellant flared up and said that since the settlement was for a two-storeyed house and not a single-storey house, as reflected in Ex. P-13, he would cancel the marriage unless the 'demands' as made earlier were fulfilled. The story of 'Varapuja' which has been too readily accepted by the courts below, again appears to us to be of a doubtful nature and does not inspire confidence. The following admission of PW 1 in his evidence, in the context of 'Varapuja' allegedly held on 31-10-1985 has significance:

> "*It is true that Varapuja is puja of bridegroom according to my understanding. I did not take any purohit for Varapuja. I did not take any photograph on that occasion. I did not get any Lagna Patrika prepared for the marriage.* It is not true that I am deposing falsely that there was Varapuja and that I offered money on that occasion.
>
> I started marriage preparation probably in the month of September, or October, I cannot say on what date I booked hall for the marriage. Ex. P-8 is only cancellation receipt of the marriage hall. I have not got invitation cards printed. I did not write any letter to anybody informing them of the marriage or inviting them to the marriage as I *received letter from A-1 to cancel the marriage in the month of October itself, cancellation of the date of marriage was prior to Varapuja.*"
>
> (emphasis ours)

26. The above admission creates a lot of doubt about the performance of 'Varapuja'. According to PW 1, he had received a letter from the appellant to *cancel* the marriage in the month of October itself "*prior to Varapuja*". Therefore, if the marriage had been *cancelled prior to 'Varapuja'*, it does not stand to reason as to why 'Varapuja' should have taken place at all. The holding of 'Varapuja' appears to be highly improbable. No corroboration of any nature to support this part of the evidence of PW 1 is forthcoming on the record.

174

27. That the marriage between the parties did not take place is not in dispute but there is no satisfactory evidence on the record to show that the appellant cancelled the marriage on account of non-fulfilment of dowry demand allegedly made by him. The letter which PW 1 claims to have himself received from the appellant regarding cancellation of marriage prior to 'Varapuja' ceremony has not been produced. Reliance instead has been placed by the prosecution on letter Ex. P-6 allegedly written by the appellant to Ms Vani cancelling the date of marriage. We shall refer to the documentary evidence in the latter part of the judgment. The failure of PW 1 to produce the letter allegedly received by him from the first accused invites an adverse presumption against him that had he produced the letter, the same would have belied his evidence. The evidence of PW 1, who is the sole witness, suffers from serious inconsistencies and exaggerations. He admittedly is the most interested person to establish his case. He is the complainant in the case. It was he who had made two complaints to the Director of National Police Academy against the appellant before lodging the FIR, Ex. P-20. He is a lawyer by profession. He would be presumed to know the importance of the 'demand' made by the appellant on the two occasions. He, however, has offered no explanation as to why those facts are conspicuous by their absence from the FIR and the two complaints made to the Director of the Academy. PW 1, does not appear to us to be a wholly reliable witness. He has made conscious improvements at the trial to implicate the appellant by indulging in exaggerations and that detracts materially from his reliability. Prudence, therefore, requires that the Court should look for corroboration of his evidence in material particulars before accepting the same. Neither Ms Vani nor Shri Narasinga Rao in whose presence the appellant is said to have demanded dowry have been examined as witnesses. The failure to examine them is a serious lacuna in the prosecution case. It was Ms Vani who could have deposed about the circumstances which led to the breakdown of the matrimonial negotiations, before its maturity. Various letters which PW 1 produced at the trial were allegedly written by the appellant to Ms Vani. None of them had been addressed to PW 1, yet he came forward to prove those letters and the courts allowed him to do so. Since, the appellant has denied the authorship of those letters and claimed that the same have been fabricated, it was desirable for the prosecution to examine Ms Vani in connection with those letters. The appellant is alleged to be the author of the letters more particularly letters Exs. P-1, P-6, P-7 and P-9. From the opinion of PW 3, the handwriting expert, prosecution has sought to corroborate the evidence of PW 1 regarding the authorship of those letters. The opinion of PW 3, the Assistant Director in the State Forensic and Science Laboratory, Hyderabad, in our view cannot be said to be of a clinching type to attribute the authorship of those letters to the appellant. PW 3 during his statement deposed:

> "In my opinion (1) there are similarities indicating common authorship between the red enclosed writings marked as S-12 to S-23 and the red enclosed writings marked as Q-4 to Q-7. *But no definite*

175

opinion can be given on the basis of the present standards. (2) No opinion can be given on the authorship of the red enclosed signatures and writings marked as Q-1 to Q-3 and Q-8 to Q-15 on the basis of present standards." (emphasis supplied)

The expert further opined:

"When all the writing characteristics are considered collectively, they led to the conclusion that there are similarities indicating common authorship between the standard writings marked S-12 to S-25 and the questioned writings marked Q-4 to Q-7. But *no definite opinion can be given on the basis of the present standards. Extensive admitted writings are required for offering definite opinion.*" (emphasis supplied)

During his cross-examination PW 3 admitted:

"Q. From the available standards you cannot say that the signatures of Exs. P-7 and P-9 is the same person who wrote Exs. P-7 and P-9.

Ans: We can compare truly like live (*sic*), signatures with signatures and writings with writings and not a signature with a writing."

28. Thus, the evidence of PW 3 is not definite and cannot be said to be of a clinching nature to connect the appellant with the disputed letters. The evidence of an expert is a rather weak type of evidence and the courts do not generally consider it as offering 'conclusive' proof and therefore safe to rely upon the same without seeking independent and reliable corroboration. In *Magan Bihari Lal* v. *State of Punjab*[5], while dealing with the evidence of a handwriting expert, this Court opined: (SCC pp. 213-14, para 7)

"... We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. It was held by this Court in *Ram Chandra* v. *State of U.P.*[6] that it is unsafe to treat expert handwriting opinion as sufficient basis for conviction, but it may be relied upon when supported by other items of internal and external evidence. This Court again pointed out in *Ishwari Prasad Misra* v. *Mohd. Isa*[7] that expert evidence of handwriting can never be conclusive because it is, after all, opinion evidence, and this view was reiterated in *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*[8] where it was pointed out by this Court that expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive

5 (1977) 2 SCC 210: 1977 SCC (Cri) 313: AIR 1977 SC 1091
6 AIR 1957 SC 381: 1957 Cri LJ 559
7 AIR 1963 SC 1728: 1963 BLJR 226
8 AIR 1964 SC 529

176

evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in regard to handwriting in *Fakhruddin* v. *State of M.P.*[9] and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial."

29. We are unable to agree, in the established facts and circumstances of this case, with the view expressed by the courts below that PW 1 is a competent witness to speak about the handwriting of the appellant and that the opinion of PW 3 has received corroboration from the evidence of PW 1. PW 1 admittedly did not receive any of those letters. He had no occasion to be familiar with the handwriting of the appellant. He is not a handwriting expert. The bald assertion of PW 1 that he was 'familiar' with the handwriting of the appellant and fully 'acquainted' with the contents of the letters, admittedly not addressed to him, without disclosing how he was familiar with the handwriting of the appellant, is difficult to accept. Section 67 of the Evidence Act, 1872 enjoins that before a document can be looked into, it has to be proved. Section 67, of course, does not prescribe any particular mode of proof. Section 47 of the Evidence Act which occurs in the chapter relating to "relevancy of facts" provides that the opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact. Similarly, opinion of a handwriting expert is also a relevant fact for identifying any handwriting. The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. The receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document. These modes are legitimate methods of proving documents but before they can be accepted they must bear sufficient strength to carry conviction. Keeping in view the inconclusive and indefinite nature of the evidence of the handwriting expert PW 3 and the lack of competence on the part of PW 1 to be familiar with the handwriting of the appellant, the approach adopted by the courts below to arrive at the conclusion that the disputed letters were written by the appellant to Ms Vani on the basis of the evidence of PW 1 and PW 3 was not proper. The doubtful evidence of PW 1 could neither offer any corroboration to the inconclusive and indefinite

9 AIR 1967 SC 1326: (1967) 2 Andh LT 38

177

opinion of the handwriting expert PW 3 nor could it receive any corroboration from the opinion of PW 3. We are not satisfied, in the established facts and circumstances of this case, that the prosecution has established either the genuineness or the authorship of the disputed letters allegedly written by the appellant from the evidence of PW 1 or PW 3. The courts below appear to have taken a rather superficial view of the matter while relying upon the evidence of PW 1 and PW 3 to hold the appellant guilty. We find it unsafe to base the conviction of the appellant on the basis of the evidence of PW 1 or PW 3 in the absence of substantial independent corroboration, internally or externally, of their evidence, which in the case is totally wanting.

30. To us it appears that the demand of dowry in connection with and as consideration for the marriage of the appellant with Ms Vani was made by the second accused, the elder brother of the appellant and that no such demand is established to have been directly made by the appellant. The High Court rightly found the second accused guilty of an offence under Section 4 of the Act against which SLP (Criminal) No. 2336 of 1990, as earlier noticed stands dismissed by this Court on 15-2-1991. The evidence on the record does not establish beyond a reasonable doubt that any demand of dowry within the meaning of Section 2 read with Section 4 of the Act was made by the appellant. *May be* the appellant was in agreement with his elder brother regarding 'demand' of 'dowry' but convictions cannot be based on such assumptions without the offence being proved beyond a reasonable doubt. The courts below appear to have allowed emotions and sentiments, rather than legally admissible and trustworthy evidence, to influence their judgment. The evidence on the record does not establish the case against the appellant beyond a reasonable doubt. He is, therefore, entitled to the benefit of doubt. This appeal, thus, succeeds and is allowed. The conviction and sentence of the appellant is hereby set aside. The appellant is on bail. His bail bonds shall stand discharged.

(1996) 4 Supreme Court Cases 616

(BEFORE M.M. PUNCHHI AND SUJATA V. MANOHAR, JJ.)

SECRETARY, TAMIL NADU WAKF BOARD AND ANOTHER .. Appellants;

Versus

SYED FATIMA NACHI .. Respondent.

Criminal Appeal No. 687 of 1996†, decided on July 9, 1996

A. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — S. 4 — State Wakf Board's liability to provide maintenance to a divorced Muslim woman who is unable to maintain herself and has not remarried — Such divorced women not required to initiate proceedings in the first instance against**

† From the Judgment and Order dated 16-3-1994 of the Madras High Court in Crl. O.P. No. 3557 of 1993

178

stipulation of minimum guaranteed charges cannot be held to be ultra vires on the ground that it is incompatible with the statutory duty. Differences between this contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the consumer with whom it is made, as was held in *Northern Ontario Power Co. Ltd.* v. *La Roche Mines Ltd.*[3]"

24. In the result, the appeal is allowed and the impugned order is set aside. As a corollary, the demand of minimum charges created by the predecessor of Appellant 1 is upheld and the writ petition filed by the respondent is dismissed. The appellant shall now be entitled to encash the bank guarantee furnished by the respondent in terms of interim orders dated 13-9-2002 and 5-12-2003 passed by this Court.

(2009) 9 Supreme Court Cases 709

(BEFORE G.S. SINGHVI AND H.L. DATTU, JJ.)

RAMESH CHANDRA AGRAWAL .. Appellant;

Versus

REGENCY HOSPITAL LIMITED AND OTHERS .. Respondents.

Civil Appeal No. 5991 of 2002†, decided on September 11, 2009

A. Consumer Protection — Services — Medical negligence — Denial of opportunity of adduction of opinion of expert — Effect — National Commission directed its Registry to forward all documents of treatment furnished by appellant complainant to expert (Neurologist) for his opinion — Registry failed to send all the documents to expert — Expert concluding that in absence of complete set of documents he was unable to offer opinion — National Commission rejecting prayer for forwarding all documents of treatment again to expert, dismissing complaint and holding medical negligence not proved — Sustainability — Held, complainant should not suffer for negligence of Registry of Commission — Principles of natural justice require that fair opportunity should be given to complainant to prove his claim based on report of expert — Since opportunity denied, held, impugned order of National Commission unsustainable — Registrar of Commission directed to forward all records of treatment to expert — Commission requested to pass order based on fresh opinion of expert — Evidence Act, 1872 — S. 45 — Consumer Forums — Practice and Procedure — Registry of Consumer Forums — Need for proper functioning — Consumer Forums — Pleading and particulars — Need to afford adequate opportunity to parties to adduce relevant material

(Paras 28 to 33)

3 (1938) 3 All ER 755 (PC)

† From the Judgment and Order dated 23-5-2002 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 128 of 1996

179

B. **Consumer Protection Act, 1986 — Ss. 21 and 22 — Jurisdiction — Held, National Commission is the last fact finding authority in the scheme of the Act** (Para 23)

C. **Evidence Act, 1872 — S. 3 — Law of evidence — Nature and scope — Law of evidence is designed to ensure that court considers only that evidence which enables it to reach a reliable conclusion** (Para 16)

Alan Merry and Alexander McCall Smith: *Errors, Medicine and the Law*, 2001 Edn., Cambridge University Press, *referred to*

D. **Evidence Act, 1872 — S. 45 — Expert evidence, when called for — Test for — Issues involving medical science — Held, test is whether matter is outside knowledge and experience of a layperson — Where a medical issue is to be settled, scientific question involved therein is assumed to be not within court's knowledge and hence there is a need to hear expert opinion — Since medical science is complicated, expert opinion provides deep insight — Where diagnosis and the method of treatment suggested to a patient vary, held, expert opinion forms an important role in arriving at a conclusion — Medical Practice and Practitioners — Medical negligence — Expert opinion — Need for — Tort Law — Negligence — Medical negligence** (Paras 15 and 16)

Alan Merry and Alexander McCall Smith: *Errors, Medicine and the Law*, 2001 Edn., Cambridge University Press, *referred to*

E. **Evidence Act, 1872 — S. 45 — Expert evidence — Admissibility — Requirements — Evidence of expert is admissible when (i) expert is heard, (ii) he must be within a recognised field of expertise, (iii) his evidence must be based on reliable principles, and (iv) he must be qualified in that discipline — Reiterated, without examining expert as a witness, no reliance can be placed on his opinion alone** (Paras 16, 21 and 22)

F. **Evidence Act, 1872 — S. 45 — Expert opinion — Evidence of witness, when can be accepted as that of expert — Held, in order to bring evidence of a witness as that of an expert, it is to be shown that he has made a special study of the subject or acquired special experience therein or is skilled and has adequate knowledge of the subject** (Para 18)

Alan Merry and Alexander McCall Smith: *Errors, Medicine and the Law*, 2001 Edn., Cambridge University Press; Article "*Relevancy of Expert's Opinion*", *referred to*

State of Maharashtra v. *Damu*, (2000) 6 SCC 269 : 2000 SCC (Cri) 1088, *relied on*

State (Delhi Admn.) v. *Pali Ram*, (1979) 2 SCC 158 : 1979 SCC (Cri) 389, *referred to*

G. **Evidence Act, 1872 — S. 45 — Functions and duty of expert — Scope and nature of — Expert's role — Exception, when cannot be taken to — Held, cases where science involved is highly specialised, expert's role cannot be disputed — Credibility of expert depends on the reasons stated in support of his conclusions and data and material furnished which form the basis of his conclusions — Expert has to put before court all materials with necessary scientific criteria for testing accuracy of conclusions together with reasons, so that court, although not an expert, may form its own independent judgment — Practice and Procedure — Expert opinion** (Paras 16, 19 and 20)

Alan Merry and Alexander McCall Smith: *Errors, Medicine and the Law*, 2001 Edn., Cambridge University Press, *referred to*

Titli v. *Alfred Robert Jones*, AIR 1934 All 273, *approved*

180

H. Evidence Act, 1872 — S. 45 — Expert — Nature and function of — An expert is not a witness of fact — His evidence is only advisory in character — Further, he cannot act as judge or jury (Paras 19 and 20)

I. Evidence Act, 1872 — S. 45 — Expert opinion — When considered as evidence — Scientific opinion evidence, if intelligible, convincing and tested becomes an important factor for consideration along with other evidence of the case (Para 20)

Malay Kumar Ganguly v. *Dr. Sukumar Mukherjee*, (2009) 9 SCC 221; *State of H.P.* v. *Jai Lal*, (1999) 7 SCC 280 : 1999 SCC (Cri) 1184, *relied on*

J. Medical Jurisprudence — Potts' disease — Nature and diagnosis — Discussed (Paras 10 to 14)

Appeal allowed N-D/43829/C

Advocates who appeared in this case :
Anil Mittal, Vibhuti Sushant and Dr. Kailash Chand, Advocates, for the Appellant;
Ms Indu Malhotra, Senior Advocate (Kush Chaturvedi, Vikas Mehta, Ms Sharmila Upadhyay, R.K. Tripathi and John L. Joedl, Advocates) for the Respondents.

Chronological list of cases cited *on page(s)*

1. (2009) 9 SCC 221, *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee* 714*c*, 716*a*
2. (2000) 6 SCC 269 : 2000 SCC (Cri) 1088, *State of Maharashtra* v. *Damu* 716*a*
3. (1999) 7 SCC 280 : 1999 SCC (Cri) 1184, *State of H.P.* v. *Jai Lal* 715*c-d*
4. (1979) 2 SCC 158 : 1979 SCC (Cri) 389, *State (Delhi Admn.)* v. *Pali Ram* 716*a-b*
5. AIR 1934 All 273, *Titli* v. *Alfred Robert Jones* 715*e-f*

The Judgment of the Court was delivered by

H.L. DATTU, J.— This appeal is directed against the order passed by the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 128 of 1996 dated 23-5-2002. By the impugned order the National Consumer Disputes Redressal Commission has rejected the petition filed by the complainant.

