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Topic of the Month

Medical Evidence in Criminal cases

Sufficient weight must be given to the evidence of the doctor who performed autopsy as against statements in books, but giving weight does not *ipso facto* mean that each and every statement made by a medical witness should be accepted on its face value even when it is se1f-contradictory. Opinions expressed in textbooks may have persuasive value, but cannot be considered to be conclusive. It cannot have higher value than the opinion of expert examined in court. Court can also prefer to accept eyewitnesses 'testimony in preference to the opinion of the doctor. When the testimony of eyewitnesses' is found to be credible and trustworthy, alternative possibilities emerging from medical evidence are not to be accepted as conclusive. Medical treatises must be put to the expert on cross examination. Discrepancies between medical evidence and eyewitness testimony should be treated and appraised like other discrepancies. Mere variance between such items of evidence does not lead to rejection of prosecution case. Effort should be made to find the truth by separating the chaff from the grain. If in spite of this effort, reasonable doubt remains, benefit of doubt goes to accused. Eyewitness testimony may contain inaccuracies and exaggerations; there may be errors or omissions on account of lapse of memory or poor power of observation or inability to recount and recite accurately. Sometimes doctors also may not bestow sufficient care while performing examinations or preparing records and their opinion may be based on inadequate, incomplete, or defective examinations or lack of complete knowledge. It is indeed not fair to expect a total correspondence between these two items of

evidence. The court must carefully examine the discrepancies and if it is reasonably possible to arrive at a substantial and true version, the court should not throw the prosecution case on the basis of such discrepancies. Accuracy of medical witnesses and ocular witnesses depends upon several factors. Inconsistency is not sufficient to discredit the eyewitness. Sometimes the eyewitness may allege a blow or a stab etc., but there may not be corresponding injuries. The possibility of weapon not actually striking and not causing injury cannot be ruled out. Eyewitness may err in details like direction of the blow etc. Inconsistency regarding such details between the two items of evidence may not be important. There may be discrepancies regarding the weapon or manner of attack. If the eyewitness testimony is clear and convincing, discrepancies cannot matter. Doctor is a witness of both fact and opinion. Medical evidence is also direct evidence as far as it establishes facts, e.g. tattooing marks, nature and dimensions of injury, etc. Medical evidence is also corroborative of eyewitness testimony; in as much as it may show that the injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injury could not have been caused as alleged and thereby try to discredit eyewitness testimony. However, unless the medical evidence goes so far that it completely rules out all possibilities whatsoever of the injuries taking place in the manner alleged by the eye witness, the prosecution version cannot be thrown out on the ground of alleged inconsistency between the two items of evidence.

The Court has to remember that medical evidence is mainly opinion evidence on which the court is required to form its own independent conclusion. In case of divergence, the court must try to reconcile the two; if that is not possible the Court has to appreciate the evidence like any other evidence, having regard to reasons and data provided by the doctor and the cogency or otherwise of eyewitness testimony. If eyewitnesses are credible and trustworthy, medical opinion suggesting alternative possibility is not accepted as conclusive.

Primacy shou1d be given to oral evidence. In case of conflict in evidence of two doctors evidence must be sifted carefully and more reliable version accepted.

In a case of strangulation, a piece of cloth was used, the width of which was one meter and was tightly rolled in the shape of a rope whose diameter was less than 1 meter was used. It was removed immediately after strangulation as witnesses reached the place. In this situation ligature mark could be much less than width of the rope. Width of ligature mark need not always correspond to the diameter of the cloth. It depends on the type of cloth, how tightly it was rolled over and how soon it was removed. If direct evidence is reliable, it is not liable to be rejected on hypothetical medical evidence.

If the prosecution case is deliberately changed at the trial stage to suit medical evidence, the case becomes doubtful. It may be difficult to exactly tally the injuries blow by blow. It cannot be said presence of a particular accused is doubtful, because there was no injury corresponding to the blow attributed to him.

