Bombay High Court
Salman Salim Khan vs The State Of Maharashtra on 10 December, 2015
Bench: A.R. Joshi

Deshmane and

Ladda(PS)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 572 of 2015

Salman Salim Khan,

Age about 49 yrs, Occ.-Actor,

Resident of 111A, Galaxy Apartments,
B.J. Road, Bandra (West),

Mumbai-400 050. ..APPELLANT.
(Orig. Accus

Versus.

The State of Maharashtra,
(Through:-

Bandra Police Station) ..RESPONDENT

WITH

CRIMINAL APPLICATION No. 1041 of 2015
IN
CRIMINAL APPEAL No. 572 of 2015

.....

Mr Amit Desai, Senior Counsel with Mr Anand Desai,

Mr Nirav Shah, Mr Munaf Virjee, Ms Chandrima Mitra, Ms Manasi Vyas, Mr Nausher Kohli, Mr Niranjan Mundargi, Mr Gopala K. Shenoy, Mr Manhar Saini i/by DSK Legal for the Appellant.

Mr S.K.Shinde, Public Prosecutor with Mrs P.H. Kantharia, Mr.Deepak Thakare and Mr S.H. Yadav, APP for the Respondent-State.

.....

CORAM : A.R.JOSHI, J.

DATED : 7th, 8th, 9th and 10th DECEMBER, 2015 ORAL JUDGMENT:

th DICTATION ON 7 DECEMBER, 2015 :

1. Present Criminal Appeal is preferred by the appellant/accused challenging the judgment and order of conviction dated 6.5.2015. Said order of conviction was passed by the Sessions Court at Bombay in Sessions Case No.240 of 2013. By the impugned judgment and order the appellant/accused was 2 / 305 3 CR APEAL-572-2015-JUDGMENT.doc convicted for various offences and sentenced to suffer respective imprisonments and was also directed to pay fine. Following is the operative part of the judgment and order :

> "1. Accused Salman Salim Khan is convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.304 II of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for a period of five (5) years and to pay fine of Rs.25,000/ (Rupees Twenty Five Thousand only), in default to suffer Rigorous Imprisonment for a period of six (6) months.
>
> 2. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.338 of the Indian Penal Code and sentenced to suffer Simple Imprisonment for a period of one (1) year and to pay fine of Rs.500/ (Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of one (1) month.
>
> 3. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.337 of the Indian Penal 3 / 305 4 CR APEAL-572-2015-JUDGMENT.doc Code and sentenced to suffer Simple Imprisonment for a period of three (3) months and to pay fine of Rs.500/ (Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of one (1) month.
>
> 4. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.134 r/w. Sec.187 of the Motor Vehicles Act,

1988 and sentenced to suffer Simple Imprisonment for a period of two (2) months and to pay fine of Rs.500/ (Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of fifteen (15) days.

5. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.185 of the Motor Vehicles Act, 1988 and sentenced to suffer Simple Imprisonment for a period of six (6) months and to pay fine of Rs.2,000/ (Rupees Two Thousand only), in default to suffer Simple Imprisonment for a period of one (1) month.

6. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.3(1) r/w. 181 of the Motor Vehicles Act, 1988 and sentenced 4 / 305 5 CR APEAL-572-2015-JUDGMENT.doc to suffer Simple Imprisonment for a period of two (2) months and to pay fine of Rs.500/ (Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of seven (7) days.

7. All the substantive sentences shall run concurrently.

8. The accused is on bail. He shall surrender his bail bonds.

9. ig Set off be given to the accused u/s.428 of the Code of Criminal Procedure for the period undergone by him in the prison.

10. The seized articles be destroyed after appeal period is over.

11. Unmarked articles, if any, be destroyed after appeal period is over.

12. The vehicle was returned to the accused Salman Khan on Supurtnama (bond). The Supurtnama (Bond) be cancelled after appeal period."

2. Reportedly, the fine amounts are already paid and the present appellant/accused is granted bail during pendency of appeal.

3. Being aggrieved by the judgment and order of 5 / 305 6 CR APEAL-572-2015-JUDGMENT.doc conviction, present appeal is preferred on various grounds. Those grounds have been dealt with hereunder at the appropriate place.

4. Present appellant was granted bail during pendency of the appeal and by consent of the parties the hearing of the appeal was expedited by this Court vide order dated 8.5.2015 (Coram : A.M. Thipsay, J.).

Under this premise, present appeal was taken for final hearing and the rival arguments were heard at length.

It is specifically mentioned that though the appeal is challenging the conviction for the main offence punishable under Section 304 Part II of IPC, various other aspects were also argued as to the involvement of the appellant as a driver of the motor vehicle involved in the incident and whether he was under the influence of alcohol or whether it was pure and simple accident due to bursting of the tyre of the vehicle. As 6 / 305 7 CR APEAL-572-2015-JUDGMENT.doc such, considering the scope of the matter and considering the conviction of the appellant awarded by the Sessions Court after examination of 27 witnesses, learned Senior Counsel for the appellant argued the matter since 30.7.2015. Initially the matter was started for arguments on 30.7.2015 and was taken on 5.8.2015, 6.8.2015 and 7.8.2015.

Thereafter it so happened that various objections were raised on behalf of the appellant as to the manner in which the paper book of the appeal was prepared and as such time was consumed in between and after the final paper-book in four volumes is prepared by the office of the Court. The appeal was then taken for arguments from 21.9.2015 and the hearing lasted till 4.12.2015.

5. It is the case of prosecution that the present appellant, a famous film star of Hindi cinemas drove 7 / 305 8 CR APEAL-572-2015-JUDGMENT.doc the motor vehicle Toyota Land Cruiser (Registration No.MH 01-DA-32) (hereinafter referred to as "the said car".) He drove the said car on the night between 27.9.2002 and 28.9.2002. Specifically it is the case of the prosecution that at early hours of 28.9.2002, he drove the said car in high speed and in rash and negligent manner and that time he was under the influence of alcohol. It is the case of prosecution that on the night of 27.9.2002 at about 9:30 p.m. or so the appellant took out the said car. He was accompanied by his friend one Kamal Khan (not examined in the present matter) and his police bodyguard one Ravindra Himmatrao Patil (since deceased).

According to the case of prosecution the appellant/accused was driving the said car from his house at Galaxy Apartments Bandra and firstly visited Rain Bar. In the Rain Bar the appellant and his friend Kamal Khan went inside and his bodyguard Ravindra 8 / 305 9 CR APEAL-572-2015-JUDGMENT.doc Patil remained outside. It is also the case of prosecution that brother of the appellant one Sohail Khan also visited Rain Bar at the relevant time and the bodyguard of Sohail Khan was present outside the Rain Bar. Name of said bodyguard of Sohail Khan is Balu Laxman Muthe (PW-6).

6. It is the prosecution's case that at Rain Bar various eatables and drinks were served to the appellant and his friend and others. This service was given by one waiter by name Malay Bag (PW-5), who was then on duty at Rain Bar. After consuming the food and drinks which included alcohol (Bacardi), a White Rum and some cocktails, the appellant and his friend left Rain Bar and then visited hotel JW Marriott.

Again according to the case of prosecution the appellant/accused was driving the said car and his bodyguard Ravindra Patil sat by the side of driver's 9 / 305 10 CR APEAL-572-2015-JUDGMENT.doc seat in the front and the friend Kamal Khan sat at the rear seat. At hotel JW Marriott the appellant/accused and his friend went inside and again Ravindra Patil remained outside.

7. According to the case of prosecution at about 2:15 a.m. or so on 28.9.2002 the appellant and his friend Kamal Khan came out of hotel JW Marriott.

Again the appellant sat on the driver seat and his bodyguard Ravindra Patil sat by his side on the frond seat and Kamal Khan sat at the rear and they started coming back to the house of the appellant via St. Andrews Road and Hill Road. It is also specific case of the prosecution that at that time the appellant was under the influence of alcohol and was driving the car at very high speed of about 90 to 100 km. per hour.

Ravindra Patil, the bodyguard, cautioned him to lower down the speed but the appellant did not pay any 10 / 305 11 CR APEAL-572-2015-JUDGMENT.doc heed. Consequently the appellant lost his control over the car while negotiating the right turn at the junction of St. Andrews Road and Hill Road. The appellant dashed the said car on the shutters of American Laundry which is situate at the junction. Said impact resulted in the death of one person by name Nurulla and injuries to four persons who are PW-2, PW-3, PW-

4 and PW-11. The deceased and the injured were sleeping on the platform in front of American Laundry.

Due to the impact there was a loud noise and there was a sort of commotion that followed. Many people gathered on the spot after hearing the noise and they saw the appellant coming out from the car. They also saw that few persons were below the car and apparently under the tyre. They noticed that one person was seriously injured and he subsequently died and four persons sustained injuries. Out of them two persons received grievous injuries and two persons 11 / 305 12 CR APEAL-572-2015-JUDGMENT.doc received simple injuries.

8. It is also the case of prosecution that the mob which was gathered on the spot after the incident was rather furious and apparently there was manhandling of the inmates of the car including Ravindra Patil, police bodyguard of the appellant. Said bodyguard sensing the seriousness of the situation showed his police identity card and proclaimed that he was a police officer. As such, he pacified the people who had gathered there who were angry and aggressive. It is also the case of the prosecution that the appellant and his friend Kamal Khan ran away from the spot without giving any help to the persons involved in the incident.

In the meantime intimation was given to Bandra Police and within few minutes the police persons arrived at the spot and took charge of the situation. The incident of impact of the car on the shutters of American 12 / 305 13 CR APEAL-572-2015-JUDGMENT.doc Laundry happened around 2:45 a.m. on 28.9.2002.

When the police persons arrived on the spot the bodyguard Ravindra Patil was also present there. A crane was called and the car was lifted and taken aside. The injured persons were rescued from beneath the car and taken to Bhabha Hospital for medical treatment and examination. One person was found dead. Subsequently he was identified as one Nurulla.

Dead body of Nurulla was taken to Bhabha hospital and some blood samples from the dead body were collected for analysis.

9. The statements of injured persons were recorded during investigation. However prior to that the spot panchnama (Exhibit-28) was conducted after the spot was shown by Ravindra Patil. The spot panchnama was conducted under the supervision and directions of police inspector Rajendra Kadam (PW-

13 / 305 14 CR APEAL-572-2015-JUDGMENT.doc

26). PW-1 one Sambha Gavda was one of the panch witnesses. Various articles were collected from the spot like broken glass pieces, piece of shutter of American Express Laundry, blood stained soil etc..

The documents concerning the car like RTO and insurance papers were also collected. Key of the car was also taken charge of by the police.

10. Ravindra Patil, the bodyguard of the appellant was enquired at Bandra Police Station. He lodged his complaint. It was later on marked as Exhibit-P-1 during the recording of the evidence before the Metropolitan Magistrate Court when the case was first tried there when the main offence against the present appellant/accused was punishable under Section 304A of IPC. It so happened that initially on lodging of the FIR the main charge was for the offence under Section 304A of IPC. However various 14 / 305 15 CR APEAL-572-2015-JUDGMENT.doc subsequent events occurred and there was application of applying section 304 Part II of IPC. The events which took place from lodging of the FIR in the matter till case was committed to the Court of Sessions, shall be detailed hereunder at the appropriate place.

During investigation, police took steps to search the appellant by visiting his house but he could not be found. Subsequently the appellant/accused was arrested in the morning of 28.9.2002. According to prosecution, initially the appellant was taken to Bhabha hospital for taking his blood sample as it was the case of prosecution that the appellant was under the influence of alcohol and driving the car in rash and negligent manner and thereby caused the incident, killing one person and injuring four persons.

Though according to the prosecution the appellant was taken first to Bhabha hospital for extracting blood for alcohol test, it is also the case of prosecution that 15 / 305 16 CR APEAL-572-2015-JUDGMENT.doc the blood could not be extracted at Bhabha hospital for want of proper equipments and facility. This aspect shall also be dealt with hereunder as to whether this fact has been established by the prosecution by any cognate evidence and it is also to be ascertained whether this case of prosecution can be accepted in the light of the factual position that Bhabha hospital does have ICU unit and also admittedly the blood of the deceased Nurulla was extracted there for testing. The fact remains that as the blood could not be extracted at Bhabha hospital, the appellant was taken to JJ Hospital in the afternoon of 28.9.2002 at about 1:30 p.m. or so. His blood samples were collected at JJ Hospital by one Dr. Shashikant Pawar (PW-20). Said blood samples

along with requisite forms A & B as per the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 were given in the custody of police 16 / 305 17 CR APEAL-572-2015-JUDGMENT.doc constable and they were taken to Bandra Police Station. It is also the case of prosecution that though the blood samples were collected and received from JJ Hospital in the afternoon of 28.9.2002 they were immediately not sent to the Chemical Analyzer's office at Kalina, Santacruz as the CA office was closed.

Consequently the blood samples were sent to the office of CA on 30.9.2002. Admittedly samples remained in the custody of the police in the meantime.

They were kept in the chamber of PI Shengal (PW-27).

The condition in which the blood samples were kept was a crucial aspect and much emphasis was placed on this by the learned Senior Counsel for the appellant as to the storage of said biological evidence. This aspect shall also be dealt with in detail when minutely the arguments advanced on behalf of the appellant will be considered for analyzing the case of prosecution as to drunken driving and causing death 17 / 305 18 CR APEAL-572-2015-JUDGMENT.doc and injuries.

11. As mentioned above, the blood samples reached the CA office on Monday i.e. 30.9.2002 and on the next day i.e. on 1.10.2002 the analysis report was received by the police. According to the said report (Exh.81) the blood contained 0.062% w/v of ethyl alcohol i.e. weight by volume 62 mg per thousand ml.

12. Initially the investigation was conducted by PW-26 one Rajendra Kadam, then working as PSI Bandra Police Station. Subsequent investigation from 1.10.2002 was conducted by Sr. P.I. Kisan Shengal (PW-27). However, he is also the police officer who visited the spot immediately after the incident as he was informed by PSI Kadam over telephone regarding the incident.

13. During investigation, statements of various 18 / 305 19 CR APEAL-572-2015-JUDGMENT.doc witnesses were recorded. The motor vehicle involved in the incident was also inspected by Motor Vehicle Inspector (PW-19) Rajendra Sadashiv Keskar.

According to him he inspected the vehicle on 29.9.2002 at about 9:30 a.m. and gave his report which is at Exh.84. It is the specific evidence of this witness appearing in notes of evidence in paragraph-3 of his evidence recorded before the Sessions Court.

There is certain variance in the substantive evidence of this witness. This is because of some answers given by him in his cross-examination. This variance is as to on which date or dates he examined the vehicle. Again this aspect was much emphasized by the learned Senior Counsel for the appellant and the same shall be dealt hereunder at the appropriate place.

14. During investigation Sr. P.I. Shengal (PW-27) visited Rain Bar and recorded the statements of the 19 / 305 20 CR APEAL-572-2015-JUDGMENT.doc waiter Malay Bag (PW-5) and manager Rizwan Rakhangi (PW-9). Certain bills from the Rain Bar were collected during the investigation in

order to establish that the drinks containing alcohol were ordered and consumed by the appellant and his friends who were accompanying him and were with him in Rain Bar. PW-27 Kisan Shengal also visited the hotel JW Marriott and recorded statements of one Kalpesh Verma (PW-12). He was then working as a parking assistant at JW Marriott hotel. PW-27 Kisan Shengal also collected the parking tag from the hotel.

At this juncture it is also necessary to point out that said parking tag was not seized and apparently there was no panchnama drawn for alleged seizure of the parking tag and this factual position has been substantiated by evidence of PW-27.

15. During investigation, enquiries were made 20 / 305 21 CR APEAL-572-2015-JUDGMENT.doc with RTO Tardeo and also Andheri RTO seeking information on whether driving licence was obtained by the appellant. It was reported back by said RTO offices that the appellant was not given any driving license by said offices. At this juncture it must be mentioned that even it is not the case of the appellant that he had a valid motor driving license in his name as on the date of the incident.

16. During investigation, statements of some of the witnesses were also recorded under Section 164 of Cr.P.C., before the Metropolitan Magistrate Court No.12, Bandra. Statement of one Kamal Khan, a friend of the appellant, was also recorded under Section 161 of Cr.P.C. on 4.10.2002. At this juncture it must be mentioned that this Kamal Khan was all along accompanying the appellant on that night between 27.9.2002 and 28.9.2002 i.e. from 9:30 p.m. on 21 / 305 22 CR APEAL-572-2015-JUDGMENT.doc 27.9.2002 till the happening of the incident at about 2:45 a.m. on 28.9.2002. Again at this juncture it must be mentioned that though said Kamal Khan was the important eye witness and all along present in the car and was accompanying the appellant and his bodyguard Ravindra Patil, said Kamal Khan was not examined even before the Metropolitan Magistrate Court when the matter was before the M.M. Court or before the Sessions Court when the matter was committed to it. This aspect shall also be dealt in detail as at the fag end of the arguments in this appeal, an application was preferred on behalf of the appellant under Section 391 of Cr.P.C.. By said application request was made to the Court to call said Kamal Khan as a court witness mentioning that his substantive evidence before the Court would throw light on the factual position, more so when the first informant Ravindra Patil was not available for cross-

22 / 305 23 CR APEAL-572-2015-JUDGMENT.doc examination before Sessions Court when the Sessions Case was tried. The evidence of Ravindra Patil before the Metropolitan Magistrate Court recorded in the year 2007 was accepted by the Sessions Court under Section 33 of the Evidence Act. The said application under Section 391 of Cr.P.C. is dismissed by this Court.

This aspect shall also be dealt in detail while appreciating the arguments advanced on behalf of the appellant.

17. On 1.10.2002 supplementary statement of Ravindra Patil (since deceased) bodyguard of the appellant, was recorded. It must be mentioned that for the first time the prosecution came with a case that the appellant had consumed alcohol during the incident on 28.9.2002. Apparently this theory of the appellant consuming alcohol came in the supplementary statement of Ravindra Patil

recorded 23 / 305 24 CR APEAL-572-2015-JUDGMENT.doc on 1.10.2002 and it is admittedly not present in the first information report which was immediately recorded after the incident of 28.9.2002. Of course this aspect needs careful scrutiny when the defence of the appellant is that he was not under the influence of alcohol and moreover he was not driving the said car.

This aspect shall also be dealt in detail at the appropriate place.

18. On 7.10.2002 Section 304 Part II of IPC was added by the investigating agency. This information was provided to the concerned Magistrate Court which was then dealing with the remand application of the appellant/accused. Earlier the appellant was released on bail on his production before the Metropolitan Magistrate Court and subsequently when Section 304 Part II of IPC was added he again voluntarily surrendered to the police on 7.10.2002 and then was 24 / 305 25 CR APEAL-572-2015-JUDGMENT.doc released on bail.

19. After completion of investigation charge-sheet was filed before 12th Metropolitan Magistrate Court, Bandra on 21.10.2002. On 31.1.2003 the case was committed to the Court of Sessions as the offence then applied under Section 304 Part II of IPC was exclusively triable by the Court of Sessions. The appellant/accused filed Misc. Application No.463/2003 before the Sessions Court contending that the provisions of Section 304 Part II of IPC cannot be attracted on the facts and circumstances of the case alleged against him. Said application was heard and rejected by the Sessions Court. The Sessions Court framed the charges against the appellant/accused for the offences punishable under Sections 304 Part II, 308, 279, 337, 338, 427 of IPC and under Section 134(a) & (b) read with Section 187 read with Sections 25 / 305 26 CR APEAL-572-2015-JUDGMENT.doc 181 and 185 of M.V.Act, 1988. In fact the offence under Section 66(i)(b) of the Bombay Prohibition Act was also framed.

20. The appellant/accused pleaded not guilty to the charges. However, he did prefer Criminal Writ Petition No.2467 of 2003 before this Court. Said petition was apparently under Section 482 of Cr.P.C..

It was allowed by this Court and the order of the Sessions Court to the extent of framing charge under Section 304 Part II of IPC was quashed and set aside.

This order was challenged by the State before the Apex Court by filing Criminal Appeal No.1508 of 2003.

21. The Hon'ble Apex Court set aside the order of this Court as well as the order of the trial Court and kept the issue of framing of the charge under Section 304 Part II of IPC, open and to be decided at the 26 / 305 27 CR APEAL-572-2015-JUDGMENT.doc appropriate stage by the learned Metropolitan Magistrate Court as by that time it was the factual position that the learned Metropolitan Magistrate Court, Bandra had already framed fresh charges including the main charge for the offence under Section 304A of IPC. This was the action taken by M.M. Court in consonance with the order of this Court quashing the charge for the offence under Section 304 Part II of IPC. The Hon'ble Apex Court felt it appropriate to set aside the finding in regard to sufficiency or

otherwise of the material to frame the charge for the offence punishable under Section 304 Part II of IPC. The Apex Court thought it appropriate that said issue would be left open to be decided by the Court trying the offence under Section 304A of IPC and to alter or change any such charge at appropriate stage based on the evidence produced by the prosecution.

27 / 305 28 CR APEAL-572-2015-JUDGMENT.doc

22. Under the above premise, the matter was taken before the Metropolitan Magistrate Court at Bandra and almost 17 witnesses were examined.

Without much going into the details as to the evidence of those witnesses, suffice it to say that after the examination of 17 witnesses and admittedly when only the investigating officers were to be examined, the prosecution thought it fit to file an application for adding the charge under Section 304 Part II of IPC.

Accordingly said application was made and entertained by the Metropolitan Magistrate Court and allowed. In the result, the case was committed to the Court of Sessions and it was held by the Magistrate that the material then brought on record does indicate that it is a case of framing of charge under Section 304 Part II of IPC. The matter reached the Sessions Court on about 31.1.2013 and it was numbered as Sessions Case No.204 of 2013 and only after hearing and 28 / 305 29 CR APEAL-572-2015-JUDGMENT.doc recording evidence of 27 prosecution witnesses and one defence witness, the Sessions Court passed the order of conviction which is impugned in the present appeal.

23. When the matter was thus committed to the Court of Sessions and when the charge was framed, a plea was taken on behalf of the appellant for discharge under Section 227 of Cr.P.C. which was rejected by the Sessions Court. Thereafter detailed charge was framed on 24.7.2013. For the sake of ready reference said detailed charge is reproduced hereunder as it is of much significance inasmuch as there is no charge for the offence under Section 66(i)(b) of Bombay Prohibition Act. Heads of charge reads as under :

> "That on 28/09/2002 at about 2:45 a.m., near American Express Cleaners, St. Andrews Road and Ramdas Nayak Marg (Hill Road), Bandra (West), Mumbai - 400 050:-
>
> 29 / 305 30 CR APEAL-572-2015-JUDGMENT.doc Firstly : committed culpable homicide not amounting to murder by causing death of Nurulla Mehboob Shaikh by driving your Toyata Land Cruiser bearing No. MH-01-DA-32, in rash or negligent manner and in drunken condition, with the knowledge that by the driving of supra car in supra manner and condition, you were likely to cause death and thereby committed an offence punishable under Sec. 304 Part II of IPC, and within the cognizance of this Court;
>
> Secondly :- by driving said car rashly or negligently so as to endanger human life or personal safety of others caused hurt to Kalim Mohd Pathan and Munna Malai Khan,

aged 24 & 29 respectively and thereby committed an offence punishable under section 337 I.P.C., and within the cognizance of this Court;

Thirdly :- by the said act of driving car rashly or negligently as to endanger human life or the personal safety of others, caused grievous hurt to Abdul Rauf Shaikh aged 18 years and one Muslim Niyamat Shaikh aged 17 years and thereby caused an offence punishable under section 338 of I.P.C., and within the cognizance of this Court.

Fourthly : while driving the said car 30 / 305 31 CR APEAL-572-2015-JUDGMENT.doc in public place you were not holding a valid driving licence and thereby committed an offence U/s. 3(1) of Motor Vehicles Act, 1988 and punishable U/s. 181 of said Act and within the cognizance of this Court.

Fifthly :- That at the aforesaid date, time and place you did not take reasonable steps to secure medical aid to the victim persons by conveying them to nearest medical practitioner or hospital and thereby committed offence U/s. 134 of Motor Vehicles Act, 1988, P/U/S. 187 of Motor Vehicles Act, 1988 and within the cognizance of this court.

Sixthly :- failed to give information about the incident / report / circumstances of the occurrence of incident to the police and thereby you committed offence punishable U/S. 187 of Motor Vehicles Act, 1988 and within the cognizance of this court.

Seventhly :- That you had in your blood, alcohol exceeding 30 mg. Per 100 ml. i.e. .062% mg and that you were under the influence of alcohol to that extent so as to incapable of exercising proper control over supra vehicle and thereby you committed offence punishable U/s. 185 of Motor Vehicles Act, 1988.

I hereby direct that you be tried by 31 / 305 32 CR APEAL-572-2015-JUDGMENT.doc this Court on the aforesaid charges.

NOTE: I have not framed charge of the offence punishable U/s. 427 of IPC because for committing mischief contemplated by Sec. 427 of Cr.P.C. intention is required. This was held in Brij Mohan Kishansing Pardeshi Vs. State of Maharashtra, 2006, Cri.L.J. 1614."

24. The appellant/accused pleaded not guilty to the said charge and claimed to be tried. Total 27 prosecution witnesses were examined. After recording of the statement of the appellant/accused under Section 313 of Cr.P.C., one defence witness by name Ashok Singh (DW-1) was examined on behalf of the defence. According to the defence this Ashok Singh was driving the vehicle from JW Marriot hotel till the spot of incident and again according to the defence he was so driving in place of earlier driver by name Altaf.