2. The facts in brief are as under: the appellant complainant was a teacher by profession. He was aged about 60 years when he was down with physical ailments such as backache and difficulty in walking as a result of progressive weakness of both his lower limbs. As the problem worsened, on 20-11-1995, the appellant approached Regency Hospital Ltd. (Respondent 1), for medical check-up. On the same day, CT scan was done and he was diagnosed as a patient of "Dorsal Cord Compression D-4 to D-6 Pott's spine" which in simple terms means that TB infection had spread till his vertebrae. On the same day he was advised to get operated for decompression of spinal cord by *Laminectomy D-3 to D-6*. The operation was performed by Dr. Atul Sahay (Respondent 2) on 25-11-1995.

3. It is asserted, that, after the operation, the condition of the appellant deteriorated further and it was revealed from the MRI scan that the operation was not successful as it was not done at the right level. It is also stated that the case summary and the MRI reports suggested that the problem was aggravated and there was need for another operation. Dr. I.N. Vajpayee (Respondent 3) was consulted on 12-12-1995 and he performed the operation on the same day. Even after the second operation the infection was not cured

181

and this forced him to refer his case to Vidya Sagar Institute of Mental Health and Neurological Sciences, New Delhi (VIMHANS) for further treatment. It is further stated, that, the third operation was preformed and it provided the appellant some relief, but left him handicapped due to his legs being rendered useless and loss of control over his bladder movement.

Complaint before the National Commission

4. The appellant, being impaired by the treatment, filed a complaint before the National Consumer Disputes Redressal Commission (hereinafter referred to as "the National Commission") alleging medical negligence on the part of Respondents 1 to 3. The claim of the appellant before the National Commission was as under:

(*i*) That the correct method of operating his infection was the *Antero-Lateral Decompression (ALD)* and not *Laminectomy*.

(*ii*) That the appellant complainant contends that he was kept only for one week on the anti-tubercular drugs before the surgery which is a much shorter duration than the accepted medical practice.

(*iii*) That there was no requirement of immediate surgery.

(*iv*) That Respondent 2, who was a neurosurgeon did not consult the orthopaedic surgeon, even though he was not capable to handle the case of the appellant complainant without consulting orthopaedic surgeon.

Hence, it was claimed that there was gross negligence and carelessness on the part of the respondents in treating the appellant complainant, and therefore, the respondents be directed to pay a sum of Rs 22,00,000 with interest at the rate of 24% per annum to the complainant.

National Commission judgment

5. After considering the case presented by the appellant and the respondents and looking through the affidavits filed by the parties, the National Commission has come to the conclusion that medical negligence is not proved against the respondents. The Commission has concluded:

> "Medical negligence is when a doctor did something which he ought not to have done or did not do what he ought to have done. The doctors were qualified professionals. They did whatever was required to be done of neurosurgeons. In fact, we find the complainant's case deficient, who neither appeared for cross-examination nor produced any literature in support of this case to be of any assistance to this Commission."

Feeling aggrieved by the decision, the appellant has filed this appeal under Section 23 of the Consumer Protection Act, 1986.

Contention in the appeal

6. It is the contention of the appellant that it was due to non-compliance with the order of the National Commission by the Registry of the National Commission, the Commission did not have the benefit of the expert opinion to arrive at a conclusion, as to whether there was any negligence of the doctors who treated the appellant.

182

7. It is further contended that pursuant to the Order passed by the Commission dated 5-1-2000, the appellant had submitted all the records relating to his treatment on 4-2-2000 and had requested the Registry of the Commission to forward the same to Dr. A.K. Singh, Neurologist, who had been requested to offer his opinion on the surgery done on the appellant. However, the Registry had not sent the documents furnished by the appellant to the expert and therefore, the expert could not offer his opinion and thereby, the appellant was denied the benefit of having an opinion which would have proved his case before the Commission.

8. The respondents in their counter-affidavit filed before this Court, have denied the assertions and allegations made by the appellant and further justified the judgment of the National Commission.

9. We have heard the learned counsel for the parties to the lis.

Pott's disease and protocol of treatment

(i) The Disease

10. Pott's disease results from an infection of the bone by the mycobacterium tuberculosis bacteria via a combination of haematogenous root and lymphatic drainage. The organism may stay dormant in the skeletal system for an extended period of time before the disease can be detected. In Pott's disease, the spinal cord may become involved in a compression by bony elements and/or expanding abscess or by direct involvement of cord and leptomeninges by granulation tissue. Through experimentations it is found that the golden standard of the diagnosis in patients is CT guided needle aspiration biopsy. (Assistance taken from the website.)

(ii) Diagnosis

11. At present, the treatment of Pott's disease remains controversial. Some advocate conservative treatment with late spinal fusion and others early spinal fusion followed by conservative treatment. Surgical treatment should include anti-TB medication, abscess decompression. The anterior surgical approach is chosen for cervical and lumbar regions. Anterior spinal fusions is currently thought to be the best surgical adjunct to after at least 18 months of anti-TB chemotherapy.

12. The differential diagnosis of lower back pain is complicated by the number of possible causes and the patient's reaction to the discomfort. In many cases the patient's perception of back pain is influenced by poor quality sleep or emotional issues related to occupation or family matters. A primary care doctor will begin by taking a careful medical and occupational history, asking about the onset of the pain as well as its location and other characteristics.

13. Back pain associated with the lumbar spine very often affects the patient's ability to move, and the muscles overlying the affected vertebrae may feel sore or tight. Pain resulting from heavy lifting usually begins within 24 hours of the overexertion. Most patients who do not have a history of chronic pain in the lower back feel better after 48 hours of bed rest with pain

183

medication and either a heating pad or ice pack to relax muscle spasms. If the patient's pain is not helped by rest and other conservative treatments, he or she will be referred to an orthopaedic surgeon for a more detailed evaluation. An orthopaedic evaluation includes a *physical examination*, neurological workup, and imaging studies.

(*iii*) ***Conservative treatments***

14. Surgery for lower back pain is considered a treatment of the last resort, with the exception of cauda equina syndrome. Patients should always try one or more conservative approaches before consulting a surgeon about a laminectomy. [http://www.surgeryencyclopedia.com/Fi-La/Laminectomy.html]

Cleavage of opinion

15. Since medical science is complicated, expert opinion provides deep insight. (See *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee*[1].) It is clear that diagnosis and the method of treatment suggested to a patient of Pott's disease vary. The nature of disease is such that there exist differences in the identification of the symptoms and also the protocol of treatment to cure the disease. Therefore, the expert opinion forms an important role in arriving at a conclusion.

Expert opinion

16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialised and perhaps even esoteric, the central role of an expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

(*i*) that the expert must be within a recognised field of expertise,

(*ii*) that the evidence must be based on reliable principles, and

(*iii*) that the expert must be qualified in that discipline.

(See *Errors, Medicine and the Law*, Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p. 178.)

17. Section 45 of the Evidence Act, 1872 speaks of expert evidence. It reads as under:

> "45. *Opinions of experts.*—When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

1 (2009) 9 SCC 221 : (2009) 10 Scale 675

Such persons are called experts.

Illustrations

(*a*) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b*) The question is, whether *A*, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant."

18. The importance of the provision has been explained in *State of H.P.* v. *Jai Lal*[2]. It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

19. It is not the province of the expert to act as Judge or Jury. It is stated in *Titli* v. *Alfred Robert Jones*[3] that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form

2 (1999) 7 SCC 280 : 1999 SCC (Cri) 1184
3 AIR 1934 All 273

185

the basis of his conclusions. (See *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee*[1], SCC p. 249, para 34.)

21. In *State of Maharashtra* v. *Damu*[4], it has been laid down that without examining the expert as a witness in court, no reliance can be placed on an opinion alone. In this regard, it has been observed in *State (Delhi Admn.)* v. *Pali Ram*[5] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him".

22. In the article "Relevancy of Expert's Opinion" it has been opined that the value of expert opinion rests on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be crosschecked. Therefore, the emphasis has been on the data on the basis of which opinion is formed. The same is clear from the following inference:

> "Mere assertion without mentioning the data or basis is not evidence; even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

23. Though we have adverted to the nature of disease and the relevancy of the expert opinion, we do not think it necessary to go into the merits of the case in view of the course we propose to adopt, and in view of the fact that the Commission is the last fact finding authority in the scheme of the Act.

24. The Commission by its order dated 6-3-2000 had requested Dr. A.K. Singh, Neurologist, to give his opinion on the surgery done in this case. It was also ordered that all the records of the surgery will be submitted by the complainant to the Registrar of the Commission to enable him to forward it to Dr. A.K. Singh, along with the complaint and also the affidavits filed on behalf of the respondents. Dr. A.K. Singh will make himself familiar with the complaint and the records and then give his opinion. The Assistant Registrar by his letter dated 12-6-2000, forwarded the original records of the present case to Dr. A.K. Singh. On 19-8-2000, Dr. A.K. Singh submitted his report to the Assistant Registrar with the findings that:

> "After careful scrutiny of the documents now made available to me, I find that the current situation as regards these vital and missing documentary evidences is as follows:
>
> (*a*) No original x-ray films, of various radiological examinations were enclosed either in original form or in the form of copies.

4 (2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : AIR 2000 SC 1691
5 (1979) 2 SCC 158 : 1979 SCC (Cri) 389 : AIR 1979 SC 14

186

(*b*) No details of findings at surgery are provided.

(*c*) No details of operative findings have been provided. Only the surgical procedure carried out has been mentioned.

(*d*) No details of any subsequent neurological/neuroradiological assessment have been provided.

In view of the foregoing, I feel that not much additional information, over and above what had originally been provided to me by Dr. Atul Sahai, has been made available now for me to substantially revise my opinion earlier. I, therefore, stand by my earlier opinion referred to above."

25. The appellant on 17-9-2001, again filed an application before the Commission for referring the matter to an eminent doctor for his opinion. It was stated that the expert had at many places stated that he would have been in a better position to examine the matter if he was made available the x-rays and MRI reports, etc.

26. Inquiries from the office of the Commission revealed that the office of the Commission, by mistake, forgot to forward the original record to Dr. A.K. Singh and as a result thereof, Dr. A.K. Singh was deprived of the opportunity of perusing the same before submitting his opinion in the matter. In this way, the case of the appellant was severely prejudiced as without these records it was not possible for an expert to give definite and correct opinion in the matter.

27. The Commission by its order dated 22-11-2001 rejected the application of the appellant stating that Dr. A.K. Singh had submitted his report as far back as on 19-8-2000 and it is not understandable as to why this application should have been filed at such a later stage. The Commission in the course of its judgment has observed:

"That in spite of opportunity being given, the complainant and his wife did not offer themselves for the cross-examination and they have failed to supply material to Dr. A.K. Singh as mentioned in his report dated 19-8-2000, which could have enabled him to give a more complete report. Also no evidence of any expert was led by the appellant. For that matter none of the parties filed any literature on the subject to support their contentions in spite of giving them an opportunity."

28. In the present case, the appellant had filed all the records of the treatment before the Commission. The Assistant Registrar, due to oversight, did not send the original records and x-ray films to the expert. Thus, it was the Assistant Registrar of the Commission who had failed to perform the duty diligently.

29. Due to the non-availability of vital and important information, the expert was handicapped in giving his opinion on the basis of which the order of the Commission was to be passed. It is very much clear from the report of

187

Dr. A.K. Singh dated 19-8-2000, that he would have been in a better position if certain documents would have been made available to him.

30. The appellant had also filed an application before the Commission dated 17-9-2001, bringing to the notice of the Commission the lack of care shown by the Assistant Registrar, who had failed to forward the records of the treatment to the expert, and had requested to send the records for reconsideration. This application was rejected by the Commission holding that the reconsideration of the expert opinion at this stage is not necessary.

31. The Commission while rendering its judgment has failed to appreciate that in such cases an expert would not be in a position to form a true opinion if all the documents pertaining to the matter, on which the opinion is desired, are not made available to him. The Commission on the application made by the appellant should have again directed for the expert opinion after making all the records of the treatment available to the expert. The appellant should not suffer for the negligence of the Assistant Registrar and also when the Commission has itself stated in its judgment that supply of material to Dr. A.K. Singh could have enabled him to give a more complete report.

32. It is important to note that the appellant had brought to the notice of the National Commission, the lack of care shown by the Assistant Registrar, who had failed to forward the records of the treatment to the expert, by filing an application before the Commission dated 17-9-2001. This application was rejected by the Commission holding that the reconsideration of the expert opinion at this stage is not necessary. In our view, the principles of natural justice require that a fair opportunity should be given to the complainant to prove his claim based on the report of the expert. Since that opportunity is denied to the appellant, the impugned order passed by the National Commission cannot be sustained.

33. In view of the above discussion, the appeal requires to be allowed and accordingly, it is allowed. The impugned order is set aside. The Registrar of the Commission is directed to forward all the records of the treatment filed by the appellant before the Commission to Dr. A.K. Singh, Neurologist, who is now working at Fortis Hospital, Noida, for his expert opinion within one month from the date of receipt of this order, with a request to give his expert opinion on the basis of the records of the treatment and affidavits filed by both the parties within two months from the date the records are made available to him. After receipt of the expert opinion, the Commission is requested to pass fresh order in accordance with law. No order as to costs.

188

(2012) 8 Supreme Court Cases 263

(BEFORE SWATANTER KUMAR AND F.M. IBRAHIM KALIFULLA, JJ.)

a DAYAL SINGH AND OTHERS .. Appellants;

Versus

STATE OF UTTARANCHAL .. Respondent.

Criminal Appeal No. 529 of 2010†, decided on August 3, 2012

A. **Public Accountability, Vigilance and Prevention of Corruption — Corruption in Criminal Justice System — Investigating officer (SI) and government doctor deliberately favouring accused and acting in conscious and deliberate violation of their duty — Disciplinary proceedings, even after retirement of officials concerned — Initiation of — Power of trial court to direct — Punishment for contempt by High Court or Supreme Court for disobedience of such orders of trial court — Contempt of Courts Act, 1971 — S. 10 — Nature and Scope — Power of superior court to punish for contempt of inferior/subordinate court**

B. **Criminal Trial — Defective or illegal investigation — Investigation and doctor's report coloured with motivation — Dereliction of duty and misconduct by investigating officer and expert witness (doctor) or other material witnesses — Power of trial court to issue directions for disciplinary and other action against them, even after retirement of officials concerned — Such directions issued by trial court, affirmed and contempt notices issued to Higher Officials for not initiating disciplinary proceedings directed by trial court — Court's approach in appreciation of evidence in such cases**

— Court should ascertain on examination of prosecution case in its entirety whether there have been acts of omission and commission by investigating agency and other material witnesses which resulted in defective investigation and whether same were intentional and deliberate and adversely affected prosecution case — If investigation is found to be motivated, court should exercise higher degree of caution and care so as to ensure that despite attempt to misdirect trial, criminal justice system is not subverted — Court must record specific finding and reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to prosecution case, in breach of professional standards and investigative requirements of law, during course of investigation by investigating agency, expert witnesses and even PWs — Further, trial court would be justified in directing disciplinary authorities to take disciplinary or other action, whether such officer, expert or employee witness, is in service or has since retired

— Directions issued by Supreme Court against investigating officer (SI, PW 6) who conducted investigation and doctor (PW 3) who conducted post-mortem, both in a manner so as to defeat prosecution case, and other officials — Directors General, Health Services of U.P./Uttarakhand issued contempt notices as to why appropriate action be not initiated against them for not complying with directions contained in judgment of trial court for initiation of disciplinary proceedings against PW 3 — Abovesaid officials

† From the Judgment and Order dated 17-3-2008 of the High Court of Judicature of Uttarakhand at Nainital in Crl. A. No. 2050 of 2001 (Old No. 1324 of 1990)

189

directed to take disciplinary action against Medical Officer, PW 3, whether he was in service or had since retired, for deliberate dereliction of duty, preparing a medical report which ex facie was incorrect and was in conflict with inquest report and statement of IO, PW 6 — Bar of limitation, if any, under the Rules not to come into play because they were directed by the order of the trial court to do so — Action even for stoppage/reduction in pension can appropriately be taken by the said authorities against PW 3 — Directors General of Police U.P./Uttarakhand directed to initiate, and expeditiously complete disciplinary proceedings against PW 6 SI, whether he was in service or had since retired, for acts of omission and commission and deliberate dereliction of duty — Criminal Procedure Code, 1973 — Ss. 156 to 161, 353 and 354 — Constitution of India — Arts. 136 and 129 — Service Law — Departmental enquiry — Initiation of, even after retirement of officials concerned — Directions by court — Contempt of Courts Act, 1971 — S. 10 — Nature and Scope — Power of superior court to punish for contempt of inferior/subordinate court (Paras 30 to 48)

C. Criminal Trial — Fair and speedy trial — Object — Social justice — Rights of society and victim — To do justice not only to accused but also to society represented by prosecution by giving it a chance to prove its case — Aim is to ensure not only that no innocent person is punished but also that guilty persons do not escape — Constitution of India, Art. 21 (Paras 30 to 34)

D. Criminal Trial — Defective or illegal investigation — Investigation coloured with motivation — Acts of omission and commission committed by investigating agency and other material witnesses — Whether deliberate and adversely affected prosecution case — Medical evidence in conflict with eyewitness version

