
XVI K.K. LUTHRA MEMORIAL MOOT COURT COMPETITION, 2020

Before

THE HIGH COURT OF EREWHONE

Appeal No. 10 of 2019

THE STATE OF EREWHONE.....APPELLANT
v.
ELIZABETH BROWN.....RESPONDENT

Appeal No. 11 of 2019

THE STATE OF EREWHONE.....APPELLANT
v.
ELIZABETH BROWN.....RESPONDENT

Appeal No. 12 of 2019

ELIZABETH BROWNAPPELLANT
v.
THE STATE OF EREWHONE.....RESPONDENT

Appeal No. 13 of 2019

ELIZABETH BROWNAPPELLANT
v.
THE STATE OF EREWHONE.....RESPONDENT

MEMORIAL *for the* RESPONDENT

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF FACTS vi

ISSUES RAISED viii

SUMMARY OF ARGUMENTS viii

WRITTEN SUBMISSION 1

ISSUE I: ELIZABETH IS NOT GUILTY OF THEFT. 1

 [A] Essentials of theft under Section 378 of the Erewhon Penal Code have not been met. 1

 [B] Elizabeth had a *bona fide* claim over those documents. 2

 [C] No evidence on record, either direct or circumstantial, warrants the conviction of Elizabeth. 3

 [D] Elizabeth is entitled to get the *benefit of doubt* 4

ISSUE 2: THE CRIMINAL PROCEEDING AGAINST ELIZABETH IS VITIATED. 5

 [A] The investigation was biased. 5

 [B] The police interrogated Elizabeth without following the canons of law. 7

 [C] The Trial Court did not deliver a reasoned judgment. 7

ISSUE III: THE EXCLUSION OF ELIZABETH’S FINGERPRINTS AND HER MOBILE PHONE FROM THE EVIDENCE IS LAWFUL. 8

 [A] Elizabeth’s right to privacy has been infringed 8

 [B] Elizabeth had a Right against self-incrimination. 9

 [C] The Police wrongfully took Elizabeth’s fingerprints 10

 [D] The evidence obtained from Elizabeth is the *fruit of the poisonous tree*. 10

ISSUE 4: THERE HAS BEEN A SUPPRESSION OF EVIDENCE BY THE PROSECUTION 11

 [A] Secondary Evidence produced by the appellant is insufficient. 12

 [B] Elizabeth and Diana’s conversation on the text was a relevant fact. 13

 [C] The appellant must produce that evidence in court. 14

PRAYER FOR RELIEF x

MEMORIAL FOR THE RESPONDENT

INDEX OF AUTHORITIES

STATUTES

- Constitution of Erewhon (Part III).
- The Erewhon Penal Code, 1860.
- The Erewhon Procedure Code, 1973.
- The Erewhon Evidence Code, 1973.

FOREIGN LEGISLATION

- Data Protection Act, 2018 (United Kingdom)

1. Cases

2. <i>Aktar Hossain</i> 1981 Cri LJ (NOC) 32 Gau.	3
3. <i>Anvar P.V. v. P.K. Basheer</i> (2014) 10 SCC 473	12
4. <i>Asst. Commissioner v. M/s. Shukla & Brothers</i> SLP No. 16466 of 2009.	7
5. <i>Azeez v. State of Kerala</i> Criminal Appeal No. 177 of 2013.	4
6. <i>Babubhai Jamnadas Patel v. State of Gujarat</i> (2009) 9 SCC 610.....	5
7. <i>Babubhai v. State of Gujarat</i> (2010) 12 SCC 254.	6
8. <i>Babubhai v. State of Gujarat</i> 2011(1) ACR 496 (SC).	5
9. <i>Babulal Choukhani v. Western India Theatres Ltd.</i> AIR 1957 Cal 709.....	13
10. <i>Bai Radha v. State of Gujarat</i> AIR 1970 SC 1396.	11
11. <i>Bhuwan @ Sonu v. State of U.P.</i> Criminal Appeal No. 7054 of 2006.....	12
12. <i>Bidyadhar v. Shyam Sundar</i> (1971) 1 Cut WR 205.	2
13. <i>Binoy Viswam v. Union of India</i> AIR 2017 SC 2967.	10
14. <i>Board of Secondary and Higher Secondary Education of Maharashtra v. K.S. Gandhi</i> (1991) 2 SCC 716.	7
15. <i>Brady v. Maryland</i> 373 U.S. 83 (1963).....	14
16. <i>Burasing</i> AIR 1935 Sind 115	1
17. <i>Captain Amarindar Singh v. Parkash Singh Badal</i> (2009) 6 SCC 260.	6
18. <i>CCT v. Shukla and Bros.</i> (2010) 4 SCC 785.	7
19. <i>Cf Raja v. State of Haryana</i> (1971) 3 SCC 945.....	7
20. <i>Chandi Kumar v. Abanidhar Roy</i> , AIR 1965 SC 585.....	3
21. <i>Chandrappa. v. State of Karnataka</i> , (2007) 4 SCC 415	4
22. <i>Chiraguddin</i> , AIR 1914 Cal 450.....	4
23. <i>Commissioner of Income Tax v. Surendra Singh Pahwa</i> AIR 1995 All. 259.	7
24. <i>Cooper v. Wandsworth Board of Works</i> [1863] 143 ER 414.	8
25. <i>Daya Ram v. State of Hayana</i> 1997 (1) RCR (Criminal) 662.	4

