IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 2349 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
	Circulate this judgement in the subordinate judiciary.	

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STATE OF GUJARAT

Versus

ASHOKKUMAR LAVJIRAM JOSHI

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Appearance:
MS. MOXA THAKKAR, ADDL. PUBLIC PROSECUTOR(2) for the PETITIONER(s) No. 1
NOTICE SERVED BY DS(5) for the RESPONDENT(s) No. 1,2,3

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 06/04/2018

ORAL JUDGMENT

1. The respondents Nos.1 and 2-original accused persons, although served with the notice issued by this Court, yet have chosen not to remain present before this Court either in person or through an advocate and oppose this application.

2. Rule returnable forthwith. Mr. Tushar Chaudhari, the learned counsel, waives service of notice of rule for and on behalf of the respondent No.3-original first informant.

3. By this application under Article 227 of the Constitution of India, the State of Gujarat calls in question the legality and validity of the order passed by the 2nd Addl. Sessions Judge, Banaskantha dated 05.01.2018 below Exh.125 in the Sessions Case No.40 of 2011. It appears that the respondents Nos.1 and 2 have been put on trial for the offence of murder in the court of the 2nd Addl. Sessions Judge, Banaskantha at Deesa. In the course of the investigation, the Circle Officer was asked by the Investigating Officer to prepare a map of the scene of offence. Accordingly, the map was prepared and is sought to be relied upon by the prosecution by adducing the same in evidence. This map of the scene of offence was prepared, at the relevant point of time, by one Popatlal S. Trivedi, serving as a Circle Officer in the office of the Dantiwada Taluka Panchayat. Popatlal S. Trivedi has retired from the service. In such circumstances, the prosecution sought to adduce the map of the scene of offence in evidence through the P.W. No.20, namely, Manabhai Ajabhai Patel. This Manabhai, as on date, is serving as the In-charge Panchayat Circle Officer in the office of the Dantiwada Taluka Panchayat. The deposition of the P.W. No.20 is extracted hereunder;

"***Sessions Case No. 40 / 2011***

Exhibit No. 125

Deposition of Prosecution Witness No. 20

I do hereby on solemn affirmation state that

My Name	Manabhai Ajabhai Patel		
Religion	Hindu	Mobile No.	9426749101
Age about	57 years	Occupation	Job
Residence	Dantiwada	District	Banaskantha
Oath administered	Examination in chief	A.P.P.	Mr. D.K. Purohit

At present, I have been discharging my duties as the In-Charge Panchayat Circle Officer in the Dantiwada Taluka Panchayat. Popatlal S. Trivedi had been discharging his duties as the Circle Officer on 11/12/2010. He received police yaadi to prepare a map of the scene of offence in connection with the offence registered vide I C.R. No. 78/10 with Panthavada Police Station. He prepared the map of the scene of offence on the basis of the panchnama and the said yaadi and kept it in the Taluka Panchayat Office. He has retired from the Dantiwada Panchayat about two years back from today. I have brought the said map today as the same was given to me by the staff of the Taluka Panchayat and I produce the same, which bears his signature. I identify it. (Defence has raised objection in exhibiting this document and also to bring the same on record.) First of all, before the Prosecution opens its case, all the documentary evidences have to be produced in the court. It is further submitted that the copy of the documentary evidences, relied upon by the Prosecution, have to be submitted in the court of the Magistrate u/s 207 before the case is committed. The practice of the Prosecution of adducing the document at the last stage cannot be termed as fair trial. The Defence has not been able to defend himself till the final stage of the trial. Further, the said map has not been prepared by the witness, who has produced the same and he was not present at the relevant point of time. He is not aware of the said documentary evidence. He has not deposed in his deposition as to under whose custody the said document was after it was prepared and as to from whose custody he has brought it. Further, looking at the said map, it appears that it was made in December, 2010, but it has not been explained as to why Prosecution has concealed the said document till date. Under such circumstances, these documents cannot be exhibited or admitted in the evidence. The APP has submitted that this witness has brought the map from

Dantiwada Taluka Panchayat. Moreover, December – 2010 is written in this document, but date is not written. Moreover, the witness giving deposition is acquainted with the signature of the Circle Officer and he has worked with him. This map has been prepared as per the panchnama of the scene of offence. Therefore, it should be admitted in the record and exhibited. Considering all the submissions, it is found that when the copies of the police papers were supplied along with the charge sheet to the accused party as per section 207, why the copy of this document was not supplied and as per section 226, when the Prosecution opens its case before framing of the charge against the accused, the documentary evidences, on which the Prosecution relies upon, should be produced before the Court and at this stage also the Prosecution did not produce the map of the place. Though this map was prepared in the year 2010, the original map or copy of it, has not been submitted before the court till date. Therefore, the witness giving deposition does not have personal information regarding the said document. He is only acquainted with the signature of the officer who prepared the map. Except this, he has not prepared the map nor he was present when the map was being prepared. Under such circumstances, permission cannot be granted to produce the map at the last stage of the trial. I agree with the submission of the Defence and as per the principle of fair trial, copy of the documentary evidences on which the Prosecution relies upon against the accused, should be supplied to the Defence in advance. Therefore, the demand to produce the map of the scene of offence is rejected. The map of the scene of offence produced by this witness during the deposition is returned to the APP.

As the APP wants to prefer Revision Application against the order, rejecting the permission to produce the said document, further deposition of the witness is adjourned."

4. It appears that when the map of the scene of offence was produced by the P.W. No.20 for the purpose of reading into the evidence, an objection was raised by the defence counsel that the map in question should not be permitted to be produced

and proved through the P.W. No.20 because the same has not been prepared by him. To put it in other words, the objection raised by the defence counsel appears to be that it is only Popatlal S. Trivedi, retired Circle Officer, who could have entered the box and prove the map. The objection raised by the defence counsel as regards the mode of proof was upheld by the Trial Court. Being dissatisfied with the same, the State of Gujarat is here before this Court.

5. Mr. Chaudhari, the learned counsel appearing for the original first informant-respondent No.3 supports the learned APP appearing for the State.

6. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the Trial Court committed any error in upholding the objection raised by the defence so far as the admissibility of the map of the scene of offence is concerned.

7. It appears that the court below is labouring under a misconception of law that the map of the scene of offence should have been a part of the charge-sheet and ought to have been supplied to the accused along with the charge-sheet at the time when the case came to be committed to the Court of Sessions. What I have been able to gather is that the court below is of the view that the provisions of section 207 of the Cr.P.C were not complied with.

