Summary on the Subject:- Law relating to the practice and procedure of recording of oral and documentary evidence in Criminal Case including panchnama u/Sec.27 of the Evidence Act & identification of Muddemal.

Introduction.

Quest for truth is the underlying object of a criminal trial. The duty of the court is to arrive at the truth and subserve the ends of Justice. Judicious scrutiny of facts proved by admissible evidence culminating into a reasoned judgment are the integral features of a Criminal trial. Since the object of a criminal trial is to do justice and to convict the guilty and protect the innocent, the trial should be a search for truth and not a bout over technicalities. A trial must be conducted with utmost care and sensitivity so as to protect the innocent and to punish the guilty. A trial Judge is shouldered with yet another responsibility. The Appellate Court looks at the evidence through the eyes of the trial Judge. Therefore clear and correct recording of evidence assumes great significance.

Oral Evidence.

2) For proof of a fact evidence is required to be adduced. The Indian Evidence Act regulates production of evidence. According to Section 3 of the Evidence Act, evidence means and includes oral evidence and documentary evidence. The idea of best evidence is implicit in the Evidence Act. The best oral evidence is of the person, who has actually perceived something by that sense by which it is capable of perception. This becomes clear from Section 60.

3) First part of section 60 refers to eye-witnessing. Second part of Section 60 refers to hearsay. It can be said that hearsay evidence,(which is indirect & derivative) is not admissible to prove truthfulness of the heard statement. Still Section 60 says that hearsay evidence is admissible, but for certain purpose and that is, to prove something heard which is not actually seen. The words heard may be used, among others, to prove conduct of the person telling and as such not to prove truthfulness of the heard statement. In ***Balram Prasad Agrawal vs. State of Bihar & others (AIR 1997 SC 1830),*** the Hon'ble Apex Court referred to the observations of the Privy Council, in the following words :

> *Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proved to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter, of the witness or some other person in whose presence these statements are made.*

4) Third part of Section 60 relates to oral evidence, which is direct referring to a fact, which could be perceived by any other sense. Any other sense means by smell, touch, gait, timbre voice etc. Fourth and last part of Section 60 refers to an opinion or to the grounds on which that opinion is held by that person.

Documentary Evidence.

5) According to Section 3 of the Evidence Act, “document” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter. A writing, printing, lithograph, photograph, map, a plan, an inscription on a metal plate or a stone, a plaque, a caricature etc. are documents.

6) The purpose of production of documents in a proceeding is to rely upon the truth of the statements contained therein. This involves the examination of three questions :

= Is the document genuine ?

= What are its contents ? and

= Are the statements in the document true ?

7) The genuineness of a document or the truth of its contents is proved by oral evidence vide of Section 59 of the Evidence Act. Whereas, the contents of the document are proved either by primary evidence or by secondary evidence in view of Section 61 of the Evidence Act. Section 62 says, “primary evidence” means the document itself produced for the inspection of the court. Section 63 speaks about what is meant by secondary evidence and its inclusion. Execution of a document is to be proved by admissible evidence. The admissible evidence is by way of : i) Admission by the signatory to the document of its execution (Section 58),ii)Examination of a scribe; (Section 67),iii)Examination of an attesting witness; (Sections 67 & 68), iv) By proof of signature and handwriting of the person, who is

alleged to have signed or written the document produced ;(Section 67),v)By proof of digital signature; (Section 67 A), vi)By opinion as to, or comparison of, signature, writing or seal with other admitted or proved document ; (Sections 45, 47 or 73)and vii) Proof as to verification of digital signature. (Section 73 A).

Various methods for proving handwriting or signature are:

i) The direct evidence of the person, who wrote or signed, (Section 67).

ii) Evidence of a person acquainted with the handwriting or signature (Section 47) ;

iii) By comparison by the court (Section 73), and

iv) Opinion of expert as to handwriting and/or signature(Sec.45).