MEMORIAL FOR THE RESPONDENT

26. <i>Dayal Singh v. State of Uttaranchal</i> (2012) 8 SCC 263.	6
27. <i>Dayawati v. Yogesh Kumar Gosain</i> 2017 SCC OnLine Del 11032.	6
28. <i>Dharambir Khattar v. Union of India</i> 2012 SCC OnLine Del 5805.	11
29. <i>Dsnda v. Deka v. State Of Assam</i> (1982) Cr Lj 188 (Gau)(NOC).....	2
30. <i>Durga Burman Roy v. State of Sikkim</i> (2014) 13 SCC 35.....	4
31. <i>Emperor v. Abasalli Yusufalli Musalman</i> AIR 1935 Nag 139.	10
32. <i>Golbar Hussain v. State of Assam</i> , (2015) 11 SCC 242.....	4
33. <i>Govind v. State of M.P</i> (1975) 2 SCC 148.	9
34. <i>Harikisandas Gulabdas and Sons v. State of Mysore</i> , 27 S.T.C 434 (1971).....	11
35. <i>In re Thangavelu</i> AIR 1958 Mad 476.....	2
36. <i>James v. Giles et al. v. State of Maryland</i> 386 U.S. 66, 87, S.Ct. 793.....	13
37. <i>Jarnail Singh v. State of Punjab SC</i> (1996) 1 RCR (Criminal) 465.	4
38. <i>Justice K.S. Puttaswamy (Retd.) v. Union of India</i> 2017 10 SCC 1.	8
39. <i>K.Balakrishnan v. S.Dhanasekar</i> 2018(2)C TC 859.....	7
40. <i>K.N. Mehra v. State of Rajasthan</i> AIR 1957 SC 369.....	1
41. <i>K.S Puttaswamy v. Union of India</i> 2017 10 SCC 1.	11
42. <i>Kailash Gour v. State of Assam</i> (2012) 2 SCC 34.....	4
43. <i>Kali Ram v. State of Himachal Pradesh</i> , (1973) 2 SCC 808.....	4
44. <i>Kappinaiah v. Emperor</i> AIR 1931 Mad 233.	13
45. <i>Karan Singh v. State of Haryana</i> (2013) 12 SCC 529.....	8
46. <i>Kashmira Singh v. State</i> 1965 JK 37.	13
47. <i>Krishan Gopal Bajpai v. State of U.P.</i> Cr. Appeal No. 615 of 1998.	12
48. <i>Lal Mohammad</i> AIR 1931 Pat 337 1	1
49. <i>M P Sharma v. Satish Sharm</i> AIR 1954 SC 300.	11
50. <i>M/S Sesa Goa Ltd. v. State Of Goa</i> 2013 SCC OnLine NGT 27.....	8
51. <i>Maneka Gandhi v. UOI</i> (1978) 2 SCR 621.....	9
52. <i>Manu Sharma v. State (NCT of Delhi)</i> (2010) 6 SCC 1.....	5
53. <i>Mapp v. Ohio</i> 367 U.S. 643 (1961).....	11
54. <i>Megha Singh v. State of Haryana</i> (1996) 11 SCC 709.	11
55. <i>Mohd. Imran Khan v. State Government (NCT of Delhi)</i> (2011) 10 SCC 192.	6
56. <i>Murfree's Lessee v. Logan</i> , (Tenn. 1814) 2 Tenn. 220, 224.....	3
57. <i>Nagappa</i> (1890) 15 Bom 344.....	3
58. <i>Nahar Singh Yadav v. Union of India</i> (2011) 1 SCC 307.....	8
59. <i>Nandini Satpathy v. P.L. Dani</i> AIR 1978 SC 102.	7
60. <i>Nardone v. United States</i> 308 U.S. 338 (1939).	10
61. <i>Nasir Sikander Shaikh v. State of Maharashtra SC</i> (2005) CriLJ 2621.....	4
62. <i>Navinchandra N. Majithia v. State of Meghalaya and Ors.</i> AIR 2000 SC 3275.	5
63. <i>Neelima Misra v. Harinder Kaur Paintal</i> (1990) 2 SCC 746.	5
64. <i>Niloy Dutta v. District Magistrate</i> 1991 Cri Lj 2933(Gau).....	7
65. <i>Nirmal Singh Kahlon v. State of Punjab</i> Civil Appeal No. 6198-6199 (2008).	5
66. <i>Nitin v. Rekha</i> 2017 SCC OnLine Bom 112.	14

MEMORIAL FOR THE RESPONDENT

67. <i>P.T. Rajan Babu v. Anitha Chandra Babu</i> 2011 CrLJ 4541 Ker.....	2
68. <i>Parbhoo v. Emperor</i> , AIR 1941 All 402.....	3
69. <i>Partap v. State of U.P.</i> (1976) AIR SC 966.	4
70. <i>Pasupala Narsaiah</i> , 1982 Cri LJ 1841 (AP).	3
71. <i>Patel Manilal Chhaganlal v. The Municipal Corporation, Surat</i> AIR 1978 Guj 193.	12
72. <i>Prakash v. State of Karnataka</i> (2014) 12 SCC 133.....	6
73. <i>Pulavar B.M. Senguttuvn v. The State</i> (2004) CrLJ 558.....	7
74. <i>R. Rajagopal v. State of Tamil Nadu</i> 1994 SCC (6) 632.....	9
75. <i>Rajinder Kumar v. The State</i> 1983 Cri LJ (NOC) 3 (Del).	3
76. <i>Rajiv Singh v. State of Bihar</i> , 2015 16 SCC 369.....	3, 4
77. <i>Ram Bihari Yadav v. State of Bihar</i> (1998) 4 SCC 517.....	6
78. <i>Ram Ekbal</i> 1972 CrLJ 584 (SC).	2
79. <i>Ramesh v. State of U.P.</i> Cr. Appeal No. 524 of 2003.	14
80. <i>Ramratan</i> AIR 1965 SC 926.....	1
81. <i>Rangammal v. Kuppaswami & Anr</i> (2011) 12 SCC 220.....	3
82. <i>Ravi Yashwant Bhoir v. Collector</i> (2012) 4 SCC 407.....	7
83. <i>Reman alias Raman S/o Harilal Bhandekar v. State of Chhattisgarh</i> 2008 CriLJ 4755.	3
84. <i>Riley v. California</i> [134 S. Ct. 2473 (2014)].	9
85. <i>Royston Victor Saldanha v. State of Maharashtra</i> 2018 SCC OnLine Bom 13263.	14
86. <i>S.N. Mukherjee v. Union of India</i> (1990) 4 SCC 594.	7
87. <i>S.N. Sharma v. Bipen Kumar Tiwari and Ors.</i> AIR 1970 SC 786.....	5
88. <i>Sathyavani Ponrani v. Samuel Raj</i> 2010 SCC OnLine Mad 3758.	8
89. <i>Seanix Texhnlology Inc. v. Ircha</i> 1998, 78 C.P.(3d) 443 B.C.S.C.....	2
90. <i>Selvi v. State of Karnataka</i> AIR 2010 SC 1974.	9
91. <i>Silverthorne Lumber Co. v. United States</i> 251 U.S. 385.	10
92. <i>State of Bihar v. P.P Sharma</i> AIR 1991` SC 1260.....	5
93. <i>State of Haryana v. Jagbir Singh</i> (2003) 11 SCC 261.....	10
94. <i>State of Haryana v. Mehal Singh</i> 1978 SCC OnLine P&H 117.....	13
95. <i>State of Maharashtra v. Vishwanath Tukaram Umale</i> AIR 1979 SC 1825.....	2
96. <i>State of Orissa v. Dhaniram Luhar</i> 2004 CrLJ 1385.....	7
97. <i>State of Rajasthan v. Raja Ram</i> , (2003) 8 SCC 180;	4
98. <i>State of Tamil Nadu v. M.A. Waheed Khanthe</i> (1998) 8 SCC 723.	7
99. <i>State of Uttar Pradesh v. Bhagwant Kishore Joshi</i> AIR 1964 SC 221.....	6
100. <i>Sujit Biswas v. State of Assam</i> (2013) 12 SCC 406.	4
101. <i>Surendra Krishna v. MirzaMabamed Syed Ali</i> AIR 1936 PC 15.	12
102. <i>Suvvari Sanyasi Apparo v. Boddepalli Lakshminarayana</i> AIR 1962 SC 586.	2
103. <i>Swaran Lata Ghosh v. H.K. Banerjee</i> (1969) 1 SCC 709.....	7
104. <i>Unnikrishnan @ Unni v. The State By Inspector Of Police</i> Cr. Appeal No. 277 of 2011.	12
105. <i>Upendra Pradhan v. State of Orissa</i> , (2015) 11 SCC 124.....	4
106. <i>Vijayee Singh v. State of U.P.</i> SC 1990 (3) SCC 190.....	14
107. <i>Vinay Tyagi v. Irshad Ali @ Deepak</i> (2013) (5) SCC 762.	6

MEMORIAL FOR THE RESPONDENT

108. <i>Wong Sun v. United States</i> 371 U.S. 471.	10
109. <i>Yusuf Ali v. State</i> AIR 1968 SC 147.	13
110. <i>ZahiraHabibulla H. Sheikh v. State of Gujarat</i> (2004) 4 SCC 158.	6