8. It also appears that as the map was prepared in the month of December, 2010, the Trial Court was taken by

surprise as to why the same was being produced for the first time before the court after a period of almost seven years. According to the Trial Court, as the map was prepared by Popatlal S. Trivedi and is sought to be proved through Manabhai Ajabhai Patel, the same is impermissible in law because Manabhai cannot be said to have any personal knowledge as regards the place of occurrence, i.e, the scene of offence.

9. What I have been able to understand is that although the genuineness of the document in question, i.e., the map of the scene of offence is not disputed, yet what is being questioned is the mode of proof.

10. Ordinarily, the documents like the sketch or map of the scene of offence etc. are not a part of the charge-sheet. Such documents can be supplied to the accused even at a later stage, i.e., during the course of the trial. It is a matter of common knowledge that the documents like FSL reports etc., at times, are not part of the charge-sheet because ordinarily such documents are received at a late stage.

11. In such circumstances, I am not in agreement with the view of the court below that the provisions of section 207 of the Cr.P.C have not been complied with. It is always open for the prosecution to produce such a piece of document in the course of the trial. However, the only obligation is that a copy of the same should be provided to the accused. I had an occasion to explain the position of law very exhaustively in the case of ***Jayeshbhai Khemchandbhai Patel vs. State of Gujarat***, Special Criminal Application No.778 of 2017, decided

on 17.03.2017. In the said case, I have discussed the law as regards sections 173 and 207 of the Cr.P.C. I may quote para-50 of the said judgment,in which, the legal aspects have been summarized;

> *[1] Section 173(5) of the Cr.P.C. is not mandatory in the sense that as there is no specific prohibition, it cannot be held that the additional document cannot be produced even in the course of the trial while the evidence is being recorded of the prosecution witnesses.*
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> *[2] If the prosecution, for any good reason, has thought fit not to provide certain documents to the accused at the stage of framing of the charge or there is some omission on its end in this regard, then such document can always be relied upon in the course of the trial and can be produced subsequently.*
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> *[3] In contradistinction to the provisions of Section 173 of the Code, where the legislature has used the expression documents on which the prosecution relies upon are not used under Section 207 of the Code. In such circumstances, the provisions of Section 207 of the Code will have to be given a liberal and relevant meaning so as to achieve its object.*
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> *[4] Section 173(7) of Cr.P.C. gives a discretion to the police officer to provide copies of all or any of the documents (including statements of witnesses) to the accused, if he finds it convenient.*
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> *[5] However, under Section 207 of Cr.P.C., it is mandatory for the court to provide copies of the investigation papers.*
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> *[6] Though the legal provision laid down as above, in actual practice, it is the police officer who provides copies of the papers of the investigation to accused persons after filing of the charge-sheet.*
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> *[7] As per Section 173(5) of Cr.P.C., the police officer is required to send to the court only those documents on which the prosecution proposes to rely and only those*

statements of witnesses whom the prosecution proposes to examine. Moreover, under Section 173(6) of Cr.P.C., the police officer can request the court to exclude certain statements or their parts from the copies to be given to the accused person by the court, for the reasons mentioned in that section.

[8] Section 207 of Cr.P.C. describes copies of what documents or statements have to be given to the accused persons. Basically, these include the charge-sheet, the F.I.R., statements of witnesses, confessions and other documents of investigation on which the prosecution proposes to rely. While giving the documents to the accused, the court may not give copies of those statements for which the police officer has made a request under above-mentioned Section 173(6); however, the court may decide to give copies of such statements also if it considers necessary.

[9] Section 207 of Cr.P.C. further provides that if a particular document is very voluminous, the court may allow only inspection of the document instead of giving copy thereof to the accused person.

[10] One of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure.

[11] The right of the accused to receive the documents/ statements submitted before the Court is absolute and it must be adhered to by the prosecution and the Court must ensure supply of the documents/statements to the accused in accordance with law. The accused has a statutory right of confronting the witnesses with the statements recorded under Sections 161 and 164 of the Code. The accused has statutory right of confronting the expert witnesses too with their opinions.

[12] The words all documents or relevant extracts thereof, on which the prosecution proposes to rely will cover not only the opinion, but also the ground or the reasons for such an opinion given by the State expert i.e. Handwriting Expert, Ballistic Expert, Serologist Report,

etc. The expert has to be examined and he would have to state before the Court his grounds for such an opinion. Those grounds should be supplied to the accused if they are sent by him to the Investigating Officer, and that would be in the nature of a statement obtained from him, as if it were under Section 162 of the Cr.P.C.

[13] The right of the accused with regard to the disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial . On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from the equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon the documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

[14] The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C. is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208, Cr.P.C., seriously affects the right of an accused to a free and fair trial.

[15] The principal of Natural Justice are an integral part of a fair trial. Article 21 of the Constitution of India and the Universal Declaration, mentioned above, both guarantee a fair trial to the accused. Even if the Code does not contain any provision for providing "all" the evidence collected by the investigating agency, such a

provision has to be read into the Code. For, the principle of Natural Justice - audi alteram partem - would have to be read into the Code. It is trite to state that an opportunity of hearing means effective and substantial hearing. Truncated evidence, half hidden evidence given to the accused or placed before the Court, do not amount to effective hearing. Thus, under the principle of audi alteram partem the accused would have the right to access the evidence which is in his favour, but which the prosecution is unwilling to produce in the Court and whose disclosure does not harm the public interest.

[16] The investigating agency and the prosecution both represent the State. Every action of the State is legally required to be fair, just and reasonable". In case, the investigating agency and the prosecution withhold any evidence in favour of the accused from the accused, they are not being fair, just and reasonable with the accused. Therefore, their action would be in violation of Art. 14 of the Constitution of India. Article 21 of the Constitution of India also requires that the procedure established by law should be fair and reasonable. A procedure which permits the withholding of evidence which is in favour of the accused from the Court and from the accused, cannot be termed as "fair and reasonable". Thus, such a procedure would be in violation of Art. 21 of the Constitution of India. Therefore, Section 172(3) would have to be interpreted in such a way as to make it commensurative with the Constitutional spirit.