8) Execution of the document has to be proved by the evidence of those persons, who can assert for the truth of the fact in issue, but where document produced is admitted by the signatory thereto and then marked as an exhibit, no further evidence to prove the writing and its execution survives. Admission of document means admission of facts contained in the document.

9) The Hon'ble Bombay High Court has held in case of ***Bama Kathari Patil V. Rohidas Arjun Madhavi [2004 (2) Mh.L.J. 752]*** that a document is required to be proved in accordance with the provisions of the Evidence Act and merely for administrative convenience of locating or identifying the document, it is given an exhibit number by the Court. Exhibiting a document has nothing to do with its proof though as a matter of convenience only the proved document is exhibited. If a document is duly proved, but mistakenly or otherwise is not exhibited, still it can be read in evidence.

10) Section 68 of the Evidence Act deals with proof of execution of document required by law to be attested. Such document shall not be used as evidence until at least one attesting witness has been called to prove the execution. An attested document not required by law to be attested i.e. like a sale deed, may be proved as if it was unattested vide Section 72 of the Evidence Act. A public document is admissible per se without formal proof in view of Section 74 (1) of the Evidence Act. Section 74 classifies two categories of public documents. The document falling in sub-section (1) is the one of which court will take judicial notice under section 57(1) or 57(2) or section 57(6), or, it is relevant under Sections 35 to 38. The court takes judicial notice of the truth of contents, because it is genuine. Section 78 is also in respect of other public documents i.e. official documents. A document falling under section 78 (1), judicial notice thereof will be taken under section 57 (1) or it would be relevant under section 37. As regards a document coming under section 78 (2) or (4), judicial notice thereof will be taken under section 58 (6). Besides documents coming under section 78 (1), (3) & (4) will be relevant under section 37. Certified copies of public documents falling under section 74 (1) may be produced in proof of their contents, vide section 77. Second kind of public document falls under section 74 (2) like certified copies issued u/s 57 read with section 55 of the Registration Act,1908, and truth of contents of such document is required to be proved by independent evidence, required for proof contents of a document, direct and/or circumstantial and for such documents section 77 is not applicable, since the public record is of private documents, like a sale deed, a gift deed, a mortgage deed etc.

Procedure in recording Evidence.

11) Chapter XXIII of the Criminal Procedure Code (for short, 'the Code') deals with the mode of recording evidence in Part A and Commission for examination of witness in Part B. The provisions regarding the mode of taking and recording evidence in a criminal trial are enumerated in this Chapter

12) Section 273 of the Code mandates to record all the evidence in a trial or other proceeding in the presence of the accused, or when personal attendance is dispensed with, in the presence of his Pleader. Idea of fair trial is implicit herein. Presence of accused does not mean physical presence. In the case of ***State of Maharashtra vs.Dr. Prafulla Desai (AIR 2003 SC 2053)***, the Hon'ble Apex Court has ruled that recording of evidence by video conferencing is permissible. The term 'presence' in this section does not mean the actual, physical presence in the Court so as to meet the requirements that the evidence must be recorded in the presence of the accused.

13) According to of Section 274 of the Code, in all the Summons Cases, the Magistrate shall record the memorandum of substance of evidence of a witness in the open Court, and such memorandum must be signed by the Magistrate and shall form part of the record. In the Warrant Cases, the Magistrate shall record the evidence of the witnesses by taking down by himself or cause it to be taken down in the narrative form. However, Section 275(3) of the Code permits the Magistrate to record the evidence in the form of question and answers. The evidence of the witness in this Section may also be recorded by audio video electronic means in the presence of the Advocate of the accused in view of proviso to Section 275(1) of

the Code.

14) Section 276 of the Code says that recording of evidence in trials before the Sessions Court, should be in the form of narrative. But the presiding Judge may, in his discretion, take down or cause to be taken down, any part of such evidence in the form of question and answer, and the evidence so taken down shall be signed by the presiding Judge.

