2nd Late Jatindra Mohan Chaudhuri Law Lecture

delivered by

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REPORT

October 26, 2019
At Gauhati Town Club Auditorium, Guwahati

STUDIO
নীলিমা
COLLABORATIVE NETWORK FOR
RESEARCH AND CAPACITY BUILDING

PROGRAMME

9:00am – 10:00am	Registration
10:00am – 10:05am	Welcome Address and Felicitation by Mr. Nilay Dutta
10:05am – 11:05am	**Theme 1: Law on Hearsay Evidence** A. Opening Remarks by Mr. Siddharth Luthra B. Interactive Session
11:05am – 11:15am	Break
11:15am – 12:15pm	**Theme 2: Doctrine of "Last Seen Together"** A. Opening Remarks by Mr. Siddharth Luthra B. Interactive Session
12:15pm – 12:25pm	Break
12:25pm – 1:30pm	**Theme 3: Law on Circumstantial Evidence** A. Opening Remarks by Mr. Siddharth Luthra B. Interactive Session
Lunch	

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Note on Participants:

The lecture witnessed participation from a cross section of lawyers and law students who registered for the event. In all, 80 lawyers attended the event while 39 students and 2 Faculty members from law colleges attended the event from various parts of the state. This included 7 different law colleges (NERIM Law College, Tezpur Law College, University Law College Gauhati University, Royal Global University, NEF Law College, National Law University and Judicial Academy, Assam; Lloyd Law College, Greater Noida). Dr. J.P Bora, Principal, University Law College, Gauhati University also attended the lecture. The lawyers who were present included public prosecutors, defence counsel and government advocates with practices in various areas of law.

The audience also consisted of judicial officers from the Assam State Legal Services Authority including Mr. S.N Sarma, Member Secretary, Ms. Gitali Rabha, Deputy Secretary and Ms. Meenakshi Sarmah, Under Secretary.

The panelists for the thematic sessions apart from the keynote speaker Mr. Sidharth Luthra, Senior Advocate included Mr. Nilay Dutta, Senior Advocate and President, Studio Nilima; Mr. Ziaul Kamar, Senior Advocate; Mr. Angshuman Bora, Senior Advocate; Mr. Dilip Kothari, Advocate. Members of the Governing Council from Studio Nilima included Mr. Justice (Retd.) Brojendra Prasad Katakey, Former Judge, Gauhati High Court and Mr. Apurba Kumar Sharma, Chairman (Executive Council) Bar Council of India.

Welcome Address

Ms. Nikita Barooah, Advocate, Gauhati High Court welcomed everyone to the lecture organised by Studio Nilima in memory of one of the doyens of the Gauhati bar, Late Jatindra Mohan Chaudhuri. Ms. Barooah welcomed Mr. Siddharth Luthra, Senior Advocate, Supreme Court of India who would be delivering the keynote lecture on the law on hearsay evidence, the doctrine of last seen together and the law on circumstantial evidence. Following this, she invited Mr. Nilay Dutta, President, Studio Nilima and Senior Advocate, Gauhati High Court to address the gathering.

Mr. Dutta started his address by paying homage to the memory of Late Jatindra Mohan Chaudhuri who had been one of the most respected advocates to have graced the Gauhati Bar

in its long and chequered history. He noted that most of the great lawyers of this generation practicing on the criminal side had learned their most valuable skills from Mr. Chaudhuri who had taught law as a practice more than law as an academic discipline.

Mr. Dutta introduced Mr. Luthra who would deliver the lecture as one of the most dangerous opponents one could come up against in court. As a master in courtcraft, his inputs would be valuable for everyone present. With that, he requested Mr. Luthra to come up to the dais. He also invited Justice (Retd.) Brojendra Prasad Katakey, Former Judge, Gauhati High Court who is a Director and Member of the Governing Council of Studio Nilima and Mr. Apurba Kr. Sarma, Member of the Governing Council and Chairman (Executive Council) Bar Council of India to come up to the dias. Mr. Luthra was felicitated with a traditional Bodo *aronai* and a *pator seleng chador*. Mr. Dutta explained the modalities of the session which would be interactive in nature and invited Mr. Luthra to deliver his lecture.

Theme I: Law on Hearsay Evidence

1.1 Opening Remarks

Upon introduction, Mr Siddharth Luthra came up to the podium and thanked Mr Dutta and Ms. Abantee Dutta, Co-Founder, Studio Nilima for their invitation, his fellow co-panelists and other colleagues, for the memory being celebrated through this lecture series. He reminisced about his prior work with Mr Dutta, highlighting his ability to argue a range of matters be it constitutional, criminal, or civil matters.