TREATIES & CONVENTIONS

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MEMORIAL FOR THE RESPONDENT

STATEMENT OF FACTS

1. Diana and Elizabeth, two friends joined the offices of Brown, Fitch & Gump, a publishing house in the city-state of Erewhon. Being the daughter of Jack Brown, a founding partner in the BFG firm, Elizabeth was made part of strategy team in BFG to chart plans for expansion of its digital footprint while Diana was a copy editor in “The Voice”, BFG’s fortnightly magazine but she had been secretly developing content for a rival publishing house.
2. They were developing a “BFG Reader” App to make its online presence and pool in new subscriptions and, Elizabeth was expected to provide innovative ideas for exclusive content to achieve the same. When she couldn’t come up with a viable idea, she asked for Diana’s help. Diana and Elizabeth decided to meet at dinner on 19 May 2019 at Diana’s house. Going around her place, Elizabeth saw a stack of papers marked vignettes with a post-it. After tea, Elizabeth went back to the room on the pretext of going to the bathroom and Diana saw her peering over the papers with a phone but Elizabeth made some excuse and went down to the bathroom which was three doors down.
3. On June 1, 2019, when a beta version of the BFG Reader App was released, Diana was shocked to see writings that resembled her series of vignettes published under Elizabeth’s name. She met her friend Max, an inspector in Erewhon police on the very day and filed a complaint of theft against Elizabeth and BFG.
4. The investigation team raided Elizabeth’s house on June 2 and searched the house without any warrant citing a possibility of evidence being destroyed by her. Elizabeth handed over her mobile phone and laptop computer but the police could not find any copies of Diana’s writing. They also searched her office while raiding BFG and seized a desktop computer from there, but couldn’t find any incriminatory document.
5. The police sent all the devices for forensic analysis which sent its report on August 15 stating that devices obtained from Elizabeth’s house were registered in her name while one seized from the BFG office was not, either passwords or biometric information was required to access the devices, and the thumbnail depiction of the last picture taken in her phone’s camera appeared to be a printout with a post-it marking on top.
6. On August 30, 2019, when called for questioning, Elizabeth affirmed her visit to Diana’s house on May 19 and agreed seeing printouts there but refused making copies of any such printout. When she recalled on August 31, the police on the advice of the prosecutor’s

MEMORIAL FOR THE RESPONDENT

office coerced Elizabeth into giving her fingerprints for comparison. The police used dummy fingers mapped from those fingerprints to unlock the digital devices.

7. Some of the photographs found on her phone matched the documents obtained from Diana's house whereas the chat history on Elizabeth's phone revealed that Diana had willingly told Elizabeth about her stories and thanked her for reading them as well. After obtaining duly certified copies of the photographs on September 5, 2019, the prosecutors filed a case against Elizabeth on September 7, 2019, in the District Court of Erewhon.
8. Elizabeth was called for a pre-trial hearing on September 9, 2019. The pre-trial judge agreed with her counsel's argument that the search conducted in Elizabeth's house was illegal and the evidence collected from her phone was unlawful, therefore, inadmissible. The respondent's counsel raised the claim of suppression of evidence against the prosecution but the court did not entertain it. The pre-trial court gave the order declaring the evidence collected unlawfully to be excluded, the seizure was not bad for the want of warrant, and the text messages cannot be referred during trial for they were not relied upon by the prosecution.
9. The case was then posed before a different judge for trial on October 15 where the court found that prosecution had proved all the facts in issue. It ruled that remembering the contents of a document or taking its photograph did not constitute "moving", for S. 378. Thereby the court held Elizabeth guilty under Section 511 EPC in an attempt to commit the offense punishable under Section 380 EPC and was sentenced to 2 years in prison and a fine of 2000 Erewhon Dollars for compensation. She was released on bail the same day.
10. The prosecution has appealed in the High Court of Erewhon against the acquittal of accused for the commission of theft whereas the accused has cross-appealed against her conviction for the offense of attempt to theft pleading not guilty of any such crime.

MEMORIAL FOR THE RESPONDENT

ISSUES RAISED

ISSUE I: WHETHER ELIZABETH IS GUILTY OF THEFT?

ISSUE II: WHETHER THE CRIMINAL PROCEEDING AGAINST ELIZABETH IS VITIATED?

ISSUE III: WHETHER THE EXCLUSION OF ELIZABETH'S FINGERPRINTS AND HER SEIZED MOBILE PHONE FROM THE EVIDENCE IS LAWFUL?

ISSUE IV: WHETHER THERE HAS BEEN A SUPPRESSION OF EVIDENCE BY THE PROSECUTION?

SUMMARY OF ARGUMENTS

ISSUE I: WHETHER ELIZABETH IS GUILTY OF ATTEMPT TO THEFT UNDER SECTION 511 OF EPC READ WITH SECTION 380 OF EPC?

It is humbly submitted before this Hon'ble Court that the order of the trial court convicting the accused for the attempt of theft in a dwelling house is *per in curium*. Neither there was a dishonest intention on the part of the accused nor did she committed any such that would amount to theft under s.378, Erewhon Penal Code, 1860. Also, in normal circumstances, the accused had a bona fide claim over those documents, being an employee of the BFG Company who is the rightful owner of any work done by the appellant using its resources. Moreover, the judgment is not supported by any cogent evidence and is based on mere contentions drawn by the prosecution. Despite several facts signifying the innocence of the accused, the court has not taken cognizance of the reasonable doubts which give the accused the "benefit of doubt" and thus, in the absence of any evidence should be granted acquittal.

MEMORIAL FOR THE RESPONDENT

ISSUE II: WHETHER THE CRIMINAL PROCEEDING AGAINST ELIZABETH IS VITIATED?

It is humbly submitted before this Hon'ble court that the investigation conducted by the police authorities was tainted. The instructions mandated by the Code of Criminal Procedure were not duly followed during the interrogation which violated the protection of the accused guaranteed by the law of the land. The investigating team was biased and lopsided towards the cause of the complainant and thus, prejudice against the accused occurred at the very threshold of the judicial system.

ISSUE III: WHETHER THE EXCLUSION OF ELIZABETH'S FINGERPRINTS AND HER SEIZED MOBILE PHONE FROM THE EVIDENCE IS LAWFUL?

It is humbly submitted before this Hon'ble Court that the fingerprints of the accused were obtained via coercion and the police authorities made unlawful use of the fingerprints to make dummy fingers and accessed the accused's cell phone without her consent. This is a clear violation of the privacy of the accused. The accused has a protection of the right against self-incrimination and thus would not have relented to give her fingerprints had the police not coerced her. Furthermore, the police did not have the authority to take the accused's fingerprints against her will and thus, the evidence needs to be excluded for being a *fruit of the poisonous tree*.

ISSUE IV: WHETHER THERE HAS BEEN A SUPPRESSION OF EVIDENCE BY THE PROSECUTION?

It is humbly submitted before this Hon'ble Court that the prosecution has maliciously suppressed material facts and evidence to frame the accused. The appellant had no grounds to produce secondary evidence when the primary evidence was available. Elizabeth and Diana's conversation in the text messages was a relevant fact which revealed the actual truth. The prosecution is bound to produce that evidence in court in the interest of justice

MEMORIAL FOR THE RESPONDENT

WRITTEN SUBMISSION

ISSUE I: ELIZABETH IS NOT GUILTY OF THEFT.

Elizabeth is not liable to be convicted for the offense of attempt to theft in a dwelling house because of the following averments:

- [A] Essentials of theft under Section 378 of the Erewhon Penal Code have not been met.
- [B] Elizabeth had a *bona fide* claim over those documents.
- [C] No evidence on record either direct or circumstantial goes against Elizabeth.
- [D] Elizabeth is entitled to get the *benefit of doubt*.

[A] Essentials of theft under Section 378 of the Erewhon Penal Code have not been met.

(i) Elizabeth does not have a dishonest intention.