15) Section 277 of the Code contemplates that the evidence of the witness taken down under Section 275 and 276 must be in the language of the Court, if the witness gives evidence in the language of the Court. This Section further provides that the evidence of the witness may be taken down in the language of the witness, if practicable; otherwise true translation of the evidence in the language of the Court shall be prepared and shall form part of the record after duly signed by the Presiding Judge. If the evidence is taken down in English and translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

16) Section 278 envisages that the evidence of a witness when completed should be read over to him in the presence of the accused or his Pleader. The evidence should be read after it is completed and not at the end of the day after all the witnesses have been examined. When the evidence is read over to the witness or to the Pleader, if necessary, it can be corrected and if the witness denies correctness of any part of the evidence, the Presiding Judge may, instead of correcting the evidence, make the memorandum of the objections raised by the witness and shall add such remarks as he

deems fit. The object of this section to secure an accurate record from the witness of what he means to say. If the evidence is recorded in the language not understood by the accused or by the Pleader, it shall be interpreted to the accused or his Pleader in the open Court in the language understood to them.

17) Section 280 empowers the Presiding Judge or the Magistrate who has recorded the evidence of the witness, to record the remarks, if any, as he thinks material in respect to the demeanour of the such witness. The object of this provision is to provide aid to the Appellate Court in estimating the value of the evidence recorded by the trial Court. But the Judge recording the demeanor of such witness should avoid to pronounce his opinion on the credibility of the witness until the whole evidence of such has been taken. Demeanour of the witness which is material and likely to affect the credit of the witness while appreciating his evidence must be noted down at the appropriate stage or at the close of the evidence of the such witness.

18) Part B of this Chapter deals with the examination of the witnesses on Commission. Taking evidence on Commission in criminal cases is most sparingly resorted to, i. e., in case of delay, inability or inconvenience. The Hon'ble Apex Court has held in the case of ***Dharmanand Pant- AIR 1957 S.C. 594*** that as a general rule in criminal proceeding, the important witness on whose testimony the case against the accused is to be established, must be examined in Court and issuing of Commission should be restricted to formal witnesses or such a witness whose presence cannot be secured without unnecessary delay or inconvenience. The evidence must be recorded in the presence of the accused in open Court so that the

accused has an opportunity to cross-examine the witness and the Presiding Judge may has an advantage of hearing the witness and of noting his demeanors.

19) Section 291 A of the Code stipulates that a report of identification in respect of person or property issued by the Executive Magistrate can be admitted in evidence without calling him as a witness. But the Court may, if it things fit call the Executive Magistrate as a witness.

20) Procedure for recording evidence in absence of the accused has been laid in Sec.299 of the Code. This is the salutory exception to the scheme of trial in the Court. When an accused is absconding and there is no immediate prospect of securing his presence, the trial Court can record evidence of witnesses in his absence. Such evidence may be used against him on his arrest if the deponent is dead or incapable of giving evidence or can not be found. If the accused of an offence punishable with death or imprisonment of life is absconding, the High Court or the Court of Sessions may direct the Magistrate of First Class to hold an inquiry and to examine the witnesses. Such evidence also can be used against the accused on his arrest. The object of Section 299 is to procure and preserve the evidence so as to prevent its loss. This provision is based upon the principle of waiver by conduct.

21) Under Section 311 of the Code the Court may, at any stage of inquiry or trial or other proceeding summon any person as witness, or examine any person in attendance, who has not been summoned as a witness or recall and re examine any person already

examined and the court shall summon and examine or recall and reexamine any such person, if his evidence appears essential for the just decision of the case. It has been held by the Hon'ble Supreme Court in recent judgment in ***Mannan.S.K and others V/s State Of West Bengal 2014 Cri LJ 4072*** that recalling of witness is whether for filling of lacuna or just decision of the case depends on the facts and circumstances of the case. The power under Section 311 is very wide and discretionary. It has to be used with great care and circumspection.

Provisions of Criminal Manual.