[17] If the prosecution wants to rely upon the grounds of the opinion given by an expert in respect of any test as a piece of evidence against an accused, that has to be supplied to the accused under section 173(5) of the Cr.P.C. "

12. It is true that in the case on hand, the document in question, i.e., the sketch of scene of offence was prepared or drawn long time back and the same came to be produced and relied upon only in the course of the trial without furnishing the copy of the same to the accused along with the charge-sheet However, I do not agree with the view taken by the court below that the document could not have been produced by the

prosecution or relied upon at a late stage, i.e, in the course of the trial. Let me quote few decisions on this aspect.

13. In the case of **State vs. Jagadish Pandey [AIR 1958 Calcutta 311]**, a learned Single Judge of the Calcutta High Court was called upon to answer a reference made by the Sessions Judge under Section 438 of the old Code of Criminal Procedure. In the said case, the accused was being tried under Section 324 of the I.P.C. in accordance with the provisions of Chapter XXI of the Cr.P.C. The copies of the necessary documents were furnished to the accused under the provisions of Section 173(4) of the old Code. The case was fixed for hearing. On the date of hearing, an application was filed by the officer in-charge of the conduct of the prosecution, praying that three witnesses be summoned to give evidence in defence. The learned Magistrate refused the prayer on the ground that none of those witnesses had been examined by the police during the investigation and their statements consequently had not been recorded under Section 161 of the Cr.P.C. While quashing the order of the Magistrate and answering the reference accordingly, the Court observed as under:

> *3. Section 173 (4) of the Code of Criminal Procedure provides that the officer-in-charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-s. (1), of the first information report recorded under S. 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under S. 164, and the statements recorded under sub-s. (3) of Ss. 161 of all persons whom the Prosecution proposes to examine as its witnesses. The learned Magistrate seems*

to think that this is a provision designed to benefit the accused person by giving him an advance copy of the statements which the witnesses have made against him during investigation. Obviously copies of all police papers, including the first information report and confessions and statements of witnesses examined by the police during investigation are intended to be given to the accused for his benefit. The question arises whether this provision of the law implies that the prosecution is prevented from calling any witness at the trial who has not been examined by the police or whose statement has not been recorded by them under S. 161 of the Code. In my view, it was not the intention of the legislature to shut out relevant evidence by enacting sub-s. (4) of S. 173 of the Code. The purpose might have been to benefit the accused by giving him in advance, copies of the documents and statements referred to in the sub-section; but that could not possibly have the effect of preventing the prosecution from calling other competent evidence at the trial.

4. Reference may be made to S. 251-A of the amended Code of Criminal Procedure which provides that after the accused has been given copies of documents and papers referred to in S. 173 (4) and after hearing the parties, if the Magistrate is of the view that there is ground for presuming that the accused has committed an offence which he is competent to try and adequately punish, it shall be his duty to frame a charge against the accused. If thereafter the accused claims to be tried, the Magistrate has to fix a date for examination of witnesses; sub-s. (7) provides that on the date so fixed the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. There is a proviso attached to the sub-section which says that "the Magistrate may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined, or recall any witness for further cross-examination." The question arises whether in view of sub-s. (7) of S. 251-A, the prosecution is to be limited to examining only such persons as have already been examined by the police and whose statements have been recorded in accordance with the provisions of S. 161 (3) of the Code. The learned Magistrate's view seems to be that if examination was permitted of persons at the

trial whose statements have not been recorded by the police, that would take the accused person by surprise and prejudice the defence. A trial, in order to be fair, has to be so both to the prosecutor and to the accused. If the prosecution is to be restricted to examining only those persons whose statements have been recorded by the police, that might very much affect Proof of the charge brought against the accused. The real purpose of S. 161 (3) taken along with S. 173 (4) of the Code seems to be that the accused should be given a fair treatment by being told what the case against him is and by apprising him of the fact that certain persons have furnished to the police materials for his prosecution. It is, of course, true that when those previous statements are proved according to law, they may affect the value of the evidence in Court. But the mere fact that the police did not consider witness material during investigation or collection of evidence, will not, in my view, preclude the prosecutor from asking for or the Magistrate from calling such witness at the trial. The language of sub-s. (7) of S. 251-A seems to me to be purposely wide so as to enable the prosecutor to produce all such evidence as may be produced in support of the prosecution. If we are to read "all such evidence" in the sub-section as meaning only such evidence as relates to those of persons who have been examined by the police, it will be reading into the sub-section something which is not there. I do not think sub-s. (4) of S. 173 controls sub-s. (7) of S. 251-A of the Code. Moreover, a Magistrate in the discharge of his judicial functions must always be left free to exercise his discretion in the matter of allowing parties to produce evidence. The exercise of that discretion is controlled and regulated by various factors, one of them being the factor of admissibility of evidence. But if in the interests of justice, the Magistrate feels that the prosecutor should be allowed to examine a witness whose statement has not been recorded by the police during investigation, I do not think it would be right to limit the prosecution to producing evidence of only such persons as have been examined by the police during investigation. Further it seems clear that the proviso attached to sub-s. (7) of S. 251-A gives the Magistrate power to defer the cross-examination of a witness until a future date. That obviously prevents the accused from being taken by surprise so that he can if so permitted cross-examine the new witness on a later date upon his examination-in-

chief. In my view, it could not have been the intention of the Legislature to limit the operation of sub-s. (7) of S. 251-A by compelling the prosecution to confine itself to the evidence of only those persons whose statements have been recorded by the police.

5. There is yet another aspect of the matter. If the rule of S. 173 (4) of the Code is to be considered irrelaxable, then S. 540 would become otiose. That section provides that any Court may, at any stage of any inquiry, trial or other proceeding under the Code summon any person as a witness or examine any person in attendance, though not summoned as witness, or recall or re-examine any person already examined, provided that the Court is satisfied that the evidence of such witness is essential to a just decision of the case. The magistrate's view of sub-sec. (4) of sec. 173 taken along with sub-sec. (3) of sec. 251-A would perhaps affect even sec. 540. I cannot persuade myself that this was ever the intention of the Legislature to rob the prosecutor of the means of proving his case by calling relevant and useful evidence or to rob the Court of its power of doing complete justice between party and party by limiting the citation of evidence in the manner suggested by the Magistrate in the order in question. I think despite sub-sec. (4) of sec. 173 of the Code of Criminal Procedure a prosecutor has the right to examine a witness whose statement has not been recorded by the police under sec. 161 (3) of the Code, and certainly the Court has power under sec. 540 to examine or recall or re-examine any person whose evidence appears to the Court to be essential to a just decision of the case. The structure of evidence in Court cannot always be a mere replica of statements during investigation.

