

DOUBTS ON DOUBTS

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"The Judge, even when he is free, is still is not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw inspiration from consecrated principles. He is not to yield to spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life"(Benjamin Cardozo).

Criminal trial is meant for doing justice to the accused, victim and the society at large so that law and order is maintained (*Ambika v. State Delhi Admn.* (2000 SCC (Cr.) 522). The paramount consideration of a criminal trial is to render justice and to convict the guilty and protect the innocent. For that the hands of the court cannot be tied up with the fetters of technical procedures so as to prevent them from arriving at the truth. Criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It is too panic to say that now a days unmerited acquittals become general, and they tend to lead a cynical disregard of the law. Miscarriage of the justice arises from the acquittal of the guilty not less than from the conviction of an innocent. See *Gangadhar Behra v. State of Orissa* (2003 Cri.L.J. 41 (SC)) and *State of U.P. v. Anil Singh* (AIR 1988 SC 1998). It is not judicial heroism to blindly follow the repeated saying that let a hundred guilty men may be acquitted, but let not one innocent be punished. As rightly observed by our Apex Court in *Jayal Sahu v. State of Orissa* (1994 Cri.L.J. 2254). "An exaggerated devotion to benefit of doubt is a disservice to the society". Acquittals on the grounds of irrelevant contradictions, irrelevant omissions and due to high technicalities are not a welcome trend.

Each trial has to be conducted within the four corners confined by the Evidence Act. "Court must endeavour to find the truth. There would be failure of justice not only by an unjust conviction but also by the acquittal of the guilty for unjustified failure to produce reliable evidence. Of course the rights of the accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victim also have rights." See *State of Maharashtra v. Dr.Praful B.Desai* (2003 (2) KLT SN 35 (C.No.45) SC = 2003 Cri. L.J. 2033 (SC).

Section 5 of the Indian Evidence Act stipulates that evidence may be given of fact in issue and relevant fact. Hence we can safely arrive at the conclusion that courts are concerned only with two types of facts and they are (1) fact in issue and (2) relevant fact. In a criminal prosecution the golden principle of jurisprudence is the immunity available to the accused i.e., the presumption of innocence and except in rare occasions the burden of proof is always on the part of the prosecution. As far as a criminal litigation is concerned the fact in issue means "Those facts that are necessary to be proved or disproved to establish the charge against an accused or to establish a defense. A fact is relevant to a fact in issue when the former fact is connected with the later fact in a particular manner or in anyone of the ways referred to in the provisions in Sec.5 to 55 of the Indian Evidence Act. Fact in issue is the principal matter in dispute and relevant facts are facts which directly or by inference proves, disproves the fact in issue. The principal fact to be proved is

known as "*Factum probandum*" and the evidentiary facts which follows the principal fact is known as "*Factum probans*". Section 3 of the Indian Evidence says about the yardstick to be applied for the evaluation of evidence. It stipulates that the supposition of a prudent man is the standard to evaluate whether the material before the court can reasonably be acted to conclude whether a fact exists or not. It is pertinent to note that the legislature in its wisdom includes the words ordinary prudent man and not a juristic or intellectual man.

There are three features of evidences. They are

1. Relevancy
2. Admissibility
3. Probative value

If a fact is relevant and admissible it is counted in evidence. But if a fact is admissible in evidence, but not relevant it cannot be admitted in evidence. After the admission in evidence the court will consider the probative value of evidence. Thus it can be seen that the court has to consider the admissibility first and then its relevancy and finally the probative value. The communication made by a spouse during marriage or professional communication between the counsel and his clients may be relevant in some cases. But it is not admissible and hence cannot admit in evidence. The questions put by the defense to the prosecution witnesses in cross examination only for the purpose of testing the veracity or to impeach the credibility is of no relevance in most cases. But sorry to say that it is admissible in evidences unless and until it became indecent, scandalous or intended to annoy or insult the witnesses. Evidence is the medium of proof. It is the instrument by means of which fact in issue or relevant facts are brought before court. As already stated all admissible fact are not relevant. S.3 further states that a fact can be proved, disproved and not proved. In most of the acquitted cases the prosecution neither proves nor the defense disproves the fact in issue to the satisfaction of the court. Therefore the case will come under not proved beyond reasonable doubt and the benefit of doubt will be given to the accused. In this juncture it is significant to note what is benefit of doubt.