[Abstracted from NJA Occasional Paper Series No. 6 titled "Appreciation of Evidence in Criminal Cases" by Justice (Retd.) U.L. Bhat, Former Chief Justice, Gauhati High Court and High Court of Madhya Pradesh]

ACADEMY NEWS

1. Training Programme for Sub-Judges and Munsiffs of District Baramulla, Bandipora and Kupwara held at District H.Q. Baramulla

In pursuance of the policy of the J&K State Judicial Academy to reach out the Judicial Officers posted in remote areas of the State, a training programme for Sub-Judges and Munsiffs of Districts Baramulla,

Bandipora and Kupwara was organized at District H.Q., Baramulla on Sunday, 8th of July, 2012. Programme was condcuted by Shri Abdul Wahid, Director, State Judicial Academy alongwith Syed Javed Ahmed, Faculty Member of the Academy under the guidance and patronage of Hon'ble Shri Justice M.M. Kumar, Chief Justice (Patron Chief) and Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge Incharge, State Judicial Academy.

Hon'ble Mr. Justice Hasnain Massodi during the training programme

Topics for the discussion were "Ethics and Judicial Conduct, Code of Civil Procedure and Injunction, Receiver and Execution".

Hon'ble Shri Justice Hasnain Massodi at the request of Hon'ble the Chief Justice acted as Resource person. His Lordship explained in detail the Judicial ethics and standard to be observed by the Judicial Officers. In his address, His Lordship pointed out that every judge has to imbibe ethical values. Role of a judge and his duties were explained by His Lordship in detail. His Lordship stated that Judge has to follow the ethics both in private and public life and live like a hermit. His Lordship stated that society places judges at the highest pedestal thus the judges have corresponding responsibility to observe highest ethical values. A judge by nature of his duty is not expected socializing too much with individual lawyers and other persons in the society. His Lordship highlighted the ethical values of a judge by giving several illustrations.

His Lordship also addressed the Judicial Officers on procedural aspects of the civil matters and grant or refusal of injunction. His Lordship stated that rules of procedure are meant to advance the cause of justice not to impede it. Procedural law is as important as substantive law. Delays in disposal of cases can be removed by following strictly the procedural law. His Lordship explained in detail the concept of temporary injunction issued under Order 39 CPC and stressed upon the Judicial Officers to decide the interlocutory applications within 30 days as mandated by law, while discretion should be exercised judiciously on the well set principles governing the grant or refusal of injunctions.

His Lordship exhorted the Judges not to be insensitive to their duties keeping in view the onerous duty cast upon them in justice delivery system.

Training programme in Session

After His Lordships address, there was lively interaction in which almost all the Judicial Officers participated. During interactive session, lot of misconception and doubts about procedural aspects of the cases particularly injunction matter were removed. Judicial Officers gained a lot by His Lordships mature and thoughtful advice and suggestions. In the end, all the Judicial

Officers were more than satisfied about the usefulness of the training programme on the above topics and updated their knowledge of law.

2. Urdu Training Programme for staff of Subordinate courts of District H.Q. Jammu.

15 days Urdu training programme was conducted by the State Judicial Academy w.e.f. 4th of June, 2012 after court hours at State Judicial Academy, Jammu for the ministerial staff of the subordinate courts of District H.Q. Jammu under the supervision of S/Shri Anoop Kumar, Munsiff and Jagdish Raj, Faculty Member.

Mr. Wazir Ahmad Tak, Administrative Officer District Court, Jammu, acted as Resource person, who took the serious pains in reaching out to the participants and providing maximum benefit in learning basic urdu.

On average, about 35 officials participated in the programme. The participants were those officials who were having almost negligible knowledge of Urdu. Starting from the basic reading and writing skills in Urdu, the participants were also trained in writing the summons, notices, warrants and other dockets. Some printed material with regard to the subject was also provided to the participants. Majority of the participants displayed their keen interest in the training programme and whole heartedly participated in it.

During the course of training programme a tremendous improvement was observed in the performance of the participants. However, it has been felt that another 10-15 days refresher course after couple of months would definitely yield better results.

NEWS AND VIEWS

No disability pension in army if hurt off-duty : SC

An army personnel cannot claim disability pension if he or she gets hurt in an accident while on leave because it has no link with the official discharge of duty, the Supreme Court has held. A Bench of Justices B.S. Chauhan and J.S. Khehar said that in such cases, Courts should not interfere with the findings of the medical board about the cause of accident and eligibility of the personnel to claim the benefits.

"A person claiming disability pension must be able to show a reasonable nexus between the act, omission or commission, resulting in an injury to the person, and the normal expected standard of duties and way of life expected from such person," the Bench said.