22) Rules regarding recording of evidence have been enumerated in Chapter VI of the Criminal Manual. As per para 13 of the Chapter VI, the Criminal trial should be conducted in open Court. Only in sexual offences or any other emotional cases in-camera proceeding should be allowed by the Court. Para 16 of Chapter VI lays down that the evidence of formal character can be taken by affidavit in view of the provisions of Section 296 of the Code of Criminal Procedure. Para 17 says that in the deposition of every witness the name, father's/husband's name, surname, age, profession, residence and District of residence of the witness must be clearly mentioned.

23) According to para 18, Sessions Judges and Judicial Magistrate must record the memorandum of evidence in English in all cases and proceeding. When such memorandum of evidence is recorded, care should be taken that all answers given by the witness are recorded in the regional language and none of the statements

contained in the memorandum are omitted from the record of the deposition in regional language and English Memorandum should bear the same Exhibit Number. The evidence given by each witness should appear at one place and should not be scattered at intervals through the record even if the witness is examined on recalling. Deposition should be recorded by leaving quarter margin on each page so as to facilitate the binding of the record.

24) When recording the evidence of the witness with reference to the map or plan, care should be taken to record the evidence in such a way, that the places mentioned by the witness are easily identifiable on the map or plan. So also as per the guidelines given in para 33 of the chapter six of the manual, care should be taken to prevent doubt as to the identity of the person referred to therein. This can happen when the same individual is known by more than one name. Considering this aspect the name, fathers name and surname or his nick name should specifically mentioned in the deposition in order to identify any individual who has been referred in the deposition. As per para 27 of the criminal manual the evidence should be given in witness box and witness should stand while giving evidence, but in case of physical inability or in compelling circumstances permission can be given to sit.

Recording of Omissions and contradictions.

25) Sections 138, 140, 145, 154 and 155 of the Evidence Act provides for impeaching the credit of a witness by cross-examination. Section 145 of the Evidence Act is in two parts : – the first part enables the opponent to cross examine a witness as to previous

statement made by him in writing or reduced to writing without such writing been shown to him; the second part deals with the situation where cross-examination assumes the shape of contradiction. This section lays down that if the previous contradictory statement of witness is intended to be proved, his attention must be drawn to it. The proper procedure would be to ask a witness whether he made such statement previously. If the witness gives answer in the affirmative, the previous statement in writing need not be proved. If on the other hand, the witness denies to have made the previous statement attributed to him or states that he does not remember it, the cross examiner must read out to the witness the relevant portion which is alleged to be contradictory to his statement in the court and give him opportunity to reconcile the same if it can. It should be borne in mind that in order to contradict a witness with his previous statement, only that part which contradicts the statement in the court should be exhibited. The whole statement should not be exhibited. The manner of exhibiting such part of the previous statement has been contemplated in para 29 of Chapter VI of the Criminal Manual. The said procedure has to be followed.

Recording evidence in certain class of cases.

26) Certain witnesses require a different treatment. Certain precautions are also necessary in recording their evidence. These class of witnesses and precautions can be briefly enumerated as follows:-

Recording evidence of Deaf and dumb witnesses.

27) Section 119 stipulates that a witness who is unable to

speak may give his evidence in any other manner in which he can make it intelligible as by writing or by signs, but such writing must be written and the signs made in open court. This section further provides that such evidence shall be deemed to be oral evidence. But the dumb person or a person observing religious vow of silence cannot speak but can hear. Therefore easiest mode of recording his evidence can be through the answers given by him in writing and in case of illiteracy by interpretation of his signs. In case of deaf witness the task confines to recording of only answers given by such person by signs. But in case of deaf and dumb person interpretation pertains both questions and answers. Section 282 of the Code of Criminal Procedure provides legal sanctity to utility of services of interpreters. It also imposes restriction on the interpreters to make true and correct interpretation. When an interpreter is employed, the deposition of the witness must be recorded in the language in which the deposition is conveyed to the court by the interpreter. If the evidence is recorded under section 119 there must be a record of signs and not the interpretation of signs. It is not the correct compliance of section 119 of the Evidence Act.