In the *State of Haryana v. Bhagirath* reported in (1999) (2) KLT SN 69 (C.No.74) SC) our Apex Court held the view that it is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end. Unfortunately a misconception is being prevailed in the legal fraternity with respect to evaluation of the evidence and benefit of doubt. In *Bhogam Bhai v. State of Gujarat* our Hon'ble Supreme Court has got benevolent opportunity to discuss about the guidelines for evaluating the evidence. Apex Court cautioned the trial courts that over much importance cannot be attached to minor discrepancies and it cannot be benefited as reasonable doubts because

1. Witnesses cannot be expected to have photographic memory. Witness is not as videotape is played.
2. During the crime the witnesses will be overtaken by events. He would not have anticipated the occurrence which so often has an element of surprise.
3. Power of observation differs from person to person. What one may notice, the other may not.

4. People cannot accurately recall conversations and reproduce the same words used by them or heard by them.
5. In regard to the exact time or the time of duration of an occurrence they may make statement by guess. The sense differs from person to person.
6. They may not be able to recall the sequence of events. Witness is liable to get confused or mixed up when interrogated later.
7. A witness though wholly truthful is liable to be overawed by the unfamiliar court room and the piercing cross examination made by the counsel. Usually they became perplexed and get confused.

This does not mean that the role of test of cross examination for determining the veracity is to be minimized. As rightly observed by our Hon'ble Supreme Court in *State of Himachal Pradesh v. Lakhraj* ((2000) 1 SCC 247) that the material discrepancies are those which are not normal and expected from a normal person. When a witness is subjected to a lengthy and attacking cross examination there is always a possibility of witness committing mistakes which can be termed as omissions, improvements and contradictions. Therefore these infirmities will have to be appreciated in the background of ground realities, which make the witness confused because of the filibustering tactics of the defence counsel. See *Jai Shee Yadav v. State of U.P.* (2005 (1) KLT SN 5 (C.No.7) SC). Always it is to be borne in mind that practically cross examination is a battle between a well equipped legal practitioner and an ignorant litigant who suffered a lot during the occurrence and continuing the trauma during the investigation and even in the trial. Hence the cardinal question is whether the inconsistencies will touch the fabric of the prosecution case? If it is so definitely it is fatal to the prosecution.

The wrong conceptions among the legal community that 161 statements are the pillars of the prosecution cases is the most panic thing. It is funny to say that they consider it as a holly cow or as sacred Bible. Giving undue importance to the 161 statement prepared by a police officer at his whims and fancies at the cost of the poor and ignorant victims is the most pathetic thing. 161 statements are purely the answers given to the question put by the investigating officers at the time of investigation. They are the answers which is relevant in the eye of a police officer. But on examination of the witness before the court either by a prosecutor or by the defence lawyer the witness will be compelled to answer more aspects on the question put to them. Unfortunately most of our friends think it as a serious aspect which diminishes the scope of the prosecution case. (See AIR 2000 SC 1833).

The legendary Indian Jurist of all time Justice V.R.Krishna Iyer while pronouncing judgement in *Inder Singh & Anr. v. Delhi Administration* reported in (AIR 1978 SC 1091) held as follows.

"Credibility of testimony depends considerably on a judicial evaluation of the totality and not an isolated scrutiny. If a case is proved too perfectly, it would be urged that it is artificial. If a case has some flaws it is inevitable because human beings are prone to err. Proof beyond reasonable doubt is a guideline and not a fetish. A guilty man cannot get away with it because truth suffers from some infirmity when projected through a human

process. Judicial quest for perfect truth often accounts for police presentation of foolproof convocation. We must be realistic."

As laid down in *Dharmarajan v. State of Kerala* reported in 2014 (2) KLT SN 62 (C.No.81) = 2014 Cri.L.J. 3162), "Creating doubts for the purpose of doubt is not a reasonable doubt. In this regard it is worth mentioning the dictum laid down by the Hon'ble Apex Court in *Yogish Singh v. Mahabeer Singh & Ors.* (AIR 2016 SC 5160) that it is the cardinal principle of criminal jurisprudence that guilt of the accused must be proved beyond all reasonable doubts and it is worth to reproduce the observation made by Justice Venkatachaliah in *State of U.P. v. Krishna Gopal & Anr.* (1988 (2) KLT SN 46 (C.No.62) SC = (1988) 4 SCC 302) that "Doubts would be called reasonable if they are free from zest for abstract speculation. Law cannot afford any favouritism other than truth. To constitute reasonable doubt it must be free from over emotional response. Doubts must be actual and substantial doubts as to the guilt of accused arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon the reason and commonsense. It must grow out of the evidence in the case." Justice further observed that "The concept of probability and its degree cannot be obviously be expressed in terms of units to be mathematically enumerated as to how many of such unit constitute proof beyond reasonable doubts. There is an unmistakable subjective element in the evaluation of degree of probability and question of proof. The protection given by the criminal process to the accused is not to be eroded, at the same time uninformed legitimization of trivialities would make a mockery of administration of criminal justice". The above said words of the Supreme Court apparently show its genuine anxiety about the misconceptions in the field of appreciation of evidence.

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