1. A dishonest intention¹ is one of the most essential ingredients to bring home the guilt of theft² which is made out when a person moves a property with the intention of either causing wrongful gain to one person or wrongful loss to another person.³ Elizabeth has nothing to gain from the alleged stolen property, i.e. vignettes as BFG is the ultimate beneficiary of all the profits arising out of the appraisal of the vignettes or any other content on the BFG Reader app for that matter of fact.⁴
2. Moreover, in the instant case, no wrongful loss has been caused to Diana as her “personal data”, i.e. vignettes was never protected.⁵ Giving protection to personal data requires it to be processed fairly and lawfully.⁶ Since Diana breached her employment contract with BFG by developing the allegedly stolen content for a rival publishing house during her employment under BFG,⁷ the vignettes are said to be processed unlawfully.

(ii) No transfer of possession of the alleged stolen property has occurred.

¹ Erewhon Penal Code, 1860, s. 24.

² *K.N. Mehra v. State of Rajasthan* AIR 1957 SC 369.

³ *Ramratan* AIR 1965 SC 926; *Lal Mohammad* AIR 1931 Pat 337; *Burasing* AIR 1935 Sind 115.

⁴ Moot Problem, p.no. 1, para. 3.

⁵ Principle of Data Protection Act, 1988.

⁶ Data Protection Act, 2018, Part 1 (2) (1) (a).

⁷ Queries & Clarifications to the Moot Problem 2020, A. 28.

MEMORIAL FOR THE RESPONDENT

3. Transfer of possession of a property is *sine qua non* for establishing an offense of theft.⁸ Also, such transfer must take place with a dishonest intention on the part of the wrongdoer,⁹ and without the consent of the possessor of that property.¹⁰ A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.¹¹ The vignettes, allegedly stolen, have not been moved from the possession of Diana. Theft is an offense against possession in the first place.¹² The possession of the vignettes is still with Diana and therefore, the offense of theft cannot be made out.

[B] Elizabeth had a *bona fide* claim over those documents.

4. The ownership of any content developed by Diana using its resources lies with BFG¹³ and it can, for its profit, assign the same to any other employee.¹⁴ *Bona fide* claim is the defense to the charge of theft because it postulates the want of *mens rea*.¹⁵ Where property is occupied in the assertion of a contested claim of right, however ill-founded that claim may be, it thereof does not amount to theft.¹⁶ The claim of right here is enough to create a doubt that the property which is the subject matter of theft may not belong to the complainant.¹⁷ And Elizabeth as part of the strategy team in BFG¹⁸ can claim her legal right over the property on behalf of BFG Co.¹⁹ Since, Diana is an employee of BFG Co.²⁰, all of her work would be contributed to the firm towards its progress.²¹
5. The claim should be *bona fide*, but not mere pretence.²² Where the question is in a fluid state and the accused in good faith believed that she had a right over the vignettes then, no offence of theft can be made against her.²³ An act does not amount to theft if there is any

⁸ Erehon Penal Code, 1860, s. 378.

⁹ Erehon Penal Code, 1860, s. 378.

¹⁰ *State of Maharashtra v. Vishwanath Tukaram Umale* AIR 1979 SC 1825.

¹¹ Erehon Penal Code, 1860, s. 378, Explanation 3.

¹² *P.T. Rajan Babu v. Anitha Chandra Babu* 2011 CrLJ 4541 Ker.

¹³ Tim Russell, A Guide to U K Employment Law, 2.2 (d).

¹⁴ *Ibid.*

¹⁵ *Dsnda v. Deka v. State Of Assam* (1982) Cr Lj 188 (Gau)(NOC).

¹⁶ Dr. KI Vibhute, *PSA Pillai's Criminal Law* 758(Lexis Nexis Butterworths Wadhwa, Nagpur, India, 10th Edn.).

¹⁷ *In re Thangavelu* AIR 1958 Mad 476.

¹⁸ Moot Problem p.no. 1, para 2.

¹⁹ Moot Problem p.no. 2, para 5.

²⁰ *Suvvari Sanyasi Apparao v. Boddepalli Lakshminarayana* AIR 1962 SC 586.

²¹ *Seanix Texhnology Inc. v. Ircha* 1998, 78 C.P.(3d) 443 B.C.S.C.

²² *Bidyadhar v. Shyam Sundar* (1971) 1 Cut WR 205.

²³ *Ram Ekbal* 1972 CrLJ 584 (SC).

MEMORIAL FOR THE RESPONDENT

legal right or even a mere appearance of a colourable legal right.²⁴ Claim however weak would be entertained.²⁵ Furthermore, if a person takes away someone else's property, believing under a mistake of fact or ignorance of law that he has a right to take it, is not theft.²⁶

[C] No evidence on record, either direct or circumstantial, warrants the conviction of Elizabeth.

6. The person who comes to the court pleading a judgment in his favour for exercising his legal right and asserting the existence of certain facts must support his claim with substantive proof.²⁷ It is a duty of the prosecutor to discharge the burden of proving the accusation beyond a reasonable doubt.²⁸ A criminal case is a proceeding.²⁹ The burden of proof in such a proceeding lies on the prosecution.³⁰ Every complainant at equity must show a good title or claim before bringing a suit, conformably to the maxim, "*actori incumbit onus probandi*"³¹ which implies that the burden of proof is on the appellant. If neither prosecution nor defense leads proper evidence, the accused is entitled to be acquitted.³²
7. A charge is said to be proved only when there is certain and explicit evidence to suggest legal conviction; mere suspicion³³ or inferences³⁴ cannot take the place of legal proof.³⁵ This also implies that it is not sufficient that the property found in the accused's possession was like the stolen one,³⁶ the prosecution must prove that vignettes published in app were same as Diana's, which it failed to establish,³⁷ and the court cannot proceed on the basis of weakness of the other party.³⁸
8. Where the prosecution has supported its case through circumstantial evidence, such evidence has to prove the guilt of the accused conclusively excluding any possibility of

²⁴ *Chandi Kumar v. Abanidhar Roy*, AIR 1965 SC 585.

²⁵ Ratanlal & Dhirajlal, II *The Indian Penal Code* 2595 (Lexis Nexis, Haryana, India, 33rd edn.).

²⁶ *Nagappa* (1890) 15 Bom 344.

²⁷ Erehon Evidence Code, 1973, s. 101.

²⁸ *Reman alias Raman S/o Harilal Bhandekar v. State of Chhattisgarh* 2008 CriLJ 4755.

²⁹ Erehon Evidence Code, 1973, s. 102.

³⁰ Erehon Evidence Code, 1973, s. 102.

³¹ *Murfree's Lessee v. Logan*, (Tenn. 1814) 2 Tenn. 220, 224.

³² *Parbhoo v. Emperor*, AIR 1941 All 402.

³³ *Rajiv Singh v. State of Bihar*, 2015 16 SCC 369.

³⁴ *Aktar Hossain* 1981 Cri LJ (NOC) 32 Gau.; *Pasupala Narsaiah*, 1982 Cri LJ 1841 (AP).

³⁵ Moot Problem p.no. 5 para 21.

³⁶ *Rajinder Kumar v. The State* 1983 Cri LJ (NOC) 3 (Del).

³⁷ Moot Problem p.no. 2, para. 8.

³⁸ *Rangammal v. Kuppaswami* (2011) 12 SCC 220.

MEMORIAL FOR THE RESPONDENT

guilt.³⁹ In the instant case, the prosecution evidence establishes no concrete chain of events to make its case.