"As the military personnel sustained disability in a road accident when he was on an annual leave, and that too in his hometown, it could not be held that the injuries was attributable to or aggravated by military service. Such a person would not be entitled to disability pension," the Bench said in an order.

The Apex Court passed the order, upholding an appeal filed by the Centre challenging a judgment of the Punjab and Haryana High Court, directing the Government to pay disability pension to Talwinder Singh, who suffered eyesight impairment due to an accident sustained in his hometown while on leave.

"We are of the view that the opinion of the medical board must be given due weight, value and credence. Person claiming disability pension must establish that the injury suffered by him bears a causal connection with the military service," the Bench said.

(HT/02-07-2012)

Government can't make rules beyond statutory provisions : SC

Holding that Governments can't make rules that go beyond the scope of statutory provisions, the Supreme Court has declared illegal the part-time appointment of

Chairperson and Members of the Appellate Tribunal for Foreign Exchange.

"If a rule goes beyond the rule-making power conferred by the Statute, the same has to be declared *ultra vires*. If a rule supplants any provision for which power has not been conferred, it becomes *ultra vires*," a Bench of Justice B.S. Chauhan and Justice Dipak Misra said dismissing the Centre's appeal against a 2006 verdict of the Delhi High Court.

The High Court had declared as ultra vires the appointment of part-time Chairperson and part-time Members of the Tribunal. However, the orders passed by the part-time Members will remain valid.

"To avoid any confusion, we clarify the judgments and orders passed by the Appellate Tribunal by the chairperson or members who were not qualified and whose appointments have been quashed shall not be treated to be null and void," the Supreme Court said.

As its reply, the Government told the Bench that now it was scrupulously following the mandate of the Act and only qualified persons were being appointed as Members and Chairperson.

The Supreme Court agreed with the High Court's finding declaring Rule 5 of the Appellate Tribunal for Foreign Exchange (Recruitment, Salary and Allowances and Other Conditions of Service of Chairperson and Members) Rules, 2000 ultra vires of the Foreign Exchange Management Act, 1999 as it provided for part-time members.

When the original act did not envisage any concept of part-time member, the authorities had no power under the statute to introduce such a provision, the Supreme Court pointed out.

Clarifying the legal position on rule-making power conferred on the Government by a statute, the Supreme Court said, "The basic test is to determine and consider the source of power which is relatable to the rule" and "a rule must be in accord with the parent statute as it cannot travel beyond it".

According to the act, a Chairperson should have all the qualifications required for appointment of a High Court Judge and in the case of the Members, he/she shall have all the qualifications required for appointment as a District Judge.

But ignoring the provisions of the Act, the Government appointed certain Law Officers as part-time Members, which was in contravention of the Act, the Bench said.

Noting that Section 46 of the Act, which confers power on the Government to make rules for implementation of the Act, nowhere envisaged part-time Members in the Tribunal, the Bench wondered as to how the Government went on to introduce the concept of part-time Members by using its rule-making power.

(HT/24-06-2012)

LEGAL JOTTINGS

Legal briefs from High Court of J&K

(Case No: LPA 256 of 2011)

State of J&K & Ors. versus Ashiq Hussain Khan & Ors.

Date of Decision: 04-07-2012.

Judge(s): Hon'ble Mr. Justice M.M. Kumar, Chief Justice and Hon'ble Mr. Justice Hasnain Massodi

Subject Index : Jammu & Kashmir (Compassionate Appointment) Rules, 1994 - SRO 43 of 1994 — Rule 3 — Respondents father, who was working as Junior Assistant in the office of Deputy Commissioner, Bandipora died in a militancy related activity on 01-02-1992 - widow applied for appointment on compassionate grounds - her case was rejected on 18-08-1997 as she was involved in a criminal case - writ petitioner-respondent, who was minor at the time of death of his father claimed for compassionate appointment on 04-09-2001 after his mother relinquished her rights in his favour - his claim was rejected on 16-06-2009 on the

ground that the claim was made belatedly - writ petition filed - Single Judge allowed the writ petition by setting aside the impugned order - directions issued for re-consideration of the case of petitioner - State filed appeal against the order of Single Judge.