14. In **Public Prosecutor vs. C.S. Pachiappa Mudaliar [AIR 1958 Madras 295],** after the charges were framed against the accused persons, the prosecution felt the need to furnish some more documents on which they proposed to rely upon. The copies of those documents were offered to the accused, but the accused declined to receive the same. The learned Magistrate took the view that the prosecution could

not have filed such documents as they were not tendered in the first instance. The High Court, while allowing the documents to be tendered by the prosecution, held as under:

> *"It is true that it is the duty of the prosecution to furnish in the first instance itself under the provisions of S. 173 all the documents on which they rely. But, in the course of the trial, if the prosecution think it necessary to file additional documents or statements of witnesses on which they propose to rely, the section does not prevent them from filing them. They are entitled to file such documents, the only obligation being that they must be given in advance to the accused, so that he may be enabled to make use of the documents to his best advantage. The Magistrate is therefore not correct in holding that the prosecution is not entitled to file these documents. But in terms of the prayer in the petition. I must say that no Magistrate can compel the accused to receive any documents that are given or tendered to him by the prosecution. But the conduct of refusal must be noted by the Magistrate so that the accused may not afterwards turn round and raise an argument that the documents have not been tendered to him and he has been prejudiced thereby. I do not think, however, that the Court has any power to compel the accused to receive whatever document that is given by the prosecution. If he does not receive it, he has to suffer; but the prosecution cannot be penalised for his refusal to receive the document."*

15. In the case of **Shantilal vs. State of Madhya Pradesh [1959 Madhya Pradesh 290],** a learned Single Judge was called upon to answer a reference made by the Sessions Judge as regards permitting the prosecution to produce additional documents which were not a part of the report under Section 173 of the Cr.P.C. While setting aside the order of the Magistrate, the Court held as under:

> *"From the wording of section 173 (4), it is very clear that*

the law imperatively requires copies of all documents on which the prosecution relies to be furnished to the defence before the commencement of the trial. It is also true that the provision is mandatory in nature. But in this provision, we cannot read any disabling provision so that the court becomes powerless to allow the prosecution to file fresh documents. In the present case, the first document above-named came to the investigation officer after he had submitted the challan to the court and the second document is patently one which could not be filed with the challan because that judgment was pronounced subsequent to the institution of the police report in court. That apart, the magistrate in the discharge of his judicial functions must always be left free to exercise his discretion in the matter of production of evidence by the parties, within the limits prescribed by the law, and if there is no express provision debarring evidence to be produced at a certain stage, the procedure should be construed in such a manner as not to deprive the court of that discretion. In Section 173, nor in any other provision of the Code of Criminal Procedure, do I find any such disabling provision; I do not find in the Code any provision which prevents the prosecution from filing additional documents or statements of witnesses on whom they propose to rely. What value is to be attached to such additional documents which are produced at a late stage, will always depend upon the peculiar circumstances of each case. I therefore hold that the trial magistrate has power to admit in evidence both the documents which the prosecution seeks to produce. Of course, copies thereof must be supplied to the defence. I am supported in my view by a recent decision of the Madras High Court in Public Prosecutor v. Pachiappa, AIR 1958 Mad 295."

16. In the case of **State vs. Raghunath [AIR 1963 Rajasthan 85]**, a learned Single Judge of the Rajasthan High Court was called upon to answer a reference made by the Additional District Magistrate, Jodhpur as regards the right of the prosecution to rely upon a document which was not a part of the report under Section 173 and the copy of which was not furnished to the accused. The Court, relying upon the decision

of the Supreme Court in the case of **Narayan Rao (supra),** answered the reference accordingly as under:

> *3. It is true that under Section 1/3(4) there is an obligation on the prosecution to furnish or cause to be furnished to the accused copies of all the documents on which it proposes to rely. The object of furnishing copies referred to in Section 173(4) to the accused is to safeguard his interests so that he may have notice of the case he is required to meet. There is however, nothing in subsection (4) which prevents the prosecution from putting in such documents at the trial which at the time of the report were not available to them or if they were available their copies were not supplied to the accused. This sub-section came to be interpreted by the Supreme Court in* ***Narayan Rao v. State of Andhra Pradesh, (S) AIR 1957 SC 737*** *in which it was held that :*
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> > "*The provisions contained in Section 173(4) and Section 207A(3) have been introduced by the amending Act of 1955, in order to simplify the procedure in respect of inquiries leading upto a Sessions trial, and at the same time, to safeguard the interests of accused persons by enjoining upon police officers concerned and Magistrates before whom such proceedings are brought to see that all the documents necessary to give the accused persons all the information for the proper conduct of their defence, are furnished. But non-compliance with those provisions has not the result of vitiating those proceedings and subsequent trial. The word 'shall' occurring both in sub-sec. (4) of Section 173 and sub-sec. (3) of Section 207A, is not mandatory but only directory, because an omission by a police officer, to fully comply with the provisions of Section 173, should not be allowed to have such a far-reaching effect as to render the proceedings including the trial before the Court of Sessions, wholly ineffective.*"
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> *It will thus be clear that the provisions of the said sub-section are not mandatory but only directory. It*