[D] Elizabeth is entitled to get the *benefit of doubt*

9. It is a cardinal principle of criminal jurisprudence that the prosecution is under a legal obligation to prove every ingredient of any offense, beyond a reasonable doubt.⁴⁰ An accused is presumed to be innocent until proven guilty.⁴¹ *The presumption of innocence is acknowledged upon the justification that outcome of a wrong conviction is regarded as a significantly worse harm than wrongful acquittal.*⁴² A reasonable doubt arises out of a lack of proof that prevents a judge or jury from convicting a respondent a crime.⁴³ The prosecution story must be free of all the ambiguities⁴⁴ and the slightest of doubt in the prosecution story will lead to the acquittal of the accused,⁴⁵ whereas the accused can discharge his onus by establishing a mere preponderance of probability.⁴⁶
10. The prosecution's reliance over a thumbnail depiction of the last picture taken fails to support its allegation because (i) the marking over the document wasn't that of "vignettes"⁴⁷ and, (ii) Elizabeth would have taken many other pictures between May 19, 2019, and the date of seizure. A person cannot be held liable for criminal offenses if his guilt is not rightly proved by the prosecution beyond a reasonable doubt,⁴⁸ which is based upon reason and common sense.⁴⁹ When the evidence adduced in the court points to two disparate views, one towards the complicity and the other towards the innocence of the accused, the latter should be adopted.⁵⁰ Therefore, Elizabeth must get the benefit of doubt.⁵¹

³⁹ *Chiraguddin*, AIR 1914 Cal 450.

⁴⁰ *Daya Ram v. State of Hayana* 1997 (1) RCR (Criminal) 662.

⁴¹ *Kailash Gour v. State of Assam* (2012) 2 SCC 34.

⁴² *Rajiv Singh v. State of Bihar*, 2015 16 SCC 369.

⁴³ The Law Dictionary, Reasonable Doubt, available at: <https://thelawdictionary.org/reasonable-doubt/> (last visited on November 13, 2019 at 6:38 p.m.).

⁴⁴ *Jarnail Singh v. State of Punjab SC* (1996) 1 RCR (Criminal) 465.

⁴⁵ *Nasir Sikander Shaikh v. State of Maharashtra SC* (2005) CriLJ 2621.

⁴⁶ *Partap v. State of U.P.* (1976) AIR SC 966.

⁴⁷ Moot Problem p.no. 3, para 12.

⁴⁸ *Durga Burman Roy v. State of Sikkim* (2014) 13 SCC 35.

⁴⁹ *Sujit Biswas v. State of Assam* (2013) 12 SCC 406.

⁵⁰ *Kali Ram v. State of Himachal Pradesh*, (1973) 2 SCC 808; *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180; *Chandrappa. v. State of Karnataka*, (2007) 4 SCC 415; *Upendra Pradhan v. State of Orissa*, (2015) 11 SCC 124 ; *Golbar Hussain v. State of Assam*, (2015) 11 SCC 242.

⁵¹ *Azeez v. State of Kerala Criminal Appeal No. 177 of 2013*.

MEMORIAL FOR THE RESPONDENT

ISSUE 2: THE CRIMINAL PROCEEDING AGAINST ELIZABETH IS VITIATED.

The investigation was not conducted as per the procedure established by law because of the following defaults:

[A] The investigation was biased.

[B] The police interrogated Elizabeth without following the canons of law.

[C] The Trial Court did not deliver a reasoned judgment.

[A] The investigation was biased.

(i) The investigation was unfair.

11. It is a well-settled rule under common law that “*A vitiated investigation is the precursor for miscarriage of criminal justice.*”⁵² Not only a fair trial but a fair investigation is also a part of constitutional rights.⁵³ An accused is entitled to a fair investigation. Fair investigation and fair trial are both concomitants to the preservation of the fundamental rights of an accused under article 21⁵⁴ and article 20⁵⁵ of the Constitution of Erewhon. Where non- interference of the court would ultimately result in failure of justice, the court must interfere.⁵⁶ In case of a *mala fide* exercise of power by a police officer, the court may interfere.⁵⁷

12. Ethical conduct is essential for investigative professionalism.⁵⁸ The basic tenet of criminal jurisprudence is that the investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law.⁵⁹ It can be evinced from the moot proposition that Diana had approached Max, an inspector in Erewhon Police, not only as an aggrieved but also as a friend.⁶⁰ Thus, bias by the police department is apprehended.⁶¹ The Investigating Officer should be fair and conscious to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion

⁵² *Navinchandra N. Majithia v. State of Meghalaya and Ors.* AIR 2000 SC 3275.

⁵³ The Constitution of Erewhon, art. 20 & 21.

⁵⁴ *Nirmal Singh Kahlon v. State of Punjab* Civil Appeal No. 6198-6199 (2008).

⁵⁵ *Babubhai Jamnadas Patel v. State of Gujarat* (2009) 9 SCC 610.

⁵⁶ *Babubhai v. State of Gujarat* 2011(1) ACR 496 (SC).

⁵⁷ *S.N. Sharma v. Bipen Kumar Tiwari and Ors.* AIR 1970 SC 786.

⁵⁸ *State of Bihar v. P.P Sharma* AIR 1991` SC 1260.

⁵⁹ *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1.

⁶⁰ Moot Problem p.no. 2, para 9.

⁶¹ *Neelima Misra v. Harinder Kaur Paintal* (1990) 2 SCC 746.

MEMORIAL FOR THE RESPONDENT

as to its genuineness.⁶² The entire emphasis of a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction.⁶³ Therefore, the investigation was biased.

(ii) The investigating team had an ulterior motive.

13. The investigation should be fair, transparent and should not have an ulterior motive.⁶⁴ The investigation should be free from all objections so that either party should be satisfied with the investigation.⁶⁵ Selective search to emphasize information consistent with the presumed hypothesis and ignoring the opposed information found during a search amounts to confirmation bias.⁶⁶ An investigation directed to prove a conclusion made up by the investigating officer is cursory.⁶⁷ Furthermore, the interpretation of evidence in ways that corroborate the hypothesis in hand and simultaneously negates the contradictory information.⁶⁸ In, the present case, the investigation team searched only Elizabeth's cabin while the complaint was also registered against BFG Co.⁶⁹ This type of shoddy investigation would shake the confidence of the accused in the justice system of the country⁷⁰ and, the proceedings should be for the best interests of the public.⁷¹

14. The investigating authorities should not have an ulterior motive⁷² as it is in the interests of the general public and the Court is duty-bound to protect the interest of the public.⁷³ Strict action should be taken against the investigating officer who has the ulterior motive while investigation.⁷⁴ Therefore, the conviction of Elizabeth should be set aside.⁷⁵

⁶² *Babubhai v. State of Gujarat* (2010) 12 SCC 254.

⁶³ *Vinay Tyagi v. Irshad Ali @ Deepak* (2013) (5) SCC 762.

⁶⁴ *Supra* note 62.

⁶⁵ *Mohd. Imran Khan v. State Government (NCT of Delhi)* (2011) 10 SCC 192.

⁶⁶ Moa Lidén, *Confirmation Bias in Criminal Cases* 284 (Department of Law, Uppsala University, Sweden, 2018).

⁶⁷ *Prakash v. State of Karnataka* (2014) 12 SCC 133.

⁶⁸ Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises", II *Review of General Psychology* 175-176 (1998).

⁶⁹ Moot Problem p.no. 3, para. 9.

⁷⁰ *Ram Bihari Yadav v. State of Bihar* (1998) 4 SCC 517.