— According to eyewitness version, accused persons inflicted lathi-blows on deceased which resulted in his death on the spot — Presence of eyewitnesses at the scene of occurrence not in doubt and their testimony found to be natural and trustworthy — Investigating officer (SI, PW 6) also found, in presence of panchas, injuries on the person of deceased and prepared inquest report recording his opinion that deceased died on account of those injuries — But doctor (PW 3), who conducted post-mortem, reported no external or internal injury and could not ascertain cause of death — No reason mentioned by IO also for non-disclosure of cause of death by doctor — Deceased's viscera handed over to police but either not sent to FSL or if sent, report thereof neither called for nor proved before court — Held, post-mortem report was prepared in a perfunctory manner deliberately, to misdirect prosecution and IO also acted in a negligent and designed manner with a view to shield accused which adversely affected prosecution case — But merely because of investigation being defective and motivated, it should not enure to the benefit of accused to the extent of his acquittal — Hence, in present case concurrent conviction of accused by courts below under Ss. 302/323/34 IPC, confirmed — Criminal Procedure Code, 1973 — Ss. 156 to 161 — Evidence Act, 1872 — S. 45 — Penal Code, 1860, Ss. 302/34 and 323/34 (Paras 18 to 26 and 40)

E. Criminal Trial — Defective or illegal investigation — Investigation coloured with motivation — Acts of default/omission and commission by investigating officer and expert witness — If found to be so flagrant that

190

intentional and irresponsible attitude become apparent, investigation must be regarded as coloured by motivation and an attempt to save the accused (Paras 21 and 40)

F. Criminal Trial — Defective or illegal investigation — Intentional acts of default/omission and commission by investigating officer (IO) and medical officer (MO) of government hospital — Dereliction of duty and misconduct — What would amount to — To be determined in the context of service to which such officers belong — Police officers and doctors are required to maintain duty decorum of high standards — Hence, whether their acts constituted dereliction of duty and misconduct should be determined on basis of such standards — Disciplinary proceedings to be initiated on directions of trial court in such cases, even after retirement of officials concerned — Service Law — Misconduct (Paras 18 to 40 and 47)

G. Evidence Act, 1872 — Ss. 45, 59 and 60 — Medical evidence — Expert report (post-mortem report) in conflict with eyewitness version — Which one should be given precedence — Manner in which court should appreciate evidence — If expert report found to be perfunctory, incorrect and outcome of deliberate attempt to misdirect prosecution case, whereas eyewitness version found to be trustworthy and credible and establishes prosecution case beyond reasonable doubt, eyewitness version should be preferred over expert report (post-mortem report) — Hence, in present case concurrent conviction of accused by courts below under Ss. 302/323/34 IPC, confirmed — Penal Code, 1860, Ss. 302/34 and 323/34 (Paras 35 to 40)

H. Evidence Act, 1872 — S. 45 — Expert report — Should be well authored and convincing — Report, duly proved, has evidentiary value — But it is not binding on court — Court should analyse report, read it in conjunction with other evidence and then decide whether it is reliable or not (Paras 35 to 40)

I. Criminal Trial — Witnesses — Related witness — Testimony of, if found to be natural and truthful, cannot be discarded merely because of his relationship with deceased/victim and being interested witness (Paras 13, 14, 45 and 46)

J. Penal Code, 1860 — Ss. 302/34 or S. 304 Pt. II r/w S. 34 and Ss. 323/34 — Common intention to cause death — Accused persons armed with lathis came with premeditated mind and started assaulting deceased without any provocation, till his death on the spot, and when PWs came to deceased's rescue, accused inflicted injuries on them also — Held, conviction under Ss. 302/34 for causing death of deceased and under Ss. 323/34 for causing injuries to PWs justified (Paras 13, 14, 45 and 46)

The trial court found the accused persons guilty of offences under Section 302 read with Section 34 IPC for murder as well as under Section 323 read with Section 34 IPC for causing voluntary hurt to PWs 2 and 4. The court also commented adversely upon the professional capabilities and/or misconduct of the medical officer PW 3. It observed that since the doctor "had conducted in a manner not befitting the medical profession and prepared the post-mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that the Director General, Medical Health, U.P. be informed in this regard for

taking necessary action and for eradicating such practices in future". The High Court dismissed the appeal against the judgment of the trial court and affirmed the conviction and sentence recorded by the trial court.

Dismissing the appeal filed by the accused both on merits and on quantum of sentence, the Supreme Court

Held :

Court's approach in cases of motivated investigation and bought over expert witnesses

In a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well. (Paras 30 and 34)

Sathi Prasad v. *State of U.P.*, (1972) 3 SCC 613 : 1972 SCC (Cri) 659; *Dhanaj Singh* v. *State of Punjab*, (2004) 3 SCC 654 : 2004 SCC (Cri) 851; *Paras Yadav* v. *State of Bihar*, (1999) 2 SCC 126 : 1999 SCC (Cri) 104; *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8; *NHRC* v. *State of Gujarat*, (2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44; *State of Karnataka* v. *K. Yarappa Reddy*, (1999) 8 SCC 715 : 2000 SCC (Cri) 61; *Ram Bali* v. *State of U.P.*, (2004) 10 SCC 598 : 2004 SCC (Cri) 2045; *Karnel Singh* v. *State of M.P.*, (1995) 5 SCC 518 : 1995 SCC (Cri) 977, *relied on*

In this case, the trial court has rightly ignored the deliberate lapses of the investigating officer SI PW 6 as well as the post-mortem report prepared by PW 3 the medical officer. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 and PW 6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court. (Para 41)

It is declared and directed that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of

192

the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired. (Para 47.5)

Directions

The Directors General, Health Services of U.P./Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the trial court. The abovesaid officials are hereby directed to take disciplinary action against the Medical Officer, PW 3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report and statement of PW 6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order of the trial court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against PW 3. The Directors General of Police U.P./ Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW 6 SI, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by the direction of the Court that such enquiry shall be conducted. (Para 47.2 to 47.4)

Dharnidhar v. *State of U.P.*, (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491; *Mano Dutt* v. *State of U.P.*, (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226; *Satbir Singh* v. *State of U.P.*, (2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250, *followed*

Jayabalan v. *UT of Pondicherry*, (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966; *Ram Bharosey* v. *State of U.P.*, AIR 1954 SC 704 : 1954 Cri LJ 1755; *Har Prasad* v. *State of M.P.*, (1971) 3 SCC 455 : 1971 SCC (Cri) 703; *Gudar Dusadh* v. *State of Bihar*, (1972) 3 SCC 118 : 1972 SCC (Cri) 438, *cited*

Acts of omission and commission on part of investigating officer and medical officer

Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. The ambit of these expressions had to be construed with reference to the subject-matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. An investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialised persons. (Paras 26 and 21)

State of Punjab v. *Ram Singh*, (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435; *C. Muniappan* v. *State of T.N.*, (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402, *relied on*

193

The investigating officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. The Police Manual and even the provisions of CrPC require the investigation to be conducted in a particular manner and method which, stands clearly violated in the present case. PW 3 the medical officer concerned not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of the eyewitnesses placed by the prosecution on record. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. If primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice. (Paras 21 and 26)

Awadh Bihari Yadav v. *State of Bihar*, (1995) 6 SCC 31, *relied on*

Expert opinion vis-à-vis eyewitness version

The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. (Para 39)

The purpose of expert testimony is to provide the trier of fact with useful, relevant information and to assist the court in arriving at a final conclusion. Such report is not binding upon the court. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. (Paras 38 and 40)

Where contradictions and variations between medical and ocular evidence are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. There can be reports which are, ex facie, incorrect or deliberately so distorted so as to render the entire prosecution case unbelievable. In this case PW 3 the medical officer was expected to prepare the post-mortem report with appropriate reasoning and not leave everything to the imagination of the court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. (Paras 35, 40, 39 and 36)

Madan Gopal Kakkad v. *Naval Dubey*, (1992) 3 SCC 204 : 1992 SCC (Cri) 598, *followed*

Kamaljit Singh v. *State of Punjab*, (2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343, *relied on*

B.R. Sharma: *Forensic Science in Criminal Investigation & Trial* (4th Edn.); *The New Wigmore: A Treatise on Evidence—Expert Evidence* (2004 Edn.), *relied on*

194

Zuchowicz v. *United States*, 140 F 3d 381 (2d Cir CA 1998), *cited*

R-D/50327/CVRL

Advocates who appeared in this case :
Vineet Dhanda, Ms Puneet Dhanda, J.P. Dhanda and Ms Raj Rani Dhanda, Advocates, for the Appellants;
Ratnakar Dash, Senior Advocate (Rajeev Dubey, Kamlendra Mishra, Jatinder Kr. Bhatia and Ajai K. Bhatia, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226, *Mano Dutt* v. *State of U.P.* 275*f*
2. (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402, *C. Muniappan* v. *State of T.N.* 276*e*
3. (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491, *Dharnidhar* v. *State of U.P.* 274*e-f*
4. (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966, *Jayabalan* v. *UT of Pondicherry* 274*f-g*
5. (2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250, *Satbir Singh* v. *State of U.P.* 275*f*
6. (2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44, *NHRC* v. *State of Gujarat* 281*d*
7. (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8, *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* 280*f-g*, 281*h*
8. (2004) 10 SCC 598 : 2004 SCC (Cri) 2045, *Ram Bali* v. *State of U.P.* 282*e*
9. (2004) 3 SCC 654 : 2004 SCC (Cri) 851, *Dhanaj Singh* v. *State of Punjab* 280*d*
10. (2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343, *Kamaljit Singh* v. *State of Punjab* 283*c-d*
11. (1999) 8 SCC 715 : 2000 SCC (Cri) 61, *State of Karnataka* v. *K. Yarappa Reddy* 282*a*
12. (1999) 2 SCC 126 : 1999 SCC (Cri) 104, *Paras Yadav* v. *State of Bihar* 280*e-f*
13. (1995) 6 SCC 31, *Awadh Bihari Yadav* v. *State of Bihar* 280*b*
14. (1995) 5 SCC 518 : 1995 SCC (Cri) 977, *Karnel Singh* v. *State of M.P.* 282*e*
15. (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435, *State of Punjab* v. *Ram Singh* 279*g*
16. (1992) 3 SCC 204 : 1992 SCC (Cri) 598, *Madan Gopal Kakkad* v. *Naval Dubey* 283*f-g*
17. (1972) 3 SCC 613 : 1972 SCC (Cri) 659, *Sathi Prasad* v. *State of U.P.* 280*c*
18. (1972) 3 SCC 118 : 1972 SCC (Cri) 438, *Gudar Dusadh* v. *State of Bihar* 273*d-e*
19. (1971) 3 SCC 455 : 1971 SCC (Cri) 703, *Har Prasad* v. *State of M.P.* 272*g-h*
20. AIR 1954 SC 704 : 1954 Cri LJ 1755, *Ram Bharosey* v. *State of U.P.* 275*d*
21. 140 F 3d 381 (2d Cir CA 1998), *Zuchowicz* v. *United States* 285*b-c*

The Judgment of the Court was delivered by

SWATANTER KUMAR, J.— Settled canons of criminal jurisprudence when applied in their correct perspective, give rise to the following questions for consideration of the Court in the present appeal:

(*a*) Where acts of omission and commission, deliberate or otherwise, are committed by the investigating agency or other significant witnesses instrumental in proving the offence, what approach, in appreciation of evidence, should be adopted?

(*b*) Depending upon the answer to the above, what directions should be issued by the courts of competent jurisdiction?

(*c*) Whenever there is some conflict in the eyewitness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence?

2. The facts giving rise to the questions in the present appeal are that the fields of Gurumukh Singh and Dayal Singh were adjoining in Village Salwati

195

within the limits of Police Station Sittarganj, District Udham Singh Nagar. These fields were separated by a mend (boundary mound). On 8-12-1985, Gurumukh Singh, the complainant, who was examined as PW 2, along with his father Pyara Singh, had gone to their fields. At about 12 noon, Smt Balwant Kaur, PW 4, wife of Pyara Singh came to the fields to give meals to Pyara Singh and their son Gurumukh Singh. At about 12.45 p.m., the accused persons, namely, Dayal Singh, Budh Singh and Resham Singh (both sons of Dayal Singh) and Pahalwan Singh came to the fields wielding lathis and started hurling abuses. They asked Pyara Singh and Gurumukh Singh as to why they were placing earth on their mend, upon which they answered that mend was a joint property belonging to both the parties. Without any provocation, all the accused persons started attacking Pyara Singh with lathis. Gurumukh Singh, PW 2, at that time, was at a little distance from his father and Smt Balwant Kaur, PW 4, was nearby. On seeing the occurrence, they raised an alarm and went to rescue Pyara Singh. The accused, however, inflicted lathi injuries on both PW 2 and PW 4.

3. In the meanwhile, Satnam Singh, who was ploughing his fields, which were quite close to the fields of the parties and Uttam Singh (PW 5) who was coming to his village from another village, saw the occurrence. These two persons even challenged the accused persons upon which the accused persons ran away from the place of occurrence. Pyara Singh, who had been attacked by all the accused persons with lathis fell down and succumbed to his injuries on the spot. Few villagers also came to the spot. According to the prosecution, pagri (Ext. 1) of one of the accused, Budh Singh, had fallen on the spot which was subsequently taken into custody by the police. Gurumukh Singh, PW 2, left the dead body of his deceased father in the custody of the villagers and went to the police station where he got the report, Ext. Ka-3, scribed by Kashmir Singh in relation to the occurrence. The report was lodged at about 2.15 p.m. on 8-12-1985 by PW 2 in presence of SI Kartar Singh, PW 6. FIR (Ext. Ka-4A) was registered and the investigating machinery was put into motion.

4. The two injured witnesses, namely, PW 2 and PW 4 were examined by Dr P.C. Pande, PW 1, the medical officer at the Public Health Centre, Sittarganj on the date of occurrence. At 4.00 p.m., the doctor examined PW 2 and noticed the following injuries on the person of the injured witness vide Injury Report, Ext. Ka-1.

Injury Report of PW 2

"(*1*) Lacerated wound of 5 cm × 1 cm and 1 cm in depth. Margins were lacerated. Red fresh blood was present over wound. Wound was caused by a hard and blunt object. Wound was at the junction of left parietal and occipital bone 7 cm from upper part of left ear caused by blunt object. Advised x-ray. Skull A.P. and lateral and the injury was kept under observation.

(*2*) Contusion of 6 cm × 2.5 cm on left side of body 3 cm above the left iliac crest. Simple in nature caused by a hard and blunt object."

According to the doctor, the injuries were caused by a hard and blunt object and they were fresh in duration.

196

5. On 8-12-1985 at 7.30 p.m. Dr P.C. Pande (PW 1) examined the injuries of Smt Balwant Kaur, PW 4 and found the following injuries on her person vide Injury Report, Ext. Ka-2:

Injury Report of PW 4

"(*1*) Contusion 6 cm × 3 cm on left shoulder caused by a hard and blunt object.

(*2*) Contusion of 5 cm × 2 cm on lateral side of middle of left upper arm. Bluish red in colour caused by a hard and blunt object.

(*3*) Contusion of 4 cm × 2 cm on left parietal bone 6 cm from left ear caused by a hard and blunt object."

According to Dr Pande, these injuries were caused by a hard and blunt object and the duration was within 12 hours and the nature of the injuries was simple. According to Dr Pande the injuries of both these injured persons could have been received on 8-12-1985 at 12.45 p.m. by lathi.

6. As noted above, according to Dr Pande, the injuries were caused by a hard and blunt object and duration was within 12 hours. Thereafter, SI Kartar Singh, PW 6, proceeded to the place of occurrence in Village Salwati. He found the dead body of Pyara Singh lying in the fields. In the presence of panchas, including Balwant Singh, PW 8, he noticed that there were three injuries on the person of the deceased Pyara Singh and prepared inquest report vide Ext. Ka-6 recording his opinion that the deceased died on account of the injuries found on his body. After preparing the site plan, Ext. Ka-10, he also wrote a letter to the Superintendent, Civil Hospital, Haldwani for post-mortem, being Ext. Ka-9. The dead body was taken to the said hospital by Constable Chandrapal Singh, PW 7.

7. Dr C.N. Tewari, PW 3, medical officer in Civil Hospital, Haldwani, performed the post-mortem upon the body of the deceased and did not find any ante-mortem or post-mortem injuries on the dead body. On internal examination, he did not find any injuries and could not ascertain the cause of death. Further, he preserved the viscera and gave the post-mortem report, Ext. Ka-4. After noticing that there was no injury or abnormality found upon external and internal examination of the dead body, the doctor in his report recorded as under:

"Viscera in sealed jars handed over to the accompanying constables.

Jar 1: Sample preservative saline water.

Jar 2: Pieces of stomach.

Jar 3: Pieces of liver, spleen and kidney.

Death occurred about one day back.

Cause of death could not be ascertained. Hence, viscera preserved."

8. It appears from the record that the deceased's viscera, which allegedly was handed over by the doctor to the police, was either never sent to the forensic science laboratory (for short "the FSL") for chemical examination, or if sent, the report thereof was neither called for nor proved before the court. In fact, this has been left to the imagination of the court.

197

9. The accused persons, at about 5.45 p.m. on the same day, lodged a written report at the same police station, which was received by Head Constable Inder Singh, who prepared the check report, Ext. C-1 and made appropriate entry. The case was registered under Section 307 of the Penal Code, 1860 (IPC) against PW 2 Gurumukh Singh. Dayal Singh was arrested in furtherance of the FIR, Ext. Ka-4A. He was also sent for medical examination and was examined by Dr K.P.S. Chauhan, CW 2. After examining the said accused at about 7.45 p.m., the doctor found two injuries on his person and prepared the report (Ext. C-4). According to Dr Chauhan, the injuries on the person of the accused could have been received by a firearm object and injuries were fresh within six hours.