Commencing with the first session, Mr Luthra began with a description of evidence as pertaining to a courtroom, highlighting that evidence encompasses things seen or heard, be it in the form of circumstantial or direct evidence. He emphasized that Indian Evidence Act, 1872 (hereinafter referred to as "IEA"), does not have explicit provisions for last seen theory or circumstantial evidence, rather, that Indian law has adapted these concepts from English law and since distilled them to adapt to the Indian scenario. While musing that evidence law is one of the least appreciated subjects, he advised younger lawyers to start at the lowest rungs in the field, to learn the art of convincing the judge to appreciate the evidence submitted.

Here, a parallel was made with the way that trials had been conducted before, with jurors placing greater importance on the reputation of the person accused who would then make up their minds accordingly. This went on till about the 1600s in England, when people placed greater emphasis

on evidence in court instead. The requirements that arose were then as follows: one, the person who speaks must be capable of coming to court and deposing, and two, there must be an oath taken by them. The underlying concept was that 'Men may lie but circumstances don't'. These requirements become important when the idea of hearsay evidence is studied.

Speaking on hearsay evidence, Mr Luthra began by delineating the limitations of the concept itself and the limited applicability that it has. He did so by raising a question as to whether cross-examination would be the correct test to establish truth in a case, reaching the conclusion that while it may not be the ideal method, it is not one that is likely to disappear from practice in this lifetime.

Truth in hearsay evidence is often limited. The human mind's capacity to adapt to the circumstances around it ensures this. Here, he illustrated that in the event of an accident where events get blurred, there is a tendency to take a longer time to narrate the series of circumstances that transpired, due to the role emotions play in embellishing a story. A good cross-examiner, he explained, takes away the excess from the actual content. The relevancy of facts, how they are connected, and how they get introduced, are all factors that play a role in establishing a case.

The question now arose as to where hearsay evidence could be applied, given how they cannot be proved by a person in a court the way other statements - whether oral or written - can. Here, Mr Luthra took note of various documents that courts have allowed in recent years, providing as they do for a more efficient trial process. These include formal witness affidavits, and reports of certain technical and medical officers.

However, there are exceptions to the general rule of non-admissibility of hearsay evidence, notably, the doctrine of res gestae, and the scope of Section 6 IEA. To illustrate, he listed various examples of hearsay evidence, such as statements of people reaching after an event has occurred, and contrasted them with admissible evidence, such as statements of a person who has seen someone fleeing the scene after an event has occurred. He placed reliance on *Jagroop v. Rex*, as reported in AIR 1949 All (441), where, at page 444, the Court noted that the test to distinguish between direct and hearsay evidence was this: "it is direct if the Court to act upon it has to rely upon the witness whereas it is hearsay if it has to rely upon not only the witness, but some other person also."

Relationships pose another issue; for instance a person's statement about a father having had a property dispute with his son 10 years ago where they can appear before the Court, would not be statements that can be tested and proved in court. The scope of Section 32 would thus become relevant. Similarly, in the case of a newspaper publishing something defamatory, the content itself would not be admissible, unless there is a source for the information given.

Mr Luthra then moved on to discuss in detail the scope of Section 32 IEA, and delved into the cases arising out of the 2012 Nirbhaya incident, where the statement of the victim was shaky. In the ensuing political fight between the then-government and the police, there were newspaper reports doubting the witness' statement. Recording of the statement and dying declaration was thus necessary, and was done by a magistrate. While there were slight variations in her accounts, she did make statements to the doctor and the police. The day before being taken to Singapore, there was a window of a few hours, during which she gave a dying declaration which then became the basis of the conviction of the accused. While Section 6 is an exception to the general rule of hearsay evidence, it is important for the acts to be contemporaneous, so that the time limit is short enough for there to be a known connection, during which nothing new could have been introduced.

At this point Justice Katakey had to leave for a prior engagement and Mr. Dutta requested Mr Ziaul Kamar, Senior Advocate, Gauhati High Court, Mr Angshuman Borah, Senior Advocate, Gauhati High Court, and Mr Dilip Kothari, Advocate, Gauhati High Court, to come up to the stage and join the panel. Mr Luthra then resumed his talk, detailing that the death of the person becomes an essential, before admitting a dying declaration. Any such statement made under Section 32 IEA will be replaced instead by the cross-examination that the now-surviving witness gives. These statements then have to be capable of being tested. The interactive session for the first session was then initiated, and questions on a range of topics were raised by the audience.