⁷¹ *Dayawati v. Yogesh Kumar Gosain* 2017 SCC OnLine Del 11032.

⁷² *Captain Amarindar Singh v. Parkash Singh Badal* (2009) 6 SCC 260.

⁷³ *ZahiraHabibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158.

⁷⁴ *Dayal Singh v. State of Uttaranchal* (2012) 8 SCC 263.

⁷⁵ *State of Uttar Pradesh v. Bhagwant Kishore Joshi* AIR 1964 SC 221.

MEMORIAL FOR THE RESPONDENT

[B] The police interrogated Elizabeth without following the canons of law.

15. The Police served a notice to Elizabeth⁷⁶ and called her for questioning.⁷⁷ No female witness can be called in for interrogation at any place other than the place in which she resides.⁷⁸ The accused, when called in as a witness to the case will come under the ambit of s.160(1).⁷⁹ The Criminal courts have accepted that a woman cannot be called elsewhere for questioning.⁸⁰ This provision provides for special treatment towards women⁸¹, which is violated by the police in the present case. Elizabeth was called by the investigating team for interrogation twice⁸² and the investigating officer is liable to be punished for the same.⁸³

[C] The Trial Court did not deliver a reasoned judgment.

16. When the trial court had not considered the evidence and had given ambiguous reason to back its judgment then it is unreasoned judgment.⁸⁴ The concept of reasoned judgment is a part of basic rule of law and it is a requirement of procedural law.⁸⁵ The reason should be ambiguous but it should be the link between material on record and the conclusion on which the court had arrived.⁸⁶ Basically, a reasoned judgment is the one in which there is an application of laws in the facts that have been produced⁸⁷ which has been lacking in this case where there has been no application of law while giving the judgment.⁸⁸

17. The principle of natural justice requires that the court should give the reasoned judgment⁸⁹ and giving a reasoned judgment is a cardinal principle⁹⁰ of criminal jurisprudence.⁹¹ Failure to give valid reason while giving judgment is a denial of justice.⁹² Supreme Court had emphasized that it is implicit that giving an unambiguous reason is a violation of fair

⁷⁶ Queries and Clarification to Moot Problem 2020, A.29.

⁷⁷ Erewhon Procedure Code, 1973, s. 41A.

⁷⁸ Erewhon Procedure Code 1973, s. 160(1).

⁷⁹ *Pulavar B.M. Senguttuvn v. The State* (2004) CrLJ 558.

⁸⁰ *State of Tamil Nadu v. M.A. Waheed Khanthe* (1998) 8 SCC 723.

⁸¹ *Niloy Dutta v. District Magistrate* 1991 Cri Lj 2933(Gau).

⁸² *Nandini Satpathy v. P.L. Dani* AIR 1978 SC 102.

⁸³ *Cf Raja v. State of Haryana* (1971) 3 SCC 945.

⁸⁴ *K.Balakrishnan v. S.Dhanasekar* 2018(2)C TC 859.

⁸⁵ *Asst. Commissioner v. M/s. Shukla & Brothers* SLP No. 16466 of 2009.

⁸⁶ *Commissioner of Income Tax v. Surendra Singh Pahwa* AIR 1995 All. 259.

⁸⁷ *Swaran Lata Ghosh v. H.K. Banerjee* (1969) 1 SCC 709.

⁸⁸ Moot problem p.no. 5, para. 21.

⁸⁹ *Ravi Yashwant Bhoir v. Collector* (2012) 4 SCC 407.

⁹⁰ *State of Orissa v. Dhaniram Luhar* 2004 CrLJ 1385.

⁹¹ *CCT v. Shukla and Bros.* (2010) 4 SCC 785.

⁹² *S.N. Mukherjee v. Union of India* (1990) 4 SCC 594.

MEMORIAL FOR THE RESPONDENT

play and natural justice.⁹³ And in a case where there is a serious violation of natural justice then the court can declare the action as invalid.⁹⁴ God himself did not pass the sentence against Adam without giving a valid reason⁹⁵ and in this case, there was no application of laws in the facts that were on record. Hence, there was no reasoned judgment given by the trial court.

ISSUE III: THE EXCLUSION OF ELIZABETH'S FINGERPRINTS AND HER MOBILE PHONE FROM THE EVIDENCE IS LAWFUL.

The Pre-Trial Judge has rightly excluded the fingerprints of Elizabeth and the mobile phone from the evidence due to the following reasons:

- [A] Elizabeth's right to privacy has been infringed
- [B] Elizabeth had a right against self- incrimination
- [C] The Police wrongfully took Elizabeth's fingerprints
- [D] The evidence obtained from Elizabeth is a fruit of a poisonous tree

[A] Elizabeth's right to privacy has been infringed

18. In pursuance of framing Elizabeth, her fundamental right to privacy⁹⁶ has been violated when her digital devices were accessed by the investigation team against her will. ⁹⁷ It acted against the procedure established by law. ⁹⁸ Fair trial and investigation is the right of every individual and if the state is not able to provide it then it is the violation of Article 14 and 21.⁹⁹ Elizabeth, being the accused, should not have the slightest doubt that she had been denied her right and has been subjected to injustice.¹⁰⁰

19. The right to privacy is a fundamental right¹⁰¹ that has been violated by the investigating team while accessing Elizabeth's mobile by using her fingerprints.¹⁰² The procedure which was followed by the investigating team should not be arbitrary but should be fair

⁹³ *Board of Secondary and Higher Secondary Education of Maharashtra v. K.S. Gandhi* (1991) 2 SCC 716.

⁹⁴ *M/S Sesa Goa Ltd. v. State Of Goa* 2013 SCC OnLine NGT 27.

⁹⁵ *Cooper v. Wandsworth Board of Works* [1863] 143 ER 414.

⁹⁶ Constitution of Erehwon, art. 21.

⁹⁷ Moot Problem p.no. 4, para. 15.

⁹⁸ *Nahar Singh Yadav v. Union of India* (2011) 1 SCC 307.

⁹⁹ *Sathyavani Ponrani v. Samuel Raj* 2010 SCC OnLine Mad 3758.

¹⁰⁰ *Karan Singh v. State of Haryana* (2013) 12 SCC 529.

¹⁰¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India* 2017 10 SCC 1.

¹⁰² Moot Problem, p.no. 4, para. 15.

MEMORIAL FOR THE RESPONDENT

and carefully designed.¹⁰³The interference with the mobile should be justified and must satisfy the state interest¹⁰⁴ which was lacking in this case. Elizabeth has the right to safeguard her mobile¹⁰⁵ which was infringed by the investigating team. No authority can arbitrarily interfere with Elizabeth's phone and the law is duty-bound to protect her from such arbitrariness.¹⁰⁶ Also, the International Covenant on Civil and Political Rights protects the honour and reputation of a person,¹⁰⁷ who is subjected to such invasion.

20. The Court characterized cell phones as minicomputers filled with massive amounts of private information, which distinguished them from the traditional items that can be seized from an arrestee's person, such as a wallet.¹⁰⁸ Moreover, Elizabeth being a woman might have had photographs that she did not want anyone else unless she consented. It can be deduced reasonably that there might have been information related to her bank accounts and other monetary assets. Therefore, when asked by the police authorities for the password she forthwith refused to provide the same.