10. The investigating officer completed the investigation and filed charge-sheet (Ext. Ka-11) against the accused persons on 15-1-1986. It may be noticed that in furtherance to Ext. C-2, neither any case was registered nor was any charge-sheet presented before the court of competent jurisdiction. The accused also took no steps to prove that report in court. They also did not file any private complaint.

11. Considering the ocular and other evidence produced by the prosecution, the learned trial court vide its judgment of conviction and order of sentence, both dated 29-6-1990, found the accused persons guilty of offences under Section 302 read with Section 34 IPC as well as under Section 323 read with Section 34 IPC. The trial court, while dealing with the arguments of the accused for application of Section 34, as well as the submission that the witnesses had not attributed specific role to the respective accused persons, held as under:

> "The attack was premeditated and the accused had come fully prepared to do the overt act. The injury was caused on the head of the deceased which is a vital part of the body at which it was aimed by employing lathi, it was clear that the accused persons had intended to cause death by giving blow on vital part of the body of the deceased. After receiving the injuries, the deceased fell down and even thereafter he was attacked by the accused persons and he died on the spot immediately. This all goes to show that the accused persons who all were armed with lathis and had attacked in furtherance of their common intention by surrounding Shri Pyara Singh. At that juncture when the occurrence took place suddenly and the witnesses were at some distance it was quite natural for the witnesses not to have noted as to whose lathi-blow caused the injuries on Shri Pyara Singh and also on the injured persons. It was thus quite natural in such circumstances for the witnesses not to have noted the minute details of the incident.
>
> The Hon'ble Supreme Court has held in *Har Prasad* v. *State of M.P.*[1] that in view of the large number of accused involved in the occurrence it is quite natural for the prosecution witnesses to get a bit confused. In fact, no cross-examination was made on this aspect of the case which has been discussed by me above.

1 (1971) 3 SCC 455 : 1971 SCC (Cri) 703 : 1971 Cri LJ 1135

The fact that the accused persons had gone to the place of occurrence fully armed with lathis and immediately on the basis of 'mend' started attacking the deceased Shri Pyara Singh, indicates that they had gone there with premeditation and prior concert. All the four accused were physically present at the time of the commission of offence. The criminal act was done by the accused persons and they all had shared the common intention by engaging in that criminal enterprise for which they had come fully prepared. The prosecution has succeeded in showing the existence of common purpose or design. All the accused persons were confederates in the commission of the offence and they had participated in that common intention. Each of the accused person is liable for the act done in pursuance of that common purpose or design.

The acts done by the accused persons are similar as they all had come prepared armed with lathis and lathi-blows were struck on the deceased Shri Pyara Singh by the accused persons in furtherance of their common intention. Each of them is liable for the blows struck with lathi on the deceased and also on the injured persons. It is proved beyond all reasonable doubt that lathi-blow was struck on the head of Shri Pyara Singh which was a vital part and he died on the spot due to injuries. Whoever may have struck that lathi-blow, each of the accused person is liable for the lathi-blows struck on the vital part of the deceased. Since the lathi-blow was struck on the head of the deceased which is a vital part, the offence amounts to murder (see *Gudar Dusadh* v. *State of Bihar*[2]). The death of Shri Pyara Singh was caused in the occurrence and it is proved to the hilt and beyond all reasonable doubt that he died on the spot on account of lathi-blows inflicted on him. It is nobody's case that he died natural death. The accused persons have committed offence punishable under Sections 302/34 IPC and committed offence punishable under Sections 323/34 IPC for causing voluntary hurt to Shri Gurumukh Singh and Smt Balwant Kaur."

12. The above judgment of the trial court was assailed by the accused persons in appeal before the High Court. The High Court, vide its judgment dated 17-3-2008, dismissed the appeal and affirmed the judgment of conviction and order of sentence passed by the learned trial court giving rise to the present appeal.

13. From the narration of the above facts, brought on record by the prosecution and proved in accordance with law, it is clear that there are three eyewitnesses to the occurrence. Out of them, two are injured witnesses, namely, PW 2 and PW 4. PW 2 is the son of the deceased and PW 4 is the wife. Presence of these two witnesses at the place of occurrence is normal and natural. According to PW 4, she had gone to the place of occurrence to give food to her husband and son around 12 noon, which is the normal hour for lunch in the villages. The son of the deceased had come to the field with his father to work. They were putting earth on the mend which was objected

2 (1972) 3 SCC 118 : 1972 SCC (Cri) 438

199

to by the accused persons who had come there with lathis and with a premeditated mind of causing harm to the deceased. Upon enquiry, the deceased informed the accused persons that the mend was a joint property of the parties. Without provocation, the accused persons thereupon started hurling abuses upon Pyara Singh and his son, and assaulted the deceased with lathis. PW 2 and PW 4 intervened to protect their father and husband respectively, but to no consequence and in the process, they suffered injuries. In the meanwhile, when the accused persons were challenged by PW 5 and Satnam Singh, who were close to the place of occurrence, they ran away. The presence of PW 2, PW 4 and PW 5 cannot be doubted. The statement made by them in the court is natural, reliable and does not suffer from any serious contradictions. Once the presence of eyewitnesses cannot be doubted and it has been established that their statement is reliable, there is no reason for the court to not rely upon the statement of such eyewitnesses in accepting the case of the prosecution. The accused persons had come with premeditated mind, together with common intention, to assault the deceased and all of them kept on assaulting the deceased till the time he fell on the ground and became breathless.

14. This Court has repeatedly held that an eyewitness version cannot be discarded by the court merely on the ground that such eyewitness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the court would examine the possibility of discarding such statements. But where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the court to discard the statements of such related or friendly witness.

15. The Court in *Dharnidhar* v. *State of U.P.*[3] took the following view: (SCC pp. 768-69, paras 12-13)

> "*12.* There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In *Jayabalan* v. *UT of Pondicherry*[4], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24)
>
> '*23.* We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses,

3 (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491
4 (2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966

200

the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

24. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill-treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently. PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint.'

13. Similar view was taken by this Court in *Ram Bharosey* v. *State of U.P.*[5], where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same."

A similar view was taken by this Court in *Mano Dutt* v. *State of U.P.*[6] and *Satbir Singh* v. *State of U.P.*[7]

16. With some vehemence, it has then been contended on behalf of the appellant that the post-mortem report and the statement of PW 3 Dr C.N. Tewari, specifically state that no external or internal injuries were found on the body of the deceased. In other words, no injury was either inflicted by the accused or suffered by the deceased. In the face of this expert medical evidence, the statement of the eyewitnesses cannot be believed. The expert evidence should be given precedence and the accused persons are entitled to acquittal. This argument is liable to be rejected at the very outset despite the fact that it sounds attractive at first blush.

5 AIR 1954 SC 704 : 1954 Cri LJ 1755
6 (2012) 4 SCC 79 : (2012) 2 SCC (Cri) 226
7 (2009) 13 SCC 790 : (2010) 1 SCC (Cri) 1250

201

17. No doubt the post-mortem report (Ext. Ka-4) and the statement of PW 3 Dr C.N. Tewari, does show/reflect that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally. But the fact of the matter is that Pyara Singh died. How he suffered death is explained by three witnesses, PW 2, PW 4 and PW 5, respectively. Besides this, the statement of the investigating officer, PW 6, also clearly shows that the body of the deceased contained three apparent injuries. He recorded in his investigative proceedings that the accused had died of these injuries and was found lying dead at the place of occurrence. It is not only the statement of PW 6, but also the panchas in whose presence the body was recovered, who have endorsed this fact. The course of events as recorded in the investigation points more towards the correctness of the case of the prosecution than otherwise. Strangely, Dayal Singh and other accused persons not only took the stand of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) but even went to the extent of stating that they had no knowledge (pata nahin) when they were asked whether Pyara Singh had died as a result of injuries.

18. We have already discussed above that the presence of PW 2, PW 4 and PW 5 at the place of occurrence was in the normal course of business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to *C. Muniappan* v. *State of T.N.*[8]

19. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the investigating officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In order to examine this aspect in conformity with the rule of law and keeping in mind the basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

(*i*) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

(*ii*) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

(*iii*) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

(*iv*) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.

8 (2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402 : AIR 2010 SC 3718

20. In order to answer these determinative parameters, the courts would have to examine the prosecution evidence in its entirety, especially when a specific reference to the defective or irresponsible investigation is noticed in the light of the facts and circumstances of a given case.

21. The investigating officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the Police Manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. We may illustrate such kind of investigation with an example where a huge recovery of opium or poppy husk is made from a vehicle and the investigating officer does not even investigate or make an attempt to find out as to who is the registered owner of the vehicle and whether such owner was involved in the commission of the crime or not. Instead, he merely apprehends a cleaner and projects him as the principal offender without even reference to the registered owner. Apparently, it would prima facie be difficult to believe that a cleaner of a truck would have the capacity to buy and be the owner, in possession of such a huge quantity i.e. hundreds of bags of poppy husk. The investigation projects the poor cleaner as the principal offender in the case without even reference to the registered owner.

22. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the court. It cannot be considered a case of bona fide or unintentional omission or commission. It is not a case of faulty investigation simpliciter but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot-free. This can safely be gathered from the following:

22.1. The entire investigation, including the statement of the investigating officer, does not show as to what happened to the viscera which was, as per the statement of PW 3, handed over to the constable PW 7, who, in turn, stated that the viscera had been deposited in the police station malkhana. In the entire statement of the investigating officer, there is no reference to viscera, its collection from the hospital, its deposit in the malkhana and whether it was sent to the FSL at all or not. If sent, what was the result and, if not, why?

203

22.2. Conduct of the investigating officer is more than doubtful in the present case. In his statement, he had stated that he noticed three injuries on the body of the deceased. He also admitted that in the post-mortem report, no internal or external injuries were shown on the body of the deceased. According to him, he had asked PW 3 in that regard but the reply of the doctor was received late and the explanation rendered was satisfactory. Firstly, this reply or explanation does not find place on record. There is no document to that effect and secondly, even in his oral evidence, he does not say as to what the explanation was.

22.3. In his statement, PW 3 Dr C.N. Tewari, stated that he did not find any external or internal injuries even after performing the post-mortem on the body of the deceased. This remark on the post-mortem report apparently is falsified both by the eyewitnesses as well as the investigating officer. It will be beyond apprehension as to how a healthy person could die, if there were no injuries on his body and when, admittedly, it was not a case of cardiac arrest or death by poison, etc., more so, when he was alleged to have been assaulted with dandas (lathis) by four persons simultaneously. In any case, the doctor gave no cause for death of the deceased and prepared a post-mortem report which ex facie was incorrect and tantamounts to abrogation of duty. The trial court while giving the judgment of conviction, noticed that medico-legal post-mortem examination is a very important part of the prosecution evidence and, therefore, it is necessary that it be conducted by a doctor fully competent and experienced.

22.4. The court also commented adversely upon the professional capabilities and/or misconduct of Dr C.N. Tewari, as follows:

> "Whatever may have been the reasons but it is quite evident that Dr C.N. Tewari failed in his professional duty and he did not perform the post-mortem examination properly after considering the inquest report and the police papers sent to him. If his finding deferred from the finding of the panchas he should have informed his superior officers in that regard so that another opinion could have been obtained before the disposal of the dead body. The evidence leaves no room for doubt that Shri Pyara Singh was attacked with lathis as alleged by the prosecution and he received three injuries already referred to above which were mentioned in the inquest report (Ext. Ka-6)....
>
> The case of the prosecution cannot be thrown on account of the gross negligence and apathy of the Medical Officer Dr C.N. Tewari who had performed autopsy on the dead body of Shri Pyara Singh. Since the Medical Officer Dr C.N. Tewari had conducted in a manner not befitting the medical profession and prepared the post-mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that *the Director General, Medical Health U.P. be informed in this regard for taking necessary action and for eradicating such practices in future.*" (emphasis supplied)

204

23. From the record, it is evident that the learned counsel appearing for the State was also not aware if any action had been taken against Dr C.N. Tewari. On the contrary, Mr Ratnakar Dash, learned Senior Counsel appearing for Dr C.N. Tewari, informed us that no action was called for against Dr C.N. Tewari as he had authored the post-mortem report and given his evidence truthfully and without any dereliction of duty. He also informed us that since Dr C.N. Tewari is now retired and is not well, this Court need not pass any further directions. We are not impressed with this contention at all.

24. We have already noticed that PW 3 Dr C.N. Tewari, certainly did not act with the requisite professionalism. He even failed to truthfully record the post-mortem report, Ext. Ka-4. At the cost of repetition, we may notice that his report is contradictory to the evidence of the three eyewitnesses who stood the test of cross-examination and gave the eye-version of the occurrence. It is also in conflict with the statement of PW 6 as well as the inquest report (Ext. Ka-6) prepared by him where he had noticed that there were three injuries on the body of the deceased. It is clear that the post-mortem report is silent and PW 3 did not even notice the cause of death. If he was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it is conceded before us by the learned counsel for the parties, including the counsel for Dr C.N. Tewari that it was not a case of death by administering poison.

25. Similarly, the investigating officer has also failed in performing his duty in accordance with law. Firstly, for not recording the reasons given by Dr C.N. Tewari for non-mentioning of injuries on the post-mortem report, Ext. Ka-4, which had appeared satisfactory to him. Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by Dr C.N. Tewari, who allegedly handed over the same to the police, and their disappearance. There is clear callousness and irresponsibility on their part and deliberate attempt to misdirect the investigation to favour the accused.

26. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. This Court in *State of Punjab* v. *Ram Singh*[9] stated that the ambit of these expressions had to be construed with reference to the subject-matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of

9 (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435

205

high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialised persons. The Police Manual and even the provisions of CrPC require the investigation to be conducted in a particular manner and method which, in our opinion, stands clearly violated in the present case. Dr C.N. Tewari, not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of the eyewitnesses placed by the prosecution on record. Also, in the same case, the Court, while referring to the decision in *Awadh Bihari Yadav* v. *State of Bihar*[10] noticed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice.

27. Now, we may advert to the duty of the court in such cases. In *Sathi Prasad* v. *State of U.P.*[11] this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in *Dhanaj Singh* v. *State of Punjab*[12], held: (SCC p. 657, para 5)

> "5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

28. Dealing with the cases of omission and commission, the Court in *Paras Yadav* v. *State of Bihar*[13] enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*[14], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater

10 (1995) 6 SCC 31
11 (1972) 3 SCC 613 : 1972 SCC (Cri) 659
12 (2004) 3 SCC 654 : 2004 SCC (Cri) 851
13 (1999) 2 SCC 126 : 1999 SCC (Cri) 104 : AIR 1999 SC 644
14 (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8

responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

> "*42.* Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. *Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.*" (emphasis supplied)

30. With the passage of time, the law also developed and the dictum of the Court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

31. Reiterating the above principle, this Court in *NHRC* v. *State of Gujarat*[15] held as under: (SCC pp. 777-78, para 6)

> "*6.* ... '*35.* ... The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.' (*Zahira Habibullah case*[14], SCC p. 395, para 35)"

15 (2009) 6 SCC 767 : (2009) 3 SCC (Cri) 44

14 *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8

207

32. In *State of Karnataka* v. *K. Yarappa Reddy*[16] this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)

> "*19.* But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

33. In *Ram Bali* v. *State of U.P.*[17] the judgment in *Karnel Singh* v. *State of M.P.*[18] was reiterated and this Court had observed that: (*Ram Bali case*[17], SCC p. 604, para 12)

> "*12.* ... In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective."

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

16 (1999) 8 SCC 715 : 2000 SCC (Cri) 61
17 (2004) 10 SCC 598 : 2004 SCC (Cri) 2045
18 (1995) 5 SCC 518 : 1995 SCC (Cri) 977

deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well.

35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh* v. *State of Punjab*[19], the Court, while dealing with the discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> "*8.* It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

> "*34.* ... The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by [examining] the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert's opinion is accepted, it is not the opinion of the medical officer but [that] of the court."

(See *Madan Gopal Kakkad* v. *Naval Dubey*[20], SCC pp. 221-22, para 34.)

37. Profitably, reference to the value of an expert in the eye of the law can be assimilated as follows:

> "The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence.

19 (2003) 12 SCC 155 : 2004 SCC (Cri) Supp 343 : 2004 Cri LJ 28
20 (1992) 3 SCC 204 : 1992 SCC (Cri) 598 : (1992) 2 SCR 921

If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based." [See *Forensic Science in Criminal Investigation & Trial* (4th Edn.), by B.R. Sharma.]

38. The purpose of expert testimony is to provide the trier of fact with useful, relevant information. The overwhelming majority rule in the United States, is that an expert need not be a member of a learned profession. Rather, experts in the United States have a wide range of credentials and testify regarding a tremendous variety of subjects based on their skills, training, education or experience. The role of the expert is to apply or supply specialised, valuable knowledge that lay jurors would not be expected to possess. An expert may present the information in a manner that would be unacceptable with an ordinary witness. The common law tried to strike a balance between the benefits and dangers of expert testimony by allowing expert testimony to be admitted only if the testimony were particularly important to aiding the trier of fact. Even in the United States, if the helpfulness of expert testimony is substantially outweighed by the risk of unfair prejudice, confusion or waste of time, then the testimony should be excluded under the relevant Rules, and State equally balanced. Expert testimony on any issue of fact and significance of its application has been doubted by the scholars in the United States. Even under the law prevalent in that country, the opinion of an expert has to be scientific, specific and experience based. Conflict in expert opinions is a well-prevalent practice there. While referring to such incidence David H. Kaye and other authors in *The New Wigmore: A Treatise on Evidence—Expert Evidence* (2004 Edn.) opined as under:

"The District Court opinion reveals that one pharmacologist asserted 'that Danocrine more probably than not caused plaintiff's death from pulmonary hypertension,' but it describes the reasoning behind this

210

opinion in the vaguest of terms, referring only to 'extensive education and training in pharmacology' and an unspecified 'scientific technique' that 'relied upon epidemiological, clinical and animal studies, as well as plaintiff's medical records and medical history...'. The nature of these studies and their relationship to the patient's records is left unstated. The District Court incanted the same mantra to justify admitting the remaining testimony. It asserted that the other experts 'similarly base their testimony upon a careful review of medical literature concerning Danocrine and pulmonary hypertension, and plaintiff's medical records and medical history'.