1.2. Interactive Session

- In response to a question on whether photofit pictures could be admitted without infringing the general rule on hearsay evidence, Mr Luthra mentioned the ambit of Section 65 B IEA, and problems with electronic compliance, as laid down in *PV Anvar v.*

PK Basheer as reported in (2014) 10 SCC 473, a case where the judge later wrote about his doubts regarding his own judgment in an academic paper. The first test to be made is authenticity. The photofit may be hit by hearsay rule, and a person needs to come and produce someone to examine and prove the contents of the photo. Mr. Kamar added that earlier, black and white photos were being produced, for which the negatives needed to be given.

- A question was raised to how much of a role hearsay evidence plays in convictions. To this, Mr Luthra responded that hearsay evidence has to be kept out completely, and Indian law only notes certain exceptions to hearsay law, such as Section 6 IEA. Mr Borah here added that hearsay evidence was completely inadmissible.

- To a question on whether implied assertions by conduct would be included in hearsay, Mr Luthra informed the audience that under Section 8 IEA, evidence of conduct is an exception to the hearsay rule. For example, an accused running away after an incident is a fact that might be admitted. But mere conduct of five people meeting should not be accepted. There are two concepts: criminal law in ordinary cases and criminal law in hard cases. A lot of the development in law has been seen in hard cases as in *Kehar Singh v. Union of India* as reported in (1998) SCR Supl. 3 1102. Many problematic concepts in hard criminal cases, have led to a weakening, or a steady dilution of evidentiary principles, and stringency of application of statutory rules, leading to the current state of affairs.

  For instance, the concept of an independent witness, while a fundamental requirement under the Code of Criminal Procedure Code, 1973 (hereinafter referred to as "CrPC") has become so diluted as to be virtually inapplicable. To illustrate, in cases under Section 498 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), family members often come to state and verify that their daughter had been beaten, but only her statement should have been recorded. Mr Kamar added here that merely stating something would not be enough, but conduct will, giving an example of a person coming to a police station with a dao and stating that they have killed someone. The conduct of the person here is relevant.

- A member of the audience then asked whether hearsay rule would apply in cases where a person finds someone dying on the street, and is told that X was the one who had assaulted him. If the person then dies, would this evidence be considered hearsay?
  In response, Mr Borah responded that it would be a case of dying declaration, and would be admissible accordingly. Subsequently, another question was raised as to the relevance of a dying declaration when a person is in a coma. To this, Mr Luthra stated that a statement is to be related to the circumstances surrounding it. If a person makes a statement and is then incapable of giving evidence, eg. by death, or in missing person cases, then this statement becomes admissible.

- On being asked about the admissibility of statements made under Section 161 CrPC if the person making the statement subsequently dies, Mr Luthra responded that such statements may be considered dying declarations. However, he noted that it was a perturbing trend that Section 161CrPC had begun creeping into judgments of the courts. Courts have to eschew any consideration of statements made under Section 161 CrPC. Mr Kamar too noted that this has become evident in recent judgments, adding that the veracity of a statement needs to be seen for its admissibility. In relation to this, Mr Dutta mentioned that the problem with judicial recruitments now is that judges who have experience only in civil law are put in charge of criminal cases, and vice-versa, with lawyers who had been working on criminal litigations throughout a major part of their career having to pass orders on highly specialised civil cases. He noted that when specialists in a certain field are appointed as judges, the matters that they handle should be within those areas of specialisation. Similarly, a civil lawyer may have a certain view on death penalty cases, and may pass a judgment accordingly, without having been able to take due note of the import of the facts involved. A death penalty needs comprehensive evaluation of evidence available. This is a chronic problem currently, and there has to be a desire to enhance specialisations in the judicial system. This led to a subsequent question, on the validity of a dying declaration if the injured witness dies after a gap of 2-3 months. Mr Luthra stated that death may occur after a long gap, but other factors then need to be considered, such as the cause of death, proximity of incidents, and any intervening factors between the point of time from when the statement was made, to the time of passing away. Not knowing the cause of death would make the statement unreliable. The first session was thus concluded, and a 10-minute break was then announced.

Theme 2: Doctrine of Last Seen Together

2.1 Opening Remarks

The lecture series was resumed with Mr Luthra asking the audience where 'last seen together' could be found in the IEA, explaining that these concepts are not part of the written words in statutory law. These were, instead, concepts that are learnt by lawyers during their training, not in law school. Due to the inter-linkages of the concept of last seen together, and circumstantial evidence, he stated that he would be linking the two topics and addressing them together.

He commenced the session by mentioning the cases arising out of the death of Arushi Talwar. Last seen together may be explained as follows - there are four people in a house, the house is closed. In the morning, two are alive, while two are dead, and there are visitors who saw all four alive at some time in the night. Ergo, they were last seen together. Who would now explain the deaths?