[B] Elizabeth had a Right against self-incrimination

21. The accused has a right to remain silent or refuse to give any evidence that might result in a conviction.¹⁰⁹ The information extracted by the investigating team through Elizabeth's mobile is not only an infringement of her privacy but also violates her right against self-incrimination.¹¹⁰ The privilege against self-incrimination is a fundamental of common law criminal jurisprudence which purports that a person accused of an offense shall not be compelled to discover documents or objects which incriminate the accused.¹¹¹ The investigating authority must not exert any mental or physical pressure on the suspect to extract any information.¹¹² Thus, it would be a travesty of justice to compel Elizabeth to render evidence that might be detrimental for her defense.

¹⁰³ *Maneka Gandhi v. UOI* (1978) 2 SCR 621.

¹⁰⁴ *Govind v. State of M.P* (1975) 2 SCC 148.

¹⁰⁵ *R. Rajagopal v. State of Tamil Nadu* 1994 SCC (6) 632.

¹⁰⁶ The Universal Declaration of Human Rights, 1948, art. 12.

¹⁰⁷ The International Covenant on Civil and Political Rights, 1966, art. 17.

¹⁰⁸ *Riley v. California* [134 S. Ct. 2473 (2014)].

¹⁰⁹ Constitution of Erewhon, art. 20(3).

¹¹⁰ *Selvi v. State of Karnataka* AIR 2010 SC 1974.

¹¹¹ M.P.Jain, *Indian Constitutional Law* 1144 (Lexis Nexis, Gurgaon (Haryana), 8th edn. 2018).

¹¹² The Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art. 3

MEMORIAL FOR THE RESPONDENT

[C] The Police wrongfully took Elizabeth's fingerprints

22. S. 73 of the Erehon Evidence Code, 1973 provides for the court to direct a person to give their signature, handwriting or seal for comparison during a proceeding.¹¹³ So, a magistrate has this authority, subject to the condition that the accused must have been arrested at some time in connection with such investigation or proceeding.¹¹⁴ Also, for proper implementation of this section, it is quintessential for a proceeding to be awaiting decision before the court.¹¹⁵ The Chief Judicial Magistrate does not have the authority to compel the accused to give his biometrics for comparison during the investigation¹¹⁶.

23. Moreover, the state has no right over a citizen's proprietary information and thus it cannot force or induce any person to submit their identification entitlements such as fingerprints as it infringes their basic right to informational self-determination.¹¹⁷ Also, when a police officer in his capacity of a public servant¹¹⁸ is entrusted with any property and he dishonestly misappropriates or converts it to his use, he is said to commit criminal breach of trust.¹¹⁹ Misappropriation of that property amounts to an abuse of the dominion on behalf of the state, which is punishable by law and thus amounts to his conviction under s. 409 EPC.¹²⁰ Therefore, the Police, acting on the advice of the Prosecutors' Office¹²¹ had no right to coerce Elizabeth into giving her fingerprints in the first place and it committed criminal breach of trust when it used her fingerprints to access her mobile phone.¹²²

[D] The evidence obtained from Elizabeth is the fruit of the poisonous tree.

24. The doctrine of the *fruit of the poisonous tree*¹²³ is very similar to the exclusionary rule followed in the United States.¹²⁴ The fruit of the poisonous tree doctrine was first held applicable to Fourth Amendment violations of the Constitution of America¹²⁵. Elizabeth

¹¹³ Erehon Evidence Code, 1973, s..73.

¹¹⁴ Just. M. Monir, *Law of Evidence* 1322 (Universal Law Publication, 14th edn., 2006).

¹¹⁵ *State of Haryana v. Jagbir Singh* (2003) 11 SCC 261.

¹¹⁶ *Ibid.*

¹¹⁷ *Binoy Viswam v. Union of India* AIR 2017 SC 2967.

¹¹⁸ Erehon Penal Code, 1860, s. 21.

¹¹⁹ Erehon Penal Code, 1860, s. 409.

¹²⁰ *Emperor v. Abasalli Yusufalli Musalman* AIR 1935 Nag 139.

¹²¹ Moot Problem p. no. 4 para. 14.

¹²² Moot Problem p.no. 4, para. 15.

¹²³ *Silverthorne Lumber Co. v. United States* 251 U.S. 385.

¹²⁴ *Nardone v. United States* 308 U.S. 338 (1939).

¹²⁵ *Wong Sun v. United States* 371 U.S. 471.

MEMORIAL FOR THE RESPONDENT

was reluctant to give access to her devices but the police obtained her fingerprints by coercion and used them to retrieve photos.¹²⁶ The copies of the printouts of those photos are thus generated by violating the statutes, so they should be held inadmissible.¹²⁷ Even if the prejudice is caused to the accused, then also the evidence should be held inadmissible.¹²⁸

25. The evidence can't be collected by *mala fide* intention.¹²⁹ As the law does not support compelling the accused to render evidence one is not willing to give,¹³⁰ taking of Elizabeth's fingerprints is wrong. Moreover, evidence which is gathered during an illegal action is inadmissible according to the exclusionary rule.¹³¹ This rule should be applied because illegally obtaining evidence is against the procedure established by law.¹³² The illegal access to someone's mobile is her violation of the right to privacy¹³³ which is a fundamental right¹³⁴ that has been infringed by the police. Therefore, this evidence should not be admissible in the court of law.¹³⁵

ISSUE 4: THERE HAS BEEN A SUPPRESSION OF EVIDENCE BY THE PROSECUTION

The Pre-Trial Court's decision concurring with the prosecution's contention regarding the non-reliance upon evidence of text messages exchanged between Diana and Elizabeth was erroneous due to the following reasons:

[A] Secondary Evidence produced by the appellant is insufficient.

[B] Elizabeth and Diana's conversation on the text was a relevant fact.

[C] The appellant must produce that evidence in court.

¹²⁶ Moot Problem p.no. 4, para 14.

¹²⁷ *Dharambir Khattar v. Union of India* 2012 SCC OnLine Del 5805.

¹²⁸ *Bai Radha v. State of Gujarat* AIR 1970 SC 1396.

¹²⁹ *Megha Singh v. State of Haryana* (1996) 11 SCC 709.

¹³⁰ *M P Sharma v. Satish Sharm* AIR 1954 SC 300.

¹³¹ Merriam Webster, Dictionary of Law 175 (Goyal Publishers & Distributors Pvt. Ltd., Delhi, 1st Indian edn., 2005).

¹³² 94th Law commission report, "Evidence Obtained Illegally or Improperly: Proposed Section 166 A, Indian Evidence Act, 1872" (October 1983).

¹³³ *Mapp v. Ohio* 367 U.S. 643 (1961).

¹³⁴ *K.S Puttaswamy v. Union of India* 2017 10 SCC 1.

¹³⁵ *Harikisandas Gulabdas and Sons v. State of Mysore*, 27 S.T.C 434 (1971).

MEMORIAL FOR THE RESPONDENT

[A] Secondary Evidence produced by the appellant is insufficient.

26. The parties can produce secondary evidence in the court, subject to certain conditions¹³⁶ but, “*in a digital camera the printout viz., the photo itself is the primary evidence.*”¹³⁷ The party proposing to produce secondary evidence must prove the fact that the primary evidence was lost.¹³⁸ The mobile phone seized from Elizabeth’s house does not fall under any of the given categories.¹³⁹ In such a case, the prosecution was bound to produce the primary evidence in the court of law¹⁴⁰ but, instead they submitted the copies of the photographs without proving the fact that the primary evidence, couldn’t be produced i.e. the original photographs they obtained from her phone, only to hide the fact that the photographs were indeed not recovered from the camera folder but some other folder and those were the same photographs which were sent by Diana White to which she referred in her texts and even thanked Elizabeth for reading them.¹⁴¹ Therefore, the appellants produced false evidence in the court.