Recording the evidence of child witness.

28) Great sensitivity needs to be employed in recording the evidence of a child witness, particularly a child victim. It has to be recorded that he has sufficient intelligence to understand the questions and answer them rationally as required by the Sec. 118 of the Evidence Act. Oaths Act provides that oath cannot be given to a child below 12 years of age. If the child is more than 12 years of age, it has to be ascertained whether he knows the sanctity of the oath. If

he knows the sanctity, oath can be administered. There is no difference between the statement given on oath or without oath because the witness is bound to tell the truth.

Use of Modern technology.

29) Law is not static. It always changes with the change in the society to meet the needs of the society. We have to keep pace with the changes occurring in life while applying legal provisions. Detailed procedure for proof of tape record evidence is described in the Criminal Manual. Substantive amendments in the Evidence Act were carried out in order to provide legal recognition to electronic evidence. Information Technology Act has been introduced. Requisite precautions have to be taken in procuring, preserving and proving electronic evidence. Because possibility of loss of evidence in electronic form is very high. Several factors such as environmental changes, magnetic fields, improper handling and preservation lead to corruption of data in electronic form. At the same time strict adherence to Section 65B of the Evidence Act is imperative for the proof of electronic evidence. Recently in case of ***Anvar vs. Bashir (Civil Appeal No. 4226/2012 decided on 18.09.14***) the Hon'ble Supreme Court deliberated upon the procedure for proof of electronic evidence and concluded,

> *"An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is*

inadmissible".

Section 27 of Indian Evidence Act

30) Section 27 is an exception to the rules enacted in Secs. 25 and 26 of the Evidence Act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of Magistrate, shall be proved as against such person. Where however any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

31) The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

32) The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the

prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well-settled that recovery of an object is not discovery of a fact as envisaged in the Section.

33) The expression "whether it amounts to a confession or not" has been used in order to emphasize the position that even though it may amount to a confession that much information as relates distinctly to the fact thereby discovered can be proved against the accused. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. On a bare reading of the terms of the section it appears that what is allowed to be proved is the information or such part thereof as relates distinctly to the fact thereby discovered. If the police officer wants to prove the information or a part thereof, the Court would have to consider whether it relates distinctly to the fact thereby discovered and allow the proof thereof only if that condition was satisfied.

34) The essential requirements of Section 27 can be spelled out as follows :-

(1) The fact of which evidence is sought to be given must be relevant to the issue. (2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by accused's own act.(4) The persons giving the information must be accused of any offence (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of

information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

35) There is no requirement either under Section 27 of Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100 (5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The Court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth. Thus, what is admissible being the information, the information itself has to be proved and not the opinion formed on the information by the police officer. In other words, the exact information given by the accused while in custody which led to recover of the articles has to be proved. A mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given". The fact discovered embraces the place from

which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery is the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered.

36) In case of ***Shankar Gopal Patil vs. State of Mah.2000 (5) Bom CR 360*** Hon'ble Bombay High Court has issued following directions to all the trial courts. :-

(a) The prosecutor should be careful in seeking compliance to section 27 strictly from the concerned witnesses viz. the panchas and the Investigating Officer who are intended to be examined for that purpose.

(b) The prosecutor should elicit from the witnesses the exact words used by accused with reference to the articles involved in the crime, place where they are kept and the manner in which they are kept.

(c) The Judge recording evidence should take down the words used by witnesses whether panchas or police officer regarding disclosure made by accused to them or regarding statement made by accused to them which led to the discovery of objects, the place where the objects were kept and the manner in which they were kept.

(d) The trial Court should bear in mind that mere proof of panchanama as a document itself is not sufficient and the contents of the panchanama viz. the statements of accused under section 27 of the Evidence Act must be proved and brought on record by the witnesses in their oral testimony.