25. During pendency of the trial and after 32 / 305 33 CR APEAL-572-2015-JUDGMENT.doc framing of the charge, a question arose before the Sessions Court as to whether the evidence earlier recorded before the Metropolitan Magistrate Court, when the charge was mainly for the offence punishable under Section 304A of IPC, is to be treated as an evidence in the sessions case after the committal.

That time rival arguments were heard. Import of section 323 of Cr.P.C. and the provisions of Chapter XVIII and the provisions of Sections 225 to 235 of Cr.P.C. were discussed and considered. Consequently the Sessions Court passed a detailed order on 5.12.2013 ordering fresh trial against the accused thereby not accepting the evidence of the earlier recorded prosecution witnesses i.e. 17 witnesses recorded before the Metropolitan Magistrate Court.

This order is apparently not challenged by both the parties and under this premise, total 27 prosecution witnesses were examined and one defence witness 33 / 305 34 CR APEAL-572-2015-JUDGMENT.doc was examined before the Sessions Court. Considering the substantive evidence sufficient to establish the guilt of the appellant/accused for the charges framed against him and considering the effect of defence witness and rejecting the evidence of the defence witness even on preponderance of probabilities, the trial Court convicted the appellant/accused for all the charges as mentioned earlier at the threshold of this judgment.

During the arguments various issues were

26. raised by the learned Senior Counsel for the appellant.

Broadly the argument is based on three propositions :

(a) Firstly, that the appellant was not driving the vehicle;

(b) Secondly, he was not drunk and was not under the influence of alcohol at the time of incident;

and 34 / 305 35 CR APEAL-572-2015-JUDGMENT.doc

(c) Thirdly, it was pure and simple accident as left side front tyre of the car burst thus the car was beyond the control of the driver and met with an accident.

27. Apart from the above three broad propositions, it is also argued that there is incorrect application of penal section 304 Part II of IPC and also that the evidence before M.M. Court of one Ravindra Patil (since deceased) should not have been taken help of by the Sessions Court under Section 33 of the Evidence Act. It was so argued on the factual position that the evidence of Ravindra Patil was recorded before the Metropolitan Magistrate when the main charge was under Section 304A of IPC and before the Sessions Court the main charge was for the offence under Section 304 Part II of IPC and by the time the matter reached the Sessions Court or even much 35 / 305 36 CR APEAL-572-2015-JUDGMENT.doc earlier in the year 2007 said Ravindra Patil died and was not available for cross-examination before the Sessions Court. His evidence recorded before the

Metropolitan Magistrate was accepted as a substantive evidence under Section 33 of the Evidence Act.

28. In order to appreciate the broad submissions on behalf of the defence, the effect of the prosecution evidence is required to be summarized. Broadly, the following position of examination of witnesses vis-a-

vis the effect of their evidence can be chalked out.

[A] WITNESSES ON THE POINT THAT THE APPELLANT/ACCUSED WAS DRIVING THE CAR / COMING OUT OF THE CAR :

PW-2 injured witness one Muslim Niyamat Shaikh who sustained grievous injury;

PW-3 injured witness Mannu Khan who received injuries on his right leg. At this juncture it must be 36 / 305 37 CR APEAL-572-2015-JUDGMENT.doc mentioned that the injuries sustained by this witness are grievous injuries inasmuch as there was a fracture of proximal phalynx of his right leg as apparent from his medical certificate Exh.152.

PW-4 injured witness Mohd. Kalim Iqbal Patra who received simple injuries to his right leg and left hand.

PW-11 injured witness Mohd Abdulla Shaikh who received grievous injury and sustained abrasion.

29. Apart from the above witnesses, important witness to the prosecution on this aspect of driving is the police bodyguard i.e. Ravindra Patil. He was examined before the Metropolitan Magistrate Court on different dates and specifically on 5.1.2006, 2.2.2006, 6.2.2006 and thereafter on 16.3.2006. He is the person who lodged First Information Report and initially the main offence under Section 304A of IPC was registered. He was examined before the 37 / 305 38 CR APEAL-572-2015-JUDGMENT.doc Metropolitan Magistrate Court when the main charge was under Section 304A of IPC and not under Section 304 Part II of IPC. His evidence was subsequently accepted by the Sessions Court under Section 33 of the Evidence Act as mentioned earlier.

30. Apart from the above witnesses, there are other witnesses concerning the driving of the said car by the appellant. Though these are not the witnesses who actually saw the appellant driving the car they are concerning the circumstances which according to the prosecution establishes that the only inference that can be drawn is that the appellant was driving the vehicle and no other person. Said witnesses are - PW-

8 one Ramsare Ramdeo Pande who visited the spot after hearing of the noise of the impact, PW-12 Kalpesh Verma working as parking assistant at JW Marriott Hotel and apparently saw the appellant 38 / 305 39 CR APEAL-572-2015-JUDGMENT.doc coming out of JW Marriott hotel and sitting on the driver seat of the car.

[B] WITNESSES ON THE ASPECT OF

CONSUMPTION OF ALCOHOL BY THE APPELLANT/ACCUSED :

PW-3 injured Mannu Khan. According to this witness the appellant/accused was drunk during the incident and due to drunkenness he fell down on the ground twice and again woke up and ran away.

PW-5 Malay Bag, the waiter working in Rain Bar and Restaurant.

PW-9 Rizwan Ali Rakhani, the Manager of Rain Bar and Restaurant.

31. On this aspect of drunkenness of the appellant, according to the prosecution, their other important witness is Ravindra Patil, the bodyguard of 39 / 305 40 CR APEAL-572-2015-JUDGMENT.doc the appellant. According to the prosecution, apart from the point of appellant driving the car, this witness is also on the point of consumption of alcohol by the appellant. According to this witness in his substantive evidence before the Metropolitan Magistrate Court he has stated that the appellant/accused was under the influence of alcohol.

32. There is another set of witnesses examined by the prosecution and their evidence relate to the case of prosecution as to the appellant/accused was under the influence of alcohol during the incident. The said witnesses are :

PW-20 Dr. Shashikant Pawar, Medical Officer from JJ Hospital. He extracted the blood from the appellant for alcohol test on 28.9.2002 at around 2:30 p.m. and sent the blood sample to the CA office through police constable.

40 / 305 41 CR APEAL-572-2015-JUDGMENT.doc PW-18 one Dattatraya Balshankar, is the Assistant Chemical Examiner from the office of CA at Kalina.

He analyzed the blood sample sent by the Investigating Officer and gave his report (Exh.81) and that the blood sample contained 0.062 mg of alcohol w/v.

PW-21 is one Sharad Borade, a Police Naik then attached to Bandra police station, who carried the blood samples from Bandra Police Station to the office of CA.

PW-22 is then PSI attached to Bandra Police Station who brought the appellant/accused with other police staff to JJ Hospital for clinical examination and also for drawing blood sample for alcohol

test.

[C] WITNESSES ON THE ASPECT OF BURSTING OF TYRE OF THE CAR:

PW-19 Rajendra Keskar who is the RTO Inspector who 41 / 305 42 CR APEAL-572-2015-JUDGMENT.doc inspected the vehicle i.e. the car involved in the incident and gave inspection report (Exh.84). This witness stated that the tyres of the vehicle were found in good condition and only stated that the left side front tyre was deflated.

PW-1 is the panch witness Sambha Gowda regarding spot of incident. According to him, as mentioned in his substantive evidence, the left side tyre of the car was found punctured. It is also so mentioned in the spot panchnama (Exh.28).

PW-8 Ramsare Pande stated that the left side tyre of the car was found burst.

PW-13 Amin Shaikh stated that the tyre of the car was found burst.

PW-26 Rajendra Kadam, investigating officer stated that the vehicle involved in the accident had burst tyre 42 / 305 43 CR APEAL-572-2015-JUDGMENT.doc and it was not in a position to be driven. He further stated that the front left side tyre of the car was burst.

PW-27 Kisan Shengal stated that it was not possible for him to send the front side left tyre of the car to the forensic laboratory for ascertaining the accident and cause of burst.

33. Again on this aspect of bursting / puncture of the left side front tyre of the car there is mention in the spot panchnama (Exh.28) mentioning that the tyre was punctured. As against this, the FIR given by Ravindra Patil mentions the word burst.

34. Apart from the above, on this issue of bursting/puncture of tyre DW-1 one Ashok Singh, a defence witness, is also of much significance. He was examined on behalf of the appellant/accused to establish the defence firstly that the appellant was not driving the vehicle and secondly that the incident 43 / 305 44 CR APEAL-572-2015-JUDGMENT.doc occurred because of the bursting of the left side front tyre of the car prior to car reaching the spot of the incident.

[D] WITNESSES ON SPEED OF THE CAR AND ROUTE TAKEN BY IT TILL REACHING THE SPOT OF INCIDENT :

The speed of the car is also one of the significant factors in the present case. So also the route taken by the vehicle is also a significant factor.

Ravindra Patil is the prosecution witness who mentioned that the car was being driven at the speed of 90-100 km per hour.

The factual position is that there were no break marks on the spot and there is no mention in the spot panchnama to that effect.

35. The damage to the car is also not so extensive 44 / 305 45 CR APEAL-572-2015-JUDGMENT.doc as it is apparent from the vehicle inspection report (Exh.84) prepared by RTO Inspector PW-19 Rajendra Keskar so as to establish that the impact happened at 90-100 km/ph.

36. So far as the route taken by the car, it is an admitted position and substantiated by the evidence of Investigating Officer and mainly PW-27 Mr. Shengal i.e. the FIR at two places the route by which the car was driven is mentioned as from "St. Andrews Road"

to "Hill Road". However, it is also an admitted position that the initial words were "Manuel Gonsalves" and these words are cancelled by slanting marks and above these words "St. Andrews" is written.

It is significant that though this factual position is admitted by PW-27 there is no explanation as to why this alteration was made though it was the defence that the vehicle took the route via Manuel Gonsalves 45 / 305 46 CR APEAL-572-2015-JUDGMENT.doc road and the vehicle came to the Hill Road by taking right turn from Manuel Gonsalves road and not from St. Andrews Road.

37. Another argument on behalf of the appellant was as to whether on given facts Section 304 Part II of IPC is applicable or not. This aspect also shall be dealt in detail at the appropriate place as in fact it is the appreciation of the material available before the trial Court as to acceptance or otherwise of knowledge of the accused or whether simplicitor fact situation that driving in a drunken condition can be accepted as a knowledge that such driving is likely to cause death of human being if the vehicle meets with an accident.

On this aspect two authorities are taken shelter of, in fact by both the sides. First one is in the case of Alister Anthony Pareira vs. State of Maharashtra (2012) 2 SCC 648 and second one in the case of 46 / 305 47 CR APEAL-572-2015-JUDGMENT.doc State vs Sanjiv Nanda (2012) 8 SCC 450. The ratio of these authorities including the rival arguments shall be dealt in detail when dealing with this aspect of applicability or otherwise of Section 304 Part II of IPC to the present matter.

38. Apart from the broad and other ancillary points argued on behalf of the appellant there are still other points argued such as whether the death of Nurulla was on account of the incident or whether it was by falling of a car when being lifted with the help of a crane.

39. After having broad analysis of the arguments on behalf of the appellant and the different circumstances to be examined in the present case, the broad arguments on behalf of the prosecution are required to be mentioned so that the scope of the present appeal can be ascertained. Broadly there is an 47 / 305 48 CR APEAL-572-2015-JUDGMENT.doc argument on behalf of the State by learned Public Prosecutor on three main defences raised on behalf of the appellant i.e. who was driving, secondly whether the appellant/accused was under the influence of alcohol and thirdly

whether it was a pure and simple accident. It is also much argued on behalf of the prosecution that the recourse to Section 33 of the Evidence Act was rightly taken by the Sessions Court while accepting the testimony of Ravindra Patil which was recorded in the Metropolitan Magistrate Court and it is further canvassed that the questions which arise were substantially the same before the proceeding at Metropolitan Magistrate Court level and in the Sessions Case. This is so argued on the applicability of Section 33 of the Evidence Act still in the light of the factual position that before the Metropolitan Magistrate Court the main charge was under Section 304A of IPC and the main charge 48 / 305 49 CR APEAL-572-2015-JUDGMENT.doc before the Sessions Court was under Section 304 Part II of IPC.

40. Apart from the above, it is also argued on behalf of the State that the theory of left side front door of the car was in jammed condition and therefore could not be opened during the incident, cannot be accepted. Moreover, it is submitted that also the theory of bursting of the left side front tyre prior to the incident is also required to be discarded more so in view of the report of the RTO Inspector (Exh.84). It is also submitted that the speed of the car was 90-100 kms per hour as stated by Ravindra Patil in his evidence before the Metropolitan Magistrate Court.

41. Apart from the above, the main thrust of arguments on behalf of the State was on the conduct of the accused immediately after the incident and also conduct on the part of the defence witness Ashok 49 / 305 50 CR APEAL-572-2015-JUDGMENT.doc Singh who allegedly was driving the vehicle from hotel JW Marriott till the spot of incident. It is also argued much that the minor contradictions and omissions or even improvements by the prosecution witnesses and mainly by the injured cannot be taken as a mitigating circumstance to the case of the prosecution. Various authorities were cited, which shall be dealt in detail while analyzing the argument of the learned Public Prosecutor in order to ascertain whether the prosecution has reached that standard of proof required to establish the guilt of the appellant for the offences charged and mainly the offence charged under Section 304 Part II of IPC.

42. It must be mentioned that during the arguments learned Public Prosecutor did not argue much on the collection of the hotel bills from hotel JW Mariott and it was so taken by the learned Counsel for 50 / 305 51 CR APEAL-572-2015-JUDGMENT.doc the appellant that this aspect of collection of documentary evidence as to consumption of alcohol by the appellant, has been given go bye by the prosecution. Though it is so, as not much emphasis was placed by the prosecution on this documentary evidence of bills, this aspect is nevertheless being dealt critically at appropriate place. This is more so when in the present matter there is an argument on behalf of the appellant that the investigating agency was bent upon to collect the material against the appellant/accused in order to establish the charge of drunkenness apart from the charge that he was driving the vehicle and it was the argument on behalf of the appellant that it was definitely an attempt on the part of the investigating agency to fabricate the said bills so as to suit their case of consumption of alcohol by the appellant.

51 / 305 52 CR APEAL-572-2015-JUDGMENT.doc

43. During the arguments, learned Public Prosecutor also submitted that the theory of the appellant that one Ashok Singh was driving the vehicle can be negated in view of absence of any such case put to any of the prosecution witnesses and more so when PW-7 Fransis Fernandez does not mention regarding the presence of Ashok Singh on the spot.

The defence evidence of DW-1 Ashok Singh was also assailed by the prosecution on various aspects more particularly that DW-1 does not mention at which spot the left side front tyre of the car burst when the car was on the Hill Road. Also DW-1 did not mention at what time he reached JW Marriott hotel to relieve the earlier driver one Mr. Altaf. Also much is argued on the conduct of said DW-1 in not explaining to anybody either to media or to the police or even to the Court during the course of the trial that he was driving the vehicle and not the appellant/accused.

52 / 305 53 CR APEAL-572-2015-JUDGMENT.doc

44. Now having the broad analysis the substantive evidence before the Sessions Court vis-a-

vis the arguments on behalf of the appellant and the State, a detailed analysis of the evidence and its acceptability and the trustworthiness of the witnesses is required to be done on the broad three aspects as to who was driving, whether the appellant was drunk and whether it was an accident. So also the other allied submissions are also required to be dealt in detail.

ASPECT OF DRIVING :

45. Admittedly in the said incident one person by name Nurulla died and four persons i.e. PW-2, PW-3, PW-4 and PW-11 sustained injuries. It is also an admitted position that the post mortem report of the deceased Nurulla is accepted. So also the injury certificates of PW-2, PW-3, PW-4 and PW-11 were 53 / 305 54 CR APEAL-572-2015-JUDGMENT.doc accepted by the defence and they were accordingly marked as exhibits. The post mortem report is Exh.149/20. Coming to the substantive evidence of PW-2 Muslim Shaikh according to him the incident took place at about 2:45 a.m. and he and other injured witnesses and deceased Nurulla were sleeping near American Laundry and he heard a noise and found himself beneath the car. The wheel of the car passed over his left leg. The bakery people helped to remove him from beneath the car and many people had gathered on the spot. He further stated that the people gathered were saying that Salman Khan got down from the car. According to this witness one person also got down from the left side of the car saying that he was a police. According to this witness, the people caught hold of the accused, but, subsequently released him. Other injured and deceased Nurulla were also found beneath the car and 54 / 305 55 CR APEAL-572-2015-JUDGMENT.doc then the police appeared and brought him to Bhabha hospital. It is significant to note that this witness further stated that he was at Bhabha hospital for a period of two and half months and in the hospital he knew that Nurulla had expired. Thereafter according to him Bandra police recorded his statement. Again it is significant to note that at the end of his examination-in-chief this witness has stated that he saw accused getting down from the right side of the car. Specifically he does not mention anything about the accused getting down from the car from the front right or rear right. This substantive evidence of PW-2 was assailed on behalf of the appellant/accused and it was brought on record that earlier this witness had stated

before the Metropolitan Magistrate Court when his evidence was then recorded that he did not see anybody getting down from the car. During the cross-

examination it has been brought on record that after 55 / 305 56 CR APEAL-572-2015-JUDGMENT.doc two and half months he had gone to Bandra and his only one statement was recorded. By pointing this out, cross-examination appearing in para-3 of the notes of evidence in the paper book page PW-2/4 it is submitted on behalf of the appellant that this witness was not available to the police immediately as according to him he had left Bombay. His further cross-examination also revealed that his statement was not shown to him by the police and he did not read the statement at any time. In the cross-examination it has been brought on record that the doctor asked him about the incident but he was in pain and was not in a position to speak. According to this witness he returned to Mumbai on 26.4.2014 from U.P. And prior to that he had not been to Mumbai. He further stated that he was not present in Mumbai on 20.12.2006.

However, subsequently changed his version and stated that his statement was recorded in Bandra Court on 56 / 305 57 CR APEAL-572-2015-JUDGMENT.doc 20.12.2006. Then again he stated that his evidence was recorded in Bandra Court on that date. But according to him the oath was not administered to him at that time. Moreover during his cross-

examination it is brought on record that before the Metropolitan Magistrate Court he had not mentioned that accused had got down from the car. As such by taking recourse to Section 145 of the Evidence Act, this witness was cross-examined on behalf of the defence during the trial before the Sessions Court vis-

a-vis his earlier statement recorded before the M.M.

Court, Bandra during the initial trial when the offence was for Section 304A of IPC.

46. The final effect of the statement of this PW-2 even accepting his omission, goes to show that he saw the accused coming out of the car from a right side door. Two things are possible from his statement, one 57 / 305 58 CR APEAL-572-2015-JUDGMENT.doc is admitted position that he sustained injuries as depicted in his medical examination papers and secondly that he was under the car when the impact occurred. Other injured and deceased Nurulla were also under the car and the incident was at the wee hours of 2:45 a.m. on 28.9.2002. He was in the hospital and was in pain and unable to talk to the doctor although according to him he mentioned before the Metropolitan Magistrate Court that he saw the accused coming out from the car from the right side. It is not so appearing in his statement. In fact the evidence of this witness as to the accused coming out of the car from the right side may not be of much significance for the simple reason that this position of the appellant coming out of the car from the driver's seat is accepted and it is so accepted while answering the question under Section 313 of Cr.P.C.. Though on this aspect the learned Public Prosecutor had argued 58 / 305 59 CR APEAL-572-2015-JUDGMENT.doc that this answer is required to be taken against the appellant, needless to mention that this answer is required to be construed in juxtaposition of the other explanation given by the appellant/accused in his statement under Section 313 of Cr.P.C.. This aspect as to the compulsive circumstances for the appellant to

come out of the vehicle from the front right side door, are required to be construed in detail hereunder at the appropriate stage and it is regarding defence placed before the Court by way of factual position and admissions given by the prosecution witnesses that the left side front door of the car was jammed and was not in a condition to be opened. Thus rendering even a person sitting by the left side of the driver to come out of the vehicle from the driver's seat.

47. Now coming to the substantive evidence of PW-3 one Mannu Khan and who is apparently an 59 / 305 60 CR APEAL-572-2015-JUDGMENT.doc important witness of the prosecution, it must be said that said Mannu Khan had also sustained injuries to his left foot and there was a fracture to the proximal phalynx. Substantive evidence of this witness in chief is regarding the happenings of the event at about 2:30 a.m. to 2:45 a.m. on 28.9.2002 and that time he was sitting on the platform of the American Laundry. He suddenly heard a noise and found himself beneath the car. The said car was on his person. According to him, he and other injured and also deceased Nurulla were found beneath the said car and when he opened the eyes he found that all were crying and many people had gathered there and the people pushed the said car and rescued him from beneath the car. In the substantive evidence in the chief he specifically mentioned that the accused got down from the drivers seat and one bodyguard also got down from the said car. This witness also talked of a third person who got 60 / 305 61 CR APEAL-572-2015-JUDGMENT.doc down from the back portion of the car. He further stated that the bakery people caught hold of accused on the road. Now the crucial evidence of this witness in the chief which was vehemently assailed on behalf of the appellant, is to the effect as follows :

"Salman was so drunk that he fell down. Salman Khan stood but he again fell down and again he stood and ran away from the spot."

48. According to the case of the prosecution, statement of this witness was recorded under section 164 of Cr.P.C. on 5th October, 2002. But, still it is the factual position that he was not examined before the M.M.Court at Bandra and his evidence was recorded for the first time before the Sessions Court on 6.5.2014. During the cross-examination, it is brought on record, as is appearing in paragraph 6 in the notes of evidence, that one day prior to recording of his 61 / 305 62 CR APEAL-572-2015-JUDGMENT.doc evidence he was called by the police to come to Bandra Court. First, he went to Bandra police station and thereafter to Bandra Court, where his statement under section 164 of Cr.P.C. was recorded. It is his specific evidence in the cross-examination that the police had shown one statement to Bandra Court and stated that it was his statement. According to this witness, after perusing the said statement, Magistrate asked him some questions and this witness told as per the contents of the statement and thereafter his signature was obtained on the statement. He further disclosed in the cross-examination that he was not knowing in which language statement was recorded.

He could not even answer whether the statement was in handwritten or in type written form. He specifically answered that he signed on the papers where he was asked to sign and further answered that he was not knowing whether the statement contained the 62 / 305 63 CR APEAL-572-2015-JUDGMENT.doc information known to him or not. All this material, which is brought on record during his cross-

examination, goes to show that he was called by the police and before the Magistrate he was questioned and an earlier prepared statement was endorsed. The question remains, whether this witness has given a truthful account either in his examination-in-chief or in his cross-examination. This is more so, as the crucial evidence in the examination-in-chief of this witness, as reproduced earlier to the effect that the accused was drunk and fell twice and then ran away, is in fact an omission and this omission has been brought on record during his cross-examination and subsequently by asking to the officer. Moreover, it is pertinent to note that in the cross-examination this witness has stated in what manner his statement under section 164 of Cr.P.C. was recorded. If still an allowance is required to be given to this witness, who 63 / 305 64 CR APEAL-572-2015-JUDGMENT.doc apparently, according to the prosecution is a rustic witness and not an educated person, but still it is a factual position that there was a scope available to the prosecution to counter check the truthfulness or otherwise of the answers given by this witness during his cross-examination and this could have been done by examination of the concerned M.M. Court. It is an admitted position that a summons to the said Magistrate was also prayed for by the prosecution vide letter Exh.87 which is dated 15.12.2014. As such, a step was taken by the prosecution to call the concerned Magistrate before the Court and to find out the truth or veracity in the evidence of PW 3. On said application, apparently, no orders were passed by the trial Court and one Constable Mane was allowed to be called but he was also not examined as he was not available and, therefore, the factual position remains that the substantive evidence of said PW 3, the major 64 / 305 65 CR APEAL-572-2015-JUDGMENT.doc part of his testimony as to the falling down of the accused twice and then running away is an omission and only after 12 years of the incident does the witness give his testimony before the Sessions Court.

At the cost of repetition, it must be mentioned that he was not examined before the M.M.Court when the main charge was under section 304-A of IPC. Further, in the cross-examination, he has answered and it is appearing in paragraph 7 in the notes of evidence that he could not move from the place till the time the car was lifted. Definitely, the circumstances after that incident were such that all the injured and even deceased Nurulla were under the said vehicle and it was the wee hours of 2:45 a.m. in the morning and the injured witnesses could realise coming of the vehicle on their persons only when the impact occurred and when they sustained injuries. During the arguments, the learned Public Prosecutor submitted 65 / 305 66 CR APEAL-572-2015-JUDGMENT.doc that said PW 3 is, in fact, a natural witness and had seen the incident and in fact also seen the accused driving the car. In order to substantiate his argument, the learned Public Prosecutor stated that said PW 3 was the person who received minor injuries and he had all the opportunities to see how the incident had occurred. So far as injuries of this witness and their nature is concerned, the medical certificate Exh.150 is of much importance. It shows that this injured was referred to emergency operation and his x-ray shows a fracture of proximal phalanx of greater toe, right side.

In the column under the description of the injuries, it is mentioned as "grievous". Definitely, any fracture is taken as "grievous injury" as per section 320 of IPC which defines "grievous hurt". The injury described, seventhly in Section 320 is :- "fracture or dislocation of a bone or tooth". This kind of injury is designated as "grievous". Much is argued on behalf of the State that 66 / 305 67 CR APEAL-572-2015-JUDGMENT.doc the degree of gravity of injury may differ and the fracture of a proximal phalanx of a toe may not be that grievous or serious enough than the fracture of any other

bone of the body. For the time being, if it is accepted, still the other circumstances under which this witness has sustained injury, cannot be over looked more so in the light of the major omission as detailed earlier.