Various facets exist in determining the application of last seen doctrine to a case - did the interaction take place a day, a week, or a month ago? In rural areas especially, the doctrine of last seen plays an important role - the way people lived was by knowing what everyone else did. However, if A kills B in an open field, it is unlikely to find witnesses to establish the case. Proving that A killed B would now entail the raising of many questions, such as the proximity of time between the evidence of being seen together, and the time of death and discovery of the body. The theory is also significant in cases related to kidnapping, where the one last seen with the missing person is considered.

A detailed example in the context of 'last seen together' from *Shibu Soren v. C.B.I.* as reported in 2007(97) DRJ 629 was mentioned, where there was difficulty in procuring the body from the jungles of Jharkhand. Last seen together was among the main evidence used, and the matter has been pending in the SC for ever. Thus, last seen together is never enough to be the sole basis for a conviction.

The doctrine requires a shift in the onus of proof in a case, wherein the burden of proving whether the deceased went their own way, or met someone else etc. - all of this is now on the accused to prove. Under Section 106 of the Indian Evidence Act, a person can establish that the deceased was in a place without them, and this discharges the burden upon them. However, it

does not discharge the burden of the prosecution. Today, a false answer can be coupled with other evidence, such as last seen, to convict a person. However, the proximity of time is an essential element to consider. The larger the time gap, the more difficult it becomes for the prosecution to prove that the guilt is on the person last seen with the victim.

Coming back to the Arushi Talwar case, he mentioned that the Prosecution had found that the internet had been used that night, so the child was probably awake. If the parents were the only ones in the immediate vicinity, it becomes inevitable that they would be asked to discharge the burden. Motive plays an important role in a case as well, while determining the relevance of the doctrine. For instance, four people merely having tea at a tea shop would not suffice as evidence. Something done on a regular course of events cannot be counted. Finally, he noted that last seen is not a standalone circumstance; it must be a part of a chain of circumstances, and it must be linked. With this, the topic of circumstantial evidence was now brought in.

Theme 3: Law on Circumstantial Evidence

3.1 Opening Remarks

The position on circumstantial evidence is best described by the statement of the Hon'ble Supreme Court in *Aftab Ahmed Ansari v. State of Uttaranchal* as reported in (2010) 2 SCC 583 in para 12; "Men may tell lies, but circumstances do not". This view draws lineage from the English law. It is quite apparent that the English did not trust the police and neither do we. It was the colonial view that witnesses in India generally lie in their testimonies. There is an increasingly greater reliance on circumstantial evidence and even the death penalty is being increasingly being given on the basis of circumstantial evidence which is a serious thing.

Direct evidence includes first hand observations for oral evidence such as eyewitness statements, confessions etc and written evidence such as documentary evidence including deeds, written contracts, letters, notes etc. Circumstantial evidence is generally indirect physical or biological evidence that can link a person to a crime but does not of itself prove the guilt directly. It can, as in *State (NCT of Delhi) v. Navjot Sandhu@Afsan Guru* as reported in (2005) 11 SCC 600 be in the nature of pointing out where a certain thing was procured or could be the manifestation of last seen together or matching of last seen together as in the Nirbhaya case. In circumstantial evidence, inference is drawn but by creating a chain of circumstances in a manner such that only one such chain is possible, which is that of conviction. Through judicial interpretation, the chain

of circumstances is becoming thinner and thinner and facts which may be nebulous are being stitched together.

There are certain rules to be observed in case of circumstantial evidence, which are as follows:

1. The facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;
2. The burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;
3. In all cases, whether of direct and circumstantial evidence, the best evidence may be adduced which the nature of the case admits;
4. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt.
5. If there are reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

Mr. Luthra asked the audience, "Where can you find 'reasonable doubt' in the IPC?". In our constitutional scheme of things, it is not fanciful but it is required that proof of a very high order is furnished where there can only be an inference of guilt. Even if the prosecution has proved the case beyond reasonable doubt, a plea of innocence can still be substantiated by claims of general defence to mitigate liability.

In all cases, the inculpatory circumstances must be unimpeachable. The classic case in this regard is the judgement in *Hanumant v. State of Madhya Pradesh* as reported in AIR 1952 SC 343 where in para 10 it was held that "it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is drawn should in the first instance be fully established and all the facts established should be consistent only with the hypothesis of the guilt of the accused."