(e) The prosecutor and the trial Court should not permit summary of the evidence of the witnesses to go on record in so far as the oral evidence is in respect of section 27 of this Act. Whatever witnesses state in the Court in this regard as the words of the accused or the statements of the accused should be taken down in its full original form and there should be no abridging or curtailment in that

regard while recording the evidence.

(f) While examining memorandum of discovery under section 27 of the Evidence Act, that part of the statement of the accused which is liable to be excluded as inadmissible should be specifically mentioned in the deposition.

Muddemal Property.

37) Rules relating to muddemal property have been enumerated in para 67, 68 and 69 of the Chapter VI of the Criminal Manual. It is the duty of the Court that when the muddemal property is produced before it with a list, the list should be exhibited and it should be seen that each article is separately marked and numbered for identification. If the list is not prepared the list should be prepared and it should be exhibited. Particulars of the articles sent to the chemical analyzer and its numbers given by Police as well as the analyzer should be mentioned in the list. Detailed procedure in this context is laid down in para 167 of the Police Manual which is reproduced in Criminal Manual. It is obligatory upon the Magistrate to ascertain that the procedure in para 167 is strictly complied with.

38) Para 68 of the Chapter VI says that when muddemal property is stick or weapon used for commission of the offence its weight and dimensions should be stated in the proceeding so as to enable the appellate Court to form an opinion as to the nature of the weapon and the intention with which it was probably used. This is to facilitate in adjudging the gravity of the offence and to determine appropriate quantum of punishment.

39) No express provisions find place in the Criminal Procedure Code or in the Criminal Manual specifying the procedure

for identification of Muddemal Property and manner of proving it in evidence. By practice and prudence the following procedure can be cautiously followed to avoid miscarriage of justice :- Before examining the witness ensure that the property required for trial is in the court. The objects/articles should be proved through the panchas, I.O. and the witnesses as the case may be (Section 9 of Evidence Act). If wrong object/articles are shown to the wrong witness, weakens the case. Nexus between of the object/weapon recovered with the fact that it had been used for commission of the offence or is connected with the fact in issue or relevant fact must be established. A weapon must be shown to the Medical Officer and his opinion must be solicited as to whether the injuries mentioned in his testimony are possible by the said weapon.

Practical Difficulties.

40) Every day while recording evidence we face several practical difficulties. Although these aspects have not been dealt with in the papers received. But it appears elementary to put forth these practical difficulties and to discuss probable solutions on them before this gathering. Second part of Section 138 of the Evidence Act says that the examination-in-chief and the cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts deposed in chief -examination. Question arises as to whether the wording of Section 138 can be construed so as to mean that the cross-examination is unfettered. The obvious answer is negative. Relevancy is the first restriction imposed upon the cross-examination in Section 138 itself. The objects of cross examination are to impeach the accuracy, credibility, and general value of the

evidence given in-chief, to sift the facts already stated by witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party.

41) Many times same questions are repeatedly asked so as to elicit favourable answers or to create discrepancy. Repetition of questions has to be prohibited in view of the Law laid down by Hon'ble Bombay High Court in case of ***Satara. Currently lodged at Vs. The State (Criminal Appeal No.485/2006 decided on 6.5.2011).***

42) Often compound, complex or presumptive questions are put forth to the witness. Some times a series of questions is asked in one breath. Some times the witness does not understand the question. In all these circumstances the Presiding Officer has to be vigilant. Such questions should not be permitted unless simplified. The cross examiner should be asked to repeat the question if the witness is unable to understand. This minor precaution can prevent improper and incorrect recording of evidence. Many a times questions regarding legal provisions are asked. At times such questions may be relevant to an expert witness but for ordinary witnesses such questions are inconsequential and should not be permitted.