The court of appeals[21] elaborated on the testimony of two of the experts. The physician 'was confident to a reasonable medical certainty that the Danocrine caused Mrs Zuchowicz's PPH' because of 'the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes'. Yet the 'differential etiology' here was barely more than a differential diagnosis of PPH. The causes of PPH are generally unknown and it appears that the only other putative alternative causes considered were drugs other than Danocrine. It is not at all clear that such a 'differential etiology' is adequate to support a conclusion of causation to any kind of a 'medical certainty'. The pharmacologist, not being a medical doctor, testified 'to a reasonable degree of scientific certainty ... [that] the overdose of Danocrine, more likely than not, caused PPH...'. He postulated a mechanism by which this might have occurred: '(*1*) a decrease in estrogen; (*2*) hyperinsulinemia, in which abnormally high levels of insulin circulate in the body; and (*3*) increase in free testosterone and progesterone ... that ... taken together, likely caused a dysfunction of the endothelium leading to PPH'.

In sum, plaintiff's experts did not know what else might have caused the hypertension, and they offered a conjecture as to a causal chain leading from the drug to the hypertension. This logic would be more than enough to justify certain clinical recommendations—the advice to Mrs Zuchowicz to discontinue the medication, for example. But is it enough to allow an expert not merely to testify to a reasonable diagnosis of PPH, or 'unexplained pulmonary hypertension', as the condition also is known, but also be able to propound a novel explanation that has yet to be verified, even in an animal model?"

39. The Indian law on expert evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. Dr C.N. Tewari was expected to prepare the post-mortem report with appropriate reasoning and not leave everything to the imagination of the

21 *Zuchowicz* v. *United States*, 140 F 3d 381 (2d Cir CA 1998)

2-11

Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.

40. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

41. Reverting to the case in hand, the trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 and PW 6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.

42. Despite clear observations of the trial court, no action has been taken by the Director General, Medical Health, Uttar Pradesh. We do not see any justification for these lapses on the part of the higher authority. Thus, it is a fit case where this Court should issue notice to show cause why action in accordance with the provisions of the Contempt of Courts Act, 1971 be not

212

initiated against him and he be not directed to conduct an enquiry personally and pass appropriate orders involving Dr C.N. Tewari and if found guilty, to impose punishment upon him including deduction of pension. Admittedly, this direction was passed when Dr C.N. Tewari was in service. His retirement, therefore, will be inconsequential to the imposing of punishment and the limitation of period indicated in the service regulations would not apply in face of the order of this Court.

43. Similarly, the Director General of Police U.P./Uttarakhand also be issued notice to take appropriate action in accordance with the service rules against PW 6 SI Kartar Singh, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law.

44. Lastly, the learned counsel for the appellant had, of course, with some vehemence, argued that the offence even if committed by the appellant, would not attract the provisions of Section 302 IPC and would squarely fall within the ambit of Part II of Section 304 IPC. In other words, he prays for alteration of the offence to an offence punishable under Part II of Section 304 IPC.

45. We are concerned with a case where four persons armed with lathis had gone to the fields of the deceased. They first hurled abuses at him and without any provocation started assaulting him with the dang (lathi) that they were carrying. Despite efforts to stop them by the wife and son of the deceased, PW 4 and PW 2, they did not stop assaulting him and assaulted both these witnesses also. Thereupon, they kept on assaulting the deceased until he fell down dead on the ground. Three injuries were noticed by the police on the body of the deceased including a protuberant injury on the head, which the court is only left to presume has resulted in his death.

46. In the absence of an authentic and correct post-mortem report (Ext. Ka-4), the truthfulness of the prosecution eyewitnesses cannot be doubted. In addition thereto, the stand taken by the accused that they had suffered injuries was a false defence. Firstly, according to the doctor, CW 2, it was injuries of a firearm, while even according to the defence, the deceased or his son were not carrying any gun at the time of occurrence. Secondly, they did not choose to pursue their report with the police at the time of investigation or even when the trial was on before the trial court. The accused persons had gone together armed with lathis with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. Thus, the intention to kill is apparent. It is not a case which would squarely fall under Part II of Section 304 IPC. Thus, the cumulative effect of appreciation of evidence, as aforediscussed, is that we find no merit in the present appeal.

47. Having analysed and discussed in some elaboration various aspects of this case, we pass the following orders:

47.1. The appeal is dismissed both on merits and on quantum of sentence.

212

47.2. The Directors General, Health Services of U.P./Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the trial court dated 29-6-1990.

47.3. The abovesaid officials are hereby directed to take disciplinary action against Dr C.N. Tewari, PW 3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which ex facie was incorrect and was in conflict with the inquest report (Exts. Ka-6 and Ka-7) and statement of PW 6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order dated 29-6-1990 of the Court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against Dr C.N. Tewari.

47.4. The Directors General of Police U.P./Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW 6 SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by the direction of the Court that such enquiry shall be conducted.

47.5. We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.

48. The appeal is accordingly dismissed.

SUPPLEMENTARY ORDER

49. Today, by a separate judgment, we have directed that action be taken against PW 3 Dr C.N. Tewari and PW 6 SI Kartar Singh. The Director General of Police and Director General, Health of State of Uttar Pradesh and/or Uttarakhand whoever is the appropriate authority, to take action within three months from today and report the matter to this Court. List for limited purpose on 15-10-2012.

214

Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28(*b*)(*ii*). The position taken by the appellant, throughout, was that this rule should be deemed to have been "supplemented" by the impugned government notification. It is not correct that the impugned notification merely "supplements" or fills up a gap in the statutory rules. It tends to supersede or superimpose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz., *seniority* and *fitness* for promotion to the Upper Division prescribed, by the statutory Rule 28(*b*)(*ii*), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction it did.

31. For the foregoing reasons the appeal fails and is dismissed with costs.

(1979) 2 Supreme Court Cases 158

(BEFORE R. S. SARKARIA AND O. CHINNAPPA REDDY, JJ.)

THE STATE (DELHI ADMINISTRATION) .. Appellant;

Versus

PALI RAM .. Respondent.

Criminal Appeal No. 336 of 1976†, decided on September 26, 1978

Evidence Act, 1872 — Sections 73 & 45 — Scope of powers of court under Section 73 — Held, Magistrate in seisin of the case is competent to direct the accused to give his specimen signature and to get it compared by handwriting expert — In absence of any expert, court can call for an expert — But the court should reach its conclusion on the basis of its own findings and not that of the expert — Function of the expert indicated — Evidence Act, 1872, Section 165 — Criminal Procedure Code, 1898, Section 540 — Criminal Procedure Code, 1973, Section 311

The question that came up for determination by the Supreme Court was whether the Magistrate in the course of an enquiry or trial on being moved by the prosecution, is competent under Section 73, to direct the accused person to give his specimen handwriting so that the same may be sent along with the disputed writing to the Government Expert of Questioned Documents for Examination, with a view to have the necessary comparison.

Held :

Comparison within the meaning of the first paragraph of Section 73, may be made by a handwriting expert (Section 45) or by one familiar with the handwriting of the person concerned (Section 47) or by the court. The two paragraphs of the section are not mutually exclusive, but complementary to each other. Section 73 is therefore, to be read as a whole, in the light of Section 45. (Paras 25 and 26)

Thus read, it is clear that a court holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under Section 73 if, in the interest of justice, it directs an accused person appearing before it, to give

†Appeal by Special Leave from the Judgment and Order, dated February 18, 1975 of the Delhi High Court in Criminal Revision 46 of 1973.

his sample writing to enabling the same to be compared by a handwriting expert chosen or approved by the Court, irrespective of whether his name was suggested by the prosecution or the defence, because even in adopting this course, the purpose is to enable the Court before which he is ultimately put up for trial, to compare the disputed writing with his (accused's) admitted writing, and to reach its own conclusion with the assistance of the expert. Such a direction in the ultimate analysis, "is for the purpose of enabling the Court to compare" the writing so written with the writing alleged to have been written by such person, within the contemplation of Section 73. That is to say, the words "for the purpose of enabling the Court to compare" do not exclude the use of such 'admitted' or sample writing for comparison with the alleged writing of the accused, by a handwriting expert cited as a witness by any of the parties. Even where no such expert witness is cited or examined by either party, the Court may, if it thinks necessary for the ends of justice, on its own motion, call an expert witness, allow him to compare the sample writing with the alleged writing and thus give his expert assistance to enable the Court to compare the two writings and arrive at a proper conclusion. (Paras 26 and 33)

Once a Magistrate in *seisin* of a case, duly forms an opinion that the assistance of an expert is essential to enable the Court to arrive at a just determination of the issue of the identity of the disputed writing, the fact that this may result in the "filling of loopholes" in the prosecution case is purely a subsidiary factor, which must give way to the paramount consideration of doing justice. Moreover, it could not be predicated at this stage whether the opinion of the Government Expert of Questioned Documents would go in favour of the prosecution or the defence. (Para 28)

Further, it is not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert. (Para 30)

The real function of the *expert* is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert may form its judgment by its own observation of those materials. Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because *strictly* speaking, such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence. (Para 31)

In addition to Section 73, there are two other provisions resting on the same principle, namely, Section 165, Evidence Act and Section 540, Cr. P. C., 1898, which between them invest the Court with a wide discretion to call and examine any one as a witness, if it is *bona fide* of the opinion that his examination is necessary for a just decision of the case. (Para 29)

In view of all the foregoing reasons, the Magistrate in the present case was within his powers under Section 73 of the Act in allowing the application made by the prosecution.

Fakharuddin v. *State of M. P.*, AIR 1967 SC 1326; *Titli* v. *Jones*, ILR 56 All 428: AIR 1934 All 237, *relied on*

216

State of Bombay v. *Kathi Kalu Oghad*, (1962) 3 SCR 10 : AIR 1961 SC 1808 ; *Rudragouda Venkangouda* v. *Basangouda*, AIR 1938 Bom 257 ; *Gulzar Khan* v. *State*, AIR 1962 Pat 255 ; *B. Rami Reddy* v. *State of A. P.*, 1971 Cri LJ 1591 ; *Hira Lal Agarwala* v. *State*, ILR (1957) 2 Cal 928 : AIR 1958 Cal 123 ; *State* v. *Poonam Chand Gupta*, ILR 1958 Bom 299 : AIR 1958 Bom 207 : 1958 Cri LJ 619 and *T. Subbiah* v. *S. K. D. Ramaswami Nadar*, AIR 1970 Mad 85 ; 1970 Cri LJ 254, *referred to*

Cobbett v. *Kilminister*, 1865 4 F & F 490 ; *Doed Devine* v. *Wilson*, (1855) 10 Moor PC 502, 530 : 110 RR 83, *cited*

Appeal allowed RGB/4027/CR

Advocates who appeared in this case :

H. S. Marwaha and *R. N. Sachthey*, Advocates, for the Appellant ;

D. B. Vohra, Advocate, for the Respondent.

The Judgment of the Court was delivered by

Sarkaria, J.—This appeal by special leave, directed against a judgment dated February 18, 1975, of the High Court of Delhi, involves a question with regard to the scope of the powers of court under Section 73, Evidence Act to direct an accused person to give his specimen writings. It arises out of these circumstances :

2. Pali Ram, respondent along with Har Narain and 8 others was challaned by the police in respect of offences under Sections 120-B/420/477-A/467/471, Penal Code before the Additional Chief Judicial Magistrate, Delhi. The case being exclusively triable by the Court of Session, the Magistrate started inquiry proceedings under Section 207-A, Chapter XVIII of the Code of Criminal Procedure, 1898. After most of the prosecution evidence had been recorded, an application dated December 11, 1970, was submitted on behalf of the prosecution. It was stated in the application that one of the basic documents (Ex. PW 21/F) tendered in evidence was, according to the prosecution, in the handwriting of Pali Ram ; but it could not be got compared by a handwriting expert with any specimen writing of Pali Ram because the latter was absconding and had avoided to give any specimen writing. It was further stated that this document is a very vital link to establish the case against the accused, and in the interest of justice, the Court should direct Pali Ram, accused to give his specimen writings, and forward the same along with the original documents, marked P. 21/F, to the Government Expert of Questioned Documents "with a view to have the necessary comparison". This application was strenuously opposed on behalf of the accused. After hearing arguments, the Magistrate on May 20, 1972, allowed that application. Since the construction of that order has a bearing on the problem before us, it will be appropriate to extract its material portion in extenso, as under :

> It was argued on behalf of Pali Ram accused.....that the power of the Court is limited to the extent only where the Court itself is of the view that it is necessary for its own purpose to take such writing in order to compare the words or figures so written with any word or figure alleged to have been written by such person and that this power does not extend to permitting one or the other party before the Court to take such writing for the purpose of its evidence or its own use. *Harilal Shamalji Parekh* v. *Jain Co-operative Housing Society*[1] was cited in this connection. It was further argued that Section 73, Indian Evidence Act did not entitle the Court to assist a party to the proceedings. *It entitled*

1. AIR 1957 Bom 207

217

the Court only to assist itself for a proper conclusion in the interest of justice. I have applied this test to the present case before me. It is true that here it is the prosecution which has made this request. But the observation contained in this ruling cannot be stretched to the extent, the defence wants me to do it. Ex. PW 21/F was stated by Tekchand to be in Paliram's handwriting when he made statement before the police. In his statement during committal proceedings he resiled from it. This document is undoubtedly a vital link. It has an important bearing on the case as Pali Ram himself happens to be an accused. In this peculiar situation it becomes necessary to take recourse to the Court's power under Section 73 in the interest of justice and to ask Pali Ram to give specimen handwriting (*to have it examined by handwriting expert*) *and then to decide about it*. Under these circumstances, I think it fit to allow the request of the prosecution in this regard. (emphasis supplied)

3. Feeling aggrieved by this Order, Pali Ram preferred a revision to the Court of Session. The revision was dismissed by the learned Additional Sessions Judge on December 7, 1972. Against this dismissal, Pali Ram preferred a revision petition (C. R. 46 of 1973) in the High Court. The revision petition first came up for hearing before R. N. Agarwal, J., who felt that the case involved an important question of law which was not free from difficulty. He therefore referred it to a larger Bench, although he did not formulate any specific question.

4. The matter then came up for consideration before a Division Bench consisting of Jagjit Singh and R. N. Agarwal, JJ. The Division Bench gathered from the referring order "that the matter requiring consideration is, whether the second paragraph of Section 73 of the Indian Evidence Act empowers a court to direct an accused to write in words or figures by way of specimen writings for enabling the prosecution to send the specimen writing to a handwriting expert for purposes of comparison with the writing of a disputed document alleged to be in the handwriting of that accused person".

5. After referring to certain decisions, Jagjit Singh, J., who delivered the judgment of the Bench, answered the question posed, thus:

> There is no ambiguity or confusion in the phraseology used in the second paragraph of the section. Therefore, the only purpose for which a court may direct any person present in the court (including an accused person) to write words of figures is to enable the court to compare the words and figures so written with any words or figures alleged to have been written by such person. Where the purpose of directing a person present in court to write any words or figures is not to enable the court to compare the words or figures with any words or figures alleged to have been written by such person but is to enable any of the parties to have the words or figures so written compared from a handwriting expert of that party, the second paragraph of Section 73 would have no application.

In the result, the High Court held that "the order of the learned Additional Chief Judicial Magistrate dated May 20, 1972, in so far as it related to disposal of the application filed on December 11, 1970, was not legal and was beyond the scope of Section 73 of the Evidence Act. To that extent, the said order and the order of the Additional Sessions Judge dated December 7, 1972, by which the revision was dismissed, are set aside and the revision filed by Pali Ram is accepted".

218

6. Hence, this appeal by the State (Delhi Administration).

7. We have heard Shri Marwah, appearing for the appellant-State. None has appeared on behalf of the respondent, despite notice.