In S. 313 CrPC provides that in all cases of circumstantial evidence, one must explain all circumstances in an adequate manner. It is a requirement of all courts to put all incriminating circumstances to the accused. Mr. Luthra gave the example of arguing cases recently on the point of S.313 CrPC which has been diluted. He gave the example of a criminal trial where he had assisted his father, Mr. K.K Luthra. The case in question was that of a murder in a market in

Delhi post the 1984 riots which involved members of political parties. There was a handprint of the accused on a scooter which had been adduced as evidence by the prosecution. Judge GP Thareja, who was the Sessions Judge in the case, provided the accused the opportunity to explain this incriminating circumstance. The accused stated that "the police had arrested me and then taken me to the scooter which resulted in my handprint being registered on it". He was acquitted on that ground. The last seen theory is an element of circumstantial evidence along with various other constituents such as forensic evidence, expert testimonies etc. They must be integrated together. With this, Mr. Luthra closed his opening remarks and opened the floor for the interactive session.

3.2 Interactive Session

The interactive session for the doctrine of last seen together and law on circumstantial evidence were clubbed together as they were intertwined topics. The questions raised were answered by both Mr. Luthra and the panel and often led to directed discussions on the topic concerned. The following issues were discussed:

- To a question on the role of time gap in last seen theory, Mr. Luthra replied that time gap actually plays the most crucial role in the last seen theory. If time gap and distance is adequately large, it can be an important element in demolishing the applicability of the theory in that case. This is generally done in primarily two ways:
    a. Increasing use of electronic evidence by investigating officers
    b. Increasing use of oral evidence

  They can be coupled together in the husband and wife in a hotel and in the morning, one of them is found dead. If the time of death is 10pm at night and the husband walked out at 5pm, then he can plead. But if it becomes narrow, it can become a problem.

- The role of last seen together theory in conviction was raised before the panel. It was noted that a failure to explain circumstances where the accused had been last seen together with the deceased can be a problem. The presence of 'last seen together' alone cannot lead to conviction but must be coupled with other elements.

- It was raised that since it is evident from the opening remarks that the courts have a tendency to readily invoke S.106 IEA whether the prosecution must create the chain of circumstances definitely before the above mentioned provision can be invoked. Mr.

Luthra mentioned that only once a chain of circumstances is established can the burden of proof be reversed in terms of the provision.

- Mr. Luthra's opinion on the light of the recent decision of the Supreme Court in *Fainul Khan v. State of Jharkhand*, Criminal Appeal No. 937 of 2011 will be the impact of presumption of innocence was sought. Mr. Luthra stated that it was difficult to comment as his arguments were not accepted in the case. Rights of the victim ought to be seen in the context of the sentence and not judgement or appreciation of evidence. There has to be a correction sooner rather than later.

- What would happen in a case where S. 313 CrPC to accused is not confronted with the circumstances of last seen theory. According to Mr. Kamar, the law is very clear, especially in the recent judgement of the Supreme Court in *Reena Hazarika v. State of Assam* as reported in 2018 SCC OnLine SC 2281 (in which Studio Nilima played a role) where it was clarified that all circumstances must be put to the accused. Mr. Luthra pointed out that according to the recent decision in *Fainul Khan* that deficiency in the S.313 CrPC must be taken up immediately by the accused either in the Trial Court or the court of first appeal. *Fainul Khan* has distinguished the rule laid down in *Masalti v. State of Uttar Pradesh* as reported in 1964 SCR (8) 133. The deficient S.313 CrPC must be taken at the stage of first appeal.

- The relevance of sketch map in criminal procedure would depend upon how it has been made. Mr. Luthra opined that it is only on the basis of the understanding of the investigating officer, it ceases to be very relevant. However, when it has been made on the basis of statements of witnesses who have been examined and then it becomes crucial for the purposes of contradiction.

- There was a question on the evidentiary value of statement of the accused under S. 313 CrPC as there is no oath which is taken. Mr. Luthra mentioned that is an opportunity for the accused to explain circumstances. Often the circumstances put forth in a matter may run to hundreds of questions, but it is a disregarded area of law where standard answers are given. The interpretation of the law by the Supreme Court states that false or evasive answers can be a link in the chain of circumstances and can be used against the accused.

- It was put to the panel whether conviction on the basis of circumstantial evidence but with no finding as to motive would hold good. Mr. Kamar stated that motive loses relevance when there is a proper link of circumstantial evidence. It being a psychological phenomenon, it remains very difficult to pin down on any one individual. Mr. Luthra pointed out in certain cases, as in a conventional murder case, often there is no direct link between the deceased and the accused and it becomes very difficult to establish motive. There might be no evidence of enmity but the death has been caused. In such cases, the prosecution will often rely on the 'criminal character' of the person or refer to criminal antecedents. This has become a trend in certain states especially in some districts of Madhya Pradesh. The example of the Nithari serial murders (Surinder Koli and Moninder Singh Pandher) was also discussed in this regard.