43) Some times it so happens that omissions and contradictions are recorded without examining the previous statement of the witness. Some times the fact which is present in the previous statement is also brought on record as an omission. Some times only a part of a statement does not find place in the previous statement. While recording omissions and contradictions the

Presiding Officer must verify the previous statement. When the omission relates to only part of the statement, it should be specifically recorded to that effect.

44) During cross-examination documents are referred to the prosecution witness. At times they are directly referred without filing them on record. In this method some times xerox copies are also attempted to be referred. Unless the documents are properly filed on record they should not be permitted to be referred in cross-examination. Documents can be referred, not the copies. Here it would not be out of place to mention that the documents proving the defence case can not be permitted to be proved in cross-examination of the prosecution witness, except when they relate directly to the witness.

45) The most vital aspect in recording cross-examination comes when objections are raised. The objections can be classified as – objections as to oral evidence and objections as to documents. In case of ***Bipin Shantilal Panchal Vs. State of Gujrat (2001 Cri.L.J.1254)*** *the Hon'ble Apex Court* held that such objections, except relating to admissibility of document, should be postponed till final hearing and the evidence be recorded subject to objections. The Hon'ble Bombay High Court in case of ***Geeta Marine Services Vs. State (2009 Cri.L.J.910 (Bom.))*** *A*fter considering the Law laid down by Hon'ble Supreme Court in the case of ***Bipin Panchal (supra)*** and ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesarswami and V.P. Temple and another (AIR 2003 S.C. 4548)*** as well as the provisions of Criminal Manual has **observed** *"Therefore, after filing of affidavit of examination-in-chief and after recording*

formal examination-in-chief of the concerned witness, an objection raised regarding proof of documents or insufficiency of proof or of adopting incorrect mode of proof has to be dealt with immediately by the learned Magistrate before proceeding with the recording of cross-examination. Only in a case where the said adjudication involves a decision on complicated questions which require a very detailed adjudication, it can be postponed till the final hearing. In a case where a document is proved in accordance with Evidence Act but an objection is raised to the admissibility of the said document, as held by the Apex Court in the case of ***Bipin Panchal*** *(Supra), such document can be tentatively marked as an exhibit as objection to the admissibility can be decided at the stage of final hearing as contemplated in the decision of the case of* ***Bipin Panchal*** *(Supra). As pointed out earlier, if objection regarding proof of a document is decided, the complainant or accused who has produced the said documents is put to the notice that the document is not held as proved so that he can seek indulgence from the Court of leading further evidence. This avoids possibility of parties applying at the stage of Judgment for recalling the witness or for leading further evidence for proving a document".*

46) Before commencement of a trial it is necessary to ensure that the Muddemal property, C.A. Report, expert opinions such as final opinion of the Medical Officer etc. are produced. Taking recourse to para 25 of Chapter III of Criminal Manual, particularly in cases under Section 138 of Negotiable Instruments Act, an order at Exh.1 can be passed denoting that the case is tried as a summons case. This avoids de-novo trial. These precautions would reduce delay in trial, adjournments and inconvenience to the witnesses. Recourse to Section 294 of the Criminal Procedure Code can curtail the length of

evidence.

Conclusion.

47) Section 165 of the Evidence Act confers a wide discretion upon the Judge. The object of section 165 is to discover the truth or to obtain proper or relevant facts. A judge should endeavour to elucidate the facts and record evidence in clear and intelligible manner. A judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence. But it is his duty to elucidate points left in ambiguity by either side, intentionally or unintentionally, to come to a clear understanding of the actual event that occurred and to remove the ambiguities as far as possible. The Supreme Court has criticized the silence of trial judges who have permitted the trials to develop into a contest between the prosecution and defence resulting into contradictions entering into the trial in several cases. 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. He must become a participant in the trial by showing intelligent and active interest. The Judge has to take a participatory role in the trial. He has to monitor the proceedings in aid of Justice in the manner that something which is not relevant is not unnecessarily brought on record. He has to control the proceedings effectively so that the ultimate objective i.e. truth is arrived at.

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