8. In the course of his elaborate arguments, Shri Marwah has tried to make out these points: (*i*) the expression "any person" in Section 73 includes a person accused of an offence. (*ii*) The word "court" in Section 73 includes the Court of the Magistrate competent to try the offence or hold an enquiry in respect thereof against such accused person under the Code of Criminal Procedure. (*iii*) Section 73 does not offend Article 20(3) of the Constitution, because by giving a direction to an accused person to give his specimen handwriting the Court does not compel that accused "to be a witness against himself". *State of Bombay* v. *Kathi Kalu Oghad*[2] has been relied upon. (*iv*) There is nothing in Section 73 which prohibits the Court from sending the specimen writing obtained by it from the accused to a handwriting expert for opinion after comparison of the same by him with the disputed writing, even if that expert happens to be the Government Expert of Questioned Documents. A court is fully competent under Section 73, to make an order directing the accused to write down words or figures if the ultimate purpose of obtaining such specimen writing is to enable the court trying the case, or inquiring into it, to compare that specimen writing with the disputed one to reach its own conclusion, notwithstanding the fact that, in the first instance, the court thinks it necessary in the interest of justice to send that specimen writing together with the disputed one, to an expert to have the advantage of his opinion and assistance. (*v*) The specimen writings taken from an accused person by the Court under the second paragraph of Section 73 are to all intents and purposes, "admitted writings" within the purview of the first paragraph of the section which read with illustration (*e*) of Section 45, Evidence Act, clearly indicates that such specimen writings can legally be used for comparison with the disputed writing by a handwriting expert, also, irrespective of whether such expert is examined as a witness by any of the parties, or as a court witness by the court acting suo motu or on being moved by the prosecution or the defence. (*vi*) The Government Expert of Questioned Documents is supposed to be a high officer of integrity who is not under the influence of the investigating officer and he is expected to give his opinion truthfully about the identity or otherwise of the two sets of writings on objective, scientific data. The mere fact, therefore, that in the instant case, he has been summoned as a prosecution witness will not prejudice the accused, particularly when the Court, in the cricumstances of the case, thinks it necessary to take the assistance of the expert for reaching its own conclusion on this point. (*vii*) The order of the Magistrate, construed as a whole, shows that, in substance, the ultimate purpose of directing the accused to give his specimen writings is that the Magistrate wants to compare the specimen thus obtained, with the disputed writing, to form a just opinion about its identity, after availing himself of the advantage of the expert's opinion. (*viii*) This course was adopted by the Magistrate in the interests of justice taking into account the conduct of the accused who had been absconding for a long time and was declared a proclaimed offender, and thus avoided to give his admitted or specimen writings at the investigation stage, and later, (it is contended) tampered with the prosecution witness (Tek Chand) who was expected to prove the disputed writing and who, in consequence of the tampering by the accused, resiled

2. (1962) 3 SCR 10 : AIR 1961 SC 1808

from his police statement during the proceedings in court. In such a situation, even on the principle underlying Section 540, Cr.P.C. of 1898, which governs these proceedings, and is analogous to the principle underlying Section 73, para (2), the Magistrate was competent to use the specimen writing thus obtained, for securing the opinion and evidence of the Government Expert, with a view to assist himself (Magistrate) in forming his own opinion with regard to the identity of the disputed writing, Ex. PW. 21/F. (*ix*) The action of the Magistrate inasmuch as it sought the specimen writing of the accused to be sent, in the first instance, to the Government Expert for his opinion and evidence, far from being prohibited, was consistent with the principle enunciated by the Bombay High Court in *Rundragouda Venkangouda* v. *Basangouda*[3], which received the imprimatur of this Court in *Fakhruddin* v. *State of Madhya Pradesh*[4]. This principle is to the effect, that comparison of the handwriting by the Court with the other documents not challenged as fabricated, upon its own initiative and without the guidance of an expert is hazardous and inconclusive.

9. Points (*i*) and (*iii*) are well-settled and beyond controversy.

10. For points (*iv*) to (*ix*), Shri Marwah relies on *Gulzar Khan* v. *State*[5] and *B. Rami Reddy* v. *State of Andhra Pradesh*[6]. Shri Marwah further maintains that the view taken by a learned Judge of the Calcutta High Court in *Hiralal Agarwalla's* case[7] followed in the impugned judgment by the Delhi High Court, and also by the Bombay High Court in *State v. Poonamchand Gupta*[8] inasmuch as it is held therein, that the second clause of Section 73 limits the power of the Court to obtain the specimen writing of the accused, exclusively for its own purpose *viz.*, for comparison with the disputed writing by the Court itself, is too narrow and incorrect.

11. The question that falls to be determined in this case is:

> Whether a Magistrate in the course of an enquiry or trial on being moved by the prosecution, is competent under Section 73, Evidence Act, to direct the accused person to give his specimen handwriting so that the same may be sent along with the disputed writing to the Government Expert of Questioned Documents for examination, "with a view to have the necessary comparison"?

12. There appears to be some divergence of judicial opinion on this point. In *Hiralal Agarwalla* v. *State* (supra) a learned Single Judge of Calcutta High Court took the view that Section 73 does not entitle the Court to assist a party to the proceedings. "It entitles the Court to assist itself to a proper conclusion in the interests of justice. It is not open to the Magistrate to send the specimen writing obtained from the accused for examination to an expert who is a prosecution witness." It was, however, conceded that "it is perfectly open to the Court to call its own photographer, take the enlargements under its own supervision, study them, and if necessary call its own expert as a court witness in order that it might be assisted to a proper conclusion".

13. The dictum in *Hiralal Agarwalla's* case was followed by a learned Single Judge of the Bombay High Court in *State* v. *Poonamchand*

3. AIR 1938 Bom 257
4. AIR 1967 SC 1326
5. AIR 1962 Pat 255 FB
6. 1971 Cri LJ 1591
7. ILR (1957) 2 Cal 928: AIR 1958 Cal 123
8. ILR 1958 Bom 299: AIR 1958 Bom 207: 1958 Cri LJ 619

220

Gupta (supra), wherein it was held that the second clause of Section 73 limits the power of the court to direct a person present in court to write any words or figures only where the court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written by such person. The power does not extend to permitting one or the other party before the court to ask the court to take such writing for the purpose of its evidence on its own case.

14. In *T. Subbiah* v. *S. K. D. Ramaswamy Nadar*[9], Krishnaswami Reddy, J. of Madras High Court adopted a similar approach in coming to the conclusion that Section 73, Evidence Act gives no power to a Magistrate at the pre-cognizance stage or in the course of police investigation, to direct an accused person to give his specimen handwriting. K. Reddy, J., was careful enough to add that "the court for the purpose of comparison can take extraneous aid by using magnifying glass, by obtaining enlargement of photographs or *by even calling an expert*—all these to enable the court to determine by comparison. There is no basis for the view that the court cannot seek extraneous aid for its comparison; but on the other hand, *there is indication in Section 73 of the Evidence Act itself that such aid might be necessary*". (Emphasis added)

15. As against the above view, a full Bench of Patna High Court in *Gulzar Khan* v. *State* (supra), held that a Magistrate has the power under Section 73, Evidence Act to direct, even before he has taken cognizance of the offence, an accused person to give signatures, specimen writings, fingerprints or footprints to be used for comparison with some other signatures, handwritings, fingerprints or footprints which the police may require in the court of investigation. It was remarked that in Section 73, the word 'court' must be equated with the court of the Magistrate in a case triable by him or before it is committed to Sessions in a case triable by the Court of Session. As a matter of fact, in every case where the accused is arrested and required to give his specimen handwriting or signature, or thumb-impression etc., he is arrested under a warrant which must be issued by a Magistrate, or when the police arrest without a warrant in a cognizable offence under Section 60 of the Code of Criminal Procedure, he must be produced before a Magistrate without unreasonable delay and the procedure under Sections 60 to 63 of the Code as also under Article 22 of the Constitution has to be followed and that attracts the provisions of Section 73 of the Evidence Act.

16. In taking this view, the Patna High Court sought support from the decision of this Court in *State of Bombay* v. *Kathi Kalu Oghad* (supra), wherein the police had obtained from the accused three specimen handwritings to show whether a chit, Exh. 5, was in the handwriting of the accused, in the course of police investigation of the case, and it was held to be inadmissible by the Bombay High Court, for a different reason viz., on the ground that it was hit by Article 20(3) of the Constitution. This Court had held that those specimen writings were admissible.

17. In *B. Rami Reddy* v. *State of Andhra Pradesh* (supra), the High Court of Andhra Pradesh took a similar view. Following the ratio of *Gulzar Khan* v. *State of Bihar* (supra), it was held that the court does not exceed its powers under the section in directing an accused to give his thumb-impression to

9. AIR 1970 Mad 85 : 1970 Cri LJ 254

221

enable the police to make investigation of an offence as even in such a case the purpose is to enable the court before which he is ultimately put up for trial to compare the alleged impressions of the accused with the admitted thumb-impression.

18. At the outset, we may make it clear that the instant case is not one where the Magistrate had made the impugned order in the course of police investigation. Here, the Magistrate has taken cognizance of these two companion cases. The evidence of most of the prosecution witnesses has been recorded. The problem before us is, therefore, narrower than the one which was before the Patna and Andhra Pradesh High Courts in the aforesaid cases. All that we have to consider is, whether the High Court was right in holding that the order dated May 20, 1972 of the Magistrate calling upon the accused before it, to give his specimen handwriting, was "beyond the scope of Section 73, Evidence Act".

19. Before considering the scope of Section 73, it will be appropriate to have a look at the legislative background of this provision. Section 73 like many other provisions of the Indian Evidence Act, is modelled after the English Law of Evidence as it existed immediately before the enactment of the Indian Evidence Act in 1972.

20. The English Law on the subject, as amended by the English Acts of the years 1854 and 1865, was substantially the same as incorporated in Section 73 of Indian Evidence Act. Section 48 of the English Act II of 1855 was as follows:

> On an inquiry whether a signature, writing or seal is genuine, any undisputed signature, writing or seal of the party whose signature, writing or seal is under dispute may be compared with the disputed one, though such signature, writing or seal be on an instrument which is not evidence in the cause.

Section 48 was repealed and the Criminal Procedure Act, 1865 was passed by British Parliament. Section 8 of that Act, which still holds the field, provides:

> *Comparison of disputed writing with writing proved to be genuine.*— Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witness respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

This Section applies in both civil and criminal Courts by virtue of Section 1 of the Act.

21. Apart from this Section, it was well settled that the Court in the case of a disputed writing, was competent to obtain an exemplar or specimen writing. In any case, the Court was competent to compare the disputed writing with the standard or admitted writing of the person in question. The position, as it obtained after the passing of the Criminal Procedure Act 28 and 29 Vict. C. 18, has been summed up by Taylor as follows:

> Under the Statutory Law, it seems clear. . . . that the comparison may be made either by the witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the

222

intervention of any witnesses at all, by the jury themselves (*Cobbett* v. *Kilminister*[10]), or in the event of there being no jury, by the Court. . . . It further appears that any person whose handwriting is in dispute, and who is present in court, may be required by the Judge to write in his presence, and that such writing may be compared with the document in question. *Doed Devine* v. *Wilson*[11]; *Cobbett* v. *Kilminister* (supra).

22. Let us now compare it with Section 73 of the Indian Evidence Act, which runs as under:

> In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
>
> The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. . . .

23. It will be seen that the first paragraph of Section 73 is, in substance, a combined version of Section 48 of the English Act II of 1855 and Section 8 of the English Criminal Procedure Act, 1865. The second paragraph of Section 73 is substantially the same as the English Law condensed by Taylor in the above-quoted portion of paragraph 1871.

24. Just as in English Law, the Indian Evidence Act recognises two direct methods of proving the handwriting of a person:

(1) By an admission of the person who wrote it.

(2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

(*i*) By the evidence of a handwriting expert. (Section 45)

(*ii*) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)

(*iii*) opinion formed by the court on comparison made by itself. (Section 73)

All these three cognate modes of proof involve a process of comparison. In mode (*i*), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (*ii*), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the

10. (1865) 4 F & F 490—(*See* Taylor on Evidence by Johnson & Bridgman, Vol. 2, paragraphs 1870 and 1871, page 1155)
11. (1855), 10 Moor PC 502, 530: 110 RR 83

223

case of (*iii*), the comparison is made by the court with the sample writing or exemplar obtained by it from the person concerned.

25. A sample writing taken by the court under the second paragraph of Section 73, is, in substance and reality, the same thing as "admitted writing" within the purview of the first paragraph of Section 73, also. The first paragraph of the section, as already seen, provides for comparison of signature, writing, etc. purporting to have been written by a person with others admitted or proved to the satisfaction of the court to have been written by the same person. But it does not specifically say by whom such comparison may be made. Construed in the light of the English Law on the subject, which is the legislative source of this provision, it is clear that such comparison may be made by a handwriting expert (Section 45) or by one familiar with the handwriting of the person concerned (Section 47) or by the court. The two paragraphs of the Section are not mutually exclusive. They are complementary to each other.

26. Section 73 is therefore to be read as a whole, in the light of Section 45. Thus read, it is clear that a court holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by itself or by the Court of Session, does not exceed its powers under Section 73 if, in the interests of justice, it directs an accused person appearing before it, to give his sample writing to enabling the same to be compared by a handwriting expert chosen or approved by the court, irrespective of whether his name was suggested by the prosecution or the defence, because even in adopting this course, the purpose is to enable the court before which he is ultimately put up for trial, to compare the disputed writing with his (accused's) admitted writing, and to reach its own conclusion with the assistance of the expert.

27. In the instant case, the Magistrate, as the extract from his order dated May 20, 1972, shows after considering the peculiar circumstances of the case, and recalling the observation of the Calcutta High Court in *Hiralal Agarwalla* v. *State* (supra) to the effect, that Section 73 entitled "the court to assist itself for a proper conclusion in the interest of justice", expressly "applied this test to the present case". The peculiar circumstances which weighed with the Magistrate in directing the accused to execute sample writing to be compared, in the first instance, by the Government Expert of Questioned Documents, included the contumacious conduct of the accused and the resiling of the material witness, Tek Chand, which, according to Mr. Marwah, was possibly due to his having been suborned or won over by the accused. It was apparent from the record that the accused was playing hide and seek with the process of law and was avoiding to appear and give his sample writing to the police. The Magistrate therefore, had good reason to hold that the assistance of the Government Expert of Questioned Documents was essential in the interest of justice to enable the Magistrate to compare the sample and the questioned writings with the expert assistance so obtained and then to reach a just and correct conclusion about their identity. Although the order of the Magistrate is somewhat inartistically worded, its substance was clear that although initially, the specimen writing sought from the accused was to be used for comparison by the Government Expert, the ultimate purpose was to enable the court to compare that specimen writing with the disputed one, Ex. PW 21-F, to reach a just decision.

224

28. In the revision petition filed by the accused before the High Court a grievance is sought to be made out that the Magistrate's order will work prejudice to the defence and enable the prosecution to fill gaps and loopholes in its case. This contention was devoid of force. Once a Magistrate in *seisin* of a case, duly forms an opinion that the assistance of an expert is essential to enable the court to arrive at a just determination of the issue of the identity of the disputed writing, the fact that this may result in the "filling of loopholes" in the prosecution case is purely a subsidiary factor which must give way to the paramount consideration of doing justice. Moreover, it could not be predicated at this stage whether the opinion of the Government Expert of Questioned Documents would go in favour of the prosecution or the defence. The argument raised before the High Court was thus purely speculative.

29. In addition to Section 73, there are two other provisions resting on the same principle, namely, Section 165, Evidence Act and Section 540, Cr. P. C., 1898, which between them invest the court with a wide discretion to call and examine any one as a witness, if it is bona fide of the opinion that his examination is necessary for a just decision of the case. In passing the order which he did, the Magistrate was acting well within the bounds of this principle.

30. The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.

31. It is not the province of the expert to act as Judge or Jury. As rightly pointed out in *Jiili* v. *Jones*[12], the real function of the *expert* is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, *strictly* speaking, such issues are for the court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence.

32. In this connection, the observations made by Hidayatullah, J. (as he then was) in *Fakharuddin* v. *State of Madhya Pradesh* (supra) are apposite and may be extracted:

> Both under Sections 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In

12. ILR 56 All 428 : AIR 1934 All 273

either case, the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in one case and to appraise the value of the opinion in the other case. The comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way, the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the court must see for itself *and with the assistance of the expert* come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the court must play the role of an expert but to say that the court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.

33. Since even where proof of handwriting which is in nature comparison, exists, a duty is cast on the court to use its own eyes and mind to compare the admitted writing with the disputed one to verify and reach its own conclusion, it will not be wrong to say that when a court *seised* of a case, directs an accused person present before it to write down a sample writing, such direction in the ultimate analysis, "is for the purpose of enabling the court to compare" the writing so written with the writing alleged to have been written by such person, within the contemplation of Section 73. That is to say, the words "for the purpose of enabling the court to compare" do not exclude the use of such "admitted" or sample writing for comparison with the alleged writing of the accused, by a handwriting expert cited as a witness by any of the parties. Even where no such expert witness is cited or examined by either party, the court may, if it thinks necessary for the ends of justice, on its own motion, call an expert witness, allow him to compare the sample writing with the alleged writing and thus give his expert assistance to enable the court to compare the two writings and arrive at a proper conclusion.

34. For all the foregoing reasons, we are of opinion that in passing the orders dated May 20, 1972 relating to the disposal of the application dated December 11, 1970, the learned Additional District Magistrate did not exceed his powers under Section 73, Evidence Act. The learned Judges of the High Court were not right in holding that in directing the accused by his said order dated May 20, 1972, the Magistrate acted beyond the scope of Section 73 or in a manner which was not legal.

35. Accordingly, we allow this appeal, set aside the judgment of the High Court, and restore the order dated May 20, 1972, of the Magistrate who may now repeat his direction to the accused to write down the sample writing. If the accused refuses to comply with the direction, it will be open to the Court concerned to draw under Section 114, Evidence Act, such adverse presumption as may be appropriate in the circumstances. If the accused complies with the direction, the Court will in accordance with its order dated May 20, 1972, send the writing so obtained, to a senior Government Expert of Questioned Documents, named by it, for comparison with the disputed writing and then examine him as a court witness.

226

36. Since the case is very old, further proceedings in the case shall be taken with utmost expedition.

(1979) 2 Supreme Court Cases 170

(BEFORE S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.)

GOPAL LAL .. Appellant;

Versus

STATE OF RAJASTHAN .. Respondent.