- It was put to the panel whether a principle of the nature of *res ipsa loquitur* can be applied to the defence of insanity in criminal trials. That is, whether the facts may themselves speak that the person involved is insane. Mr. Luthra replied that it is high time that a distinction between the test of insanity and incidence of psychopathic behaviour be introduced as has already been done in the United Kingdom. India has adopted McNaughton's rule by which every person is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes unless the contrary is proved. However, it must be understood that mental illnesses may have waxing and waning periods which depend upon the medication and the nature of illnesses. Often a person may be functioning on medication and may be mentally ill but not insane, which needs to be provided for by law.

  It is therefore important that laws be audited from time to time as has been done by Lawyers Collective for the Protection of Women from Domestic Violence Act, 2005. The Legal Services Authorities may consider doing this for various statutes. There are many facets requiring examination including even the Criminal Law (Amendment) Act, 2013 which creates a confusion between the previous Section 377 and the new Section 376. Many of these loopholes are evident only after implementation.

  Mr. Luthra referred to his days studying in England, where there is a practice of regular legal audit of laws every 5-10 years. The data collected from the Indian legal system is rudimentary at best including the data from the National Crime Records Bureau which is

however improving in depth. The incoherence is persistent even in judge made law which is manifest in several areas including the law of negotiable instruments. The law in the area of vicarious liability which was laid down in *S.M.S Pharmaceuticals v. Neeta Bhalla* as reported in (2005) 8 SCC 89 has been diluted further in *Standard Chartered Bank v. State of Maharashtra* as reported in (2016) 6 SCC 62 and then finally in Sunil Mittal's case which essentially concerned an IPC offence. How then does a magistrate/judicial officer apply the law when there is no coherence in it. Hence, legal audit is required. The lack of a coherent voice in the Supreme Court is such that there have been instances where in similar Special Leave Petitions different decisions were handed down by the Court on different occasions.

In *Mukesh v. State of NCT of Delhi* as reported in (2018) 8 SCC 149 an argument was raised whether the courts can accept populist sentiments in sentencing. While this argument was accepted in the Nirbhaya case, this paragraph has been applied indiscriminately. There is a need to take a relook at both the judge made and statutory law.

- One of the queries raised a question as to the role of evidence in criminal trials. Mr. Luthra opined that legally speaking, the witness is supposed to depose as per memory. In practicality, the prosecution tutors the witness. Clever prosecutors will often not only lead evidence in prosecution but also disprove possible defences that the accused may take at a later stage for any reason.
  If the witness becomes hostile, he may be declared as such as long as the investigating officer before whom the initial statement was made is examined. He recommended that young lawyers and students should read the decision in *Tahsildar Singh v. State of Uttar Pradesh* as reported in 1959 SCR Supl. (2) 875 before reading the Indian Evidence Act, 1872.

- A query posed to the panel was whether unlawful assembly under S.149 IPC and S. 304 IPC can go together. It was stated that there is nothing barring that and there is a decision of the Supreme Court in 2017 by Justice Nageswara Rao which explains the interlinkages. Mr. Kamar stated that an example of this situation would be where there is a fight between two farming communities over resources like water and there is a resultant altercation. In such cases there would also be a claim of private defence. Certain

exceptions to the *Masalti* rule have been carved out in the High Courts as in Gauhati High Court where a recent decision of Justice A.K Goswami made some exceptions to the rule. Mr. Luthra stated that the validity of S.149 IPC has already been challenged in the Supreme Court and notice has been issued. In his opinion, the decision in *Masalti* was when there was complete reliance on oral evidence in criminal trials. Nowadays, there is the involvement of myriad forms of evidence such as CCTV videos etc.

- It was raised whether for S. 149 IPC to be applicable participation is mandatory. Mr. Luthra answered the question by stating that there was a recent decision of the Supreme Court in 2017 by Justice Nageswara Rao and Justice S.A Bobde where the mandate and understanding of S. 149 IPC has undergone a change. It is the duty of the prosecution to prove that all members of the unlawful assembly had common object which leaves room for the defence to draw a distinction for their own clients. As a result, often accused will be convicted of lesser offences than principal offenders.