therefore, follows that a non-compliance of this provision cannot debar the prosecution from examining any witness or producing any document during the course of the trial. On the other hand sub-section 7 of Section 251A which lays down the procedure to be followed by the Court in cases instituted on police report is in very wide terms and the Magistrate is bound to take all such evidence as may be produced in support of the prosecution. No restriction has been put on the right of the prosecution to produce evidence at the trial in this sub-section. Sub-sec. (4) of S. 173 does not control sub-section (7) of Section 251A of the Code. The words 'all such evidence' do not mean only such evidence as is referred to in sub-section 4 of Section 173. If that were so then something more will have to be read in sub-section (7) which is not there. All that can be inferred from sub-section (4) of Section 173 is that before the prosecution is allowed to put in additional document it should furnish a copy of the same in advance to the accused so that he may not be prejudiced in his defence. If it is shown that by lie production of additional evidence the rights of the accused are prejudiced in any manner the Magistrate may recall any witness for the purpose of cross-examination and also give him opportunity to meet that additional evidence. However, the provisions of sub-section 173 cannot be read to mean that the prosecution is prevented from putting in additional document at the trial copy of which had not been supplied to the accused. In ***Thota Ramalingeshwara Rao's case, AIR 1958 Andh Pra 568*** *relied on by Mr. Singhvi it was held that the provisions of Section 173(4) are mandatory and its non-compliance leads to failure of justice. In view of the decision of the Supreme Court referred to above this case cannot be taken as laying down good law. A Division Bench of the same Court in* ***Chandu Veeriah's case, AIR 1960 Andh Pra 329*** *dissented from the view expressed in* ***Thota Ramalingeswara Rao's case, AIR 1958 Andh Pra 568,*** *and held that there is no express prohibition in Section 173(4) or Section 251-A against the use by the prosecution of documents copies of which have not been furnished. These provisions do not, by implication, deny the prosecution using a document at the enquiry or trial, a copy of which does not happen to have been furnished to the accused. In* ***re Rangaswami Goundan, (S) AIR 1957 Mad 508*** *though it was held that provisions of section 173(4) are mandatory yet it*

was held that the report of the chemical examiner which is usually not received by the time the enquiry commences can be admitted in evidence during the course of the enquiry, even though its copy had not been supplied to the accused. There is ample authority in support of the view that if in the course of trial the prosecution thinks it necessary to file additional documents or statements of witnesses on whom they propose to rely Section 173(4) does not prevent them from filing them. See ***Public Prosecutor v. C. S. Pachippa Mudaliar,*** *AIR 1958 Mad 295,* ***State v. Jagdish Pandey,*** *AIR 1958 Cal 311, In* ***re Shantilal,*** *AIR 1959 Madh Pra 290 and* ***State v. Baikunthanath Mohanta,*** *AIR 1960 Orissa 150. In my view the learned City Magistrate was in error in rejecting the request of the prosecution to prove the entries in the log book by the evidence of Munir Khan. In order to safeguard the interests of the accused he should have directed the prosecution to supply copies of the entries of the log book to the accused in advance. It has not been urged before me that the entries of the log book are not relevant in this case.*

17. In the case of **State vs. Baikunthanath Mohanta [AIR 1960 Orissa 150]**, a learned Single Judge of the Orissa High Court was called upon to answer a reference made by the Additional District Magistrate and somewhat in the following facts:

The police submitted chargesheet under Sections 379 read with 34 of the I.P.C. against six persons. The Court took cognizance upon the chargesheet. The Magistrate, prior to the commencement of the trial, satisfied himself that the documents referred to under Section 173(4) of the Cr.P.C. were duly handed over to the accused persons. After perusing those papers, the Magistrate framed charges under Sections 379 read with 34 of the I.P.C. Six prosecution witnesses were examined, cross-examined and discharged. The prosecution,

then wanted to examine an expert and also to prove his report. The learned Magistrate took the view that the report of the expert was inadmissible inasmuch as a copy of the same had not been granted to the accused prior to the commencement of the trial along with the other papers referred to under Section 173(4) of the Cr.P.C. While answering the reference, the learned Single Judge observed as under:

> *"2. There has been some divergence of judicial opinion on this question. In AIR 1958 Andh Pra 568 the learned Judge took the view that the provisions of Sec. L73(4) Cr. P.C. were mandatory and that the accused should be furnished with copies of all documents on which the prosecution relies, prior to the commencement of the trial; and that after the; commencement of the trial the prosecution should not be permitted to produce and prove any new documents even though the accused may get sufficient opportunity to cross-examine the prosecution witnesses with reference to the new documents. The Calcutta and Madras High Courts have, however, taken a contrary view. Thus, in* ***State v. Jagdish****, AIR 1958 Cal 311 it was pointed out that the provisions of Sec. 173(4) Cr. P.C. are directory and that even after the commencement of the trial the prosecution may prove additional documents in the usual way - provided the accused gets a full opportunity to cross-examine the prosecution witnesses in the light of those documents. The Madras High Court has taken a similar view in* ***Public Prosecutor v. C.S. Pachiappa*** *AIR 1958 Mad 295.*
>
> *3. With respect, I would follow the Calcutta and Madras view. It is true that the provisions of Sec. 173(4) Cr. P.C. should be followed strictly and copies of all the papers mentioned in that Sub-Section and on which the prosecution relies should be furnished to the accused persons before the trial commences. But after the commencement of the trial, the proper section to be followed would be Sec. 251-A(7) Cr. P.C. by which the Magistrate is required "to proceed to take all such evidence as may be produced in support of the*

prosecution". The expression "all evidence" in this clause must include documentary evidence also. It is likely that some documents which were not available during police investigation may become relevant and may have to be produced subsequently. In such a case the prosecution should not be denied an opportunity to prove these documents - provided it is ensured that no prejudice is caused to the accused and he is given an opportunity to cross-examine the prosecution witnesses in the light of those documents; if necessary the accused may be granted an adjournment for the purpose of facilitating such cross-examination. If the view of the Andhra High Court in the above-cited case be accepted the power conferred on the Court by Sec. 540 Cr. P.C. would be rendered ineffective in many cases. The ends of justice may sometime require that even after the commencement of the trial some additional documentary evidence may have to be produced and proved by the prosecution, and the exercise of discretion by the Court cannot be fettered merely because the relevant papers were not furnished to the accused, before the commencement of the trial, as required by Sec. 173 (4). On this question I would, with respect, agree with the Calcutta view given in AIR 1958 Cal 311."