Criminal Appeal No. 255 of 1973†, decided on January 30, 1979

Penal Code, 1860 — Section 494 — Bigamy — Charge of, held, not effected by the voidness of the second marriage under Section 17 of the Hindu Marriage Act, 1955 — Sentence reduced

Held :

The essential ingredients of the offence under Section 494, IPC are :

(1) that the accused spouse must have contracted the first marriage,

(2) that while the first marriage was subsisting the spouse concerned must have contracted a second marriage, and

(3) that both the marriages must be valid in the sense that the necessary ceremonies required by the personal law governing the parties had been duly performed.

The combined effect of Section 17 of Hindu Marriage Act and Section 494 is that when a person contracts a second marriage after the coming into force of the said Act, while the first marriage is subsisting, he commits the offence of bigamy.

Bhaurao Shankar Lokhande v. *State of Maharashtra*, (1965) 2 SCR 837 : AIR 1965 SC 1564 : (1965) 2 Cri LJ 544, *followed*

Section 17 of the Hindu Marriage Act requires that the marriage must be properly solemnised in the sense that the necessary ceremonies required by law or by custom must be duly performed. Once these ceremonies are proved to have been performed the marriage becomes properly solemnized and if contracted while the first marriage is still subsisting the provisions of Section 494 will apply automatically. The voidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494 because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act. Hence one cannot say that the second marriage being void, Section 494 will have no application.

Kanwal Ram v. *Himachal Pradesh Administration*, (1966) 1 SCR 539 : AIR 1966 SC 614 : 1966 Cri LJ 472 ; *Priya Bala Ghosh* v. *Suresh Chandra Ghosh*, (1971) 1 SCC 864 : 1971 SCC (Cri) 362 : (1971) 3 SCR 961, *relied on*

Hindu Marriage Act, 1955 — Section 7(1) — Essential ceremonies of nata marriage prevalent in Telli community

†Appeal by Special Leave from the Judgment and Order dated July 16, 1973 of the Rajasthan High Court in S. B. Criminal Revenue 309 of 1973.

227

"*18.* ... the exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law."

13. In the light of the principles mentioned above, inasmuch as Respondent 2 complainant has filed an affidavit highlighting the stand taken by the appellant (Accused 3) during the pendency of the appeal before this Court and the terms of settlement as stated in the said affidavit, by applying the same analogy and in order to do complete justice under Article 142 of the Constitution, we accept the terms of settlement insofar as the appellant herein (Accused 3) is concerned.

14. In view of the same, we quash and set aside the impugned FIR No. 45 of 2011 registered with Sanand Police Station, Ahmedabad for offences punishable under Sections 467, 468, 471, 420 and 120-B IPC insofar as the appellant (Accused 3) is concerned.

15. The appeal is allowed to the extent mentioned above.

(2012) 12 Supreme Court Cases 406

(BEFORE DR B.S. CHAUHAN AND F.M. IBRAHIM KALIFULLA, JJ.)

AJAY KUMAR PARMAR .. Appellant;

Versus

STATE OF RAJASTHAN .. Respondent.

Criminal Appeal No. 1496 of 2012†, decided on September 27, 2012

A. **Criminal Procedure Code, 1973 — Ss. 209, 190, 207, 208, 227, 228, 235, 239, 240, 248 and 343 — Offence exclusively triable by Sessions Court — Powers and duties of Magistrate in committal proceedings — Cognizance — Circumstances for consideration of defence evidence — Refusal of Magistrate to take cognizance and consequent discharge/acquittal of accused relying upon evidence led by accused without even committing case to Sessions Court — Sustainability — Held, scheme of CrPC, 1973, and particularly a conjoint reading of Ss. 207 to 209 CrPC makes it crystal clear that committal of a case exclusively triable by Court of Session, in a case instituted by police is mandatory — Scheme of CrPC, 1973 simply provides that Magistrate can determine whether facts stated in report (prima facie) make out offence triable exclusively by Court of Session — Once Magistrate reaches conclusion that facts alleged in report make out offence triable exclusively by Court of Session, Magistrate must commit case to Sessions Court — Criminal Procedure Code, 1898, S. 207-A** (Para 18)

B. **Criminal Procedure Code, 1973 — Ss. 209, 207, 208, 164(1), 190(1), 173(2) and 169 — Offence exclusively triable by Sessions Court — Magistrate refusing to take cognizance of offence and acquitting accused by relying on statement of prosecutrix incorrectly recorded under S. 164 —**

† From the Judgment and Order dated 9-1-2012 of the High Court of Judicature of Rajasthan at Jodhpur in SB Criminal Revision Petition No. 458 of 1998

Reversal of such discharge/acquittal by Sessions Court and High Court, and restoration of proceedings, upheld — Sessions Court to which case had been committed directed to proceed expeditiously in accordance with law — Penal Code, 1860, Ss. 376 and 342

The prosecutrix lodged a complaint against the appellant-accused for the offences punishable under Sections 376 and 342 IPC. She gave her statement before the Chief Judicial Magistrate (CJM) alleging that the police was not investigating the case despite her complaint. Considering her statement, the CJM directed the jurisdictional Judicial Magistrate First Class (JMFC) to record the statement of the prosecutrix under Section 164 CrPC and to proceed with the case. The prosecutrix appeared before the JMFC and the matter was taken up the next day as the case diary was not produced on the same day. The next day, the statement of the prosecutrix was recorded under Section 164 CrPC. In the meantime, a charge-sheet against the appellant-accused was filed. The JMFC after considering the statements of the prosecutrix, refused to take cognizance of offence and acquitted the appellant-accused relying on the statement of the prosecutrix wherein she had indicated that false case had been lodged against the appellant-accused. This order was set aside by the Sessions Court and the High Court. Hence this appeal.

Dismissing the appeal, the Supreme Court

Held :

When an offence is exclusively triable by the Sessions Court, the Magistrate cannot probe into the matter. The Magistrate has no such jurisdiction to look into the matter and evaluate evidence related thereto. Once the offence is triable by the Sessions Court, the Magistrate has to commit the matter to the Sessions Court and he cannot do anything in such cases. Such committal is mandatory. If the accused is discharged by the Magistrate then such discharge would be nullity for being without jurisdiction. Once a prima facie case is made out against the accused then courts cannot acquit him by refusing to take cognizance. While framing charges the only material that has to be considered by the court are documents submitted by the investigating agency. Any document relied on by the accused cannot be appreciated as evidence at this stage. Consideration of such evidence would lead to a mini-trial during the stage of framing of charge thus defeating the object of CrPC. In the rarest of rare cases, material produced by the accused can be considered only if it convincingly establishes that the case of the prosecution was absurd, preposterous or concocted. It is the duty of courts to safeguard the rights of the victim who never participates in discharge proceedings. On the other hand, if the material produced by the prosecution does not disclose the offence then the Magistrate can refuse to take cognizance. He must be satisfied that the complaint, case diary, statements under Sections 161 and 164 CrPC does not disclose the alleged offence. But while taking cognizance the Magistrate cannot appreciate evidence and determine balance of probability. The Magistrate cannot apply his mind to materials produced by the investigating agency as there is no provision under CrPC, 1973 which is analogous to Section 207-A CrPC, 1898. (Paras 14 to 19)

The scheme of CrPC, 1973, and particularly a conjoint reading of Sections 207 to 209 CrPC, 1973 makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of CrPC, 1973 simply provides that the Magistrate can

229

determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once the Magistrate reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Session, the Magistrate must commit the case to the Sessions Court.

(Para 18)

Sanjay Gandhi v. *Union of India*, (1978) 2 SCC 39 : 1978 SCC (Cri) 172, *applied*

State of Orissa v. *Debendra Nath Padhi*, (2003) 2 SCC 711 : 2003 SCC (Cri) 688; *State of Orissa* v. *Debendra Nath Padhi*, (2005) 1 SCC 568 : 2005 SCC (Cri) 415; *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*, (2005) 8 SCC 89 : 2005 SCC (Cri) 1975; *Bharat Parikh* v. *CBI*, (2008) 10 SCC 109 : (2008) 3 SCC (Cri) 609; *Rukmini Narvekar* v. *Vijaya Satardekar*, (2008) 14 SCC 1 : (2009) 1 SCC (Cri) 721; *P. Vijayan* v. *State of Kerala*, (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488; *R.S. Mishra* v. *State of Orissa*, (2011) 2 SCC 689 : (2011) 1 SCC (Cri) 785, *relied on*

The CJM recorded the statement of the prosecutrix without the identification of the prosecutrix. The JMFC erred in considering the defence evidence at the stage of framing of charges. Further, no notice was given to the prosecutrix before dropping the prosecution of the appellant-accused and thus the JFMC violated the mandatory requirements. The JMFC had no jurisdiction to discharge the accused when the offence was exclusively triable by the Sessions Court.

(Paras 16, 20, 29 and 30)

Ajay Kumar Parmar v. *State of Rajasthan*, Criminal Revision Petition No. 458 of 1998, order dated 9-1-2012 (Raj), *affirmed*

C. **Criminal Procedure Code, 1973 — Ss. 190(1), 203, 204 and 173(2) — Refusal to take cognizance and dropping of proceedings against accused — Prerequisites to be complied with — Held, when Magistrate decides to not to take cognizance of case and to drop proceedings against accused, it is mandatory to hear complainant or informant by issuing him notice**

(Para 20)

Minu Kumari v. *State of Bihar*, (2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310; *Bhagwant Singh* v. *Commr. of Police*, (1985) 2 SCC 537 : 1985 SCC (Cri) 267, *reiterated*

D. **Criminal Procedure Code, 1973 — S. 164 — Recording of statements by Magistrates — Recording of statements without satisfactory identification of witness/complainant — Impermissibility of — Held, Magistrate cannot record statements under S. 164 without satisfactory identification of such person — When statements are recorded without proper identification then such statements lose their sanctity**

(Paras 11 to 13 and 21)

Jogendra Nahak v. *State of Orissa*, (2000) 1 SCC 272 : 2000 SCC (Cri) 210, *applied*

Mahabir Singh v. *State of Haryana*, (2001) 7 SCC 148 : 2001 SCC (Cri) 1262, *referred to*

E. **Criminal Procedure Code, 1973 — S. 227 — Phrase "hearing the submissions of the accused" — Meaning of — Held, it means that hearing the accused on record of case as filed by prosecution and on documents submitted therewith and nothing more** **(Para 16)**

F. **Evidence Act, 1872 — Ss. 47, 73 and 45 — Comparison of handwriting and signatures — Power of, and approach to be followed by courts — Held, court can compare writing sample given in its presence or admitted or proved to be writing of the person concerned and there is no legal bar on court for comparing handwriting or signature using its own eyes and it can make its own observations thereto — If situation so demands, court can take upon itself the task of comparison of signatures without sending for expert's report — Though expert's report could be**

230

fallible but it cannot be brushed aside as useless — However, cautioned, when court is comparing handwriting or signatures it cannot become expert and it must refrain from playing role of expert as opinion of court may not be conclusive — Therefore court should be slow and hesitant to base its findings only on comparisons made by it — Criminal Trial — Expert evidence — Handwriting (Paras 24 to 30)

Ram Chandra v. *State of U.P.*, AIR 1957 SC 381 : 1957 Cri LJ 559; *Ishwari Prasad Misra* v. *Mohd. Isa*, AIR 1963 SC 1728; *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*, AIR 1964 SC 529; *Fakhruddin* v. *State of M.P.*, AIR 1967 SC 1326 : 1967 Cri LJ 1197; *State of Maharashtra* v. *Sukhdev Singh*, (1992) 3 SCC 700 : 1992 SCC (Cri) 705; *A. Neelalohithadasan Nadar* v. *George Mascrene*, 1994 Supp (2) SCC 619; *O. Bharathan* v. *K. Sudhakaran*, (1996) 2 SCC 704; *State (Delhi Admn.)* v. *Pali Ram*, (1979) 2 SCC 158 : 1979 SCC (Cri) 389; *Ram Pyaralal Shrivastava* v. *State of Bihar*, (1980) 1 SCC 492 : 1980 SCC (Cri) 260; *Lalit Popli* v. *Canara Bank*, (2003) 3 SCC 583 : 2003 SCC (L&S) 353; *Jagjit Singh* v. *State of Haryana*, (2006) 11 SCC 1; *Thiruvengadam Pillai* v. *Navaneethammal*, (2008) 4 SCC 530; *G. Someshwar Rao* v. *Samineni Nageshwar Rao*, (2009) 14 SCC 677 : (2009) 5 SCC (Civ) 475 : (2010) 2 SCC (Cri) 213, *relied on*

G. Evidence Act, 1872 — S. 45 — Expert opinion — Non-availability of — Duty of court — Held, when no expert opinion is available to court for assistance then court should seek guidance from authoritative textbook and use its own experience and knowledge — In absence of expert opinion, court should discharge its duty with or without expert or with or without any other evidence — Criminal Trial — Expert evidence — Generally (Para 25)

Murari Lal v. *State of M.P.*, (1979) 3 SCC 612 : 1979 SCC (Cri) 662, *relied on*

G-D/50786/SVR

Advocates who appeared in this case :
Ms Aishwarya Bhati and Ms Jyoti Upadhyay, Advocates, for the Appellant;
Irshad Ahmad, Advocate, for the Respondent

Chronological list of cases cited *on page(s)*

1. Criminal Revision Petition No. 458 of 1998, order dated 9-1-2012 (Raj), *Ajay Kumar Parmar* v. *State of Rajasthan* 410*d*, 412*a*
2. (2011) 2 SCC 689 : (2011) 1 SCC (Cri) 785, *R.S. Mishra* v. *State of Orissa* 414*f*
3. (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488, *P. Vijayan* v. *State of Kerala* 414*f*
4. (2009) 14 SCC 677 : (2009) 5 SCC (Civ) 475 : (2010) 2 SCC (Cri) 213, *G. Someshwar Rao* v. *Samineni Nageshwar Rao* 417*e-f*
5. (2008) 14 SCC 1 : (2009) 1 SCC (Cri) 721, *Rukmini Narvekar* v. *Vijaya Satardekar* 414*d-e*
6. (2008) 10 SCC 109 : (2008) 3 SCC (Cri) 609, *Bharat Parikh* v. *CBI* 414*d-e*
7. (2008) 4 SCC 530, *Thiruvengadam Pillai* v. *Navaneethammal* 417*e-f*
8. (2006) 11 SCC 1, *Jagjit Singh* v. *State of Haryana* 417*e-f*
9. (2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310, *Minu Kumari* v. *State of Bihar* 415*e*
10. (2005) 8 SCC 89 : 2005 SCC (Cri) 1975, *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla* 414*d-e*
11. (2005) 1 SCC 568 : 2005 SCC (Cri) 415, *State of Orissa* v. *Debendra Nath Padhi* 414*d-e*
12. (2003) 3 SCC 583 : 2003 SCC (L&S) 353, *Lalit Popli* v. *Canara Bank* 417*e-f*
13. (2003) 2 SCC 711 : 2003 SCC (Cri) 688, *State of Orissa* v. *Debendra Nath Padhi* 414*d-e*
14. (2001) 7 SCC 148 : 2001 SCC (Cri) 1262, *Mahabir Singh* v. *State of Haryana* 412*g*

231

15. (2000) 1 SCC 272 : 2000 SCC (Cri) 210, *Jogendra Nahak* v. *State of Orissa* 412*d-e*, 412*g*, 413*a-b*
16. (1996) 2 SCC 704, *O. Bharathan* v. *K. Sudhakaran* 417*b-c*
17. 1994 Supp (2) SCC 619, *A. Neelalohithadasan Nadar* v. *George Mascrene* 417*a*
18. (1992) 3 SCC 700 : 1992 SCC (Cri) 705, *State of Maharashtra* v. *Sukhdev Singh* 416*f*
19. (1985) 2 SCC 537 : 1985 SCC (Cri) 267, *Bhagwant Singh* v. *Commr. of Police* 415*e*
20. (1980) 1 SCC 492 : 1980 SCC (Cri) 260, *Ram Pyaralal Shrivastava* v. *State of Bihar* 417*b*
21. (1979) 3 SCC 612 : 1979 SCC (Cri) 662, *Murari Lal* v. *State of M.P.* 416*f*
22. (1979) 2 SCC 158 : 1979 SCC (Cri) 389, *State (Delhi Admn.)* v. *Pali Ram* 417*b*
23. (1978) 2 SCC 39 : 1978 SCC (Cri) 172, *Sanjay Gandhi* v. *Union of India* 413*b-c*
24. AIR 1967 SC 1326 : 1967 Cri LJ 1197, *Fakhruddin* v. *State of M.P.* 416*f*
25. AIR 1964 SC 529, *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee* 416*f*
26. AIR 1963 SC 1728, *Ishwari Prasad Misra* v. *Mohd. Isa* 416*f*
27. AIR 1957 SC 381 : 1957 Cri LJ 559, *Ram Chandra* v. *State of U.P.* 416*e-f*

The Judgment of the Court was delivered by

DR B.S. CHAUHAN, J.— This appeal has been preferred against the impugned judgment and order dated 9-1-2012 passed by the High Court of Judicature of Rajasthan at Jodhpur in *Ajay Kumar Parmar* v. *State of Rajasthan*[1], by way of which, the High Court has upheld the judgment and order dated 25-7-1998, passed by the Sessions Judge in Revision Petition No. 5 of 1998. By way of the said revisional order, the court had reversed the order of discharge of the appellant for the offences under Sections 376 and 342 of the Penal Code, 1860 (hereinafter referred to as "IPC") dated 25-3-1998, passed by the Judicial Magistrate, Sheoganj.