- Mr. Dilip Kothari, Advocate who was on the panel raised a query on the feasibility of challenging the wide interpretation of S.165 IEA being taken by courts to participate in the trial process. Mr. Luthra stated that the actual role of S. 165 IEA as envisaged by the framers can be understood from the notes of the original commentaries of the Law Commissioners which clearly state that the purpose of the provision was only for gaining clarity and not the expansive role that is being given to it in the present day. However, the interpretation given to S.165 IEA in the case of *Zahira Habibullah Sheikh v. State of Gujarat* as reported in (2004) 4 SCC 158. Violation of this standard is a complete violation of the law and the judge must be impervious to both views and only use this provision to get clarity on facts which is not already clear from the evidence adduced. To go any deeper vitiates both the right to fair trial and the prosecution's case.

- In response to another question on whether the liberal use of the death penalty is an indirect rejection of correctional services and points to an ignorance of socio-economic realities. Mr. Luthra narrated his experience when dealing with the Nirbhaya case where he himself had many sleepless nights as a special public prosecutor. Having said that, now there is an intermediate sentence where life sentences without remission can be awarded and should be availed by the courts instead of a liberal application of the principle laid down in *Mukesh*.

In the ensuing discussion, Mr. Dutta stated that people dominating the death penalty discourse are people who have never gone to jails themselves. In his personal experience, there have been people lodged in prisons, who if faced with a choice between life in prison and a death sentence, would choose the latter. Often intervenors in matters of death penalty are not aware of such realities and it is desirable that a capable team of evaluators with psychologists and psychiatrists conduct interviews and submit their opinion in a sealed cover to the sentencing court.

Mr. Luthra stated that it is also important to note that our system has deficiencies in terms of scientific investigation, plantation etc. There is a new concept of residual doubt and not reasonable doubt which is used for determining whether death sentence should be awarded. If our system of investigation was more scientific and accurate, the liberal imposition of the death sentence would be more acceptable.

- There was a discussion on the role of the public prosecutor in the criminal justice system in response to a question. Prior to the introduction of the CrPC in 1973, there used to be the system of Prosecuting Sub Inspectors or PSIs who used to prosecute certain cases. Only after the 1973 Code, was a bifurcation between the Prosecution department and the police created. The problem with the present police system is that the police do not have any legal support in their work which is ensured indirectly by involving the prosecutors from the department in vetting *challans*, chargesheets etc. One way of making this system more ethical and functional is by deputing prosecutors from the prosecution department to the police (this suggestion has already been made to the Delhi Police). The Bar Council Rules make clear provisions in this regard and a decision of this *Shivkumar v. Hukumchand* as reported in (1999) 7 SCC 467 which provides that prosecutor must ensure that no innocent person is convicted. There are several judgements also on the role of the victim's lawyer from various High Courts including Gauhati, Madras and Calcutta which will now potentially be incorporated in an authoritative judgement by Justice Deepak Gupta as the issue has been raised before the Supreme Court.

- Mr. S.N Sarma, Member Secretary, Assam State Legal Services Authority sought Mr. Luthra's suggestion on his expectations from the state legal services authority. Mr. Sarma mentioned that it had become essential to engage with the younger Bar and inculcate a

realisation of social responsibility in them so that they can have a more fruitful association with the legal services mechanism.

Mr. Luthra opined that he spoke from his experience as an amicus for the Legal Services Authority, as a defence counsel and as a witness in a criminal trial. He had also been associated with the Delhi State Legal Services Authority for the last 10 years and continued to be an active member of the Supreme Court Legal Services Committee. The primary concerns for the legal services framework would be to ensure speed, quality of work and access to lawyers and their clients which is sorely lacking. The ability of the lawyers and their client to interact is extremely important in cases which require contextual information as to circumstances as in death penalty cases. Consistency of legal aid services is also essential at all stages of the criminal process. He referred to a case where he had acted as an amicus where only 6 of the 50 witnesses were examined in the trial. In another case, a criminal trial was completed in 13 days and death sentence was given in Andhra Pradesh by the Sessions Court.

The first measure should be rigorous training of legal aid lawyers. It is also important to understand most lawyers will do full time work for legal services authorities for a few years in their career and then move to private practice. By training them, the legal services authority will be able to create a group of more effective counsel in private practice as well.

The second measure should be monitoring the performance of the legal aid lawyers by electronic means to ensure effective service. Legal awareness among the general public is also equally important. There are certain systemic flaws which is apparent in the continuing appointments of amicus by the court in legal services matters. In case, well trained lawyers are available to conduct such cases with the legal services authorities, the need for appointing amicus in cases where there are unsettled questions of law or are special cases for some reason will cease.

It is also necessary to ensure legal representation/advice during the investigation phase or in bail matters where a lot of people go without representation. In some parts of India, lawyers are appointed to particular police stations to ensure legal services but the flipside to such arrangements is the possibility of collusion between lawyers and police. In fact, in

the Nirbhaya case, the possibility of such collusion necessitated the need to appoint two senior counsel who were seen as independent for the accused.