18. With regard to the second aspect of the matter, i.e., the mode of proof, the Trial Court could have easily avoided the controversy by permitting the P.W. No.20 to produce the map by giving a tentative exhibit with an understanding that the probative or evidentiary value of the document would be looked into at the time of the final appreciation of the evidence. The Supreme Court and this Court has, time and again, impressed upon the Trial Courts not to waste time on such issues. I could have disposed of this application by directing the Trial Court to permit the P.W. No.20 to produce the map and give a tentative exhibit with an understanding that its probative or evidentiary value be considered in the last in accordance with law while appreciating the overall evidence on record. However, having regard to the importance of the

issue, as it has something to do with the procedural law, let me try to explain the correct procedure in this regard. Ordinarily, the documentary evidence like the postmortem report, site plan, as prepared by the draftsman, should be proved by the prosecution through the makers of such documents. For example, it is only the doctor, who has performed the postmortem, who should ordinarily enter the witness box and prove the postmortem report unless for the circumstances beyond the control of the prosecution it is not possible to produce the said witness. Say for example, the doctor who had performed the postmortem has passed away or has met with an accident making him completely disabled. In such circumstances, any other doctor acquainted with the signature of the Medical Officer as contained in the postmortem report can enter the box and prove the contents of the postmortem report. In the same manner, when the documentary evidence like the map or sketch of the scene of offence, is sought to be relied upon by the prosecution in the course of the trial, then it is only the maker of such sketch or map, who should enter the box and prove the map. The reason for saying so is that the person, who has actually prepared the map or sketch is the person who has seen the entire place of the incident and would be in a better position to depose. It is not clear from the materials on record or the impugned order, why the prosecution was not able to examine Popatlal S. Trivedi. Mr. Trivedi might have retired from the service, but he could have still been summoned as a witness by the Trial Court, and if summoned, then he is duty bound to appear before the Trial Court for the purpose of his deposition. Manabhai may be acquainted with the signature of Mr. Trivedi and he may prove the signature, but it would be difficult for Manabhai to prove

anything further as regard the contents of the map because Manabhai might not be having any idea about the place of occurrence having not visited the same.

19. In this regard, let me refer to a three Judge Bench decision of the Supreme Court in the case of T***ori Singh vs. State of U.P.***, *AIR 1962 SC 399.*

20. In that case it was contended on behalf of the appellant therein that if one looked at the sketch map, on which the place where the deceased was said to have been hit was marked, and compared it with the statements of the prosecution witnesses and the medical evidence, it would be extremely improbable for the injury which was received by the deceased to have been caused on that part of the body where it had been actually caused if the deceased was at the place marked on the map. In repelling the above contention the Supreme Court observed, inter alia,:

> ".....the mark on the sketrh- map was put by the Sub-Inspector who was obviously not an eye-witness to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-Inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of S. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be

> inadmissible in view of the clear provisions of S.162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation."(emphasis supplied)

21. While on this point, it will be pertinent to mention that if in a given case the site plan is prepared by a draftsman-and not by the Investigating Officer-entries therein regarding the place from where shots were fired or other details derived from other witnesses would be admissible as corroborative evidence as has been observed by the Supreme Court in Tori Singh's case (supra) in the following passage:

> "*This Court had occasion to consider the admissibility of a plan drawn to scale by a draftsman in which after ascertaining from the witnesses where exactly the assailants and the victims stood at the time of the commission of offence, the draftsman put down the places in the map, in Santa Singh v. State of Punjab, AIR 1956 SC*
>
> *526. It was held that such a plan drawn to scale was admissible if the witnesses corroborated the statements of the draftsman that they showed him the places and would not be hit by S.162 of the Code of Criminal Procedure.*"
>
> *(emphasis supplied)*

22. The learned APP submitted that the sketch or map of the scene of offence was prepared by a Circle Officer in exercise of his official duties. According to the learned APP, the Circle Officer is a public servant. The site inspection map or sketch are records made in discharge of his official duties and the entries in such records are relevant fact under section 35 of the Evidence Act and as such those documents are public documents as these are prepared by the public servant while

discharging his official duties and as such admissible in evidence.

23. The learned APP, while relying on section 74 of the Evidence Act submitted that the documents forming acts or records of the acts of public officers are public documents. Section 77 of the Evidence Act provides that the contents of the public documents may be proved by producing their certified copies. The learned APP placed reliance on a decision of the Supreme Court in the case of ***Madamanchi Ramappa vs. Muthaluru Bojjappa***, *AIR 1963 SC 1633*, wherein it has been observed that if a document is certified copy of the public document, it need not be proved by calling a witness.

24. The learned APP also placed reliance on a decision of the Supreme Court in the case of ***State, through Inspector of Police, A.P. vs. K. Narasimhachary***, *2005 (8) SCC 364*. The said case was in connection with an order of sanction under section 19 of the Prevention of Corruption Act, 1988. The Supreme Court observed as under;

> *"A public document can be proved in terms of Sections 76 to 78 of the Evidence Act. A public document can be proved otherwise also. The High Court, therefore, was not correct in invoking the provisions of Section 47 of the Indian Evidence Act in the instant case as it was not called upon to form an opinion as to by whom the said order of sanction was written and signed. PW-6 was not examined as an expert or was required to give his opinion as regard the correctness or otherwise of the signature of the said N. Madanmohan Reddy. The authenticity of the said document was never in question."*

25. Which of the documents are to be public documents has been mentioned in section 74 of the Evidence Act. The following documents are public documents;

(1) Documents forming the acts or records of the acts;

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents.

26. A public document is such a document contents of which are of public interest and the statements are made by authorized and competent agents of the public in the course of their official duty. Public are interested in such a document and entitled to see it, so that if there is anything wrong in it they would be entitled to object. In that sense it becomes a statement that would be open to the public to challenge or dispute and therefore, it has a certain amount of authority.

27. With reference to the question of admissibility of a public document in evidence, the following observations were made by Lord BLACKBURN:

> *"There "should be a Public inquiry, a Public Document, and made by a Public Officer. I do not think that, 'Public' there,is to be taken in the sense of meaning of the whole world. I think an entry in the books of a Manor is 'public' in the sense that it concerns all the people interested in the manor and an entry, probably, in a Corporation book*

concerning a matter or something in which all the corporation is concerned would be 'public' within that sense. But must be a 'Public Document' and it must be made by a Public Officer. I understand a 'public document.' there, to mean, a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or quasi judicial, duty to enquire. It should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards" (per BLACKBURN J. Sturla v. Freccia, 50 LJ Ch 96 : 5 App Cas 623, 644.)"

28. If is difficult for me to accept the submission of the learned APP that a map or sketch prepared by a Circle Officer of the scene of offence would fall within the ambit of 'public document". The sketch or the report of the Circle Officer is nothing but an expression of his own impression on the basis of the spot inspection. This is not a public document of the nature referred to under section 74 of the Evidence Act and cannot also be admissible under section 35 of the said Act. The map of the Circle Officer contains the result of his investigation and cannot be said to be an entry in the public official book, register or record contemplated under section 35 of the Evidence Act.