49. Now coming to PW 4 injured Mohd.Kalim Iqbal Pathan, he had simple injury on his right leg and left hand. His injuries are admitted which are described in medical certificate Exh.151. Clinically there was no fracture and he had the abrasion on fore arm and left elbow. He has superficial infused wound, which is skin deep and having length of 1.5 cm on the left hand and thumb and had minor abrasion on right foot and right elbow. This witness has seen the 67 / 305 68 CR APEAL-572-2015-JUDGMENT.doc accused coming out of the car from the right side. He stated that he signed the statement under section 164 of Cr.P.C. recorded before the Magistrate as told by the police and the Magistrate. He also gave the same circumstances as to the timing and how he learnt regarding the impact. He was sleeping in front of American Laundry. PW 3 Mannu was also sleeping near him. He heard a noise and saw one vehicle over his person. He was beneath the car and other injured including PW 3 and also deceased Nurulla were also found beneath the car. After hearing the noise, bakery people came to the spot and they helped to remove the injured from beneath the car. According to him, many people were telling that accused got down from the car. Also, according to this witness, accused, then ran away from the spot after seeing the crowd. One police guard was also present in the car. Then, this witness was brought down to Bhabha hospital for 68 / 305 69 CR APEAL-572-2015-JUDGMENT.doc treatment. Again, it is significant to note that at the end of his examination-in-chief again this witness mentions to the effect that "the accused is the same person who got down from the right side of the car".

At the cost of repetition, it can be mentioned that it is the own defence of the accused that he himself came from the front side driver's seat in order to get out of the car after the incident. So the fact that this witness told that the accused came out of the car from the right side is not of much significance, when all these witnesses say that they saw the accused coming out of the car only after the incident and not that anybody saw the accused actually driving the vehicle and bringing the said vehicle to the spot. During the cross-

examination, this witness has stated that he signed on the statement under section 164 of Cr.P.C. because of the police and the Magistrate. This reference is to the statement under section 164 of Cr.P.C. In fact, he is 69 / 305 70 CR APEAL-572-2015-JUDGMENT.doc also the witness who answered during the cross-

examination that he heard a big noise and was not knowing what had happened and his left hand was stuck in the bumper of the vehicle and he was unable to make movement. He further answered that due to darkness he was not knowing whether the vehicle climbed the stairs or not. The cumulative effect of this witness goes to show that he sustained injuries and, apparently, he knew that the accused came out of the car from the right side. In any event, this substantive evidence of PW 4 may not be of much significance so far as the case of the prosecution is concerned as to driving and that also under the influence of alcohol by the appellant. However, during the cross-examination still another admission is taken from this witness and this witness in paragraph 8 in his notes of evidence states to the following effect:

> 70 / 305 71 CR APEAL-572-2015-JUDGMENT.doc "It did not happen that two persons ran away from the car. The second person ran away from the spot after Salman. Two persons were there in the car. I cannot say whether two persons ran away from the car."

50. By pointing out this admission, it is strongly argued on behalf of the appellant that this is the witness who talked of four persons present in the said car during the incident and it is further argued that the theory of four persons in the car is not later developed but it is put to the witnesses and also to this witness PW 4. Of course, this aspect of three persons or four persons in the car shall be dealt in detail afterwards while dealing with the arguments advanced on behalf of the defence.

51. Now, the last injured witness examined is PW 11 Mohd. Abdulla. He also sustained grievous injury to his right leg as injury certificate is also accepted by 71 / 305 72 CR APEAL-572-2015-JUDGMENT.doc the defence and which is at Exh.155. He had fractured tibia fibula of 8x3 cms, middle third right side. This patient was also referred for operation. Apart from the fracture he had abrasion on the left forearm. Again this witness gave the same account as to the time and how the incident had occurred when he was sleeping along with other injured persons near American Laundry. According to him, at about 2:30 a.m. some heavy object had passed over his leg. He tried to rescue himself but could not succeed. His right leg was fractured. All the injured cried for help. Bakery men and taxi driver rescued them by removing them from beneath the car. According to this witness, bakery men and taxi driver were telling that accident was caused by the accused. He had specifically answered that he had seen the accused only after he was rescued. He further stated that two persons were with him i.e. with the accused but he does not know who 72 / 305 73 CR APEAL-572-2015-JUDGMENT.doc they were. This witness, due to his severe injuries, was hospitalized in Bhaba Hospital for one and half month.

Though in the examination-in-chief this witness has stated that bakery men and taxi driver were saying that accident was caused by the accused and though according to him, he stated to that effect while recording his statement by the police, this part of his evidence is brought on record during his cross-

examination as an omission and he could not assign any reason how that part of his evidence is not appearing in his statement. His evidence to this effect is, in fact, insignificant that bakery men and taxi driver were telling that the accused caused the accident. Even this statement is also an omission when his evidence was recorded before the Sessions Court.

In fact, accepting this statement also it is to be treated as hear-say as the same was not to his personal knowledge and moreover the value is diminished by 73 / 305 74 CR APEAL-572-2015-JUDGMENT.doc way of omission.

52. The cumulative effect of these injured witnesses PW 2, 3, 4 and 11, as detailed above was referred in the course of arguments on behalf of the appellant and it is submitted that definitely an attempt has been made by the Investigating agency through these witnesses to show that they had seen the accused coming out of the car and then to presume that he was the person driving the car. Placing

reliance on the testimonies of these witnesses, as mentioned in examination-in-chief, learned Public Prosecutor stated that those are the injured witnesses and the testimony of injured witnesses assumes much importance inasmuch as they are the natural witnesses to the incident. Of course, there cannot be a different view as to the importance of an injured witness, so far as how the injuries have been sustained by them and by what 74 / 305 75 CR APEAL-572-2015-JUDGMENT.doc means. Of course, this importance is heightened when the questions are regarding an assault and a fight between the persons and under such circumstances the evidence of an injured person assumes much importance. Moreover, sustaining of an injury is also a fact leading to the conclusion that he was one of the parties to the incident of assault. In the instant case, however, there is no dispute that these witnesses sustained injuries in the incident, but the question is as to who was responsible. Said question cannot be answered by the factual position that they received injuries in this incident.

53. Again on the above aspect, learned Senior Counsel for the appellant stated that the natural conduct of any injured in an accident is required to be considered. Specifically when the incident occurred in the circumstances as in the present case as running 75 / 305 76 CR APEAL-572-2015-JUDGMENT.doc over by a car at the wee hours, the natural conduct would be to save oneself or to get rescued from the situation as early as possible and not that the person would give much importance to the allied facts.

Moreover, PW 11, the last injured, examined before the Court only mentioned that people were telling that the accused caused an accident. As such, in fact, whatever he had heard was told by him but that is also apparently hit by the aspect of hear-say.

54. Apart from the above, it is brought to the notice of this Court during the argument on behalf of the appellant that there is inter se variance in the substantive evidence of these witnesses. PW 3 says, which is in fact an omission, that the accused was so drunk that he fell twice and then stood up and ran away. However, PW 2 and 4 did not mention anything to that effect. In fact, out of these four 76 / 305 77 CR APEAL-572-2015-JUDGMENT.doc witnesses except PW 3 nobody speaks about the drunkenness of the appellant-accused much less his falling down on the spot twice and then running away.

55. During the arguments, learned Public Prosecutor for the State stated that these witnesses do not talk of four persons travelling in the car or coming out of the car after the incident. The learned Chief Prosecutor wanted to suggest that non mentioning by these witnesses about four persons is required to be taken as a mitigating circumstance to the defence of the accused. However, a distinction is required to be drawn between said witnesses remaining silent about a particular fact and the said witnesses specifically answering something that they did not notice four persons but only noticed three persons. These are two different things. Remaining silent may have two implications, either he has seen but has not told and 77 / 305 78 CR APEAL-572-2015-JUDGMENT.doc secondly that he had not seen at all. When a witness answers that he did not see four persons, then there is more positive effect that the witness has seen only three persons and only three were travelling. In any way, these witnesses remaining silent about how many persons were travelling in the car, cannot be taken as a mitigating circumstance to the defence of the accused as argued on behalf of the State. For that purposes the other material

evidence is required to be dealt with appropriately. Of course, it is a factual position that these witnesses are also silent as to what the police guard i.e. Ravindra Patil and also Kamal Khan were doing during the incident. If they are silent on these two persons and if the argument of the State is to be accepted then it must be said that these two persons were also not on the spot. However, the case of the prosecution is contrary to this and admitted even by the accused that the police guard Ravindra 78 / 305 79 CR APEAL-572-2015-JUDGMENT.doc Patil and also Kamal Khan were the persons travelling in the car since 9:30 p.m. on 27.9.2002 up to the incident of 28.9.2002.

56. By pointing out the evidence and the answers given by the witnesses, discussed above, it is submitted on behalf of the appellant that the investigation is not fair in the present case and there is a exaggeration brought before the Court through them, mainly from the evidence of PW 3. The following authorities are cited on the aspect that the investigation should be fair and what are the consequences of a tainted investigation.

1] (2010) 12 SCC 254 (Babubhai V. State of Gujarat & Ors) 2] (2002) 6 SCC 81 (Krishna Mochi & Ors vs. State of Bihar) 3] AIR 1973 SC 2773 (Kali Ram V. State of Himachal Pradesh) 79 / 305 80 CR APEAL-572-2015-JUDGMENT.doc

57. In support of the arguments on behalf of the State the learned Public Prosecutor placed reliance on the following authorities:-

> 1] (1983) 3 SCC 217 [Bharwada Bhoginbhai Hirjibhai Vs.State of Gujarat] : It is on the aspect of discrepancies in the evidence of witnesses whether fatal to the case of the prosecution when they are not going to the root of the matter;
>
> 2] (2010) 10 SCC 259 [Abdul Sayeed Vs. State of Madhya Pradesh] : This authority is on the appreciation of the evidence of the injured witnesses as natural witnesses and more credence be given to their testimonies;
>
> 3] (2003) SCC (Cri) 121 [Mohar & Anr vs. State of U.P.] :Again this authority is on the appreciation of the evidence of an injured witnesses and the 80 / 305 81 CR APEAL-572-2015-JUDGMENT.doc analysis of their evidence though there are minor discrepancies;
>
> 4] (2015) 1 SCC 323 [State of Karnataka vs. Suvarnamma & Anr] : This authority is also on the minor discrepancies in the evidence which may not be fatal to the case of the prosecution;

58. Needless to mention that in the ratios propounded by the superior Courts on the fact situation of a case, is not squarely binding when the facts of a case at hand are different and can be distinguished.

59. Also it is to be ascertained whether the minor contradictions and discrepancies may attain much importance as to discredit a particular witness and if the contradictions and discrepancies are not

going to the root of the matter then the evidence of such witness may not be thrown away. Bearing in mind the 81 / 305 82 CR APEAL-572-2015-JUDGMENT.doc ratio of the authorities cited above, in the opinion of this Court the omissions in the present case definitely cannot be considered as minor and not going to the root, specifically for the simple reason that the evidence of PW 3 Mannukhan who is apparently the main witness out of the four injured, according to the case of the prosecution giving the detailed account as to the involvement of the appellant that also in the drunken state. At the cost of repetition, again, it must be mentioned that the evidence of said PW 3 as to the drunkenness of the appellant to such an extent as to falling down twice and then running away is, in fact, an omission and for the first time after 12 years this witness is coming before the Court, telling so.

Otherwise also this evidence of PW 3 is to be viewed in juxtaposition of the case of the prosecution as depicted in the FIR and as per the evidence of police guard Ravindra Patil. Of course, it is to be ascertained 82 / 305 83 CR APEAL-572-2015-JUDGMENT.doc and analysed by this Court, whether the Sessions Court was right in accepting the evidence of Ravindra Patil under section 33 of the Indian Evidence Act. Still for the sake of argument at least at this stage said evidence is acceptable without there being any cross-

examination, still the concept of drunkenness of the appellant is not mentioned in the FIR and this is an admitted position. The FIR is silent regarding drunkenness. It only speaks regarding driving at high speed. If the evidence of PW 3, the injured, is to be construed as to such heavy drinking and falling twice on the spot by the appellant, then, definitely this aspect must not have been lost sight of by Ravindra Patil while he gave his FIR and this concept of alcohol which came in the investigation papers only on 1.10.2002, would have come in the case immediately on lodging of the FIR. Again this aspect as to drunkenness shall also be critically examined 83 / 305 84 CR APEAL-572-2015-JUDGMENT.doc henceforth at appropriate place when that argument shall be dealt with, considering the evidence of the prosecution witnesses and the evidence of the other material as to the drawing of the blood sample and the report of Chemical Analyser.

60. In view of the above, it cannot be said that the evidence of these injured PW 2, 3, 4 and 11 is devoid of any discrepancies going to the root of the matter. Moreover, the effect of their evidence can be construed at the end after analyzing the entire evidence of the prosecution witnesses on the different aspects which are required to be dealt in detail considering the arguments on behalf of the appellant.

61. Apart from the above injured witnesses, the substantive evidence of the other witnesses i.e. PW 8 Ramasare Pande and PW 12 Kalpesh Sarju Verma is required to be examined concerning the aspect of the 84 / 305 85 CR APEAL-572-2015-JUDGMENT.doc appellant driving the vehicle during the incident. PW 8 was examined by the prosecution in order to show that the appellant-accused was driving the vehicle during the incident. As such the substantive evidence, recorded before the Sessions Court, goes to show that according to him, he saw the accused getting down from the right front side of the car and one police person was also present in the car and he told his name as Patil. This is a witness who is a resident on the first floor of Pande Dairy and his dairy is situated in the vicinity of scene of the incident. So far as actual incident is concerned at about 2:45 a.m. on

28.9.2002 when he heard a big noise, he woke up and came down from the first floor. He saw the people making hue and cry as somebody was killed. People were running towards American Bakery and American Express Laundry. He also went there and saw the white coloured car rammed in the American Express 85 / 305 86 CR APEAL-572-2015-JUDGMENT.doc Laundry. He remembers last two digits of registration number of the vehicle as "32". According to him, many people gathered there. One person was found dead and two persons were injured and they were unconscious and two more persons were also injured.

He was knowing the injured persons as they were working in the bakery. Only significance of his evidence is that he saw the accused getting down from the right side of the car and one police person was also present there. However, it is still curious to note that this witness in fact in examination-in-chief itself further went on to say the following:

> "Two persons were also present in the car in addition to Salman and police constable Patil but I do not know who were those two persons."

62. Much reliance was placed by learned Senior Counsel on this answer of this witness in examination-

86 / 305 87 CR APEAL-572-2015-JUDGMENT.doc in-chief. This is in consonance with the theory propounded by the appellant that there were four persons in the car so as to probablize his defence that his driver was there and who drove the car. This is more so as admittedly according to the prosecution, Ravindra Patil, the appellant-accused and also his friend Kamal Khan were definitely in the car. Now this PW 8 had given a story that he saw two more persons in the car in addition to the accused and Police guard Patil. Apparently, this answer in the examination-in-

chief itself is required to be construed and in the light of this answer the earlier answer of this witness that he saw the accused getting down from the right front side of the car is to be critically examined in the light of other material. It is accused's own defence that he got down from the driver's side after the incident to come out of the car. As such the effect of the testimony of PW 8, in fact, goes to show the probability of the 87 / 305 88 CR APEAL-572-2015-JUDGMENT.doc case of the defence, argued on behalf of the appellant.

On this argument, learned Public Prosecutor for the State stated that this answer of the witness PW 8 in his examination-in-chief is required to be construed, as an attempt by the defence to interfere with the prosecution witnesses. Without there being any other material to support this submission it is difficult to accept this argument and only because the witness of the prosecution in examination-in-chief itself had given some answer which apparently supports the theory of the accused it cannot always be said that this witness has already been won over. Moreover, after examination of this witness in chief and also in the cross-examination there was an opportunity for the prosecution to re-examine him to get clarification on this anomaly or the abnormal answer given by him.

But this has not been done by the prosecution. In fact, there is nothing brought before the Court that the 88 / 305 89 CR APEAL-572-2015-JUDGMENT.doc prosecution wants to disown this witness. Then, consequently, the evidence of this witness is required to be construed as per the plain meaning which can be ascertained from his evidence.

63. One more thing of significance, so far as the evidence of PW 8 is concerned, is required to be mentioned. Now, another answer is given by this witness in his cross-examination and the said evidence is coming in paragraph no.4 of his notes of evidence at the end and it is to the following effect:

> "Left front door of the car was so touched to the shutter to the American Bakery, it could not be opened and it was jammed in the shutter. People were trying to pull the car and people were succeeded opening the right front side of the door. There was hue and cry on the spot. People who gathered on the spot, were in angry mood. People pelted the stones on the car."

64. Again, it must be mentioned that this answer 89 / 305 90 CR APEAL-572-2015-JUDGMENT.doc taken in the cross-examination is probablizing the theory of the appellant-accused that the left side front door of the car was jammed and so he could not come out of the car but came out from the front right side door. Even on this answer in the cross-examination the prosecution should have sought further clarification from the witness on re-examination. But again he has not been disowned and the said material remains on the record. Not only this evidence but still at the end of paragraph 5 in the cross-examination this witness has answered to the following effect:

> "I do not know where two people sitting in the car, besides Salman and police constable Patil, had gone."

65. This is, in fact, the reiteration of the theory of the appellant of four persons present in the car though this answer may not directly show that fourth person was the driver. But the answer does mention that 90 / 305 91 CR APEAL-572-2015-JUDGMENT.doc according to this witness there were four persons including the appellant and Ravindra Patil. Apart from above, still one more answer in paragraph 6 of his notes of evidence is to the effect :-

"The left front tyre of the car was found burst."

66. This is again the apparent defence of the appellant that the loss of control over the car was due to bursting of left front tyre. Even after this answer also there could have been remedial steps taken by the prosecution to clarify the position or to disown the witness by putting him questions in the nature of cross-examination saying that apparently he has been won over by the accused. But again this has not been done and only during the arguments in the present appeal the learned Public Prosecutor stated that the evidence of this witness so far as these answers given, 91 / 305 92 CR APEAL-572-2015-JUDGMENT.doc is required to be critically examined and not to be taken as a help to the defence of the appellant.

67. Now coming to the substantive evidence of PW 7 again there is argument on behalf of the prosecution that this witness is a partisan witness and in fact in stead of supporting the case of the prosecution he has assisted the appellant-accused in propounding the theory of the defence. This is the argument at this appellate stage and it is difficult to understand. If it was the evidence of this witness then why was he examined. Apparently, he was examined for the reason that he was present on the spot and there was some conversation between him and the accused to the following effect:

"Salman recognized me and told me, Commander save me"

68. Earlier in examination-in-chief itself this 92 / 305 93 CR APEAL-572-2015-JUDGMENT.doc witness has stated that at the time of the incident he was sleeping in his house and he knows the accused since his childhood and the accused calls him by name "Commander". After hearing the noise, he got up and then came to the spot. As the people were shouting for help, he came near American Cleaners shop. He saw the accused surrounded by mob and one person was possessing rod in his hand, he pulled that person back, also another person who was also having rod in his hand. At that time, according to this witness, the accused recognized this witness from the mob and uttered the words "Commander save me". The substantive evidence of this witness is required to be construed in the natural way as he has told. His entire evidence does not suggest in any way either driving of the said car by the appellant-accused or the appellant was drunk at the relevant time. When this was the factual position brought to the notice of learned Public 93 / 305 94 CR APEAL-572-2015-JUDGMENT.doc Prosecutor, he tried to argue that the very words of the appellant-accused "Commander save me" imply that the appellant-accused has done something wrong and in fact had committed something objectionable so as to get himself freed from the clutches of the angry mob. In the considered view of this Court, this argument if to be accepted, then it would be a wild imagination and putting the view of the prosecution in the mouth of the witness.

69. Counter to this argument, learned Senior Counsel for the appellant stated that clear evidence of PW 7 goes to show that appellant-accused was in need of help, true and he was rather in distress but by no stretch of imagination it can be said that this was on account of he himself driving and causing the incident.

By pointing out the other circumstances as to the angry mood of the mob and the two persons having 94 / 305 95 CR APEAL-572-2015-JUDGMENT.doc rods in hand and they were pulled by PW 7, it is further argued that the request for saving himself came from the appellant, on account of a particular incident and to save himself from the fury of the mob as the people have spotted him coming out of the car.

The request for saving came from the appellant-

accused. During the cross-examination this PW 7 had specifically answered that he did not find the accused smelling of alcohol during the period when he was with him. He further stated that the accused was looking normal and was able to walk normally. This answer is required to be viewed in juxtaposition of the substantive evidence of PW 3 injured witness as to the accused was so drunk, he fell twice on the ground and then ran way. So also this evidence is to be viewed in the factual

position that the FIR is silent about consumption of alcohol and the theory of alcohol comes only after 1.10.2002. Also this evidence is 95 / 305 96 CR APEAL-572-2015-JUDGMENT.doc required to be viewed in juxtaposition of the other evidence of PW 9 Rakhangi, the Manger from the Rain Bar. Evidence of that witness shall be critically examined later on when dealing with the allegations of consumption of alcohol at the Rain Bar and collection of bills by the police during investigation.

70. Again it is curious to note that even this witness is not disowned by the prosecution. In the cross-examination though this witness has stated, as mentioned earlier, no questions were put to this witness in the nature of cross-examination by the prosecution, more so when specific substantive evidence of this witness in his last paragraph of the cross-examination shows to the following effect:-

> "There were 10 to 12 speed breakers on St Andrews Road in front of Holy Family Hospital at the relevant time. At the relevant time road repairs in front of American Bakery and rubbles 96 / 305 97 CR APEAL-572-2015-JUDGMENT.doc were lying in front of American Bakery."

71. Again this evidence is apparently supportive to the defence of the accused that there was bursting of the tyre. Moreover, the answer given by the witness as to 10 to 12 speed breakers on St. Andrews Road has much significance than what it appears, for the reason that the case of the prosecution was that the appellant was driving the car at the speed of 90 to 100 kilometers per hour and he had taken the route to his home and come on the Hill Road from St. Andrews Road. It is admitted position that St.Andrews Road is in front of the American Bakery and there is Holy Family Hospital. Some guidelines regarding existence of speed breakers, also brought to the notice of this Court, by the prosecution. These guidelines mention various places, including hospital, where speed 97 / 305 98 CR APEAL-572-2015-JUDGMENT.doc breakers were required to be installed. As such, this situation probablizes the defence that the car was not at the high speed, or if at all in high speed, had not come from the St.Andrews Road. The defence of the accused is that the car came on Hill Road from 'Michael Gonsalvez Road'. In any event, the cumulative effect of the substantive evidence of PW 7 does not further the case of the prosecution on any count, either on the driving the car or on the consumption of alcohol. In spite of this situation, this witness is not disowned by the prosecution.

72. When the aforesaid was the effect of substantive evidence of PW 7, an attempt has been made on behalf of the prosecution by taking shelter of the answer given by PW 7 in his cross-examination in paragraph 4. It is to the following effect.

> "Salman and two others were present 98 / 305 99 CR APEAL-572-2015-JUDGMENT.doc there"

73. By taking shelter of this answer, it is stated on behalf of the prosecution that this witness is silent on the presence of fourth person in the car. However, definitely, this witness was not for the purpose of establishing that how many persons were in the car.

Moreover, there is no positive evidence of this witness that he saw only three persons in the car and not four.

What he answered in the cross-examination is that 'Salman and two others were present there'. In fact, this answer does not suggest that the accused and two others were present in the car. "Present there" means "present on the spot". As earlier discussed by this Court there is a subtle difference between the silence of a witness on a particular aspect and positive answer given by him and as such the silence of this witness as to the fourth person without there being anything 99 / 305 100 CR APEAL-572-2015-JUDGMENT.doc brought on record to ask him the questions regarding the fourth person, this answer cannot be taken to further the case of the prosecution that there were only three persons in the car. At the most, it can be said that this is not a witness from whom it could be established that the appellant was driving the car.

Moreover, his other answers in the cross-examination were contrary to the case of the prosecution.

74. Now, one more witness who is relevant in the case of the prosecution as to who was driving the vehicle from JW Marriott Hotel to the scene of the incident is PW 12 Kalpesh Verma who is working as a parking assistant at JW Marriott Hotel and saw the appellant coming out of the hotel and sat on the driver's seat of the car. In fact, the evidence of this witness is required to be critically examined and still if it accepted and of course which is an admitted 100 / 305 101 CR APEAL-572-2015-JUDGMENT.doc position that at some point of time the appellant-

accused was sitting on the driver's seat of the car when the car was halted in front of JW Marriott Hotel, still it is a different thing that a person sitting on a driver's seat drove away the car himself. Moreover, this aspect also touches the another circumstance regarding the valet parking in the said hotel JW Marriott. This can be dealt in detail. At this stage, it is to be mentioned that the parking tag allegedly given to the appellant for valet parking is not produced before the Court, much less it was taken charge of under any panchnama.

DICTATION ON 8 DECEMBER, 2015
th
:

75. The substantive evidence of PW-12 Kalpesh Verma goes to show that during October, 2002 he was serving in JW Marriot Hotel, Juhu as a parking assistant. He used to park the owner driven car in the 101 / 305 102 CR APEAL-572-2015-JUDGMENT.doc porch area and basement of the hotel. According to him he was on duty on 28.9.2002. He also gave his duty hours on that day from 7:00 p.m. to 7:00 a.m..

According to him his colleague Yogesh had parked the Toyota Land Cruiser vehicle in valet parking. The reference to the Toyota Land Cruiser vehicle is with respect to the car involved in the present matter.