It is important for the legal services authorities to monitor conviction and acquittal trends and analyse the reasons behind such trends. Recently, in *Manoharan v. State* being Crl. Appl No. 1174-1175 of 2019 before the Supreme Court of India, the counsel appointed for the matter did not reach in time for the review of the death penalty. This is becoming a disturbing trend in such matters.

It is also pertinent to note that the practice of separating the lawyer who actually visits the jail and the one who argues the case as is done by some legal services authorities is clearly not effective as the lawyer needs time to understand the nuances of the case. Even the practice of video conferencing is problematic in some cases. But if these issues are addressed by the legal services authorities, the reach and the impact of such work can be unparalleled.

- In response to a question on a witness who may be termed hostile for supporting the accused in the cross-examination, after having said nothing to support the accused in the chief examination, Mr Luthra stated that a re-examination of the witness is permitted. Mr Kamar cited the decision of the three-judge bench in *Dahyabhai Chhaganbhai Thakker v. State of Gujarat*, as reported in (1964) SCR 7 361, saying that in such a situation, the Prosecution is entitled to file an application and declare the witness hostile. The re-examination is then provided under the CrPC. Mr Luthra added that if the accused asks a question which is incriminating to the other accused, what remedy exists? One has the right to cross-examine and it can be a never-ending process.
  On being asked about the relevance of the Buckle Number of a police officer in a criminal case, Mr Kamar stated that after the landmark *D.K. Basu, Ashok K. Johri v. State Of West Bengal*, as reported in (1997) 1 SCC 416, even the wearing of chest plates, etc. are emphasized. Mr Luthra, however, mentioned that every constable or officer is already given a specific number which identified them uniquely, questioning the necessity of the judgment. The provisions had already been there, enshrined in various statutes and rules. The judgment was merely a restatement that led to further amendments, some of which were superfluous. He added that a problem that he found with the DK Basu case was that *Nandini Satpathy v. Dani (PL)* as reported in (1978) 3 SCR 608, provided larger access

to lawyers, which was in part curtailed with DK Basu. Mr Kamar added to this that Nandini Satpathy's judgment had emphasized the role of notice under Section 41A CrPC.

- A question was then raised by Mr Dutta, wherein he inquired about what it means when courts say that the accused is not cooperating with the police on bail. Mr Luthra responded that the dilution of Article 20 through several fiscal legislations (such as the Prevention of Money Laundering Act, 2002, or the Customs Act, 1962) has occurred, where the accused's statements are taken before officers. No one is in a position to exercise their right to silence.

  In *CBI v. Anil Sharma*, reported in (1997) 7 SCC 187, the Supreme Court laid down that custodial interrogation is more trustworthy. The import of this needs to be seen. DK Basu and Anil Sharma were judgments that came in the same year, and yet both are diametrically opposite to each other in the context of 438 CrPC and cooperation with the police. This has become a trade-off of the right to silence, and an unwritten presumption of guilt has recently begun emerging. Some judges say Art. 20 is paramount but is increasingly being diluted when seeing the rights of the investigating agency versus the rights of the accused. The non-cooperation means not agreeing to the terms desired by the officer.

- With regard to an issue on the provision in the CrPC regarding filing of written statements by the accused on record, Mr Luthra noted the importance of Section 313, which is an elaboration of the defence case, and can be used as a precursor to the defence witnesses, or other facts. So, it is an important piece of material. It is imperative to lay a foundation for the defence evidence. It is a part of 313 only where 313(2) comes into play.

- A question arose as to a situation where a witness is partly examined, but does not turn up on subsequent dates, and his evidence is thus expunged. Mr Luthra clarified here that part cross-examination is not permitted; it is to be fully completed, and then a re-examination of the same may be done. He mentioned *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, reported in (1996) 1 SCC 667 and *K.L. Verma v. State* as reported in (1998) 9 SCC 348, which is now being considered by the Supreme Court in a bench headed by Justice Arun Mishra.

Vote of Thanks

The vote of thanks was then given by Mr Dutta, who expressed gratitude to all the lawyers and students who had participated, and spoke about the need to strengthen ties in the legal fraternity. Apart from the panel, Mr. Dutta thanked Mr Surajit Bharali, Advocate, Gauhati High Court and Mr Jyotirmoy Roy, Advocate, Gauhati High Court, for their support in organising the event, as well as as the Gauhati Town Club authorities for all their help. The audience was then requested to proceed to lunch and guests were requested to send their feedback and recommendations to the Studio Nilima email address.