29. In taking the aforesaid view, I am supported by a Division Bench decision of the Allahbad High Court in ***State of U.P vs. Smt. Ram Sri***, *AIR 1976 ALL 121*, wherein it has been held that the Tahsildar's report containing the impression of his investigation is not admissible in evidence. The relevant extract from para-28 of the said decision is as under;

"Further, we are of the opinion that the report of the Tahsildar is an expression of his impression gathered by him on the spot. The report is evidence only of the fact

that he had been deputed to make an inquiry and that he came to the conclusion mentioned by him in his report and shown in the map. It will, however, be incorrect to say that the report is admissible under Sec. 35 of the Evidence Act, as submitted by the learned counsel for the respondents. Had the defendant examined the Tahsildar as a witness the report might have become admissible under some other provision of the Evidence Act."

30. Thus, a map or sketch of the scene of offence prepared by a Circle Officer on the basis of the Panchnama of the scene of offence and the statements of the witnesses has got to be proved like any other document in accordance with the provisions of the Evidence Act. It cannot be straightway admitted in evidence on the premise of being a public document.

31. The real issue arises when a dispute is raised regarding the proof of a document or admissibility of a document in evidence which is tendered along with a list of documents or along with an affidavit in lieu of examination-in-chief. My attention was invited to the decision of the Apex Court in the case of ***Bipin Shantilal Panchal vs. State of Gujarat & Anr***., *2001 Cr.L.J 1254*. Paragraphs 12 to 15 of the said decision read thus:

"*12. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional Court, when the same question is re-canvassed, could take a different*

view on the admissibility of that material in such cases the appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-mouled to give way for better substitutes which would help acceleration of trial proceedings.

13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

14. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the

parties to the litigation and would not add to their misery or expenses.

15. We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence." *(Emphasis supplied)*

32. My attention was also invited to a subsequent decision of the Apex Court in the case of ***R.V.E.Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P.Temple and another,*** *AIR 2003 SC 4548*.. It must be stated here that the said decision is rendered in a Special Leave Petition arising out of a civil suit. However, the said decision will be relevant in so far as proof or admissibility of documents in evidence is concerned. Law of evidence as regards proof and admissibility of documents is the same which is applicable to both civil and criminal trials. It will be necessary to refer to the relevant part of the said judgment. In paragraph 20 the Apex Court has held as under:

"*20. The learned counsel for the defendant-respondent has relied on the Roman Catholic Mission v. State of Madras and another, AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its*

admissibility is not excluded and is available to be raised even at later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there: and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court." (Emphasis supplied)

33. Thus, the Apex Court has categorised the objections raised to the documents into two classes. One is where the admissibility of document in evidence is not in dispute, but it is contended that the document is not proved or the proof in support of the document is insufficient. The second category of

objection is an objection that the document which is sought to be proved is itself inadmissible in evidence. The Apex Court held that in so far as in the first category where the dispute is of proof of documents is concerned, the objection should be taken at the earliest and the objection that the mode adopted for proving the document is irregular or insufficient cannot be allowed to be raised at any stage subsequent to the marking of the document as exhibit. In so far as the said category of objection that a document is not properly proved is concerned, the Apex Court observed that if the said objection is raised at the outset, it enables the Court to apply its mind and pronounce its decision on the question then and there. In the event of finding of the Court on issue of proof of document going against the party tendering the document in evidence, an opportunity of seeking indulgence of the Court for leading further evidence to prove the document by adopting proper mode is available. Insofar as the second category of objection is concerned, the Apex Court held that even if a document is marked as exhibit, an objection simplicitor as to its admissibility is not excluded and is available to be raised at a latter stage.

34. It must be noted here that there is one more category of objection which relates to insufficiency of stamp on the document sought to be tendered. On this aspect there is a decision of the Apex Court of its constitution bench consisting of five Hon'ble Judges in the case of ***Javer Chand and others Vs. Pukhraj Surana,*** *AIR 1961 SC 1655*. The Apex Court considered the provisions of section 36 of the Indian Stamp Act and relevant provisions of the Evidence Act. The Apex Court

held as under:

> "*..... Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped it has to be decided then and there when the document is tendered in evidence. Once the Court rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned ig the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit, in the case. The record in this case discloses the fact that the hundis were marked as Exhibits P.1 and P.2 and bore the endorsement 'admitted in evidence' under the signature of the Court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the Court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross examination of their witnesses, S.36 of the Stamp Act comes into consideration. Once a document ig has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or revision to go behind that order. .....*"

35. As set out earlier, the Apex Court has made three categories of objections raised by rival party when the documents are produced in the Court of law. The first objection is regarding insufficiency of the proof and/or irregular mode adopted for proving the document. This objection is that the document has not been proved in accordance with law. The

second objection is that the document is not properly stamped as required by the Stamp Act or Bombay Stamp Act as the case may be. The third objection is that the document sought to be proved is otherwise inadmissible in evidence. In the case of R.V.E.Venkatachala (supra) the Apex Court has made specific distinction between the first objection regarding the insufficiency of proof or irregular or incorrect mode of proof and the other objection regarding inadmissibility in evidence. The Apex Court observed that so far as the objection regarding the proof of document is concerned, the same has to be decided then and there. However, even after marking a document as exhibit, an objection to its admissibility can be raised at any stage of the proceedings. The decision on this objection can be postponed till the final disposal of the case. As pointed out earlier, as far as the objection regarding insufficiency of stamp is concerned, the constitution bench of the Apex Court has already held that such objection has to be raised before a document is marked as exhibit and the same has to be decided immediately.

36. On plain reading of the decision of the Apex Court in the case of Bipin Panchal (supra), it is apparent that the same does not deal with an objection as regards proof of a document or insufficiency of proof or incorrect mode of proof. The said judgment deals with objection regarding the admissibility of the document in evidence which is a separate category of objection as distinguished from an objection regarding proof as laid down by the Apex Court in the case of R.V.E.Venkatachala (supra). It is true that the procedure laid down by the Apex Court in the case of Bipin Panchal (supra) will have to be

followed by the Courts sub-ordinate to this Court. However, the said decision of Apex Court is applicable only to one category of objection and, i.e., regarding the admissibility of the document in evidence and that decision has no application when an objection is raised to the proof or to irregular/insufficient mode of proof of a document. 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 Trial Court before proceeding with the recording of the 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 the 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. (See Geeta Marine Pvt. Ltd. vs. State, 2009 Cr.L.R 406)

37. Let me, for the benefit of the subordinate judiciary

summarize the two decisions of the Supreme Court; one in the case of Bipin Shantilal Panchal (supra) and another in the case of R.V.E.Venkatachala (supra).