Further evidence of said PW-12 discloses that he saw the appellant/accused coming out from the hotel. He told his colleague Yogesh to give the key as PW-12 was to take out the vehicle from valet parking. Said vehicle was parked in the porch of the hotel. Said witness then took the vehicle in reverse condition.

Thereafter according to this witness the appellant/accused came and sat on the driver seat.

Two persons were also with Salman. This witness identified one of them as Kamal Khan who was a Singer. According to this witness, the third person was 102 / 305 103 CR APEAL-572-2015-JUDGMENT.doc the bodyguard of the accused. When this witness handed over the car to the accused he saw the bodyguard standing near the door of the driver seat.

When this witness tried to close the door, the accused asked him as to how many colleagues were there and on knowing that there were 4-5 colleagues of this witness, a tip of Rs.500/- was given to him by the accused. This witness then closed the door and went for keeping the money in the box. When this witness returned to the hotel, he did not see the car. This was the substantive evidence much emphasized by the learned Public Prosecutor for the State mentioning that this witness has seen the appellant/accused sitting on the driver seat and then within short time this witness saw the car leaving the porch. By pointing out this it is submitted on behalf of the State that this is the witness who saw Salman Khan sitting on the driver seat and then the door of the car was closed.

103 / 305 104 CR APEAL-572-2015-JUDGMENT.doc This witness has seen only three persons including the accused, further pointed out by the prosecution from his examination-in-chief. As mentioned earlier the substantive evidence of this witness in chief does not take us further than the position that he saw the accused sitting on the driver seat and the door was closed. At this juncture this witness went in the interior of the hotel to keep the tip money in the box available in the desk. Learned Public Prosecutor tries to argue that once this witness has seen the accused sitting on the driver seat and after some time when he saw that the car had already left, logically it is to be accepted that the accused drove away the car from JW Marriott hotel. This argument is required to be critically examined in the light of the factual position and also in order to see whether there is any corroboration to what the witness had stated and mainly on the point as to the valet parking. Of course, 104 / 305 105 CR APEAL-572-2015-JUDGMENT.doc the aspect of the valet parking shall be separately dealt with but suffice it to say at this juncture that said parking tag has not been produced before the Court though during recording of the evidence of said PW-12 the Investigating Officer Shri Shengal (PW-27) tried to search the tag in the muddemal articles and after searching he could not find the tag and ultimately it was not produced before the Court. Even there is no panchnama for seizure of the said tag from the custody of the JW Marriott hotel establishment. The main question remains as to who had seen the appellant/accused coming to JW Marriott and giving the car for valet parking, on the premise that the appellant/accused was himself driving and it was the car not driven by the driver but was owner driven at that particular time. Substantive evidence of PW-12 does not show that he saw the appellant/accused coming to JW Marriott hotel driving the car himself.

105 / 305 106 CR APEAL-572-2015-JUDGMENT.doc The person who could have thrown light on this is definitely one Yogesh who had parked the car as stated by said PW-12. But, admittedly said Yogesh is not examined in the present case. Also there is nothing to show whether this person by name Yogesh was interrogated by the police. According to this witness PW-12, the key of the vehicle was given by Yogesh and then the car was brought in reverse condition which was parked in the porch. During the cross-examination it is brought on record that there was a security cabin and one guard was deployed in the said cabin and the cabin was installed on the left side of the porch. Definitely additional evidence could have been gathered in order to substantiate what has been seen by said PW-12 and what is to be implied from his evidence as suggested by the prosecution.

Again admittedly this security guard or anybody from that cabin is not examined. A passing reference is also 106 / 305 107 CR APEAL-572-2015-JUDGMENT.doc required to be made so far as this witness is concerned as to whether he had noticed anything like drunken condition of the appellant/accused. Though this aspect can also be dealt in detail while coming to the aspect of consumption of alcohol at this juncture it may be mentioned that this PW-12 is silent on the condition of the appellant/accused when he came out of JW Marriott hotel.

76. Apart from the above, certain answers are obtained from this witness (PW-12) during the cross examination and this part of the evidence is appearing in paragraph-11 of the notes of evidence of this witness. The substantive evidence of this witness reads thus :

> " I did not see at what time and in what manner the Land Cruzer left the J.W. Marriot Hotel. Kamal Khan sat in the back portion of the car behind Salman Khan. Nobody sat near Kamal Khan on the left side in the 107 / 305 108 CR APEAL-572-2015-JUDGMENT.doc back portion of the car. Police asked me during recording my statement where Kamal Khan sat. I was remembering at the time of giving my statement that on which portion of the back seat Kamal Khan was sitting and he sat behind Salman Khan.
>
> Kamal Khan sat in the back portion of the car on the left side."

77. By pointing out this admission given by this witness, learned Senior Counsel for the appellant submitted that the seat arrangement as stated by this witness suggest that the appellant/accused was sitting on the left side of the front seat i.e. towards the left side of the driver's seat as Kamal Khan was sitting behind him in the back portion on the left side. Even after this material extracted from his cross-

examination no attempt has been made on behalf of the prosecution to get clarification for the anomaly created in the answers, one given in the examination-

in-chief and another at the end of the cross-

108 / 305 109 CR APEAL-572-2015-JUDGMENT.doc examination. Without confronting this witness with the questions in the nature of cross-examination, now it cannot be accepted on behalf

of the State as argued that apparently this witness has deviated from his earlier statement to the police and has partially supported the defence. The foundation for appreciating this argument has not been created while recording the evidence of this witness by the prosecution.

78. Lastly, it is argued on behalf of the appellant that the testimony of this PW-12 is doubtful for the reason that he had specifically mentioned that on 28.9.2002 he was on duty from 7:00 p.m. to 7:00 a.m.. As such, it is further argued that this witness wants to tell that he joined the duty on 28.9.2002 at 7:00 p.m.. Of course, there is no explanation taken by the prosecution on his statement that on 28.9.2002 his 109 / 305 110 CR APEAL-572-2015-JUDGMENT.doc duty hours were from 7:00 p.m. to 7:00 a.m.. It is argued on behalf of the State that allowance is required to be given in favour of this witness as to making an apparent mistake for giving the duty hours.

Otherwise also it is argued that it may be treated as a typographical error. One thing is certain that the witness had given the statement before the police and also he deposed before the Court and mentioned his duty hours for 28.9.2002. Giving some allowance to this witness as to making an error in the duty hours either on 28.9.2002 or on 27.9.2002, on that count it is not to be said that this witness was not on duty on that night but as mentioned earlier the effect of his evidence does not in any way lead this Court to imply that the appellant/accused drove the car and left JW Marriott hotel on that night.

79. Moreover, the contradiction arising from the 110 / 305 111 CR APEAL-572-2015-JUDGMENT.doc statement given in evidence in chief as compared to the one given in the cross-examination as to the seating position of the accused, creates a substantial doubt in respect of whether the accused drove the vehicle. This doubt is further enhanced as admittedly, this witness was not present when the vehicle was driven away ultimately.

THEORY OF CONSUMPTION OF ALCOHOL

80. As mentioned in earlier part of this judgment, the substantive evidence of mainly two witnesses i.e. PW-5 Malay Bag and PW-9 Rizwan Rakhangi is required to be critically examined and then the evidence of PW-20 Dr. Shashikant Pawar, the Medical Officer from JJ Hospital and PW-18 Assistant Chemical Analyzer Dattatray Balashankar from the CA office is required to be discussed hereunder. Of course, again a passing reference is required to be made regarding the 111 / 305 112 CR APEAL-572-2015-JUDGMENT.doc evidence of PW-3 Mannu Khan. His evidence is critically examined earlier on the aspect as to who was driving the vehicle. Without going into much details suffice it to say that said PW-3 has stated that he had seen the appellant/accused falling on the ground on the spot of incident twice then again standing up and running away from the spot and according to PW-3 it was due to consumption of alcohol by the appellant.

81. Coming to the substantive evidence of PW-5 Malay Bag it is seen that he was working in the Rain Bar Restaurant as a waiter and was on duty on the night of 27.9.2002. There was rush in the bar and according to him about 200-250 customers were present. According to him, the area of the bar was admeasuring about 20 ft. X 20 ft.. According to this witness, the appellant/accused and his friends were standing at the bar counter. It is brought on record 112 / 305 113 CR

APEAL-572-2015-JUDGMENT.doc from the evidence that if all the tables and chairs are fully occupied by other customers, the remaining customers used to stand at the counter to be served then and there. According to this witness he kept Bacardi White Rum and cocktail on the counter and also served some eatables. According to him at about 1:10 a.m. the accused and his friends left the bar. This witness further deposed that the accused was the regular visitor to the bar and on that relevant night he was having many friends with him and the drinks and food was ordered for all of them.

82. The evidence of the above witness PW-5 is also required to be examined in the light of the evidence given by PW-9 Rizwan Rakhangi, the Manager of the Rain Bar. According to this PW-9 when he was working in the Rain Bar as Manager at about 11:00 p.m. he saw the accused, his brother 113 / 305 114 CR APEAL-572-2015-JUDGMENT.doc Sohail Khan and their friends visited the bar.

According to this witness, the accused was standing near the table. That time some marketing event was going on in the restaurant and the tables were already occupied when the accused and his friends arrived in the bar. Also according to this witness as the restaurant was full, the accused, his brother Sohail Khan and others were standing in front of the service counter and the drinks and snacks were provided on the said standing bar counter. According to this witness he had seen the accused possessing white coloured glass and at about 1:15 a.m. left the Rain Bar.

83. Now the substantive evidence of PW-5 and PW-9, as mentioned above, go to show that the appellant/accused visited the Rain Bar on the night of 27.9.2002 and left at early hours of 28.9.2002. Drinks 114 / 305 115 CR APEAL-572-2015-JUDGMENT.doc and eatables were ordered and they were consumed.

By pointing out this evidence, during the arguments learned Public Prosecutor stated that this evidence is required to be construed along with the circumstances then prevalent and mainly the circumstance that the accused was having a white coloured glass in hand.

During the cross-examination it is brought on record that the accused was drinking clear liquid and the clear liquid looked like water. Even it is brought on record that the Bacardi Rum looks like water. By specifically pointing out this it is argued on behalf of the State that it is to be accepted that the accused was drinking Bacardi Rum. This is more so, further argued that visit of the appellant/accused was to the bar where the liquors were being supplied to the customers. It is further argued that according to PW-5 the accused was the regular customer of the bar. As such it is argued that the cumulative effect of PW-5 115 / 305 116 CR APEAL-572-2015-JUDGMENT.doc and PW-9 is required to be accepted on the fact that the accused had consumed alcohol in the said bar.

84. Counter to these arguments, learned Senior Counsel for the appellant vehemently submitted that always it cannot be conclusively presumed that every person visiting the bar necessarily consumes alcohol.

Apart from the circumstances narrated by PW-5 and PW-9 there must be some other circumstance either by way of bills for consuming alcohol or by direct evidence of a waiter showing that he supplied Bacardi rum and said Bacardi rum was in fact consumed by the appellant/accused. Admittedly there is no such direct evidence of PW-5 or for that matter of PW-9.

According to PW-5, he served the drinks and the eatables on the bar counter and according to him those were for the entire group consisting of the accused, his friend Kamal Khan and others.

116 / 305 117 CR APEAL-572-2015-JUDGMENT.doc

85. Now apart from the above evidence there is another material brought on record by the prosecution by way of four bills which are marked as Exhibit-50A, 50B, 50C and 50D during recording of evidence before the Sessions Court. At this juncture it is to be mentioned that the trial Court had marked these bills as Exhibits and accepted their evidential value in order to establish that these bills were for the drinks and eatables ordered and consumed by the accused and his friends. In fact these bills were collected subsequently by the officer and there is substantive evidence of PW-9 on this aspect and this evidence of PW-9 and the factual position as to the accused and his friends not occupying any tables, render these bills devoid of any substance. On the contrary, production of such bills before the trial Court is in fact possibly an attempt to create documents to suit the case of prosecution. The reason for this is based on the 117 / 305 118 CR APEAL-572-2015-JUDGMENT.doc following material brought on record. Substantive evidence of PW-9 during cross-examination goes to show that the bills were being generated on a computer system and the name of the customer is not generated in the bill. Even also name of a person who pays the amount also does not reflect in the bill. It is further the evidence of PW-9 that if the customer is standing near the bar counter then there is no table number mentioned or reflected in the bill. Table number is being mentioned only in case of a customer sitting at a table. Also code number of the captain or steward is generated in the bill when such captain or steward serves the order. Further substantive evidence of PW-9 is reproduced hereunder in order to see under which circumstances said bills were collected by the police:

> "Prior to recording of my statement, police had visited the restaurant and told us to give the bills of date 118 / 305 119 CR APEAL-572-2015-JUDGMENT.doc 27.9.2002. The police had inspected the bills by which the alcohol was ordered by the customers. Police had given me the four bills, out of the bills, which were inspected by the police. Police took out the bills and asked me to sign. I thought what police did was the correct regarding the bills."

86. In the light of this evidence, the bills which are Exhibit-50A to 50D are carefully examined. Said respective bills give the table numbers as under : 38, 40, 30 and 18. All the bills give the cover (number of persons) as one. The bills give the captain code number respectively as 02, 02, 02 and 48. First two bills Exhibit-50A & 50B are only for food, and third and fourth bills Exhibit-50C and Exhibit-50D are for liquor. The total of these bills is Rs.6376/-. The glaring anomaly is regarding the mentioning of the table numbers in the bills. Four different table numbers are given as mentioned above. However, the cover for which the bill is mentioned as one. So by 119 / 305 120 CR

APEAL-572-2015-JUDGMENT.doc plain reading of the bills it can be construed that each bill is for one person only and each bill is for the person sitting on a particular table number. Another glaring circumstance that said bills show the date 27.9.2002 but according to PW-9, the accused and his friends left Rain Bar at about 1:10 a.m. i.e. on 28.9.2002. There is no explanation forthcoming from the prosecution that the payment for the bills was made when it was prior to 12:00 mid night of 27.9.2002 and then the persons overstayed and left the bar at 1:00 a.m. or so. There is no explanation by the prosecution by adducing evidence to show that as per rule Rain Bar took its last order prior to midnight and permitted its patrons to remain in the bar even beyond midnight. Otherwise logically it is to be accepted that when a person finishes his drinking and eating and when he has to go out of the bar then he makes the payment. If this logical circumstance is 120 / 305 121 CR APEAL-572-2015-JUDGMENT.doc accepted then there is anomaly that said bills have a date as 27.9.2002 and not 28.9.2002. Moreover these bills are not taken under panchnama as admitted by the police officer and also stated by PW-9.

87. Apart from the above there is still glaring defect in the said bills. There is an endorsement in handwriting on the bill which is marked Exhibit-50A.

This endorsement at the top of the bill reads thus :

"They were total eight of us including Salman, Sohail and friend". And at the end, there is an endorsement on the said bill "Total 6376. Bill paid by Sohail Khan".

88. Admittedly according to the case of prosecution these were the duplicate bills obtained from the computer system of the hotel and as such it was necessary on the part of the investigating agency to establish these bills as per the procedure laid down by Section 65B of the Evidence Act. On this aspect 121 / 305 122 CR APEAL-572-2015-JUDGMENT.doc ratio of the following authority is taken shelter of on behalf of the appellant : (2014) 10 SCC 473 - Anvar P.V. vs. P.K. Basheer and others. Sections 65A, 65B and 62 deal with the proof of the electronic record and as to the primary and secondary evidence and admissibility of the same. Apparently as per the case of prosecution Exhibits-50A to 50D are the secondary evidence of the original bills either generated in the computer system and given to a customer or obtained, returned back from the customer after the payment.

As per Section 65-B (4) it is mandatory pre-

requirement to obtain a certificate. The observations of the Apex Court are reproduced hereunder :

> "Electronic record produced for the inspection of the court is documentary evidence Under Section 3 of the Evidence Act, 1872 (the Evidence Act). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in 122 / 305 123 CR APEAL-572-2015-JUDGMENT.doc accordance with the procedure prescribed Under Section 65-B of the Evidence Act. The purpose of these provisions is to sanctify secondary evidence in electronic form generated by a computer. The very

admissibility of electronic record which is called as "computer output", depends on the satisfaction of the four conditions prescribed under Section 65-B(2) of the Evidence Act. (Paras 7 and 14) ig Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which should identify the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and 123 / 305 124 CR APEAL-572-2015-JUDGMENT.doc

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device. (Para 15)

89. Considering the legal position as mentioned above and also the factual position in the present case as to production and acceptance of the bills Exhibits-

50A to 50D before the trial Court it must be said that the trial Court has not done that analysis whether this secondary evidence can be accepted. Trial Court simply accepted the correctness and genuineness of the bills in order to come to the conclusion regarding the drunkenness of the appellant. In fact there is no discussion on this relevant sections of 65A, 65B and 65C of the Evidence Act while dealing with the said bills.

90. By pointing out the above, it is submitted on behalf of the appellant that it was definitely an attempt on the part of the investigating agency to 124 / 305 125 CR APEAL-572-2015-JUDGMENT.doc fabricate the bills and to get them before the Court to support their case of consumption of alcohol by the appellant. Definitely collecting any material like the bills in the present matter during investigation and creating any document, are two different things.

Latter one is definitely highly objectionable and leads to the conclusion of fabrication of document and as such it destroys the case of prosecution if there is an element of fabrication of the document. In the present matter the endorsement at the top and bottom of the bill Exhibit-50A have not been explained by any witness, even by PW-9 as to why and how a customer will write on a bill or even a copy of the bill that the bill is for himself and his friends and how the endorsement as it is appearing at the end of bill Exhibit-50A will occur that anybody will write the total of the bills and make an endorsement as to who had paid the bills. Definitely the bills Exhibits 50A to 125 / 305 126 CR

APEAL-572-2015-JUDGMENT.doc 50D were subsequently procured from the computer system and then the Investigating Officer had got the said endorsement done but still there is nothing on record as to who and how said endorsements were taken. Said endorsement are original and they are in ink whereas all the bills are printed and they are computer printouts. As such for these detailed reasons it is required to be mentioned that there is no cognate material before the Court from PW-5 and PW-9 to establish that on that night the appellant/accused had consumed alcoholic beverage. Moreover, the cumulative effect of the substantive evidence of PW-5 and PW-9 goes to show that when a customer is served at the counter/bar, the bill generated has no table number. A bill has a table number only when a customer is served at a table. Further, from the evidence of PW-5 and PW-9 it is ascertained that the accused and his friends were served at the 126 / 305 127 CR APEAL-572-2015-JUDGMENT.doc bar/counter. Then in light of such facts, the prosecution has failed to explain how the bills with table numbers (that too four different table numbers) indicate or prove that the accused was drunk. Further, the prosecution has not disowned these witnesses.

91. When the above position was noticed by the learned Public Prosecutor during the arguments as to the evidential value of the bills, he conceded the position and did not argue on the proof of the bills by way of taking shelter of the bills to substantiate the case of drinking. Though this conceding position was taken by the State, still it is argued on behalf of the appellant that mere conceding will not serve the purpose once it is established that a positive attempt has been made by the investigating agency to fabricate the bills and produce them before the Court to be used as evidence to further the charge of drunkenness. Of 127 / 305 128 CR APEAL-572-2015-JUDGMENT.doc course this submission has much weight and is required to be dealt in the light of the further material by way of evidence of PW-20 the doctor from JJ Hospital and PW-18 Assistant Chemical Analyzer.

EXTRACTION OF BLOOD & ITS CHEMICAL ANALYSIS:

92. PW-20 had drawn the blood sample of the appellant/accused at JJ Hospital and then subsequently the sample was sent to the Chemical Analyzer and the analysis was done by PW-18.

However prior to going to PW-20, evidence of one more witness PW-22 is required to be construed. Said PW-22 is Vijay Salunke, then PSI attached to Bandra Police Station. On 28.9.2002 he was on duty at the police station. Investigating Officer Shri Shengal (PW-

27) directed him to take the accused along with police staff to JJ Hospital for medical examination. On that afternoon he took the accused to JJ Hospital along 128 / 305 129 CR APEAL-572-2015-JUDGMENT.doc with the report and requested for taking blood sample for alcohol test. He identified the report as Exhibit-97.

According to him the Medical Officer had taken blood sample from the accused and it was delivered to a constable. Admittedly this constable who took the delivery is not examined before the Court. After taking delivery of the samples said PW-22 returned to the police station along with the accused and the constable. Said constable delivered said envelope containing blood sample into the possession of PI Shengal (PW-27). During cross-examination this witness had stated that the blood

sample was not given in his custody by the Medical Officer and also this witness could not tell the name of the constable to whom the blood sample was delivered. As against this evidence of PW-22, it is case of PW-27 Investigating Officer that he asked PI Suryawanshi to take the accused to JJ Hospital whereas PW-22 is 129 / 305 130 CR APEAL-572-2015-JUDGMENT.doc silent about the presence of PI Suryawanshi at the JJ Hospital along with the appellant/accused.

93. Now coming to PW-20 Dr. Shashikant Pawar in his evidence according to him extracted the blood sample from the appellant/accused. He talked of PSI Salunkhe (PW-22) and one constable PC No.2985 coming to JJ Hospital along with the appellant/accused. According to this witness he took the history from the accused about alcohol consumption but it was denied. Then he made examination of the breath and noticed that the breath was smelling of alcohol. Pupils of the accused were slightly dilated and his gait was normal. His speech was found coherent. This witness asked the accused for verbal consent for extracting the blood. He obtained left thumb impression of the accused on his register, so also obtained signature and then 130 / 305 131 CR APEAL-572-2015-JUDGMENT.doc proceeded for collecting the blood sample. It is significant to note that this witness has in one sentence gave the procedure as to how he collected the blood. His words are "I extracted the blood.

(Witness is deposing after going through the Casualty Register). After taking blood sample, I directed my office ward boy to seal the blood sample in my presence. The bottle was sealed as per the standard procedure maintained by the hospital. There were two containers called phials. One phial was having oxalate preservative and other phial was plain". After this the witness further deposed that "Bottles(phials) were capped by white colour bandage (sticking plaster). The seal of lakh was put on the upper and lower end of both the phials. The labelling of EPR number about, date, time and PC number was done and it was wrapped around the two phials. I also put my signature on the label."

131 / 305 132 CR APEAL-572-2015-JUDGMENT.doc

94. According to this witness, the signature of the accused was obtained on the EPR register and also signature of PSI Salunkhe as well as signature of one PC-27451 was obtained on the EPR register. This witness also filled two forms "A" and "B" for sending to C.A. Kalina after filling the contents of the said forms.

According to this witness, he obtained the initials and thumb impressions of the accused and also of police persons on the form "A" and form "B". He made entries in the EPR register regarding collection of blood and also filled OPD forms. The OPD form is Exhibit-98 produced before the trial Court and form "A" and form "B" are Exhibit-101 and Exhibit-102.

95. This witness (PW-20) was cross-examined at length and mainly on the procedure as to in what manner the blood sample for alcohol test is required to have been taken and what precautions are to be 132 / 305 133 CR APEAL-572-2015-JUDGMENT.doc taken for preserving the blood sample till it reaches the laboratory for testing. During the cross-

examination it is brought on record that on the OPD form there was no thumb impression of the appellant/accused obtained and only a circle is drawn in place of the thumb impression. Even another discrepancy is also brought on record regarding non-

appearance of the word "alcohol" on the back portion of the OPD form when according to the witness back portion of the OPD form was filled when the entries were made in the EPR register by inserting carbon paper. Substantive evidence of this witness appearing in paragraph-6 in the notes of evidence is reproduced hereunder for the sake of ready reference in order to throw light as to how the entire process of collection of blood was so casually done by the Medical Officer attached to J.J. Hospital. Said evidence reads thus :

> "There is no signature of Salman 133 / 305 134 CR APEAL-572-2015-JUDGMENT.doc Khan as well as his thumb impression obtained on OPD form / case paper (Exh.98). It is true there is a circle made on Exh.98 for obtaining the thumb impression of the patient and also the signature. It was my duty to obtain the thumb impression as well as signature on the OPD form (Exh.98). Back portion of Exh.98 about the examination of Salman Khan is a carbon copy. "for blood collection" word though appeared in the register might have not imprinted on the back portion of the OPD form therefore I have written in my handwriting the word "for blood collection". Case paper is checked from the register word by word and thereafter signature is made on the case paper."

96. At the above juncture the EPR register Exh.99 was shown to the witness along with the backside of the OPD form Exh.98 and the witness answered to the following effect:

> "It is true there appears to be gap between the word "gait" and "speech coherent" seen in the back portion of the Exh.98, but there appears to be no gap seen in between the word 134 / 305 135 CR APEAL-572-2015-JUDGMENT.doc "gait" and "speech coherent" in the EPR register entry (Exh.99). It is true by placing carbon between register and the case paper and the words "gait" and "speech coherent" are written simultaneously, then there should not be gap found between the words in the copy (Exh.98)."

97. Further this witness has answered that on the case paper Exh.98 there is no mention that the consent of the patient, the accused was obtained prior to his clinical examination or extraction of the blood.

According to this witness the consent of the patient is mandatory to be obtained prior to his examination and in fact it is the requirement of law. Further regarding not having the word "alcohol" at the backside of the OPD form, the evidence of this witness in the cross-examination is of much importance which reads thus :

> "It is true in case paper Exh.98 the important factor in clinical 135 / 305 136 CR APEAL-572-2015-JUDGMENT.doc examination was breath smell alcohol. I carefully

> wrote the clinical observation in my case paper. It is true in back portion of Exh.98, there is no mention that breath smells alcohol. It is correct to say that besides smell of alcohol there can be other smells found from the mouth."