2. The facts and circumstances giving rise to this appeal are as follows: an FIR was lodged by one Pushpa on 22-3-1997 against the appellant stating that the appellant had raped her on 10-3-1997. In view thereof, an investigation ensued and the appellant was medically examined. The prosecutrix's clothes were then also recovered and were sent for the preparation of FSL report. The prosecutrix was medically examined on 22-3-1997, wherein it was opined by the doctor that she was habitual to sexual intercourse, however, a final opinion regarding fresh intercourse would be given only after receipt of report from the chemical examiner.

3. The statement of the prosecutrix was recorded under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"), by the DSP, wherein she narrated the incident as mentioned in the FIR, stating that she had been employed as a servant at the residence of one sister Durgi for the past six years. Close to the residence of sister Durgi, Dr D.R. Parmar and his son Ajay Parmar were also residing. On the day of the said incident, Ajay Parmar called Pushpa, the prosecutrix, home on the pretext that there was a telephone call for her. When she reached the residence of Ajay Parmar, she was raped by him and was restrained from going out for a long period of

1 Criminal Revision Petition No. 458 of 1998, order dated 9-1-2012 (Raj)

232

time and kept indoors without provision of any food or water. However, the next evening, she was pushed out surreptitiously from the back exit of the said house. She then tried to commit suicide but was saved by Prakash Sen and Vikram Sen and then, eventually, after a lapse of about 10 days, the complaint in question was handed over to the SP, Sirohi. Subsequently, she herself appeared before the Chief Judicial Magistrate, Sirohi on 9-4-1997, and moved an application before him stating that, although she had lodged an FIR under Sections 376/342 IPC, the police was not investigating the case in a correct manner and, therefore, she wished to make her statement under Section 164 CrPC.

4. The Chief Judicial Magistrate, Sirohi, entertained the said application and disposed of it on the same day i.e. 9-4-1997 by directing the Judicial Magistrate, Sheoganj, to record her statement under Section 164 CrPC.

5. In pursuance thereof, the prosecutrix appeared before the Judicial Magistrate, Sheoganj, which is at a far distance from Sirohi, on 9-4-1997 itself and handed over all the requisite papers to the Magistrate. After examining the order passed by the Chief Judicial Magistrate, Sirohi, the Judicial Magistrate, Sheoganj, directed the Public Prosecutor to produce the case diary of the case at 4.00 p.m. on the same day. As the Public Prosecutor could not produce the case diary at 4.00 p.m., the Judicial Magistrate, Sheoganj, directed the Public Prosecutor to produce the case diary on 10-4-1997 at 10.00 a.m. The case diary was then produced before the said court on 10-4-1997 by the Public Prosecutor. The statement of the prosecutrix under Section 164 CrPC, was recorded after being identified by the lawyer, to the effect that the said FIR lodged by her was false; in addition to which, the statement made by her under Section 161 CrPC, before the Deputy Superintendent of Police was also false; and finally that no offence whatsoever was ever committed by the appellant, so far as the prosecutrix was concerned.

6. After the conclusion of the investigation, charge-sheet was filed against the appellant. On 25-3-1998, the Judicial Magistrate, Sheoganj, taking note of the statement given by the prosecutrix under Section 164 CrPC, passed an order of not taking cognizance of the offences under Sections 376 and 342 IPC and not only acquitted the appellant but also passed strictures against the investigating agency. Aggrieved, the Public Prosecutor filed a revision before the learned Sessions Judge, Sirohi, wherein the aforesaid order dated 25-3-1998 was reversed by the order dated 25-7-1998 on two grounds, firstly, that a case under Sections 376 and 342 IPC was triable by the Sessions Court and the Magistrate, therefore, had no jurisdiction to discharge/acquit the appellant on any ground whatsoever, as he was bound to commit the case to the Sessions Court, which was the only competent court to deal with the issue. Secondly, the alleged statement of the prosecutrix under Section 164 CrPC was not worth reliance as she had not been produced before the Magistrate by the police.

233

7. Being aggrieved by the aforesaid order of the Sessions Court dated 25-7-1998, the appellant moved the High Court and the High Court vide its impugned judgment and order[1], affirmed the order of the Sessions Court on both counts. Hence, this appeal.

8. Ms Aishwarya Bhati, learned counsel appearing on behalf of the appellant, has submitted that in view of the statement of the prosecutrix as recorded under Section 164 CrPC, the Judicial Magistrate, Sheoganj, has rightly refused to take cognizance of the offence and has acquitted the appellant stating that no fault can be found with the said order, and therefore it is stated that both, the Revisional Court, as well as the High Court committed a serious error in reversing the same.

9. On the contrary, Shri Ajay Veer Singh Jain, learned counsel appearing for the State, has opposed the appeal, contending that the Magistrate ought not to have refused to take cognizance of the said offences and has committed a grave error in acquitting the appellant, after taking note of the statement of the prosecutrix which was recorded under Section 164 CrPC The said statement was recorded in great haste. It is further submitted that, as the prosecutrix had appeared before the Magistrate independently, without any assistance of the police, her statement recorded under Section 164 CrPC is not worth acceptance. Thus, no interference is called for. The appeal is liable to be dismissed.

10. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

11*. A three-Judge Bench of this Court in *Jogendra Nahak* v. *State of Orissa*[2], held that sub-section (5) of Section 164, deals with the statement of a person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate's Courts, for the purpose of creating record in advance to aid the said culprits. Such statements would be very helpful to the accused to get bail and discharge orders.

12. The said judgment in *Jogendra Nahak case*[2] was distinguished by this Court in *Mahabir Singh* v. *State of Haryana*[3], on facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 CrPC by the Magistrate, without knowing

1 *Ajay Kumar Parmar* v. *State of Rajasthan*, Criminal Revision Petition No. 458 of 1998, order dated 9-1-2012 (Raj)

* **Ed.**: Para 11 corrected vide Official Corrigendum No. F.3/Ed.B.J/66/2012 dated 26-11-2012.

2 (2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565

3 (2001) 7 SCC 148 : 2001 SCC (Cri) 1262 : AIR 2001 SC 2503

234

him personally or without any attempt of identification of the said person, by any other person.

13. In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three-Judge Bench in *Jogendra Nahak*[2], which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 CrPC. The Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/ police or anybody else.

14. In *Sanjay Gandhi* v. *Union of India*[4] this Court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held: (SCC pp. 40-41, para 3)

> "*3.* ... it is not open to the committal court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. *The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code.* Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, ... *the Magistrate has simply to commit for trial before the Court of Session.* If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. ... If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused." (emphasis added)

Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

2 *Jogendra Nahak* v. *State of Orissa*, (2000) 1 SCC 272 : 2000 SCC (Cri) 210
4 (1978) 2 SCC 39 : 1978 SCC (Cri) 172 : AIR 1978 SC 514

235

15. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old CrPC, empowered the Magistrate to exercise such a power. However, in CrPC, 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

16*. More so, it was not permissible for the Judicial Magistrate, Sheoganj, to take into consideration the evidence in defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency along with the charge-sheet. Any document which the accused wants to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. (Vide *State of Orissa* v. *Debendra Nath Padhi*[5], *State of Orissa* v. *Debendra Nath Padhi*[6], *S.M.S. Pharmaceuticals Ltd.* v. *Neeta Bhalla*[7], *Bharat Parikh* v. *CBI*[8] and *Rukmini Narvekar* v. *Vijaya Satardekar*[9].)

17. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the investigating agency. More so, it is the duty of the court to safeguard the rights and interests of the victim, who does not participate in the discharge proceedings. At the stage of application of Section 227, the court has to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. (Vide *P. Vijayan* v. *State of Kerala*[10] and *R.S. Mishra* v. *State of Orissa*[11].)

18. The scheme of the Code, particularly, the provisions of Sections 207 to 209 CrPC, mandate the Magistrate to commit the case to the Court of Session, when the charge-sheet is filed. A conjoint reading of these

* Ed.: Para 16 corrected vide Official Corrigendum No. F.3/Ed.B.J/66/2012 dated 26-11-2012.

5 (2003) 2 SCC 711 : 2003 SCC (Cri) 688 : AIR 2003 SC 1512
6 (2005) 1 SCC 568 : 2005 SCC (Cri) 415 : AIR 2005 SC 359
7 (2005) 8 SCC 89 : 2005 SCC (Cri) 1975 : AIR 2005 SC 3512
8 (2008) 10 SCC 109 : (2008) 3 SCC (Cri) 609
9 (2008) 14 SCC 1 : (2009) 1 SCC (Cri) 721 : AIR 2009 SC 1013
10 (2010) 2 SCC 398 : (2010) 1 SCC (Cri) 1488 : AIR 2010 SC 663
11 (2011) 2 SCC 689 : (2011) 1 SCC (Cri) 785 : AIR 2011 SC 1103

provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Session, he must commit the case to the Sessions Court.

19. The Magistrate, in exercise of its power under Section 190 CrPC, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 CrPC, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case.

20. We find no force in the submission advanced by the learned counsel for the appellant that the Judicial Magistrate, Sheoganj, has proceeded strictly in accordance with law laid down by this Court in various judgments wherein it has categorically been held that a Magistrate has a power to drop the proceedings even in the cases exclusively triable by the Sessions Court when the charge-sheet is filed by the police. She has placed very heavy reliance upon the judgment of this Court in *Minu Kumari* v. *State of Bihar*[12] wherein this Court placed reliance upon its earlier judgment in *Bhagwant Singh* v. *Commr. of Police*[13] and held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to the informant and grant of being heard in the matter, becomes mandatory. In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law.

21. The application filed before the Chief Judicial Magistrate, Sirohi, has been signed by the prosecutrix, as well as by her counsel. However, there has been no identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, Sirohi, proceeded to deal with the application without identification of the prosecutrix and has nowhere mentioned that he knew the prosecutrix personally. The Judicial Magistrate, Sheoganj, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, Sirohi or before the Judicial Magistrate,

12 (2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310 : AIR 2006 SC 1937
13 (1985) 2 SCC 537 : 1985 SCC (Cri) 267 : AIR 1985 SC 1285

237

Sheoganj, along with her parents or any other person related to her. In such circumstances, the statement so recorded, loses its significance and legal sanctity.

22. The record of the case reveals that the Chief Judicial Magistrate, Sirohi, passed an order on 9-4-1994. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a place far away from Sirohi, on the same date with papers/order, etc. and the said Judicial Magistrate directed the Public Prosecutor to produce the case diary on the same date at 4.00 p.m. The case diary could not be produced on the said day. Thus, direction was issued to produce the same in the morning of the next day. The statement was recorded on 10-4-1997. The fact situation reveals that the court proceeded with utmost haste and any action taken so hurriedly, can be labelled as arbitrary.

23. The original record reveals that the prosecutrix had lodged the FIR herself and the same bears her signature. She was medically examined the next day, and the medical report also bears her signature. We have compared the aforementioned signatures with the signatures appearing upon the application filed before the Chief Judicial Magistrate, Sirohi, for recording her statement under Section 164 CrPC, as also with, the signature on the statement alleged to have been made by her under Section 164 CrPC, and after examining the same, prima facie we are of the view that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them.

24. Evidence of identity of handwriting has been dealt with by three sections of the Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") i.e. Sections 45, 47 and 73. Section 73 of the said Act provides for a comparison made by the court with a writing sample given in its presence, or admitted, or proved to be the writing of the person concerned. (Vide *Ram Chandra* v. *State of U.P.*[14], *Ishwari Prasad Misra* v. *Mohd. Isa*[15], *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee*[16], *Fakhruddin* v. *State of M.P.*[17] and *State of Maharashtra* v. *Sukhdev Singh*[18].)

25. In *Murari Lal* v. *State of M.P.*[19], this Court, while dealing with the said issue, held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative textbook and the court's own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.

14 AIR 1957 SC 381 : 1957 Cri LJ 559
15 AIR 1963 SC 1728
16 AIR 1964 SC 529
17 AIR 1967 SC 1326 : 1967 Cri LJ 1197
18 (1992) 3 SCC 700 : 1992 SCC (Cri) 705 : AIR 1992 SC 2100
19 (1979) 3 SCC 612 : 1979 SCC (Cri) 662 : AIR 1981 SC 363

238

26. In *A. Neelalohithadasan Nadar* v. *George Mascrene*[20], this Court considered a case involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counterfoil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the court takes upon itself the task of comparing the signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in *State (Delhi Admn.)* v. *Pali Ram*[21] and *Ram Pyaralal Shrivastava* v. *State of Bihar*[22].

27. In *O. Bharathan* v. *K. Sudhakaran*[23], this Court considered a similar issue and held that the facts of a case will be relevant to decide where the court will exercise its power for comparing the signatures and where it will refer the matter to an expert. The observations of the Court are as follows: (SCC p. 713, para 18)

> "*18.* The learned Judge in our view was not right ... taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by this Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to be ultimately rendered."

(See also *Lalit Popli* v. *Canara Bank*[24], *Jagjit Singh* v. *State of Haryana*[25], *Thiruvengadam Pillai* v. *Navaneethammal*[26] and *G. Someshwar Rao* v. *Samineni Nageshwar Rao*[27].)

28. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from

20 1994 Supp (2) SCC 619
21 (1979) 2 SCC 158 : 1979 SCC (Cri) 389 : AIR 1979 SC 14
22 (1980) 1 SCC 492 : 1980 SCC (Cri) 260 : AIR 1980 SC 1523
23 (1996) 2 SCC 704 : AIR 1996 SC 1140
24 (2003) 3 SCC 583 : 2003 SCC (L&S) 353 : AIR 2003 SC 1795
25 (2006) 11 SCC 1
26 (2008) 4 SCC 530 : AIR 2008 SC 1541
27 (2009) 14 SCC 677 : (2009) 5 SCC (Civ) 475 : (2010) 2 SCC (Cri) 213

239

playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

29. The aforesaid discussion leads to the following inferences:

29.1. In respect of an incident of rape, an FIR was lodged. The DSP recorded the statement of the prosecutrix, wherein she narrated the facts alleging rape against the appellant.

29.2. The prosecutrix, appeared before the Chief Judicial Magistrate, Sirohi, on 9-4-1997 and lodged a complaint, stating that the police was not investigating the case properly. She filed an application that her statement be recorded under Section 164 CrPC.

29.3. The prosecutrix had signed the said application. It was also signed by her lawyer. However, she was not identified by anyone.

29.4. There is nothing on record to show with whom she had appeared before the court.

29.5. From the signatures on the FIR and the medical report, it appears that she is not an educated person and can hardly form her own signatures.

29.6. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached the court and how she knew that her statement could be recorded by the Magistrate.

29.7. More so, she appeared before the Chief Judicial Magistrate, Sirohi, and not before the Area Magistrate at Sheoganj.

29.8. The Chief Judicial Magistrate on the same day disposed of the application, directing the Judicial Magistrate, Sheoganj, to record her statement.

29.9. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a far distance from Sirohi, where she originally went, on 9-4-1997 itself, and her statement under Section 164 CrPC was recorded on 10-4-1997, as on 9-4-1997 the Public Prosecutor could not produce the case diary.

29.10. The signatures of the prosecutrix on the papers before the Chief Judicial Magistrate, Sirohi and the Judicial Magistrate, Sheoganj, do not tally with the signatures on the FIR and the medical report. There is apparent dissimilarity between the same, which creates suspicion.

29.11. After completing the investigation, charge-sheet was filed before the Judicial Magistrate, Sheoganj, on 20-3-1998.

240

29.12. The Judicial Magistrate, Sheoganj, vide order dated 25-3-1998, refused to take cognizance of the offences on the basis of the statement of the prosecutrix, recorded under Section 164 CrPC. The said court erred in not taking cognizance on this count as the said statement could not be relied upon.

29.13. The Revisional Court as well as the High Court have rightly held that the statement under Section 164 CrPC had not been recorded correctly. The said courts have rightly set aside the order of the Judicial Magistrate, Sheoganj, dated 25-3-1998, not taking the cognizance of the offence.

29.14. There is no provision analogous to Section 207-A of the old CrPC. The Judicial Magistrate, Sheoganj, should have committed the case to the Sessions Court as the said application could be entertained only by the Sessions Court. More so, it was not permissible for the court to examine the weight of defence evidence at that stage. Thus, the order is insignificant and inconsequential being without jurisdiction.

30. In view of the above, we do not find any force in the appeal. It is, accordingly, dismissed. The judgment and order of the Revisional Court, as well as of the High Court is upheld. The original record reveals that in pursuance of the High Court's order, the case has been committed by the Judicial Magistrate, Sheoganj, to the Court of Session on 23-4-2012. The Sessions Court is requested to proceed strictly in accordance with law, expeditiously and take the case to its logical conclusion without any further delay. We make it clear that none of the observations made herein will adversely affect either of the parties, as the same have been made only to decide the present case.

(2012) 12 Supreme Court Cases 419

(BEFORE G.S. SINGHVI AND S.J. MUKHOPADHAYA, JJ.)

USHA MEHTA .. Appellant;

Versus

GOVERNMENT OF ANDHRA PRADESH AND OTHERS .. Respondents.

Civil Appeal No. 3501 of 2003†, decided on October 16, 2012

A. **Constitution of India — Arts. 14 and 299 — Claim to equal treatment on basis of forged document — Non-tenability — Lease deed of public land purportedly executed by Estate Officer found to be a forged document — Government denied regularisation of said lease deed on ground that grant of lease in favour of appellant was unauthorised and entire transaction was a result of fraud and collusion and that any claim based on forged document cannot be acted upon — Similar lease deeds executed by same Estate Officer however, were regularised on payment of market value — Whether discriminatory — Division Bench of High Court upholding finding of Single**

† From the Judgment and Order dated 27-8-2001 of the High Court of Judicature of Andhra Pradesh at Hyderabad in WA No. 1202 of 1992