SRO 43 provides an exception to the general principles of recruitment to public service (Class IV) post. Proviso of Rule 3(1) stipulates that applicant must be eligible and qualified or acquires qualification and eligibility within the period of *[six months] writ petitioner-respondent's father died in the year 1992 and his family has survived upto 2010 when the writ petition was filed. Morevoer, there is huge delay in approaching the Court.

Held - Petitioner-Respondent was minor at the time of death of his father, as such, not eligible. He attained age of 19 years in the year 1999 much after the period of six months stipulated by the Rules. Application of his mother was already considered and rejected. It was observed that object of compassionate appointment is to overcome the grave and sudden situation which has resulted into snatching away the bread earner of the family. Thus leaving the family without penury and without any means of livlihood. The very fact that the family has survived for a long time would itself be sufficient to deny such appointment.

Case law, 'Bhawani Prasad Sonkar v. Union of India & Ors., (2011)4 SCC 209, State of Jammu & Kashmir & Ors. V. Sajad Ahmad Mir, (2006)5 SCC 766 and Sanjay Kumar v. State of Bihar & Ors., (2000)7 SCC 192' followed.

Appeal allowed - Judgment of single Judge set aside - impugned order restored.

*[Editor Note : Now 'One year' as per the amendment made in proviso]

(Case No: LPA 73 of 2006)

Dr. Shabir Hussain Banday versus University of Kashmir & Ors.

Date of Decision: 10-07-2012.

Judge(s): Hon'ble Mr. Justice M.M. Kumar, Chief Justice and Hon'ble Mr. Justice Hasnain Massodi.

Subject Index : Statute 3.27(13) as enshrined in Ch. III of the University of Kashmir, (Vol. 1, 1991) - Whether applicable - Held : Yes - whether holding of a regular departmental enquiry mandatory when facts are admitted - Held : No - 'Useless formality' theory as an exception would apply to the present case.

Appellant working in the University of Kashmir as Reader - holding post in permanent and substantive capacity - for taking foreign assignment, two years leave applied and granted vide order dated 23-08-1996 - extension of leave for a further period of 2 years accorded vide order dated : 3-07-2000 as extraordinary leave - appellant was directed to join back on the expiry of leave vide letter dated 26-09-2000 - appellant against requested for extension of leave by one more year - request turned down - remained on unauthorized absence w.e.f. 6-09-2000 - University issued final notice dated 17-12-2002 to resume his duty within 20 days failing which his services were to be terminated without further notice - appellant replied to the notice that he had incurred contractual obligation with his employer in U.A.E. And request for exoneration of charges formulated in the show cause notice - services of the appellant terminated vide order dated 17-12-2002 without holding any enquiry - post held by him declared as vacant.

Termination order challenged in a writ petition - Learned Single Judge dismissed the petition holding that petitioner has abandoned his post.

LPA filed - Hon'ble D.B. held - Whether holding of departmental enquiry mandatory when facts have been admitted – Held : No - 'Useless Formality' theory would

be applicable to the facts of the present case which is an exception of general rules of issuance of show cause notice, as propounded in various judgements of Supreme Court.

- Statute 3.27 is *para materia* with Rule 5(g)(i) of Rules of Aligarh Muslim University , 1969.

- Rule 5 was discussed and interpreted by Apex Court in case titled 'Aligarh Muslim University v/s Mansoor Ali Khan, AIR 2000 SC 278.

- It was observed that in view of clear enunciation of law by the Supreme Court that 'useless formality' theory as an exception would apply to the facts of Mansoor Ali Khan's case, AIR 2000 SC 2783, the same would apply *mutatis mutandis* to this case - Appeal dismissed.

[Case No. OWP 362 of 2012]

S.D. Rohmetra v. Dr. Saleem-ur-Rehman

Date of Decision : 03-04-2012

Judge(s) : Hon'ble Mr. Justice Muzaffar Hussain Attar

Subject Index : RPC and CrPC - Complaint filed u/s 489 / 500 RPC - Whether Section 198-B CrPC applicable - accused alleged to have published defamatory news item in the Daily Excelsior newspaper - Magistrate took cognizance - process issued - writ filed in the High Court seeking quashment of order of issuance of process - plea taken that Magistrate could not take cognizance of offence and issue process in view of mandate contained in Section 198-B CrPC as a news item was published in the paper in respect of official conduct of respondent - Held : The issuance of process in a criminal case is very serious matter, as it abridges liberty of a person, in as much as, the person whose liberty is guaranteed by Article 21 of the Constitution of India is asked to face the trial and for his appearance before the court he is asked to furnish bail bond and surety bond. In order to issue the process against the person in a criminal case a judicial mind to the material/evidence available on record and after referring to the allegations made in the complaint and to the statement of witnesses in brief, has to record reasons in brief for issuing process against the accused person. The act of issuing process cannot be mechanical one.