. Further this witness has answered :

> "It is true from the case paper Exh.98 it cannot be said that the patient Salman Khan was smelling alcohol.
>
> According to me the word "alcohol" was not printed on the back portion of Exh.98. I cannot say why the word alcohol was not imprint on the back portion of Exh.98. I had compared the entries mentioned in Exh.98 with the entries mentioned in EPR register. It is true that while verifying the entries in the back portion of Exh.98 with EPR register, I made entry with ball pen on back portion of Exh.98 which was not imprint while writing."

98. By pointing out these answers of PW-20 it is strongly submitted on behalf of the appellant that there is manipulation and insertion of word "alcohol"

136 / 305 137 CR APEAL-572-2015-JUDGMENT.doc in the OPD papers and apparently such word "alcohol"

could not have been also present in the original EPR register. The fact remains that PW-20 has not given any explanation as to why the word "alcohol" is missing from the backside of the OPD paper which is Exhibit-98.

99. By pointing out the main glaring defect thus suggestive of fabrication, the learned Senior Counsel for the appellant made various submissions that according to PW-20 the thumb impression and signature of the accused was taken on the EPR register but was not proved by sending the signature and thumb impression for forensic expert / handwriting expert. On this aspect, learned Public Prosecutor for the State stated that it is not a case of the appellant/accused that his blood was not drawn at JJ Hospital. Definitely it is not a case that the blood was 137 / 305 138 CR APEAL-572-2015-JUDGMENT.doc not drawn at JJ Hospital but still it is argued on behalf of the appellant that the mandatory requirements or at least the important procedural aspects are required to be followed when a person is asked to give his blood for the purpose of a particular test when apparently such examination may be used against him in a Court.

It is further argued that in fact asking for the extraction of the blood for alcohol consumption is asking a person to procure the material which ultimately may be used against him and if this is the ratio behind it then consent of the person is required to be obtained. The submission on behalf of the appellant was that though the blood was collected there was no apparent consent given by him and more so his thumb impression or signature were not appearing on the OPD paper which is Exhibit-98.

Further more the cross-examination of PW-20 in paragraph-20 is brought to the notice of the Court 138 / 305 139 CR APEAL-572-2015-JUDGMENT.doc during argument that according to this witness there was no specimen seal of lakh sent to the CA. By pointing this out, it is stated that form "B" which is Exhibit-102 bears the facsimile of lakh and there is no explanation as to how this facsimile of lakh is appearing in Exhibit-102. In fact sending of such facsimile of lakh seal on form "B" is a counter check in order to rule out tampering of the sample and to ensure the authenticity that the same sample which is extracted by the Medical officer reaches the chemical analysis laboratory.

100. Form "B" and for that matter form "A" are the requirements as per the rules under the Bombay Prohibition (Medical Examination and Blood Test) Rules and as such said form "B" is to be filled by the doctor / medical officer extracting the blood for the alcohol test and said form is addressed to the 139 / 305 140 CR APEAL-572-2015-JUDGMENT.doc Chemical Analyzer to Government of Maharashtra.

One of the aspects to access the authenticity is the facsimile of lakh seal which is to be impressed on form "B", in this case on Exhibit-102 and the same seal with lakh is required to be affixed on the blood sample phial / bottle which is to be sent to CA. At the CA office, the concerned Analyst examines the facsimile of lakh seal from form "B" and after comparing it with lakh seal of the sample bottle / phial he ascertains the authenticity by visual inspection that both the seals are same and there is no tampering. Further more it is brought to the notice of the Court that form "A", which is Exhibit-101, in the present case bear the signature of one police constable PC-27451 and according to the case of prosecution he was the constable who took said blood samples and form "A" and form "B" from JJ Hospital. However, this constable No.27451 is not examined in the case. Apparently from the signature 140 / 305 141 CR APEAL-572-2015-JUDGMENT.doc appearing on Exhibit-101 form "A" said PC-27451 is the same constable by name Mane but significantly enough the number of another police constable is mentioned on both these forms "A" and "B" i.e. 101 and 102 and the said constable's PC number is 2985 from Bandra police station.

101. According to the case of prosecution along with PSI Salunkhe this constable No.2985 was sent to JJ Hospital along with the appellant/accused for extraction of blood. Neither this constable No.2985 nor any constable No.27451 were examined in the present case. Apparently this was one of the links required to have been established when the matter is concerning biological evidence.

102. During the arguments it is argued that in case of appreciation of biological evidence a chain of custody is required to be established and if it is not 141 / 305 142 CR APEAL-572-2015-JUDGMENT.doc established then the biological evidence is not trustworthy and is required to be discarded as apparently it is the evidence as that of an expert witness. Following authorities are cited on behalf of the appellant :

> [I] MANU/MH/1360/2014 [Manoj Mahadev Gawade Vs. The State of Maharashtra] [II] 2012 SCC OnLine Del 3375 [Vinay Kumar Vs. State] [III] 212(2014)DLT99 [State through Reference Vs. Ram Singh & Ors. AND Pawan Kumar Gupta Vs. State]

103. Another factual position is brought to the notice of this Court as apparent from the substantive evidence of PW-20 Dr. Pawar. This witness agrees in the cross-examination that as per the contents of form-

A and form-B, the two phials and said forms were kept in one sealed envelope. This witness talks of single 142 / 305 143 CR APEAL-572-2015-JUDGMENT.doc sealed envelope containing form-A and form-B and two phials of blood. As against this the substantive evidence of the police head constable Sharad Borade (PW-21) (No.2019) say that the investigating officer Rajendra Kadam (PW-26) called him and gave two sealed envelopes and asked him to deliver them to the office of the CA. As per Exhibit-80 there is mention of one sealed phial so also as per the CA report there is mention of one phial but as per the evidence of PW-20 he sent two phials with form-A and form-B. Much is also argued about the sealing of the phials at the J.J.

Hospital and admittedly according to PW-20 doctor the ward boy sealed the sample bottles. Though it was so the sealing process was told by PW-20 and not by the ward boy as the ward boy was not examined.

By pointing out this, it is submitted that the evidence of doctor PW-20 on the aspect of sealing is hear-say and in fact this hear-say is on the material aspect 143 / 305 144 CR APEAL-572-2015-JUDGMENT.doc which goes to the root of the matter touching the authenticity of the blood sample which reached the CA office. Considering this evidence of PW-20 and the anomaly in the OPD form and absence of word "alcohol" and absence of the thumb impression and signature on OPD form, in the opinion of this Court no requisite and necessary care as required, was taken by PW-20 while taking blood sample. There are other aspects also which lead to the reasonable doubt as to authenticity of the sample and those aspects are regarding what was received at the CA office and what happened to the form-B (Exh.102), whether it reached back to the police station through PW-21 Head Constable Borade or whether it remained with CA office. Also there is anomaly as to how this Exhibit-

102 form-B came in the custody of police when it was produced before the Court initially when the matter was before the Metropolitan Magistrate Court. These 144 / 305 145 CR APEAL-572-2015-JUDGMENT.doc other anomalies and the subsequent evidence mainly that of PW-18 is now required to be discussed which again goes to the root of the matter as to whether what was sent to the CA was the same sample which was extracted at JJ Hospital and whether there was any authentic labeling and sealing of the sample.

Moreover, the discrepancy as to the total quantity of the blood is also required to be discussed when it was 6 ml extracted at JJ Hospital, 3 ml in each phial, and total four mls received at the CA office.

104. In view of the above, now the evidence of PW-18 is of much importance. PW 18 Dattatraya Khobrajirao Bhalshankar was working as an Assistant Chemical Analyser at Forensic Science Laboratory at Kalina, Santacruz. As per his evidence he had received one case from Bandra Police Station on 30.9.2002. He received one bottle along with letter from Bandra 145 / 305 146 CR APEAL-572-2015-JUDGMENT.doc Police Station. It was the blood extracted from the JJ hospital.

He received the letter from Bandra Police Station along with the sealed envelope. Senior Inspector of Bandra Police Station, Shri Shengal (PW

27) had given a forwarding letter dated 30.9.2002, addressed to the Chemical Analyser at Kalina, Santacruz ascertained whether Form "A" and "B" were attached with the letter. Also he ascertained whether blood phial was sealed or not. According to him, it was found sealed and seal was found intact. He put the number on the letter as AL-171/02.

105. He also made noting on the letter to the following effect "One sealed phial, seal intact as per copy sent (blood in two phials)". This witness talked of Form B which is Exh. 102. before the trial Court. It is significant to note that he talks of blood sample, in singular, though subsequently he mentioned that while 146 / 305 147 CR APEAL-572-2015-JUDGMENT.doc writing his endorsement he had mentioned in the bracket (blood in two phials). According to this witness, he affixed the two labels which were found on the phials and put them on the Form- "B" at the bottom. In fact, these are the sticking plasters which were prepared according to PW no. 20, giving the EPR number, date and time and PC number and also bear the signature of PW 20. According to this witness, PW 18, he removed the labels from the blood bottle and affixed on the letter Form- "B". Thereafter, he kept the blood phials in the refrigerator. Further the evidence of this witness shows that on 1.10.2002 he analysed the blood phials. He used the "Modified Diffusion Oxidation Method" for analyzing the blood.

Accordingly, he prepared the report as to his findings.

He identified the said report as Exh.81 which is having same ML Case No. AL-171-2002. The contents of the said report are very significant. He also made a noting 147 / 305 148 CR APEAL-572-2015-JUDGMENT.doc on the report there is specific mention of one sealed phial received from Police Naik No. 20419. This CA report is addressed to the Medical Officer, Sir JJ Group of Hospital, Mumbai. Opening words of this report reads as under :-

> "Your letter No. JJH/VA/191/202 dated 28.9.2002 forwarding of EPR containing blood of Shri Salman Salim Khan bearing certificate No. EPR/5452/Label/ Salman Salim Khan received here on 30.9.2002, with messenger Shri PN No. 20419 of one sealed EPR, seals intact as per copy sent."

106. The said CA report is in fact a printed format where the variables are the letter number, date, name of the person, date of receipt, EPR number and the name of the messenger and the quantity of the article.

The final result of the test of the blood is as under:

> "The blood contained 0.062 per cent W/v of ethyl alcohol (Sixty Two mg)."
>
> 148 / 305 149 CR APEAL-572-2015-JUDGMENT.doc

> 107. On the next page of the report the method of data and actual date and reasons leading to the result of blood analysis were mentioned. The method of analysis is: Modified Diffusion Oxidation Method, Analytical Chemistry, 1959. In the said report there is a printed format material regarding reference for the said Modified Diffusion Oxidation Method and the said reference is of MODI - A TEXT BOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY, 1977.

What is significant in the said report on page no.2 is the quantity of blood received and measured. It is 4 ML. This information is given in paragraph no. 3.

Paragraph no. 4 of the report says that "preservative used" - "Oxalate on the forwarding letter and not on blood phial." In paragraph no. 5 it is mentioned "Morpholine test - positive. There is special note at the end of this report and which is also in a printed 149 / 305 150 CR APEAL-572-2015-JUDGMENT.doc usual format to the effect "the blood sample was stored in refrigerator from the time it was received in the Laboratory, till it was taken for analysis."

108. By pointing out these specific contents of the CA report Exh.81, various points were raised on behalf of the appellant by learned Senior Counsel. So also the attention of this Court is drawn towards the specific evidence of PW 18 that he removed the sticking plasters from the sample bottle containing blood received along with Form-B Exh.102 and pasted them at the bottom of said Form. There is no specific evidence on which day he did this procedure.

Apparently, he did this prior to taking of the sample for analysis. Admittedly, the analysis was done on 1.10.2002 and the removing the sticking plasters from the sample sent through the police station and received from the constable, was done prior to that 150 / 305 151 CR APEAL-572-2015-JUDGMENT.doc and definitely on the receipt of the sample by the CA office. On this aspect, now coming to the substantive evidence of PW No. 21 Sharad Borade, it can be seen that when he was on duty on 30.9.2002 at Bandra Police Station, I.O. Rajendra Kadam called him and gave two sealed envelopes. One envelope was having two bottles and one envelope was having a letter. The said envelopes were given to him by Rajendra Kadam for carrying to the CA Office, Kalina. He then handed over the envelopes to the Laboratory. He identified the forwarding letter given by the police at Exh.80 as he made an endorsement at the back of said letter to the effect that he delivered forwarding letter from the police station along with Form "A" and "B" to the CA office. This Sharad Borade is Head Constable No. 20419. He identified his endorsement as mentioned above, as Exh.80-A. In fact, it is surprising to note that Exh.80 is a letter addressed by PI Shengal to Chemical 151 / 305 152 CR APEAL-572-2015-JUDGMENT.doc Analyser, Kalina Santacruz. However, the acknowledgement or a sort of endorsement made by PW 21 i.e. the Constable who carried the sample and the letters to CA, is appearing on the back of the same letter and, in fact, he got back that letter to the Police Station that is what is his evidence at the end of paragraph 1 in the notes of evidence. His evidence reads thus :

> "Now I am shown Exh.80. I say that letter is the same. I also made endorsement on the back of the letter (Exh.80) that I received the letter of police station along with Form "A" and Form "B" and also I deposited two sealed bottles of blood of accused.

> The endorsement is at Exh.80-A. I also signed below the endorsement. I also obtained the acknowledgement from Kalina Laboratory about delivering the bottles. I handed over the letter along with the acknowledgement to the Investigating Officer about delivering the bottles and the letter to Laboratory, Kalina."
>
> 152 / 305 153 CR APEAL-572-2015-JUDGMENT.doc
>
> 109. In fact, there could not have been any endorsement mentioning that he handed over Form "A" and "B" as those Forms were kept in sealed envelopes as per the evidence of PW 20 Dr Shashikant Pawar from Sir JJ Hospital. There was nothing for the Constable Borade to know that he was taking Form "A"

and "B" and giving such endorsement on Exh.80. What he was given is the sealed envelope containing letters and another envelope containing two bottles (phials).

Another anomalous thing is that the said Exh.80 should form part of the record of the Forensic Science Laboratory, as it was addressed to the Laboratory and on the back of it there could not have been any endorsement by the carrier i.e. PW 21. In fact, this anomalous situation has not been explained by the prosecution. Exhibit 80 which was produced before the Sessions Court is in fact the original letter and not the office copy. This fact is ascertained from the record 153 / 305 154 CR APEAL-572-2015-JUDGMENT.doc of proceeding of the trial Court. Had it been the office copy, then, PW 21 taking it back to the police station along with his endorsement as to "delivery" to the office of CA, would have been probable and acceptable. But the original letter addressed to the CA for no official purpose should go back to the police station but it should remain with the CA office and during recording of the evidence should come from the custody of the Chemical Analyser. Initially, this letter was produced before the M.M. Court when the trial was for the main offence under section 304-A of IPC. Then, it was apparently marked as P-19, which has now become Exh.80 in the Sessions Court trial.

The anomaly in the prosecution evidence does not stop here, but this witness PW 21 further went on to say now during cross-examination that he brought back the Form "B" which is Exh.102 to the Police Station and this happened on 30.9.2002. His evidence 154 / 305 155 CR APEAL-572-2015-JUDGMENT.doc to that effect reads thus :

"Exhibit 102 shown to the witness.

> The receiving clerk put an endorsement about receipt of the bottle and also my buckle number was mentioned in the endorsement, (B.No. 80429). Buckle number was mentioned in the endorsement made by him and the same Form was returned to me. I then submitted the same Form to the Police Station. I do not know when the labels were put on Exh.102. The labels were not put on Exh.102 in my presence. I do not know how the labels were affixed on Exh.102. handed over Exh.102 to Inspector Kadam. I do not know whether there were labels on Exh.102, when I delivered the letter to Kadam.

> During five minutes, the endorsement "one sealed phial seal intact as per copy sent (blood in two phials)" was not made in my presence by the receiving clerk on Exh.102."

110. In fact, this substantive evidence of PW 21 contradict the case of PW 18 as discussed above, as according to PW 18 he removed the sticking plasters 155 / 305 156 CR APEAL-572-2015-JUDGMENT.doc from the sealed bottle and pasted them at the bottom of Exh.102 - Form- "B". If PW 21 had taken back Form- "B" (Exh.102) on 30.9.2002 itself after delivering the samples to the receiving clerk at the laboratory, then, this Form-B could not have been available before PW 18 so as to put the sticking plasters on it prior to taking the sample for analysis.

111. By pointing out the above, the evidence as brought before the Sessions Court, it is submitted on behalf of the appellant that there was manipulation in the blood sample and what was extracted at Sir JJ Hospital had not reached the CA office. In order to further this argument, the following factual position is brought to the notice of this Court during arguments and it is appearing from the evidence. According to PW 20 Dr Shashikant Pawar from Sir JJ Hospital one sealed envelope was given but at the police station 156 / 305 157 CR APEAL-572-2015-JUDGMENT.doc two sealed envelopes were given to PW 21. According to PW 21 Borade, he gave two envelopes to the Laboratory. It is significant to note that the receiving clerk from the CA office is not examined, otherwise this discrepancy as to whether, in fact, PW 21 got back the original Exh.102 from the CA office, or it still remained with the CA, till the sample and the said Form-B Exh.102 reaches the hands of PW 18 could have been clarified. This is, in fact, a missing link in the biological evidence which is required to have been established by the prosecution while placing reliance on the test report Exh.81. Further more, a striking variance as to the factual position, how the sealing was done is brought to the notice of this Court and it is observed that the sealing of the blood sample was done by the ward boy at JJ Hospital. Initially, white bandage was tied on the phials, then the lakh seal was applied on the top and bottom and then thereafter 157 / 305 158 CR APEAL-572-2015-JUDGMENT.doc sticking plaster was wrapped and on which the relevant information regarding EPR number, date, time, etc. was mentioned. According to PW 18, he removed the labels i.e. the sticking plaster and fixed them on the Form "B" (Exh.102). Prior to that he talked of a Tixo tape, which according to him was the tape with which sealing was done on the phials. PW 18 does not talk of red wax seal but he talked of Tixo tape. Now, the specific evidence of PW 20 on this aspect is appearing in paragraph no. 2 of his notes of evidence to the following effect:-

> "Bottles (phials) were capped by white colour bandage (sticking plaster). The seal of lakh was put on the upper and lower end of both the phials. The labeling of EPR number about date, time and PC number and it was wrapped around the two phials".

112. As against this, according to PW 18 in 158 / 305 159 CR APEAL-572-2015-JUDGMENT.doc paragraph no. 13 of his evidence had stated that the constable brought two bottles which were wrapped by Tixo tape. PW 18 talked of constable directly giving him a sample bottle whereas said PC PW 21 talked of delivery of bottle to the receiving clerk. The Receiving Clerk is not examined by the prosecution. Now, according to PW 20 Dr Pawar, he collected blood in two phials each containing 3 ml. and in one phial he added oxalate preservative and other phial was plain.

According to PW 18 Dattatraya Bhalshankar, in his cross-examination he admitted that he received 4 ml.

of blood for analysis which he measured by taking the quantity from both the phials and he measured apparently by the same pipette. (Glan apparatus used in laboratory for chemical analysis). This is significant for the reason that one phial, according to doctor, was containing Oxalate in the blood and another phial contained plain blood. In fact, greater care should 159 / 305 160 CR APEAL-572-2015-JUDGMENT.doc have been taken by the analyst PW 18. His evidence is to be accepted as that of an expert's evidence and in order to place reliance on the same so as to its authenticity, in fact, the handling of the sample and the stages through which the sample passed from the stage of taking of the blood at Sir JJ Hospital and reaching the CA office was of an immense importance.

Even for this reason Form "B" or for that matter the Rules under the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 contemplate a special procedure in order to ascertain the authenticity that what is extracted at the hospital is reaching the laboratory. In the Form-B (Exh. 102) there is buckle number of the constable PC No. 2985 from Bandra Police station, mentioned as a carrier.

This constable is not examined. In fact, the Format of Form "B" also mention that the messenger could also be from Sir JJ Hospital. But, apparently, this mode is 160 / 305 161 CR APEAL-572-2015-JUDGMENT.doc not chosen by the doctor PW 20 and the sample was given in the custody of the constable. It being a biological sample and apparently immediately on the day of the receipt of the sample i.e. 28.9.2002 it was not delivered to the office of Chemical Analyser, utmost care was necessary to have been taken by the Investigating Agency when the sample is routed through the police.

113. On the above aspect, again a glaring anomaly is required to be considered. Though it is the case of the prosecution that on 28.9.2002 and 29.9.2002, the CA office was closed as these were the days falling on Saturday and Sunday and though the sample could not have been sent immediately to the CA, the sample was required to have been placed in a secured condition so as to rule out any possibility of internal fermentation of the blood sample. Otherwise the final 161 / 305 162 CR APEAL-572-2015-JUDGMENT.doc results would not be accurate. Otherwise also, as argued on behalf of the appellant, a special messenger could have been sent and the office of the CA could have been requested to accept the biological sample even on the office closure days. But this procedure is not adopted. In fact, it is unfortunate, if it is a fact, that the office of CA will entirely remain close for not accepting any emergent samples, in case of exigencies.

But, apparently, it is seen from the material on record and what is produced before the Court by the Investigating Agency that the sample was not sent on 28.9.2002 but it was sent on 1.10.2002 that also with the above referred anomalies as to number of phials and more particularly the quantity.

114. Again the anomaly does not stop here. There is the evidence of the IO PW 27 that the sample was kept in his anti-chamber in refrigerator, from 162 / 305 163 CR

APEAL-572-2015-JUDGMENT.doc 28.9.2002 till it was given to PW 21 Borade. Nothing is brought on record by the prosecution that in fact such arrangement of having a refrigerator at the anti chamber of a police officer at Bandra Police Station was officially done. Even if such arrangement is unofficially done, then also there is nothing on record to show that there was such refrigerator kept. It is another question whether any such refrigerator can be kept in the anti chamber of a police officer at the police station and if it is required to be done for some official purpose, then there should be an official record to that effect. However, the investigating agency wanted to believe that the said sample was kept in refrigerator with the police station from evening of 28.9.2002 till morning of 1.10.2002.

115. Apart from the above, still, another anomaly as to whether there was any preservative in the blood 163 / 305 164 CR APEAL-572-2015-JUDGMENT.doc sample. The substantive evidence of PW 20 a doctor from JJ hospital shows that he added 'Oxalate' in one of the phials containing 3 cc of blood. Another phial was not having any additive but having only the plain blood 3 cc. Even the CA report mention regarding presence of 'Oxalate' in one phial and it is, in fact, the factual position that the Oxalate is being used as anticoagulant and not as a preservative. This is specifically accepted by the expert PW 18. He further stated that preservative is required to be added in the blood sample in order to rule out the possibility of the generation of any other alcoholic substances in the sample itself due to its degeneration. Needless to mention that the effect of an 'anticoagulant' is different than the effect of a 'preservative'. The usually used preservative even according to PW 18 and according to the Chemistry so far as analysis of blood for alcohol is Sodium Fluoride (NaF). It is, in fact, 164 / 305 165 CR APEAL-572-2015-JUDGMENT.doc astonishing to see that the expert witness PW 18 was not in a position to give correct chemical formula of Sodium Fluoride and he mentions the formula as Na 2 SO4. Na2SO4 is actually 'Sodium Sulphate' and formulae for Sodium Fluoride is 'NaF'. A common man may forget about niceties of Chemistry but the expert from the Forensic Science Laboratory giving this type of evidence before the Court depicts some other picture. Lack of knowledge on the part of an expert may not always be disastrous in case of analysis of minor things. But here what was to be established by the prosecution was the drunkenness and percentage of the alcohol in the blood sample of the appellant. On all these anomalies, it is tried to be argued on behalf of the State that though the CA is giving his evidence as an expert, he need not know all the chemical reactions or formulas, he may not be in a position to give the details as to how a particular analysis can be 165 / 305 166 CR APEAL-572-2015-JUDGMENT.doc done. But it is to be seen whether he has followed the procedure which was prescribed under the law.

116. According to the prosecution, the CA report Exh.81 is required to be accepted as to containing the alcohol twice the limit than that is permitted by law.

To further this argument, it is submitted on behalf of the State that even the Rules 4 and 5 under the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 do not mandate that the said rules are mandatory but they are directory. On this aspect, various authorities are cited on behalf of the appellant and it is submitted that though the rules are not mandatory, the procedural aspect is required to be strictly followed. Though the rules say, for example, that minimum 5 ml of the blood is necessary to be sent to the laboratory, in some cases, if less quantity is received then this anomaly, itself, will not negate the 166 / 305 167 CR APEAL-572-2015-JUDGMENT.doc effect of the

tests report. Following are the authorities on the procedure to be followed in drawing of a blood sample for 'alcohol' and substantial compliance of Rule 4 as per Section 129-A of the Bombay Prohibition Act.

(1) 1979 Bom C.R. 419 [Shravan Ganpat v. The State of Maharashtra] (2) 1979 Bom.C.R. 263 [Ashok Hariba More vs. The State of Maharashtra] : This authority deals with Rule 4 (2) of the Bombay Prohibition (Medical Examination and Blood Test)Rules, 1959 and specify that sample of blood shall be forwarded for test either by Post or with a special messenger and shall be accompanied by Form "B".

(3) 1977 U.C.R. (Bom.) 532 [Tulsiram Gangaram Raykar Vs. The State of Maharashtra] (4) 1967 Mh.L.J. 13 [Bankatlal V. State] 167 / 305 168 CR APEAL-572-2015-JUDGMENT.doc (5) AIR 1967 Guj 219, (1967) 8 GLR 31.