38. Shalimar Chemical Works /vs/ Surendra Oil, (2010) 8 SCC 423 is one another decision of the Supreme Court by a two-judge Bench decided on August 27, 2010. In it, the plaintiff filed photocopies of a document which the trial judge marked subject to proof and admissibility. The Supreme Court faulted this procedure holding that he should have declined to exhibit it as well as shouldn't have left its admissibility open and hanging. In taking such view, the Court relied on Venkatachala's case (supra). Shalimar Chemicals, thus, espouses Venkatachala's ratio. I summarise their high points.

39. Highlights / Bipin's Case (Para 13 To 16)

* When an objection is raised, in the course of recording evidence in a trial, to a document's admissibility, the court can make a note of the objection and exhibit the objected document tentatively.

* If the objection relates to any piece of oral evidence, the court can similarly record the objected part of the evidence with a note of it·

* The note must stipulate that the objection shall be decided at the last stage/final judgment. If it's sustained, the court can exclude such evidence from consideration. No illegality in adopting such a course.

* The procedure suggested has twin advantages. First, the trial court's time is saved at the evidence stage. And, it can continue with the examination of the witnesses obviating the need for their waiting for long hours.

* Secondly, when the same objection is re-argued in Appeal/Revision against the trial court's judgment, the superior court can decide the correctness of the trial court's view with ease. For, the objected document/evidence is on record.

* The Supreme Court makes the above points as a procedure for trial courts to follow whenever the situation arises. However, If the objection is to stamp duty deficiency of a document, the court has to decide it before proceeding further.

40. Highlights / Venkatachala's Case (Para 20)

* Objection to the admissibility of evidence should ordinarily be made, when it's tendered, not subsequently. A document inadmissible in evidence, though brought on record, must be excluded from consideration.

* Objection to a document's admissibility may be classified into two classes. One, the document itself is inadmissible in evidence. Two, the mode of proof is irregular.

* Just because a document has been exhibited, objection to its admissibility is not excluded; and it can be raised even in Appeal/Revision.

* When the objection pertains to the mode of proof, it

should be raised before the evidence is tendered. Once the document is exhibited, objection to its mode of proof can't be raised at a subsequent stage. It's a rule of fair play.

* The omission to make such objection is fatal because by his failure the party entitled to object allows the opposite party to presume that he's not serious about the mode of proof.

* A prompt objection enables the court to apply its mind and pronounce its decision on admissibility then and there.

* If the objection to mode of proof is raised immediately, the opposite party may mark the document through correct mode with the court's permission. This practice is fair to both parties.

41. Bipin Shantilal Panchal (supra) articulates marking the documents tentatively and deciding their admissibility at the final stage; but Venkatachala (supra) instructs to decide the objection then and there. Although the problem is procedural, it is of extreme importance; for, the trial judge has to manage this mid-trial crisis effectively, if at all, he is to bring the trial process to an end as quickly as possible.

42. Bipin Panchal (supra) is a three- Judge Bench decision while Venkatachala (supra) is a two- Judge Bench ruling. Besides, the former is anterior in point of time to the later.

43. The learned Judges in Bipin's case highlight advantages of deciding objections to admissibility at a later stage. In fact, the procedure suggested by their Lordships ensures against

the delay in completing the trial, scuttling the scope for appeals on Interlocutory orders when the trial progresses.

44. In both, Venkatachala and Shalimar, the Hon'ble Judges had no opportunity to consider Bipin's case, as it was not cited before them. So they couldn't factor Bipin's line of reasoning into their thought process.

45. Order 13 Rule 3 CPC enables the court to reject any irrelevant or inadmissible document at any stage of the suit recording the grounds for the rejection. The phrase "at any stage of the suit" is a clear indication that the court need not reject inadmissible documents at the threshold. Bipin's case is, thus, in keeping with this rule.

46. Section 136 of the Indian Evidence Act, 1872 empowers the judge to question relevancy of evidence. U/s 165 the Judge may ask any question at any time about any fact relevant or irrelevant, which is meant to discover or to obtain proper proof of relevant facts. These provisions don't prescribe that objections to admissibility should be decided immediately.

47. It is true that Bipin's case was about a delayed trial under the Narcotic Drugs Psychotropic Subsistence (NDPS) Act, 1985. That's in the context of a criminal case. Can it be applied to trials under the civil law? Answer to this question is available in para (28) of Venkatachala's case (supra) itself, although it couldn't take note of Bipin's case. I supply below a summary therefrom:

* Whether a civil case or criminal case, the anvil for testing the terms “proved”, “disproved”, and “not proved” as defined in section 3 of the Evidence Act is one and the same.

* Assessing the result of the evidence derived by applying the rule makes the difference. That’s the probative effect of the evidence in civil and criminal cases and are not always the same.

* To be specific, the pre-ponderance of probability is the proof norm in civil cases while proof beyond reasonable doubt the standard in criminal cases. Except for this, no difference in the matter of exhibiting the documents.

48. Thus, having regard to the law discussed above and the facts of the present case, I am of the view that the correct approach of the Trial Court should have been to permit the prosecution to produce the map of the scene of offence in evidence by giving a tentative exhibit and decide as regards its probative or evidentiary value in the last while appreciating the evidence on record. While considering the evidentiary value of the document in question, the Trial Court may consider that if for any reason Shri Popatlal S. Trivedi could not be summoned for being examined as a witness, the defence could be said to be at a loss in not getting an opportunity to effectively cross-examining Mr. Trivedi so far as the site plan or sketch or map is concerned. It is always open for the defence counsel to cross-examine Manabhai in his own way, and in the last, show the prejudice said to have been caused to the accused by the fact that the prosecution failed to examine Popatlal S. Trivedi, i.e. the author of the document.

49. In the result, this application is allowed. The impugned order is quashed. The court below shall permit the prosecution to produce the map of the scene of offence through the P.W. No.20-Manabhai Ajabhai Patel and admit the same in evidence by giving a tentative exhibit with liberty to the accused to argue as regards its evidentiary value.. Rule is made absolute to the aforesaid extent. One copy of this judgment shall be sent to the Gujarat State Judicial Academy.

Direct service is permitted.

(J.B.PARDIWALA, J)

Vahid