Whatever is stated in News item/write up, whether has reference to public duties or note, would require to be considered at the stage of issuance of process, and/or may be ascertained during trial of case.

Learned Magistrate to re-consider the whole issue in the light of the observations made in this order and after applying its judicial mind to the entire conspectus of the case to pass appropriate orders in accordance with law either for issuance of process or for dismissal of the complaint.

Legal briefs from Supreme Court

(Case No: Civil Appeal No(s). 4905 of 2012)

Vishwanath versus Sau. Sarla Vishwanath

Date of Decision: 04-07-2012.

Judge(s): Hon'ble Mr. Justice Deepak Verma and Hon'ble Mr. Justice Dipak Misra.

Subject Index: Hindu Marriage Act, 1955 — Section 13(1)(ia) — divorce petition filed under — whether the appellant-husband had made out a case for mental cruelty to entitle him to get a decree for divorce — whether the reasons ascribed by the courts below that the allegations alleging extra marital affair of the appellant-husband has been established and, therefore, it would not constitute mental cruelty are perverse and unacceptable or justified on the basis of the evidence brought on record — to consider — the conduct and circumstances make it graphically clear that the respondent-wife had

really humiliated and caused mental cruelty to the husband. She publicized in the newspapers that he was a womaniser and a drunkard. Also, she made an effort to prosecute him in criminal litigations which she failed to prove — the cumulative effect of the evidence clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable — the judgments and decrees of the courts below set aside and a decree for divorce in favour of the appellant is granted. Further, the husband is directed to pay Rs. 50 lacs towards permanent alimony to the wife — appeal allowed.

(Case No: Cr. Appeal No(s). 874-875 of 2012)

P. Sanjeeva Rao versus State of A.P.

Date of Decision : 02-07-2012.

Judge(s): Hon'ble Mr. Justice T.S. Thakur and Hon'ble Mrs. Justice Gyan Sudha Misra.

Subject Index: Prevention of Corruption Act, 1988 — sections 7 and 13 — prosecution of the appellant or offences under — recall of prosecution witnesses No.1 and 2 for cross-examination — appeals filed for — the complainant examined as PW1 and the shadow witness examined as PW2 clearly indicted the appellant and supported the prosecution version not only regarding demand of the bribe but also its receipt by the appellant, thus, there was no question of the defence — no formal application was filed by the petitioner nor even an oral prayer made before the Trial Court to the effect that the exercise of the right to cross- examine the two witnesses was being reserved till such time the Trap Laying Officer was examined. But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer — the Supreme Court held that denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses — orders passed by the lower courts set aside and direction issued to re-call the prosecution witnesses No.1 and 2 by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant — appeals allowed.

(Case No: Criminal Appeal No(s). 133 of 2007)

O.M. Baby (Dead) by Lrs. versus State of Kerala

Date of Decision: 03-07-2012.

Judge(s): Hon'ble Mr. Justice Swatanter Kumar and Hon'ble Mr. Justice Ranjan Gogoi.

Subject Index: Indian Penal Code, 1860 — sections 376, 506(ii) and 342 — conviction and sentence of the appellant (since deceased) for commission of the offences under — in challenge — although, the two reports of the analysis of vaginal swab and smear are contradictory, the prosecution clearly proved and established the circumstances which necessitated the second medical examination of the victim as the mother of the victim had serious doubts with regard to the fairness of the doctors in the District hospital who had carried out the first medical examination and had taken the samples of vaginal swab and smear on the date of the occurrence — no motive and interest can be attributed to PW 8 who conducted the second round of medical examination — the prosecution succeeded in showing that the victim had suffered external injuries — the Supreme Court held that even in the absence of corroboration the testimony of the victim cannot be ignored, unless the inconsistencies or contradictions are sufficiently serious to warrant such a course of action — order of the High Court confirmed — appeal dismissed.

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