[Karansingh Balubha Vs. State of

Gujarat)

(6) 1980 Bom.C.R. 947

[Suresh Shankar Chavan Vs. The State of Maharashtra] (7) AIR 1980 SC 1314 [State of Rajasthan Vs. Daulat Ram) (8) AIR 1967 Bombay 218 [Narayan Krishnaji Marulkar & Anr Vs. State] (9) 1986 (3) Bom.C.R. 341 (Aurangabad Bench) [The State of Maharashtra Vs. Raghunath Madhavrao Marathe]

117. From the above authorities it is not certain that Rule 4 is mandatory but, of course, there cannot be any compromise on the aspect when a particular procedure is to be applied and which goes to the root of the matter, then fulfillment of that procedure is required to be established by material on record. Here 168 / 305 169 CR APEAL-572-2015-JUDGMENT.doc the main anomaly is not that when 5 ml of blood is necessary for the tests and 4 ml is received by PW 18 Bhalshankar, but the anomaly is what is sent by the doctor is 6 ml and what is received by the CA is 4 ml.

Moreover, there is anomaly regarding how the sample was received by the CA PW 18. At the cost of repetition, it must be mentioned that he received the sample from one Constable. However, the police constable PW 21 is silent on the aspect and he talked of giving sample to the receiving clerk. By pointing out this, it is submitted on behalf of the appellant that if it is required to be accepted that both these witnesses are right on this aspect, then, some other constable must have reached the CA with the sample because PW 21 was not the constable who gave the sample to PW 18. In fact, this

controversy could have been resolved by examining the receiving clerk from the office of CA but he is not produced before the Court in 169 / 305 170 CR APEAL-572-2015-JUDGMENT.doc order to establish the link and to suggest that the constable PW 21 is not giving the correct evidence but he gave the sample to PW 18 directly. However, the fact remains that whatever evidence adduced before the Court is required to be viewed with the anomalies which are pointed out above.

118. Again on the above aspect as to the drunkenness and testing of the blood of the appellant for alcohol content, it is again significant to note that except Dr Pawar PW 20, no other witness of the prosecution is saying that the accused was smelling of alcohol. Even Ravindra Patil did not mention this while giving his FIR that the accused was drunk and drove the vehicle. PW no. 20 Dr Pawar in his report and in his evidence before the Court did mention to the following effect :-

> "I noticed breath was smelling alcohol."
>
> 170 / 305 171 CR APEAL-572-2015-JUDGMENT.doc
>
> 119. This answer was in reference to the clinical examination of the appellant-accused. But this evidence is required to be viewed in juxtaposition of the factual position discussed earlier regarding the word "alcohol" not appearing at the back of the OPD paper Exh.98 though apparently it is appearing on the EPR register.

120. One more aspect on this alcohol consumption and the tests and the precautions to be taken while taking the sample and the carrying out the analysis, is required to be mentioned. It is argued on behalf of the State that the rules under the Bombay Prohibition (Medical Examination and Blood Tests) Rules, 1959 cannot be applicable in the present case as there is no charge in the present case for the offence under section 66 (1) (b) of the Bombay Prohibition Act, 1949. On this aspect, it is to be seen that initially 171 / 305 172 CR APEAL-572-2015-JUDGMENT.doc when the matter was before the M.M.Court, main charge was under section 304-A of IPC, the charge under section 66 (1)(b) under the Bombay Prohibition Act was also framed. Secondly, the procedure adopted by PW 18 Dr Pawar from Sir JJ Hospital was regrading sending of Form "A" and Form "B" along with the sample presupposes that there should have been compliance of the said rules. Thirdly, when the matter was before the Sessions Court after the committal and when the charge was framed initially, the charge was framed under section 66 (1)(b) of the Bombay Prohibition Act also. But when the matter came before this Court challenging the applicability of Section 304 Part II of IPC, this Court took a view that section 304 Part II of IPC is not applicable. But, consequently, the said order was challenged before the Apex Court as detailed earlier and the matter again came back and was heard before the M.M. Court. Ultimately, before 172 / 305 173 CR APEAL-572-2015-JUDGMENT.doc the M.M. Court present PW 18 and 20 were also examined. This charge under section 66 (1)(b) of the Bombay Prohibition Act was already framed. Then it so happened that after 17 witnesses the matter was again sent back to the Sessions Court on committal. At this stage, the charge under section 66 (1)(b) was not framed. There was no explanation from the prosecution as to why this charge under section 66 (1)

(b) though earlier framed when the appellant-accused was tried before the M.M.Court, not so framed before the Sessions Court. In any event, the argument by the State that for non framing of a charge under section 66 (1)(b) under the Prohibition Act, the Rules under the Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959 are of no significance, cannot sustain. The question is whether the investigation was proceeding in a particular direction for proving a charge u/s 66 (1)(b) of the Bombay Prohibition Act.

173 / 305 174 CR APEAL-572-2015-JUDGMENT.doc Then in that event it was incumbent upon the prosecution to follow the procedure. In any event, this is the aspect which is required to be considered and in fact it must be held that this goes to the root of the matter as to the consumption of alcohol by the appellant and it must be said that the evidence of the prosecution had not reached that standard of proof for establishing that the blood collected from the appellant-accused was having that percentage as mentioned in Exh.81.

121. On above aspect itself, another circumstance is required to be mentioned as to initially the appellant was sent to Bhaba Hospital according to the Investigating Agency. However, no document was produced before the Court as to report from the Bhaba Hospital that the facility of taking the blood is not available or the requisite equipments are not there.

174 / 305 175 CR APEAL-572-2015-JUDGMENT.doc This stand of the Investigating Agency is required to be examined in view of the factual position that the blood of a deceased Nurulla was taken at Bhaba Hospital for analysis. Of course, it is the argument on behalf of the State that the procedure for taking blood of a deceased and the procedure of blood to be extracted from a living being and that also for analysis of alcohol, are different and require different expertize, then also there should have been a report before the Court that the said facility was not available at Bhaba Hospital and the blood could not be extracted there for that purpose. Of course, this is one of the circumstances argued on behalf of the appellant in order to show the quality of the investigation for showing the procedural lapses.

122. This aspect was also dealt with before the Sessions Court. However, apparently the Sessions 175 / 305 176 CR APEAL-572-2015-JUDGMENT.doc Court came with a different analysis saying that the judicial notice could have been taken that if the blood is extracted from a person then always there should be a sticking plaster on his arm or on the part from where the blood is extracted. By no stretch of any imagination can it be said that this is a concept for taking a judicial notice. However, exactly that has been done by the trial Court. In any event, the factual position as referred to above indicate as resulted in the above finding of this Court as to non-establishment of the fact of consumption of alcohol by the appellant-

accused.

TYRE BURSTING :

123. Now, coming to the third major aspect as to whether it was a pure and simple accident due to bursting of the left front side tyre of the car and whether the said defence raised on behalf of the 176

/ 305 177 CR APEAL-572-2015-JUDGMENT.doc appellant-accused is probable or not. On this aspect, the major substantive evidence is that of PW 19 Arjun Kesker, the RTO Inspector and also that of defence witness Ashok Singh. PW 19 is the RTO Inspector who inspected the vehicle involved in the accident and gave his report at Exh.84. At the cost of repetition, it is to be mentioned that at about 9:30 a.m. he had inspected the vehicle on 29.9.2002. Then the vehicle was standing in front of Bandra Police Station. Firstly, he checked the vehicle from all the angles from outside and recorded damages, scratches found on the vehicle. Externally he noticed that the damage was caused to the left side and front bumper was found missing. He also noticed left head light as well as side light was broken. The electrical wires of the bulb were found outside. He noticed scratches on the wind shield glass. Right side mirror was also found broken. Now the specific observations of this witness are coming in 177 / 305 178 CR APEAL-572-2015-JUDGMENT.doc paragraph no. 5 of his evidence before the Sessions Court. He also went beneath the car in order to see whether any damage was caused to the car from below. He also opened the bonnet which was bent. He checked oil, coolant and also checked mechanical defects, electrical connections and noticed and found all intact. The result of this examination apparently lead to the conclusion that there was no much damage except the front left side damage and loss of the bumper from the front side. This fact is important in the light of the case of the prosecution that during the incident the vehicle was being driven at the speed of 90 to 100 km per hour. This is also important and to be viewed in juxtaposition of the situation as stated by PW 7 and PW 15 that there were speed breakers on the St.Andrews Road near Holy Family Hospital. This is again more significant when it is the case of the prosecution that the vehicle took the rout from 178 / 305 179 CR APEAL-572-2015-JUDGMENT.doc J.W.Marriott Hotel till the house of the appellant via St.Andrews Road and Hill Road. Apparently, the accident occurred at the junction of St. Andrews Road and Hill Road. As such, considering installation of the speed breakers as stated by the witnesses and considering the speed, alleged to be 90 to 100 km per hour, and considering the damage which is now observed, it is difficult to assess as to whether the things had happened as depicted by the case of the prosecution. The effect of a speed breaker can be understood by the condition of the vehicle when running in at speed of 90 to 100 km per hour and if with this speed the vehicle collides with any stationery object like in this case it collided with the shutter of American Laundry then the result of impact would be very disastrous so far as damage of the vehicle. This is more so when apparently there are no break marks on the spot and nothing to that effect is appearing in the 179 / 305 180 CR APEAL-572-2015-JUDGMENT.doc panchnama, or there is no evidence of any witnesses as to finding of break marks on the road or anything to suggest that the vehicle may have slowed down.

With this basic understanding, the evidence of PW 19 is to be analyzed. Also it is to be seen in the light of the evidence of the other witnesses as to the puncture or bursting of the left side front tyre. Again, it is to be seen that this RTO Inspector PW 19 has not stated anything regarding the left side door whether in damaged condition or inoperable in any manner. This witness further say that he opened the driver's side door for checking the vehicle. He tried to start the engine by inserting the key of the ignition. The engine started after inserting the key for ignition. He also checked whether hand break was functioning. After checking various other parameters regarding engine and hydraulic connection for power steering and noticing that everything was intact, he checked the 180 / 305 181 CR APEAL-572-2015-JUDGMENT.doc electrical signal and found them in order. He also found the gear box in order. Then, according to him, he took the vehicle for test drive. At this time,

this witness was questioned, still in the examination-in-

chief that instead of finding less air in the left front side wheel, whether he was in a position to drive the car. To this he answered that he was in a position to drive the car in spite of the less air in the left front tyre. At this juncture, it must be mentioned that there are various witnesses who deposed as to finding the left front tyre either punctured or burst. Without going much into details of the answers by these witnesses, suffice it to say that PW 1 in para 7 stated "left tyre of the car was found punctured". PW 8 in para no. 6 has stated, "the left front tyre of the car was found burst."

PW 13 in paragraph no. 3 stated "the tyre of the car was found burst". PW 26 the police officer had specifically stated and agreed that the vehicle involved 181 / 305 182 CR APEAL-572-2015-JUDGMENT.doc in the accident was towed from the spot of the accident as it was not in a position to be driven. The same police officer further stated that the left front tyre of the car was burst. The last prosecution witness PW 27 Police Officer Shengal stated to the following effect:-

> "It was not possible for me to send the front left tyre to the Forensic Lab for ascertaining the extent and cause of the burst."

124. By the above, this witness accepted that the tyre was burst but he did not take any measures to find out the cause, much less to ascertain whether it was due to the impact of the incident or because of the bursting the incident occurred i.e. whether it is the final result of the incident occurred, or it is the cause for the incident."

125. Now coming back to the evidence of PW 19, 182 / 305 183 CR APEAL-572-2015-JUDGMENT.doc during the course of cross-examination he had given altogether a different story as to on which day he examined the vehicle and which day he gave the report at Exh.84. According to this witness, he came to know about the incident when he received the call on 29.9.2002. He enquired with the police about the incident but they could not tell him about the incident.

He had asked the police about the papers as to how the incident took place but the police told him that the papers were not ready. He demanded the CR registered from police but copy of FIR was not available. Police told him that the documents were being prepared. He further stated that he did not see the case papers. Now, a very different story is given by this witness during cross-examination which is appearing in paragraph 12 of his notes of evidence to the following effect:

> 183 / 305 184 CR APEAL-572-2015-JUDGMENT.doc "It is true that I came to know that on the morning of 28.9.2002 that an accident had occurred. I also made a call to the control room on 29.9.2002 as to whether an inspection of the vehicle involved in the accident is to be carried or not. I had inspected the vehicle on the same day of the occurrence of the incident. Control room gave information to me about the incident on 28.9.2002."

126. During further cross-examination, he also answered that he knew one police officer Imtiaz. He was Inspector working with him and was senior to him. According to this witness, Imtiyaz also accompanied to Bandra Police Station. Imtiyaz came with him as he was residing near Bandra Police station. According to this witness, it happened on 28.9.2002 at about 9:00 to 9:30 a.m. This witness further answered that the officer who gave him the key for inspection of that vehicle was standing with Imtiaz and Imtiaz had also seen the vehicle. According 184 / 305 185 CR APEAL-572-2015-JUDGMENT.doc to this witness, Imtiaz told him whether he checked a particular thing in the vehicle or not. This witness returned the key to the officer within 20 minutes from the moment key was given to him. On the next day of this inspection he visited Bandra Police Station at about 4:00 p.m. to 5:00 p.m. and remained there for half an hour. Apparently, then he prepared the report.

In fact, this is totally in variance to his earlier story given in paragraph no.3 in his examination-in-chief that he inspected the vehicle at 9:30 a.m. on 29.9.2002. Admittedly, this witness has not been declared hostile and is not put the questions in the nature of cross-examination by the learned Prosecutor during the trial. The variance in the substantive evidence of this witness has not been explained by the prosecution by taking answers from him. As such this witness was also not disowned by the prosecution.

This raises a reasonable doubt whether in fact the 185 / 305 186 CR APEAL-572-2015-JUDGMENT.doc inspection of the vehicle was done by him as stated.

More so by driving the vehicle when it was admittedly immobilized and was required to have been taken from the spot of the incident to the police station by towing. Considering these circumstances and the evidence of the other witnesses mentioned above, it is difficult to accept that the left side front tyre of the vehicle was not punctured or burst. Now the question remains whether the bursting of the tyre was prior to the incident or it was the bursting due to the impact of the car on the platform in front of the American Bakery.

DICTATION ON 9th AND 10th DECEMBER, 2015:

127. In view of the above observations it is ascertained that the vehicle involved in the accident had a punctured / burst tyre and in fact this position has been depicted by various witnesses as discussed in 186 / 305 187 CR APEAL-572-2015-JUDGMENT.doc detail above. Though on this count the substantive evidence of PW-19 and also the documentary evidence of vehicle examination report states otherwise, it must be said that the report (Exhibit-84) apparently is not in the form prescribed for the road traffic accident report. In order to ascertain now as to the cause of such bursting of a tyre whether it was the bursting prior to the incident or whether the tyre burst because of the incident and impact of the vehicle on the shutter of American Express Laundry and while climbing

the platform, it was incumbent upon the investigating agency to call for the report from the Forensic Science Experts. In fact apparently as per the evidence of PW-27 Police Officer Shengal in paragraph-30 of his evidence had specifically stated to the following effect :

> "I had called the Forensic team for examination of the vehicle. I do not 187 / 305 188 CR APEAL-572-2015-JUDGMENT.doc recollect their names or expertise today. I do not know whether finger prints were obtained from the car. I had taken the finger prints of accused. I had sent the same to the finger print experts. I had not given direction to ascertain the finger prints of the accused on the steering."

128. If these steps were taken by the investigating agency calling for the Forensic Science team for inspection of the vehicle then definitely it was required to ascertain the cause of bursting of the left side front tyre. In this context the defence of the accused is required to be seen. Needless to mention that in a criminal trial it is the duty of the prosecution to establish its own case and there is no obligation by law on the accused to prove his innocence and even if he chooses to record any defence witness then the burden of establishing the defence can be discharged by the material which need not be satisfying the test of evidence beyond reasonable doubt. It is well settled 188 / 305 189 CR APEAL-572-2015-JUDGMENT.doc that the defence can establish its case if at all the defence chooses to, by way of giving evidence which satisfy the standard of preponderance of probability. In fact with this understanding the entire evidence of defence witness DW-1 Ashok Singh is required to be viewed. In paragraph-3 a specific case is pleaded by DW-1 and which is reproduced hereunder :

> "I then took the vehicle on Linking Road, then on Gonsalves Road and took the right turn for going to Hill Road. Our vehicle came on Hill Road. Our vehicle proceeded at some distance on hill Road, then the front left tyre of our vehicle burst, thereby our vehicle pulled towards the left side. I tried to turn my steering wheel but it had become hard to turn. I also tried to apply the brakes, but by then the vehicle had climbed the stairs of the Laundry. Our vehicle then stopped."

129. By placing this defence material before the Court through DW-1, it is tried to establish on behalf 189 / 305 190 CR APEAL-572-2015-JUDGMENT.doc of the appellant/accused during the trial, that the vehicle was being driven by DW-1 as he was the fourth person in the vehicle and after proceeding on the Hill Road by taking a turn from Gonsalves road, the left front tyre of the vehicle burst. Of course, in a running vehicle when one of the tyres burst then the vehicle is pulled towards the side on which the tyre is burst. In fact this is the science and action of a moving vehicle is governed by the laws of physics. The turning radius of a vehicle depends upon the speed of the vehicle and also the weight of the vehicle. As such the theory putforth before the Court during the trial through DW-1 was that the left side front tyre burst and due to which the vehicle pulled towards the left and then was uncontrollable thus resulting in the accident. During the arguments on behalf of the State, counter to this defence evidence, learned Public Prosecutor stated that no where in the examination-in-

190 / 305 191 CR APEAL-572-2015-JUDGMENT.doc chief DW-1 had stated that exactly at which point on the road the left front tyre burst. Again in support of this submission alleging that the false

theory being propounded by the defence, learned Public Prosecutor further drew attention of this Court towards the answer given by Ravindra Patil during his cross-

examination. Of course the admissibility or otherwise of substantive evidence of Ravindra Patil which was recorded before the Metropolitan Magistrate Court, is yet to be scrutinized hereafter, but, for the sake of argument the answer given by Ravindra Patil to the suggestion can be analyzed. The substantive evidence of Ravindra Patil which is appearing in the notes of evidence during his cross-examination reads thus :

> "It is true that front left side tyre of the incident motor car was burst at the place of the incident. It is true that left side of the incident motor car was pressed. It is true that there was no condition of the incident motor car 191 / 305 192 CR APEAL-572-2015-JUDGMENT.doc to open the left side door."

130. By pointing the first answer as to the tyre burst at the place of the incident, it is tried to argue that this answer is required to be taken as the burst is due to the incident. If this is the meaning to be given to the answer then there must be some supporting material required to have been brought before the Court during the investigation and in fact there was an opportunity for the investigating agency to get this material by way of sending the said tyre for the forensic examination as to whether some outside foreign pointed object got inserted in the tyre or the tyre has burst because of the impact and the pressure of some hard object like a cement platform. Without this forensic material though the forensic team was called to inspect the vehicle specially, it is difficult to accept the submission on behalf of the State that the 192 / 305 193 CR APEAL-572-2015-JUDGMENT.doc answer given by Ravindra Patil is to be construed as the bursting of the tyre was due to the impact. If there are two views possible, needless to mention that a view which supports the accused is required to be considered still considering the onus on the defence to establish its case on preponderance of probabilities.

131. In the considered view of this Court on this aspect of bursting of tyre it is not conclusively established by the State that the bursting was only because of the impact of the vehicle either on the cement platform in front of the bakery or due to any other object before that. Moreover there is another check for substantiating this conclusion is that except the damage to the left front show of the car and missing of the bumper from the front side and some destruction of some electrical lights, the RTO officer (PW-19) did not find any damage to the vehicle from 193 / 305 194 CR APEAL-572-2015-JUDGMENT.doc beneath. In fact according to him the vehicle was in a running condition and he had taken a test drive also.

As such, the arguments on behalf of the defence as to the bursting of tyre cannot be thrown away only because no accurate details are given by DW-1 in his examination-in-chief as to at exactly which point on the Hill road the tyre burst. In fact this mitigating circumstance to the case of prosecution is to be viewed apart from the other material which is earlier discussed and also yet to be discussed in later part of this judgment.

SECTION 33 OF EVIDENCE ACT :

132. Now the important aspect of the matter is required to be dealt with and that is the acceptability of the evidence of Ravindra Patil under Section 33 of the Evidence Act. In fact this is the crucial aspect as apart from this testimony of Ravindra Patil, the 194 / 305 195 CR APEAL-572-2015-JUDGMENT.doc prosecution case rests only on the substantive evidence of the injured eye witnesses concerning the driving of the vehicle and eye witnesses from the Rain Bar on the aspect of drunkenness. As such, the substantive evidence of Ravindra Patil is of utmost importance and in fact he is the first informant in the matter as he lodged his complaint within two hours of occurrence of the incident. The situation for taking recourse to Section 33 of the Evidence Act occurred because of the specific circumstances in the present case. As detailed earlier in the beginning of this judgment, the matter was before the Metropolitan Magistrate Court and 17 prosecution witnesses were examined. Ravindra Patil was in fact PW-1 as he is the first informant, admittedly when the main charge was for the offence under Section 304A of IPC.

Consequently there was no charge of culpable homicide not amounting to murder, specifically a 195 / 305 196 CR APEAL-572-2015-JUDGMENT.doc charge under Section 304 Part II of IPC i.e. requirement of knowledge, though there is no intention, that a person may die due to the act committed by the person.

133. Firstly the provisions of Section 33 of the Evidence Act can be seen which reads thus :

> "33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.-- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
>
> Provided--
>
> that the proceeding was between the same parties or their representatives in interest;
>
> 196 / 305 197 CR APEAL-572-2015-JUDGMENT.doc that the adverse party in the first proceeding had the right and opportunity to cross-examine;
>
> that the questions in issue were substantially the same in the first as in the second proceeding.
>
> Explanation.--A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

134. A broad proposition can be formulated from the above definition firstly that the evidence of a witness in earlier proceedings must be in a judicial proceeding or before any person authorized by

law to take it. Secondly, said evidence can be considered as relevant for proving in subsequent judicial proceeding or in a later stage of the same proceeding when said witness is dead or not found or incapable of giving evidence or is kept out of way by the adverse party or if his presence cannot be obtained without an amount of delay or expense.

197 / 305 198 CR APEAL-572-2015-JUDGMENT.doc

135. In the present case the evidence of Ravindra Patil was recorded during the trial before the Metropolitan Magistrate Court. By pointing this out, it is submitted on behalf of the State that this is the evidence recorded in a judicial proceeding. Of course, a different view is canvassed on behalf of the appellant that though the proceeding was initially a judicial proceeding, what was recorded during that proceeding subsequently loses its character as recording in any judicial proceeding when the said proceeding was required to have been stopped at the Metropolitan Magistrate Court level as there was a committal order passed and further proceeding after the committal order is in fact a denovo proceeding.

This aspect was also to be dealt accordingly. The important requirement for accepting the evidence from the earlier judicial proceeding in the later part of the proceeding or in the subsequent judicial 198 / 305 199 CR APEAL-572-2015-JUDGMENT.doc proceeding is that the question in issue must be substantially the same in the first as in the second proceeding. Much was argued by rival sides on this proviso whether the issues involved in both the matters, firstly before the Metropolitan Magistrate Court and secondly before the Sessions Court were substantially the same. Here the question is the substantial similarity of the issues and not the material required for establishment of the issues. The issue before the Metropolitan Magistrate Court was definitely whether there was an offence committed under Section 304A of IPC whereas the issue before the Sessions Court was commission of the offence under Section 304 Part II of IPC. The provisions of Section 304A and Section 304 Part II of IPC can be reproduced with advantage :

> "304A. Causing death by negligence.-- Whoever causes the death of any person by 199 / 305 200 CR APEAL-572-2015-JUDGMENT.doc doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."
>
> CLASSIFICATION OF OFFENCE Punishment - Imprisonment for 2 years, or fine, or both - Cognizable - Bailable - Triable by Magistrate of the first class - non-compoundable."
>
> "304. Punishment for culpable homicide not amounting to murder.--
>
> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term,

which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

CLASSIFICATION OF OFFENCE 200 / 305 201 CR APEAL-572-2015-JUDGMENT.doc Para I : ----

Para II : Punishment - Imprisonment for 10 years, or fine, or both - Cognizable - Non-bailable - Triable by Court of Session

- Non-compoundable."

136. By plain reading of these Sections, as reproduced above, Section 304A completely excludes the culpable homicide whereas section 304 either Part I or Part II postulate that it is a culpable homicide not amounting to murder. In other words, Section 304 contemplates that though the act is not a murder but it must be a culpable homicide whereas section 304A says what is not culpable homicide and done in a particular manner as mentioned in the section, is punishable under Section 304A of IPC. This is the difference between the two sections. This issue which was required to have been decided by the trial Court and which goes to the root of the matter that the questions in issue were substantially the same in the 201 / 305 202 CR APEAL-572-2015-JUDGMENT.doc first as in the second matter. The meaning of 'substantially the same' cannot be taken as fulfilled when the basic ingredients of the offences are different. In other words coming to this case, the basic ingredient of the offence under Section 304A of IPC was rash and negligent act causing death but this act is not at all a culpable homicide so the import of Section 304 is limited to the extent of rashness and negligence and then causing the death. Something more is necessary for the act to be termed as a culpable homicide and culpable homicide is defined in Section 299 of IPC. Moreover, the distinction between these two sections lies in the penal effect, in the sense for the offence under Section 304A of IPC the maximum punishment is upto two years or with fine or both. As such it is a lighter offence than compared to section 304 IPC. Even apart from the punishment the offence under Section 304A is bailable and triable 202 / 305 203 CR APEAL-572-2015-JUDGMENT.doc by the Magistrate of First Class whereas the offence under Section 304 Part II, as in this case, attracts the maximum punishment for imprisonment of 10 years or with fine or with both and it is a non-bailable offence. The ingredients to satisfy the respective offences are wholly different. The nature of these offences are in fact different and it cannot be said that the questions in issue are substantially the same when the issues were tried before the Metropolitan Magistrate Court and the issues were tried before the Sessions Court more particularly when one is not a culpable homicide at all while the other is culpable homicide, although not amounting to murder. As such, if this proviso to section 33 of the Evidence Act is not satisfied then the result is required to be accepted that no recourse to Section 33 of the Evidence Act can be taken for reading the evidence of Ravindra Patil in the Sessions Court trial.