27. Also, from the nature of the case, the adverse party must know that he will be required to produce it.¹⁴² The reason for the proposal of notice is to give the parties a chance to make their case stronger by satisfying the cardinal rule of the Evidence Act and provide the best evidence in court.¹⁴³ And the court can only dispense with this default when the party proposing the secondary evidence successfully proves that the reason it could not produce the original document is not negligence on its part but some other circumstances out of their control.¹⁴⁴ Moreover, the prosecution should not have concealed the material facts within its knowledge which would hamper the proceedings and affect the issues for the court to give the right decision.¹⁴⁵ The pertinent fact is that the police accessed Elizabeth’s phone and they discovered the conversation between Elizabeth and Diana about her stories where she thanked Elizabeth for reading them but the same was not

¹³⁶ Erehon Evidence Code, 1973 s. 65.

¹³⁷ *Unnikrishnan @ Unni v. The State By Inspector Of Police* Cr. Appeal No. 277 of 2011.

¹³⁸ Erehon Evidence Code, 1973, s. 136, Illustration (b) .

¹³⁹ *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473

¹⁴⁰ *Bhuwan @ Sonu v. State of U.P.* Criminal Appeal No. 7054 of 2006.

¹⁴¹ Moot Problem p.no.4, para. 16.

¹⁴² Erehon Evidence Code, 1973, s. 66(2).

¹⁴³ *Surendra Krishna v. MirzaMabamed Syed Ali* AIR 1936 PC 15.

¹⁴⁴ *Patel Manilal Chhaganlal v. The Municipal Corporation, Surat* AIR 1978 Guj 193.

¹⁴⁵ *Krishan Gopal Bajpai v. State of U.P.* Cr. Appeal No. 615 of 1998.

MEMORIAL FOR THE RESPONDENT

produced by the appellant as evidence on record in the court and was indeed suppressed by the appellant.¹⁴⁶

[B] Elizabeth and Diana's conversation on the text was a relevant fact.

28. The police officer must submit all the documents to the magistrate and he may, afterward, request the magistrate to exclude that part from the copies to be granted to the accused which are not relevant in his opinion.¹⁴⁷ The collection of evidence does not mean that the investigating authority must only record such evidence which proves the prosecution case.¹⁴⁸ Placing less reliance on exonerating evidence to confirm a pre-supposed hypothesis preferring the guilt of the accused results in bias.¹⁴⁹ The prosecution's justification for not filing the text messages¹⁵⁰ is a denial of the credibility of the evidence.

29. The fact which might not be in issue but, are so connected with the facts in issue to give them substance is known as relevant facts;¹⁵¹ this is usually known as the rule of *res gestae* in evidence.¹⁵² Sometimes, the items of evidence are said to be part of *res gestae* owing their strength of connection with the fact in issue and as such are admissible.¹⁵³ This enables the court to find out the truth when the prosecution tries to suppress the evidence favorable to the respondent.¹⁵⁴ The principle of *res gestae* also includes incidents that may be fairly considered a part of the event under discussion.¹⁵⁵ Facts in the continuity of fact in issue and the purpose or design are a part of the same transaction.¹⁵⁶

30. A tape-recorded conversation between the accused and the complainant recorded in the absence of police, the voices of the parties later being identified, was held admissible.¹⁵⁷ Diana and Elizabeth's conversation over text about Diana's stories and the fact that she thanked Elizabeth for reading them proves that she had Diana's prior consent to read

¹⁴⁶ Moot Problem p.no. 4, para 16.

¹⁴⁷ Erehon Procedure Code, 1973, s. 173 (6).

¹⁴⁸ *State of Haryana v. Mehal Singh* 1978 SCC OnLine P&H 117

¹⁴⁹ Karl Ask, Anna Rebelius & Par Anders Granhag, "The Elasticity of Criminal Evidence: A Moderator of Investigator Bias", 22 *Applied Cognitive Psychology* 1245, 1253–55, (2008).

¹⁵⁰ Moot Problem, p.no. 5, para. 19.

¹⁵¹ Erehon Evidence Code, 1973, s. 6.

¹⁵² *Babulal Choukhani v. Western India Theatres Ltd.* AIR 1957 Cal 709.

¹⁵³ Lord Hailsham, XVII *Halsbury's Laws of England* 8, (Butterworth, England, 4th edn., 1989).

¹⁵⁴ *James v. Giles et al. v. State of Maryland* 386 U.S. 66, 87, S.Ct. 793.

¹⁵⁵ *Kappinaiah v. Emperor* AIR 1931 Mad 233.

¹⁵⁶ *Kashmira Singh v. State* 1965 JK 37.

¹⁵⁷ *Yusuf Ali v. State* AIR 1968 SC 147.

MEMORIAL FOR THE RESPONDENT

those vignettes. It is a relevant fact as it dissatisfies the essential elements of theft,¹⁵⁸ establishing a reasonable doubt for Elizabeth's conviction for the above-mentioned offense and the appellant has wrongly alleged her of it.

[C] The appellant must produce that evidence in court.

31. The text message is undoubtedly reliable evidence¹⁵⁹ and can be admitted to the court of law.¹⁶⁰ The court may presume evidence to be unfavorable to the person who did not produce evidence which could be produced before the court.¹⁶¹ And to effectively reach this conclusion, the court must assess the suppressed material facts and their effect on the facts in issue and also must verify their evidentiary value and, on finding those facts to be relevant, the court is obliged to order for them to be produced before it.¹⁶² Withholding evidence material to the determination of guilt of the accused violates the respondent's right to due process of law.¹⁶³ Moreover, it is a fundamental principle of criminal jurisprudence that the burden of proof is always on the prosecution and never shifts.¹⁶⁴ Therefore, the pre-trial court's decision to neglect the messages completely without even examining or summoning the prosecution to produce the text messages exchanged between Diana and Elizabeth is arbitrary.

¹⁵⁸ Erehon Penal Code, 1860, s. 378.

¹⁵⁹ *Nitin v. Rekha* 2017 SCC OnLine Bom 112.

¹⁶⁰ *Royston Victor Saldanha v. State of Maharashtra* 2018 SCC OnLine Bom 13263.

¹⁶¹ Erehon Evidence Code, 1973, s. 114(g).

¹⁶² *Ramesh v. State of U.P.* Cr. Appeal No. 524 of 2003.

¹⁶³ *Brady v. Maryland* 373 U.S. 83 (1963).

¹⁶⁴ *Vijayee Singh v. State of U.P.* SC 1990 (3) SCC 190.

MEMORIAL FOR THE RESPONDENT

PRAAYER FOR RELIEF

WHEREFORE IN THE LIGHT OF ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE COUNSELS FOR RESPONDENTS HUMBLY PRAY THAT THIS HON'BLE COURT MAY BE PLEASED TO ADJUDGE AND DECLARE THAT:

1. Elizabeth is not guilty of an attempt to theft under section 511 read with section 380 of EPC.
2. There should be a re-investigation free of all bias.
3. The exclusion of Elizabeth's fingerprints and mobile phone from evidence is unlawful and must not be admitted.
4. There has been a suppression of evidence by the prosecution and that evidence should be produced.

**AND PASS ANY OTHER ORDER, DIRECTION, OR RELIEF THAT IT MAY DEEM
FIT IN THE INTEREST OF JUSTICE, FAIRNESS, EQUITY AND GOOD
CONSCIENCE**

**FOR THIS ACT OF KINDNESS, THE RESPONDENT AS IN DUTY BOUND SHALL
FOREVER PRAY.**

Counsels for the Respondent