203 / 305 204 CR APEAL-572-2015-JUDGMENT.doc

137. More so the above aspect can be viewed in different perspective. It so happened that after committal the question arose before the Sessions Court for recording of the evidence and whether the evidence recorded before the M.M. Court could be taken as an evidence and the sessions case can proceed on this. Earlier in the preliminary paragraphs of this judgment this aspect has been dealt in detail as to in what manner the Sessions Court directed the denovo trial thus not accepting the evidence of all 17 prosecution witnesses. If by operation of law and by committal proceedings the earlier evidence recorded before the Metropolitan Magistrate Court cannot be considered as a valid evidence to establish the case against the accused, then it is difficult to accept that how part of that evidence can be accepted under different provision if the mandate of Section 33 of the Evidence Act is not fully complied. Moreover it is 204 / 305 205 CR APEAL-572-2015-JUDGMENT.doc significant to note that said Ravindra Patil died on 3.10.2007 and prior to that he was examined before the Metropolitan Magistrate Court. The last witness before the Metropolitan Magistrate Court was examined on or about 25.2.2011 i.e. witness No.17.

In fact much prior to the year 2011, Ravindra Patil had already expired. However admittedly this position was not brought to the notice of the Sessions Court when the sessions trial commenced and almost 24 prosecution witnesses were examined. Still it is pertinent to note in the present sessions case that the usual procedure of recording of the evidence has not been followed. Of course, there cannot be any straight jacket formula as to examination of witnesses in a particular manner but when the witness is a first informant and when the entire case of prosecution rests on his evidence then it is the first thing for the prosecution to bring him before the Court if available 205 / 305 206 CR APEAL-572-2015-JUDGMENT.doc and then to proceed further with the matter, more so when it is sessions trial. In fact Ravindra Patil was then a Constable working in the Bombay Police Force and at some point of time he was dismissed from service and was not available before Metropolitan Magistrate Court for giving evidence after his earlier evidence was recorded. But still it is not explained by the prosecution as to on which date did it learn regarding the death of Ravindra Patil. Subsequently his brother PW-25 Kailas was examined by the prosecution on 7.3.2015 and through him the death certificate (Exhibit-140) of Ravindra Patil was produced on record. It is also pertinent to note that even till recording of 24 witnesses before the Sessions Court, not for a single time did the Sessions Court enquire as to the whereabouts of the first informant and why so far he was not examined. If the death of Ravindra Patil was not known to the police and also 206 / 305 207 CR APEAL-572-2015-JUDGMENT.doc to the Court then the first endeavour to be made by the prosecution was to examine Ravindra Patil or to search for him and then report to the Court his unavailability due to his death. Whatever it might be, but the fact remains that said Ravindra Patil died on 3.10.2007 when the matter was still with the Metropolitan Magistrate Court. The application for taking his evidence on record under Section 33 of the Evidence Act was filed by the prosecution (below Exhibit-131). It may not be of specific importance but the timing of said application (Exhibit-131), by the prosecution for taking evidence of Ravindra Patil on record in the Sessions Court, is crucial i.e after recording of evidence of 24 witnesses although Ravindra Patil was named as the first witness in the witness list. The appellant/accused filed his reply vide Exhibit-136 and the order was passed by the Court allowing the reading of the evidence of Ravindra Patil 207 / 305 208 CR APEAL-572-2015-JUDGMENT.doc in the sessions case but reserving its admissibility till the final decision of the sessions case.

138. The learned Senior Counsel for the appellant strongly takes exception to this procedure adopted by the Sessions Court contending that had the decision of admissibility decided at the very threshold of the sessions case and although not at the starting of the trial, but even at the time of passing the orders on Exhibit-131, then also there would have been an opportunity for the appellant/accused to take an appropriate stand and either to re-call earlier witnesses and to take appropriate steps for putting forth the defence. However, this opportunity was lost because of the adjudication by the Sessions Court at the time of final judgment, accepting the admissibility of the evidence and relying on the same that also for the purpose of decision on the main charge of Section 208 / 305 209 CR APEAL-572-2015-JUDGMENT.doc 304 Part II of IPC when admittedly the evidence earlier recorded was at the time of the main charge under Section 304A of IPC before the Magistrate Court.

139. In the considered view of this Court the mandate of Section 33 of Evidence Act is not fulfilled and evidence of Ravindra Patil cannot be taken as an evidence in the Sessions trial. In any event though this Court has come to the conclusion as to the erroneous allowing of the application under Section 33 of the Evidence Act by the trial Court, still if the evidence of Ravindra Patil is to be considered, still alternatively the effect of the evidence of Ravindra Patil can be discussed in order to see whether the prosecution has established its case beyond reasonable doubt.

140. Following authority is placed before the Court 209 / 305 210 CR APEAL-572-2015-JUDGMENT.doc on behalf of the appellant on the aspect that retrial wipes earlier evidence, as under :

[I] AIR 1963 SC 1531 [Ukha Kolhe Vs. State of Maharashtra]

141. Numerous authorities are also cited on the aspect as to the applicability of the evidence under Section 33 of the Evidence Act, as under :

[I] (1962) 3 SCR 328 [Payare Lal vs. State of Punjab]: This authority is on the aspect that one who hear has to decide. Paragraph-6 of this authority reads thus :

"6. There is no controversy that the general principle of law is that a Judge or Magistrate can decide a case only on evidence taken by him.

Section 350 of the Code is a statutory departure from this principle. That section so far as material was at the date S. Jagjit Singh decided the case in these terms :

> "350. Whenever any Magistrate, after having heard 210 / 305 211 CR APEAL-572-2015-JUDGMENT.doc and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdictions, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself or he may resummon the witnesses and recommence the inquiry or trial."

It is only if this provision was available to S. Jagjit Singh that the course taken by him can be supported."

[II] (1992) 1 SCC 279 [R.S. Nayak vs. A.R. Antulay & others]: This authority is on the effect on the case on transfer.

In this case of R.S. Nayak v. A.R. Antulay, though the matter was earlier heard before the Judge of the Bombay High Court, that also on the directions of the Apex Court, subsequently the 211 / 305 212 CR APEAL-572-2015-JUDGMENT.doc matter was transferred from the High Court to the Special Court designated to try the cases under the Prevention of Corruption Act. Under those circumstances the earlier recorded evidence of almost 57 witnesses before the High Court was not taken into consideration and denovo trial was ordered.

[III] 2008(5) Bom. C.R. 367 [Padam Chandra Singhi & Ors. Vs. Praful B.

Desai (Dr.) & Ors.] : This authority is on the aspect as to use of Section 33 of the Evidence Act. It is held that recourse to this section to be taken only in exceptional circumstances and when the condition in the said section by way of provisos are fully complied. It is observed in the said authority in paragraphs-15 and 16 as under :

> 212 / 305 213 CR APEAL-572-2015-JUDGMENT.doc "15. The depositions are in general admissible only after proof that the persons who made them cannot be produced before the Court to give evidence. It is only in cases where the production of the primary evidence is beyond the party's power that secondary evidence of oral testimony is admissible.
>
> 16. It is an elementary right of a litigant in civil suit that a witness, who is to testify against him, should give his evidence before the Court trying the case, the adverse party gets an opportunity to cross-
>
> examine at the same time so that the Court has the opportunity of seeing the witness and observing his demeanour and can, thus, form a better opinion as to his reliability rather than reading a statement or deposition given by that witness in a previous judicial proceeding or in an early stage of the same judicial proceeding."

[IV] 1945 [Vol.XLVIII] 284 PRIVY COUNCIL [Chainchal Sikngh vs. Emperor]: The observations of the Privy Council in the above authority, while dealing with Section 33 of the 213 / 305 214 CR APEAL-572-2015-JUDGMENT.doc Evidence Act, reads thus :

> "Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can

> thus form a better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved."

[V] (1988) 2 SCC 602 [A.R. Antulay Vs. R.S. Nayak & Anr.]: This is another authority and it relates to earlier 214 / 305 215 CR APEAL-572-2015-JUDGMENT.doc authority (R.S. Nayak v. A.R. Antulay & Ors., (1992) 1 SCC 279). Again this authority speaks that earlier evidence not to be accepted when the Forum is changed.

[VI] (2014) 10 SCC 494 [J.V. Baharuni & Anr. Vs. State of Gujarat & Anr.]: This authority postulates that whenever there is an order of denovo trial, earlier evidence is erased. Of course the ratio of this authority is applicable when specifically there is a case of denovo trial. But the principle behind the ratio remains the same that when the Forum is changed the earlier evidence cannot be taken shelter of unless it is expressly provided by the law.

[VII] 2011(3) UC 1941 [Nitinbhai Saevatilal Shah & Anr. Vs. 215 / 305 216 CR APEAL-572-2015-JUDGMENT.doc Manubhai Manjibhai Panchal & Anr.] : In this case the reference is made to the decision in Payare Lal vs. State of Punjab, AIR 1962 SC

690. The view endorsed in the Payare Lal's case is mentioned in paragraph-16 of this case which reads thus :

> "16. The cardinal principal of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. ....."

[VIII] AIR 1964 SC 1673 [The State of Uttar Pradesh vs. Sabir Ali & Anr.] : The ratio in this authority is that the trial conducted by a Court having no jurisdiction is void.

[IX] AIR 1928 CALCUTTA 183 [Budhu Tatua Vs. Emperor] : This authority is also on the ratio that where part of the evidence in a case is recorded by a Magistrate 216 / 305 217 CR APEAL-572-2015-JUDGMENT.doc who has no jurisdiction, and part of the evidence by a Magistrate who has jurisdiction, conviction is illegal and retrial is necessary.

[X] AIR 1926 Lah 582 [Buta Singh vs. Emperor]: The ratio of this authority is that after committal of a case, earlier evidence is not to be looked into by the Court to which the case is committed.

[XI] (1976) 1 SCC 889 [State of Gujarat vs. Haidarali Kalubhai] :

> This authority distinguishes Section 304A and Section 304 Part II of IPC. The observations in paragraph-10 of this authority reads thus :

"10. Section 304-A by its own definition totally excludes the ingredients of Section 299 or Section 300 I.P.C. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable 217 / 305 218 CR APEAL-572-2015-JUDGMENT.doc homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304-A has to make room for the graver and more serious charge of culpable homicide. ...."

[XII] 1994 Supp (2) SCC 67 [Balwant Singh Vs. State of Punjab & Anr.] [XIII] (2008) 14 SCC 479 [Mahadev Prasad Kaushik vs. State of Uttar Pradesh & Anr.] : Both these authorities distinguish Section 304A and 304 Part II of IPC.

The ratio of these authorities is Section 304A of IPC applies to the offences outside the range of Sections 299 and 300 of IPC.

142. One authority is also cited on behalf of the State as to under which circumstances recourse to Section 33 of the Evidence Act can be taken, as under :

[I] (1881) ILR 7 Cal 42 218 / 305 219 CR APEAL-572-2015-JUDGMENT.doc [Rochia Mohata vs. Unknown] From the said authority, following observations were brought to the notice of this Court by learned Public Prosecutor :

"The question whether the proviso to Section 33 is applicable, that is, whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conducted to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted under Section

33."

EFFECT OF RAVINDRA PATIL'S EVIDENCE :

143. Ravindra Patil's evidence was recorded before 219 / 305 220 CR APEAL-572-2015-JUDGMENT.doc the Metropolitan Magistrate Court specifically on 5.1.2006, 2.2.2006 and 6.6.2006. Thereafter the matter was adjourned to 7.2.2006 when the witness was under cross-examination. Subsequently it so happened that he did not remain present before the Court and apparently NBW was directed to be issued against him and he was taken in custody and then his evidence was lastly recorded on 16.3.2006 and he was re-examined by the learned Prosecutor. On 28.9.2002 according to this witness he was attached to Protection Branch and was deputed as bodyguard for the accused. He joined his duty at about 8:00 p.m. on 27.9.2002. On that

night at 9:30 p.m. the accused and Kamal Khan came outside their room at their residence and told that they were to go for a party at Rain Hotel, Juhu. Ravindra Patil further stated that Toyota Land Cruiser car bearing No. MH 01 DA 32 was driven by the appellant/accused and they three went 220 / 305 221 CR APEAL-572-2015-JUDGMENT.doc to Rain Bar Hotel. He was asked to wait outside and the accused and Kamal Khan went inside. That time bodyguard of Sohail Khan met Ravindra Patil outside the hotel and the said bodyguard told that Sohail Khan had also come there. According to Ravindra Patil at 1:30 a.m. the accused and Kamal Khan came out of the Rain Bar. Then the accused sat on the driver's seat of Toyota Land Cruiser. Ravindra Patil sat by his side in the front seat and Kamal Khan sat at the rear seat. Then they went to JW Marriott hotel. Also Kamal Khan went inside and Ravindra Patil waited outside. They came out of the hotel at 2:15 a.m. i.e. early hours of 28.9.2002. The appellant/accused sat at the steering wheel of the Land Cruiser and again Ravindra Patil took seat by the side of the driver's seat.

Ravindra Patil then asked the accused whether he would drive the car, the accused neglected his question and then they drove the car and came on the 221 / 305 222 CR APEAL-572-2015-JUDGMENT.doc St. Andrews road. According to the further substantive evidence of Ravindra Patil, the accused was drunk and was driving his motor car at a speed of 90 - 100 km per hour. According to this witness before coming to the junction of Hill Road he told the accused to lower the speed of the motor car as the right turn was ahead. Again according to this witness, the accused neglected him. The accused could not control the motor car while taking the right turn and went on the foot path. The people were sleeping on the foot path. The motor car ran over the persons sleeping on the foot path and climbed the three stairs and dashed into the shutter of the shop, namely, American Express. The motor car broke the shutter and went inside about 3 and ½ feet. There were shouts of the people and as such people gathered there. Further this witness stated that due to the incident, the people who had gathered there became 222 / 305 223 CR APEAL-572-2015-JUDGMENT.doc furious and they started manhandling the inmates of the car. Said Ravindra Patil disclosed his identity as a police officer and thus pacified the mob. Ravindra Patil further stated that the accused and Kamal Khan ran away. He went to the motor car and looked below it. He saw one person seriously injured having multiple injuries below the motor car. He also saw four injured persons below the car who were trying to come out. Then he phoned the control room and within five minutes, Bandra police reached there. The police rescued the injured persons and the body of the deceased person was sent to Bhabha hospital. Then Ravindra Patil showed the place of incident to the police and then went to Bandra police station to lodge the complaint. According to this witness the incident had taken place due to high speed and the accused was drunk and was driving and could not control the vehicle while taking the turn. The FIR was marked as 223 / 305 224 CR APEAL-572-2015-JUDGMENT.doc Exhibit-P1 before the Metropolitan Magistrate Court and it was so taken on record in the Sessions Case also. It is a factual position that various improvements were brought on record and those improvements were on the vital aspect firstly as to the drunkenness, secondly as to Ravindra Patil cautioning the appellant/accused to lower the speed and initially Ravindra Patil asking the accused whether he will drive the car. These are the improvements brought on record during the cross-examination and the important improvement in fact going to the basis of the case of the prosecution as to drunken driving, is that the accused was drunk. In fact it is an admitted position that even in the first information report there is no whisper as to the appellant/accused being drunk during the incident. The entire FIR is regarding driving by

the appellant and the speed of the car as to 90 - 100 km. per hour.

224 / 305 225 CR APEAL-572-2015-JUDGMENT.doc

144. By pointing out the above mainly the omission on the fact of alcohol consumption by the appellant it is submitted by learned Senior Counsel for the appellant that something had happened in between lodging of the FIR on 28.9.2002 and 1.10.2002. The date 1.10.2002 is significant as on that date the supplementary statement of Ravindra Patil was recorded. There was nothing brought on record as to what was the occasion for supplementary statement when the FIR was lodged and the matter was proceeded. In fact what was inserted by way of supplementary statement is the element of consumption of alcohol. Even during the arguments it is stated that there are other improvements also though might not be of much importance but to the effect that Ravindra Patil called the control room and he showed the spot. Also during the arguments it is pointed out that on the aspect as to the speed of the 225 / 305 226 CR APEAL-572-2015-JUDGMENT.doc car. The following answers given by Ravindra Patil during his cross-examination can be reproduced with advantage :

> "I cannot say the name of the road on which the incident car driven from Hotel J.W. Marriot to the place of the incident. I am also unable to tell how many turns towards the left side or right side were taken by the incident car during the journey from hotel J.W. Marriot to the place of the incident. The distance between J.W.
>
> Marriot Hotel to the place of the incident is about 7 k.m. to 8 k.m. The incident motor car did not stop from hotel Marriot to the place of incident, once started. It is true that vehicle travelling by the speed of 90 to 100 per kilometer per hour will require 8 to 10 minutes to pass the distance of 7 to 8 kilometers. We started from hotel Mariot at about 2:15 a.m. on the incident night. It is true that the incident is shown to have taken place at 2:45 a.m. on the incident night."

145. By pointing out the above substantive evidence of Ravindra Patil it is submitted on behalf of 226 / 305 227 CR APEAL-572-2015-JUDGMENT.doc the appellant that if the speed of the car as depicted by the witness is taken as 90 to 100 kms per hour then the distance of maximum 8 kms can be covered by 7 to 8 minutes. If still giving some allowance as to the exact speed whether correctly mentioned or not and allowance to the exact distance between J.W Marriot and the place of the incident, still it is difficult to perceive that a car will take half an hour to reach the spot of incident. If the timings are accepted and in fact are required to be accepted because of the documentary evidence then the car had taken 30 minutes non stop from JW Marriott hotel to the place of the incident and that is the distance of about 7 to 8 kms., so definitely it can be ascertained that the speed of the car was not as told by the witness as 90 to 100 kms per hour. At the cost of repetition it must be mentioned that even this aspect has been dealt with earlier when the damage to the car was ascertained 227 / 305 228 CR APEAL-572-2015-JUDGMENT.doc vis-a-vis the speed of the car and mentioning of PW-7 that there were speed beakers on St. Andrews road.

146. Apart from the above there is another strange factual position which is required to be mentioned inasmuch as after giving evidence before the Metropolitan Magistrate Court on 5.1.2006 and when the witness answered that his further statement was recorded by the police on 1.10.2002, a question was put by the learned Prosecutor to the witness to the effect :

"What did you say before the police?"

147. The question was objected to by the learned defence counsel, being not admissible. However apparently said question was allowed by the trial Court by giving a reason that the question is not a leading one. It must be mentioned that whatever a witness states before the police is hit by section 161 of 228 / 305 229 CR APEAL-572-2015-JUDGMENT.doc Cr.P.C. and only that statement can be considered as provided under Section 162 of Cr.P.C.. In fact with that understanding of the basic criminal law the defence counsel has raised the objection but unfortunately that has been overruled by the Sessions Court as the Sessions Court lost sight of this situation as to the statement before the police and the significance of it. So it could not have gone on record what a witness stated to the police but the learned Judge took it as not a leading question and then allowed the answer. Still the strange situation does not stop there. After allowance by the sessions court the witness answered that :

> "I have stated before the police what I remembered after the lodging the complaint with Bandra Police."

148. Apparently it so happened that with this answer also the learned prosecutor was not satisfied 229 / 305 230 CR APEAL-572-2015-JUDGMENT.doc and asked further question which was again objected by the Counsel for the defence and subject to objection the question was allowed. The question and answer is reproduced hereunder :

> "Ques. What do you remember after filing your complaint ?
>
> Ans. Mr. Ashok Singh is in employment as a driver with the accused Salman Khan. He works as driver with the accused Salman Khan.
>
> He works as driver in day duty. The accused drives his motor car in the night."

149. In fact for the first time before the Metropolitan Magistrate Court apparently the name of said Ashok Singh has appeared when Ravindra Patil gave his answer to the question as to what he remembered after filing of the complaint. Again apparently that time there was no answer coming from the witness possibly regarding drunkenness though it was the case of the prosecution. Even 230 / 305 231 CR APEAL-572-2015-JUDGMENT.doc thereafter, the episode of question and answer continued and the learned prosecutor went on asking questions as to what the witness said next but the witness also gave answers and talked of something else but not about the 'drunkenness'. The last answer of the witness prior to the prosecutor asking permission to put the leading question to this witness, was to the question 'whether you stated anything more' and then the answer was 'nothing more than what is stated above'. At this juncture, permission was asked to put the leading question

to this witness by the prosecution. The Metropolitan Magistrate Court then placed a note on record to the following effect :

> "Heard Spl. P.P. According to him, such question can be put when the witness has not supported on material point and before declaring him hostile after taking his answer. (Considering both the sides, I am of the opinion that such leading question can be asked with the permission of the Court. Hence, objection is over 231 / 305 232 CR APEAL-572-2015-JUDGMENT.doc ruled.)"

150. Even still the leading questions were asked.

The last answer of this witness was that "My supplementary statement was recorded as per my say."

151. By pointing out the above conduct of the witness Ravindra Patil it is strongly submitted on behalf of the appellant that it is in fact an unnatural conduct on the part of Ravindra Patil to say so, mentioning the things which he did not mention while giving his First Information Report or while giving his supplementary statement. This witness has improved on the material aspect firstly as to the 'drunkenness' of the accused and secondly as to this witness cautioning the accused to drive slowly. It is further argued that it is more strange that from this witness the name of Ashok Singh came on record and that also with the explanation that he was the driver in the employment 232 / 305 233 CR APEAL-572-2015-JUDGMENT.doc with the accused and works as a driver in the day duty. At this juncture it must be said that the substantive evidence of PW-27 officer Shengal does indicate the presence of Ashok Singh at the police station apparently immediately after the incident and Ashok Singh was present till the arrival of the appellant/accused at the police station. But still it is a factual position that the investigating officer has not recorded the statement of Ashok Singh though his presence at the police station was accepted at the early hours of 28.9.2002.

152. Again at this juncture it is to be mentioned that there is interpolation in the contents of the First Information Report regarding the route taken by the car while coming to the Hill Road. The earlier written words as to "Manuel Gonsalves" are deleted and the words "St. Andrews" have been inserted. This is done 233 / 305 234 CR APEAL-572-2015-JUDGMENT.doc at two places where this reference is coming in the FIR. At the cost of repetition, it must be mentioned that there is no explanation from the investigating agency or by the Investigating Officer or the officer who recorded the FIR as to how the change of name in the route has appeared in the First Information Report. This circumstance is to be viewed in juxtaposition with the defence of the accused that the vehicle had taken the route from Manuel Gonsalves road and then came to Hill Road. Even this is the substantive evidence of DW-1 as detailed earlier in paragraph-3 of his evidence before the Sessions Court :

> "3. I then took the vehicle on Linking Road, then on Gonsalves Road and took the right turn for going to Hill Road. Our vehicle came on Hill Road. Our vehicle proceeded at some distance on hill Road, then the front left tyre of our vehicle burst, thereby our vehicle pulled towards the left 234 / 305 235 CR APEAL-572-2015-JUDGMENT.doc side. I tried to turn my steering wheel but it had

become hard to turn. I also tried to apply the brakes, but by then the vehicle had climbed the stairs of the Laundry. Our vehicle then stopped."

153. Considering all the above aspects as to changing the route of the vehicle from Manuel Gonsalves road to St. Andrews road while coming to the Hill Road, non mentioning about drunkenness of the appellant in the First Information Report and the story of drunkenness coming only on 1.10.2002 and in fact on the same day receipt of the report from CA and mainly considering that the cross-examination of Ravindra Patil was only before the Metropolitan Magistrates Court and when the charge was under Section 304A of IPC, it is to be held that the evidence of Ravindra Patil is of very weak type. Though subject to the argument as to applicability or otherwise of Section 33 of the Evidence Act, his evidence is to be 235 / 305 236 CR APEAL-572-2015-JUDGMENT.doc accepted on the factum of driving of the vehicle then considering the type of this witness, an independent corroboration is required to support what he stated before the Metropolitan Magistrate Court.

154. Needless to mention that in criminal trials when a particular fact is established before the Court through ocular evidence there are three types of witnesses. As endorsed by the Apex Court in number of decisions, said three types are (1) wholly reliable witness, (2) partially reliable witness, and (3) wholly unreliable witness. It is a cardinal principle of criminal jurisprudence that so far as the wholly reliable witness is concerned, if the Court accepts his version and accepts the truthfulness depending on the circumstances then the conviction on the sole testimony can be possible. In other words the wholly reliable witness can be the basis for conviction of an 236 / 305 237 CR APEAL-572-2015-JUDGMENT.doc accused but when it comes to partially reliable witness then independent corroboration is needed and if the witness is wholly unreliable then there is no question of asking for corroboration to the version of said witness. In the opinion of this Court Ravindra Patil is a witness who cannot be considered as a wholly reliable witness for various anomalies and improvements brought on record and the conduct of this witness shown before the Court during the trial for the offence under Section 304A of IPC. Still if he is considered as a partially reliable witness then there is definitely a need for independent corroboration and in the considered view of this Court on the actual driving of the vehicle by the appellant/accused apart from this witness there is no other witness saying that the appellant/accused was in fact driving the vehicle. This is more so as this Court has earlier analyzed the substantive evidence of PW-2, PW-3, PW-4, PW-11 and 237 / 305 238 CR APEAL-572-2015-JUDGMENT.doc also the parking assistant at JW Marriott PW-12 Kalpesh Verma. Again this circumstance is to be viewed in juxtaposition of the evidence of other witnesses i.e. PW-7 and PW-8 as to mentioning of four persons in the car.

DEFENCE WITNESS ASHOK SINGH :

155. Now coming to the evidence of DW-1 Ashok Singh much is argued and it is submitted on behalf of the State that the testimony of this witness is required to be discarded in toto as he is a got up witness and in fact his conduct is such that he is not giving the truth but has been brought before the Court after 13 years of the incident and that also before the Sessions Court for the first time. Certain basic arguments advanced on behalf of the State to discredit this witness can be narrated as under :

238 / 305 239 CR APEAL-572-2015-JUDGMENT.doc

156. It is argued that this witness has not mentioned exactly at which spot the tyre of the vehicle burst when the vehicle was on the Hill Road. He also did not specifically mention as to at what time he reached JW Marriott hotel in order to replace the earlier driver Altaf. Even he is a person who did not immediately disclose that he was driving the vehicle and more so when the case was lodged against the appellant/accused i.e. his master and that also for the serious offence of killing one person and injuring four persons. It is further stated that all this conduct of DW-1 renders himself as a wholly un-reliable witness and got up witness and his evidence does not inspire confidence.

157. Counter to above arguments, various aspects were placed before the Court and learned Senior Counsel argued at length mentioning under what 239 / 305 240 CR APEAL-572-2015-JUDGMENT.doc circumstances DW-1 came before the Court only after 13 years. It is argued on behalf of the appellant that the natural tendency of any human being is not to own any criminal act. It is rather the attempt of everybody to avoid any allegations of criminal act and not to get oneself involved in it of his own. By pointing out this it is submitted on behalf of the appellant that in fact though it is an exceptional case that a defence witness is coming before the Court and accepting the blame on himself but the evidence of this witness is to be treated equally as the treatment being given to the prosecution witnesses. In elaborating this argument it is submitted on behalf of the appellant that always the defence witness may not be looked with same premeditated mind and his evidence is to be analyzed as that of other witnesses.

Moreover further argument that as per the cardinal principle of criminal law the defence is required to be 240 / 305 241 CR APEAL-572-2015-JUDGMENT.doc established by placing certain facts which are acceptable on preponderance of probabilities. In support of these submissions following authorities are cited before the Court :

> [I] (2002) 2 SCC 426 [State of Haryana vs. Ram Singh] [II] (1976) 4 SCC 233 [Sri Rabindra Kumar Dey vs. State of Orissa] [III] 1971(3) SCC 235 [Des Raj Vs. The State of Punjab]

158. Further it is argued on the conduct of this DW-1 as to not approaching any Court for saying that he was driving the vehicle and not the accused. The substantive evidence of this witness goes to show that he was a driver in the employment of father of the appellant and since 1990 he was working with Salim Khan, the father of the accused. There were no fix duty hours for him but whenever his services were required he was being called. In the year 2002, there 241 / 305 242 CR APEAL-572-2015-JUDGMENT.doc were two other drivers working along with him by name Altaf and Dutta. On the night of 27.9.2002 he was sleeping in his house. He received a phone call from Altaf at about 1:30 a.m. to 1:45 a.m. on 28.9.2002. Altaf told him to come to JW Marriott hotel as the accused had come there. Altaf also told him that he was not feeling well and he left the keys with the valet parking. DW-1 then got up and changed his clothes and went to JW Marriott hotel.

He went to the porch and saw the Land Cruiser vehicle. He saw the bodyguard i.e. Ravindra Patil who was standing outside the vehicle. The engine of the Land Cruiser was on. He opened the door of the vehicle and he saw the accused sitting on the driver's seat and the AC was on. He then sat on the driver's seat and the accused went to the seat besides that of the driver. Ravindra Patil sat behind

the driver's seat in the back portion. According to this DW-1 the fourth 242 / 305 243 CR APEAL-572-2015-JUDGMENT.doc person was Kamal Khan and he was sitting behind Salman Khan at the back portion. Then on the actual happening of the event, the evidence of this witness in para-3 has already been discussed as to the route taken for coming to Hill Road. Thereafter after the incident also the substantive evidence of this witness is of much importance to be seen. He further stated that due to the incident he was in shock. He opened the door by his side and got down. According to him the accused tried to open the door from his side but the left door was jammed. This witness saw the people beneath the car who were shouting. People started assembling near the car. The accused got down from the car from the driver's seat. This witness and the accused tried to lift the car to rescue the people found beneath the car but the car did not move. According to this witness the accused told him to inform the police. In the meantime people that had gathered 243 / 305 244 CR APEAL-572-2015-JUDGMENT.doc there gave "pull and push" to said DW-1 and also to Ravindra Patil who by then had got down from the car.

This witness has dialed 100 number and informed the police about the incident. He then proceeded to Bandra police station. There he was told that the police had already left for the spot. He narrated the incident to the police. However, he was asked to sit till 10:30 a.m. when the accused came to the police station. He talked to the accused that he had already told the police about the incident but the police did not entertain him. According to this witness he told the accused that he was suspecting some foul play and police then took the accused by arresting him.

159. In fact, this is the sum and substance of the examination-in-chief of this witness in which he indicates that when he arrived at the JW Marriott hotel he saw the accused sitting on the driver seat and 244 / 305 245 CR APEAL-572-2015-JUDGMENT.doc the door of the car was closed and the air conditioner was on. In fact this position is in consonance with what is told by the parking assistant at JW Marriott hotel, PW-12 Kalpesh Verma. Even in the evidence of this witness he has mentioned regarding the route taken via Gonsalves road and there is a cross reference in order to find out probability of this by way of alteration in the first information report and which is accepted by the investigating officer and apparently there is no explanation as to the change of the name from Manuel Gonsalves road to St. Andrews road in the FIR. Though this witness was cross-examined by the learned prosecutor on various aspects including his conduct, from the date of the incident till he came to Sessions Court for giving evidence, there is no specific cross-examination that this witness did not take the route via Manuel Gonsalves road.

245 / 305 246 CR APEAL-572-2015-JUDGMENT.doc

160. Apart from the above on various objections raised on behalf of the State as to belated examination of this witness it is submitted on behalf of the appellant that in fact the stage of recording of defence witness comes only after the entire evidence of the prosecution is over and the statements of the accused are recorded under Section 313 of Cr.P.C. Only at that stage as per the criminal procedure of trial of sessions case and for that matter all the criminal cases that the accused is asked if he wants to adduce any material in his defence. In the present matter it is seen that when the matter was before the Metropolitan Magistrate Court only 17 witnesses were examined and still two investigating officers were remained to be examined and at that stage on the application of the

prosecution the issue was taken as to applicability of Section 304 Part II of IPC and then the matter was transferred to the Court of Sessions by committal. As such, before 246 / 305 247 CR APEAL-572-2015-JUDGMENT.doc the Metropolitan Magistrate Court there was no scope for the defence witness to be examined as that stage had not then arisen. So far as recording of evidence of defence witness in the Sessions case again the stage was after recording of the statement of the accused under Section 313 of Cr.P.C. and prior to that there could not be any possibility of asking the defence witness to be examined. Apparently a wrong impression has been created and that too expressed by the learned Prosecutor before the Sessions Court that the defence witness is coming after 13 years and apparently this aspect has been highlighted by various agencies and the media coming to the conclusion that this is a belated defence. In fact apparently the trial Court i.e. Sessions Court also was carried away by this impression of belated recording of the evidence. The criminal procedure is otherwise and it is required to be honored and followed. As such argument leveled by 247 / 305 248 CR APEAL-572-2015-JUDGMENT.doc the State that the witness is coming at the fag end cannot be accepted as an argument of substance, more so when the defence is not at all to establish his case and if at all to putforth any evidence i.e. to be only to the extent of acceptance under preponderance of probabilities.

161. Lastly on this point it is argued on behalf of the State that if not before the Court for giving the evidence but at least a person could have approached some other institutions. By this argument learned Prosecutor presupposes that this defence witness should have gone to the Media. In each and every circumstance and situation everybody is not expected to rush to the media though in the recent years the media is considered as a fourth pillar of the Constitution. Much responsibility is on the media and when a person approaches the media then apparently 248 / 305 249 CR APEAL-572-2015-JUDGMENT.doc an impression is created in the mind of general public that whatever he is telling is having some ring of truth and the matter is required to be taken to task by the appropriate agencies. Without commenting much on this, suffice it to say that not going to any external authorities than the Court of law, cannot be considered as a deficiency when the witness is coming before the Court at an appropriate stage to mention what had happened. In that event his evidence is to be appreciated with rather care with the principle that his evidence is to be accepted on the touchstone of preponderance of probabilities. Even as per PI Shengal (PW-27), DW-1 was present at the police station immediately after the incident and remained there thereafter and was interrogated but his statement was not recorded.

162. Here it is not a question of believing or 249 / 305 250 CR APEAL-572-2015-JUDGMENT.doc disbelieving a defence given, but here the question is whether the prosecution has established its case as to driving by the appellant/accused that also drunken driving. As such, with the above observations it must be said that the evidence of defence witness is to be viewed with such caution and to see whether on those probabilities putforth by the defence witness whether the prosecution has established its case beyond reasonable doubt.

NON-EXAMINATION OF KAMAL KHAN :

163. With these observations now the another concept is required to be taken as to whether on non-

examination of Kamal Khan an adverse inference can be drawn. Prior to coming to this aspect as to non-

examination of Kamal Khan and whether adverse inference can be drawn, certain basic factual position is required to be narrated. According to the case of 250 / 305 251 CR APEAL-572-2015-JUDGMENT.doc prosecution there were only three persons in the car since night of 27.9.2002 till early hours of 28.9.2002 and they were the appellant/accused, Ravindra Patil and Kamal Khan. As against this, the probable defence of the accused is that there was fourth person and he was driver. Now during the trial before the Sessions Court the position was very clear that Ravindra Patil was no more and the appellant/accused being an accused could not have given evidence to show as to who was driving. The only option remained was that of Kamal Khan. According to the defence there was fourth person and the appropriate steps were taken for examining that fourth person but so far as the prosecution is concerned when Ravindra Patil was not available for cross-examination and when his evidence was accepted under Section 33 of the Evidence Act before the Sessions Court it was incumbent upon the prosecution to put forth before 251 / 305 252 CR APEAL-572-2015-JUDGMENT.doc the Court the factual aspects by way of direct evidence and only the evidence of Kamal Khan was the other direct evidence then available.

164. In view of the above factual position as to according to the case of the prosecution out of three persons travelling in the car only the person Kamal Khan was not examined and the evidence of Ravindra Patil was taken from the M.M. Court from the earlier proceeding. As such, during the arguments of this Appeal at the fag end an application was preferred on behalf of the appellant for examining said Kamal Khan as a Court witness under provisions of Section 391 of Cr.P.C. Said application was preferred on 16.11.2015 at the conclusion of defence arguments. It remained pending for few dates as by that time the arguments on behalf of the State were started and in progress.

Detailed reply was filed by the State opposing the 252 / 305 253 CR APEAL-572-2015-JUDGMENT.doc application by submitting the main contention that it is not necessary to call Kamal Khan for the evidence as a Court witness. It was also specifically mentioned in the reply that various steps were taken when the matter was pending before the M.M. Court but he could not be examined. In the reply, it is mentioned in paragraph 9 therein that even a look out notice was issued against Kamal Khan. No explanation was given by the prosecution as to for what reason said look out notice was taken out. It was further contended that even before the Sessions Court process was issued against Kamal Khan. However, the summons could not be served at the address known to the police from the statement of Kamal Khan which was recorded in the year 2002. The report dated 24.6.2014, according to the case of the prosecution, throws light that Kamal Khan was not found at the address and the said place is occupied by some-one else. Copy of said report was 253 / 305 254 CR APEAL-572-2015-JUDGMENT.doc filed along with reply of the State. By this it was tried to establish by the State that they took the steps for serving the process against Kamal Khan but for want of his whereabouts he could not be examined before the Sessions Court. It was the submission that in the absence of evidence of Kamal Khan also, the case of the prosecution can be taken as established as has been done by the Sessions Court. The application was also objected by the State on the ground that now at this belated stage, the appellant-accused cannot

claim examination of Kamal Khan. Said application was dealt with by this Court and a detailed order is passed on 30.11.2015. This Court held that considering the purport of section 391 of Cr.P.C., it is not a dire need for examination of Kamal Khan as a court witness in order to assist the Court to come to a just decision. At that juncture, there was no question of drawing adverse inference for non-examination of Kamal Khan 254 / 305 255 CR APEAL-572-2015-JUDGMENT.doc as argued by the State and in fact that aspect was kept pending till the final adjudication of the appeal and as such under this premise the present aspect is being dealt with as during the course of arguments, learned Senior Counsel for the appellant vehemently submitted that on non-examination of Kamal Khan by the prosecution, adverse inference is required to be drawn. As such it be treated as mitigating circumstance to the case of the prosecution. Though at the time of deciding the application under section 391 of Cr.P.C., this Court held it not necessary to call Kamal Khan as a court witness, now at this stage an inference is required to be drawn further argued. Considering the manner in which the prosecution has taken steps to bring Kamal Khan before the trial Court for recording of his evidence.

165. In fact, it is certain that according to the 255 / 305 256 CR APEAL-572-2015-JUDGMENT.doc prosecution, Kamal Khan was the only person, apart from Ravindra Patil, to throw light on the factual position as to who was driving. This is more so, when the evidence of Ravindra Patil was to be critically discussed and having less evidential value because of no opportunity of cross-examination in Sessions Court.

Examination of an eye-witness and when the case is on a very limited number of eye-witnesses, as in the present case, according to the prosecution of two witnesses, non-examination of one of the eye-

witnesses is definitely detrimental to the case of the prosecution, if otherwise the prosecution is not coming with a stand that the said witness has been won over and definitely not available in spite of due diligence to secure his presence.

166. In the present case, both the things as mentioned above are to be tested, whether it was just 256 / 305 257 CR APEAL-572-2015-JUDGMENT.doc and proper for the prosecution to bring Kamal Khan before the Sessions Court and to record his evidence by that way the corroboration could have been obtained on the vital aspect of driving and also on drunkenness. Definitely, the substantive evidence of Ravindra Patil as accepted by the Sessions Court was of a weak type so far as the drunkenness is concerned, due to improvements. Under such circumstances, non-

examination of Kamal Khan may apparently mean that he was withheld by the prosecution. This is more so for the reason that the process issued against Kamal Khan was on the address written in his statement under section 161 of Cr.P.C recorded in the year 2002 i.e. immediately after the incident. In fact, many events had followed after the year 2002 and specifically in the year 2008 when the matter was before the M.M. Court for trial for the offence under section 304-A of IPC. It is admitted position and 257 / 305 258 CR APEAL-572-2015-JUDGMENT.doc which is brought on record on behalf of the appellant that on three occasions Kamal Khan was before the M.M. Court with his application asking for permission to go out of India and then coming back within a particular time. These dates are 26.8.2008, 18.9.2008 and 12.11.2008. On these occasions before the M.M.

Court the then latest address at Mumbai and also the permanent address at U.K. was given by Kamal Khan.

Admittedly, Kamal Khan was British National, even at the time of incident of 2002 and his permanent residence was at U.K. At least by these applications the latest address was known to the prosecution.

However, apparently, no care was taken to secure the presence of Kamal Khan by sending the process for his attendance on the said new addresses. Instead, the process was issued on the address which was of the year 2002. This conduct on the part of the Investigating Agency leads to the conclusion that the 258 / 305 259 CR APEAL-572-2015-JUDGMENT.doc investigation was not desirous of bringing Kamal Khan before the Court for giving evidence. Whatever might be the reason for not bringing him before the Court, the fact remains that he was one of the eye-witnesses to the incident and should have thrown light on the factual circumstances and more so when the defence of the appellant-accused was spelt out much earlier as to driving of the vehicle by the fourth person by name Ashok Singh. Even apparently, the name of Ashok Singh has already appeared in the record when the matter was before the M.M. Court. As earlier seen, during examination Ravindra Patil had taken his name as one of the drivers driving only during the day time.

As such presence of fourth person and that also of Ashok Singh was the defence of the accused and known to the investigating agency. However, an apparently futile attempt was made for service on Kamal Khan on the address of 2002 and not on the 259 / 305 260 CR APEAL-572-2015-JUDGMENT.doc address which was given to M.M. Court in the year 2008.

167. Now, again coming to the conduct of the Investigating agency, a reference is required to be made about the affidavit filed by ACP of Bandra Division. Said affidavit is dated 23.11.2015. Along with affidavit at Exh.D a xerox copy of the letter dated 24.6.2014 addressed by Senior PI Bandra Police Station to the Sessions Court No. 16 Mumbai is attached. This letter is the report of outcome of the summons issued against the witnesses including Kamal Khan. Name of Kamal Khan is mentioned at serial No.3 in these witnesses. What was pointed out on behalf of the appellant-accused by the learned Senior Counsel was that apparently this report is not forming part of the Court record of the Sessions Case.

Factually this position was checked and learned 260 / 305 261 CR APEAL-572-2015-JUDGMENT.doc prosecutor in the appeal admitted that apparently this original report is not forming part of the court record of the Sessions Court. This Court has also examined the Roznama of the relevant dates including the date of 24.6.2014 but there is no mention regarding filing of this report before the Sessions Court. Of course, at this juncture, this Court does not want to endorse the view that this application itself is entirely fabricated and placed before the High Court only for the first time. This is for the reason that by inadvertence also any such report may be lost while the matter is before the Sessions Court. Unless there is concrete material this Court is not inclined to initiate any action for fabrication of this report. However, the fact remains that the conduct of the Investigating Agency can be seen from this circumstance. Definitely, the process was not issued at the known address of Kamal Khan and an attempt was made to serve him on the

address 261 / 305 262 CR APEAL-572-2015-JUDGMENT.doc of 2002. Apparently, for certain purpose this witness was withheld by the prosecution and as such in the considered view of this Court a necessary adverse inference is required to be drawn against the prosecution for non-examination of Kamal Khan as a prosecution witness. Coming back to the application under section 391 of Cr.P.C., the same was filed by the appellant-accused at the fag end of the present appeal.

Be that as it may, the same was strongly opposed by the prosecution. Taking an over all view, this court rejected the said application on 30/11/2015 on the grounds contained in the said order and more particularly that on the basis of already available material it was not a case where a just verdict would not be possible unless Kamal Khan is examined. Power under section 391 is not to be invoked casually and the refusal thereof does not preclude the Court from drawing adverse inference, on the basis that such 262 / 305 263 CR APEAL-572-2015-JUDGMENT.doc witness was not examined during trial despite ample opportunity. Though, it is so, independently also the case of the prosecution is being analyzed and is being appropriately dealt with keeping aside this aspect of adverse inference on the non-examination of Kamal Khan.

168. To substantiate the argument on behalf of the appellant, the following authorities are cited :-

1) AIR 1954 SC 51 (Habeeb Mohammad Vs. State of Hyderabad)

2) (2012) 4 SCC 722 (Govindraju Alias Govinda Vs. State by Shrirampuram Police Station & Anr)

3) (2014) 11 Supreme Court Cases 335 (Joginder Singh Vs. State of Haryana)

4) AIR 1956 SC 35 (The Member, Board of Revenue Vs. 263 / 305 264 CR APEAL-572-2015-JUDGMENT.doc Arthur Paul Benthali)

5) 2001 (2) A.W.C. 1447 (S.C.) Oriental Insurance Co. Ltd vs. Hansrajbhai V. Kodala (S.C.)

6) (2010) 13 SCC 657 (Sunil Kumar Sambhudayal Gupta (Dr) and Ors Vs. State of Maharashtra)

169. Even on this issue the following authority is cited on behalf of the State:-

2001 6 SCC 145 (Takhaji Hiraji Vs. Thakore Kubersing Chamansingh & Ors)

170. Now coming, apparently to the last submission i.e. applicability of Section 304 Part II of IPC, in the present case, a great deal of arguments were advanced before the Court by the rival sides by taking shelter of two authorities. A reference to these 264 / 305 265 CR APEAL-572-2015-JUDGMENT.doc authorities was earlier made by this Court. However, this issue will be discussed rather at length. The first authority is (2012) 2 SCC 648 (Alister Anthony Pareira Vs. State of Maharashtra) and another (2012) 8 SCC (State through PS Lodhi Colony, New Delhi Vs. Sanjeev Nanda.

171. Prior to discussing the ratios of the above authorities, it must be mentioned at the threshold that each and every case is to be determined on its own fact situation and applicability or otherwise of a penal section is to be considered on those facts and there cannot be any particular formula that on certain circumstances a particular penal section is a must to be applied. This is more so when it is tried to argue on behalf of the State on the authority in Alister Pareira. Certain factual position in the said case can be mentioned in order to appreciate the finding of the 265 / 305 266 CR APEAL-572-2015-JUDGMENT.doc Hon'ble Supreme Court in that matter. The facts of the said case are that on the South-North Road at the east side of Carter Road, Bandra (West), Mumbai in the early hours of 12.11.2006 between 3:45 a.m. to 4:00 a.m. a car ran into the pavement killing seven persons and causing injuries to eight persons. The appellant, Alister Anthony Pareira was at the wheels. The appellant was, at that time, found in drunken condition. The trial Court convicted him under Sections 304-A and 337 of IPC and sentenced him to simple imprisonment for six months with fine of Rs.5 lakhs for the former offence, and fifteen days' simple imprisonment for the latter. However, it acquitted him of the offences under sections 304 Part II and 338 of IPC. The High Court set aside the acquittal of the appellant under section 304 of IPC and convicted him for the offences under sections 304 Part II, 338 and 337 of IPC. It sentenced him to three years' rigorous 266 / 305 267 CR APEAL-572-2015-JUDGMENT.doc imprisonment with a fine of Rs. 5 lakhs for the offence under section 304 Part II, one year rigorous imprisonment and six months' rigorous imprisonment for the offences under sections 338 and 337 IPC respectively. The fine imposed by the trial court had by then been distributed to the families of the victims.

The appellant therein then filed the appeal. It was the appeal preferred by the accused Alister Anthony Pareira challenging the order of the High Court.

However, the final decision of the Hon'ble Supreme Court was that the offence under section 304 Part II of IPC was proved. Another observation in the said authority reads thus :-

> "One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is 267 / 305 268 CR APEAL-572-2015-JUDGMENT.doc done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objectives of the sentencing policy are deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

172. In the said authority another case was discussed by the Apex Court and that is Prabhakaran Vs. State of Kerala (2009) 1 SCC (Cri) 873 "45. In Prabhakaran v. State of Kerala this Court was concerned with the appeal filed by a convict who was found guilty of the offence punishable under Section 304 Part II Indian Penal Code. In that case, the bus 268 / 305 269 CR APEAL-572-2015-JUDGMENT.doc driven by the convict ran over a boy aged 10 years. The prosecution case was that bus was being driven by the Appellant therein at the enormous speed and although the passengers had cautioned the driver to stop as they had seen children crossing the road

in a queue, the driver ran over the student on his head. It was alleged that the driver had real intention to cause death of persons to whom harm may be caused on the bus hitting them. He was charged with offence punishable under Section 302 Indian Penal Code. The Trial Court found that no intention had been proved in the case but at the same time the accused acted with the knowledge that it was likely to cause death, and, therefore, convicted the accused of culpable homicide not amounting to murder punishable under Section 304 Part II Indian 269 / 305 270 CR APEAL-572-2015-JUDGMENT.doc Penal Code and sentenced him to undergo rigorous imprisonment for five years and pay a fine of Rs.

15,000/- with a default sentence of imprisonment for three years. The High Court dismissed the appeal and the matter reached this Court."

"46. While observing that Section 304A speaks of causing death by negligence and applies to rash and negligent acts and does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death and that Section 304A only applies to cases in which without any such intention or knowledge death is caused by a rash and negligent act, on the factual scenario of the case, it was held that the appropriate conviction would be under Section 270 / 305 271 CR APEAL-572-2015-JUDGMENT.doc 304A Indian Penal Code and not Section 304 Part II Indian Penal Code. Prabhakaran does not say in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act of the driver, the conviction can be maintained for the offence under Section 304 Part II Indian Penal Code even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused.

Prabhakaran turned on its own facts."

173. At the end of paragraph no. 46 the Hon'ble Apex Court has expressed its view that Prabhakaran's case turned on its own facts. The facts of Prabhakaran's case are also discussed in paragraph 45 as detailed above.

271 / 305 272 CR APEAL-572-2015-JUDGMENT.doc

174. The above reasoning either in Prabhakaran case or in the Alister Pareira case, again endorse the view that each case obviously has to be decided on its own facts and whether the person had a knowledge or not is to be seen considering the circumstances.

175. Another observations in the said authority which are appearing in paragraph no.41 in the Alister Pareira's matter are reproduced :-

> "Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law -

> 272 / 305 273 CR APEAL-572-2015-JUDGMENT.doc in view of the provisions of the Indian Penal Code - the cases which fall within last clause of Section 299 but not within clause 'fourthly' of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II Indian Penal Code. Section 304A Indian Penal Code takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description."

176. In fact, this observations of the Apex Court are also to be construed and to be accepted when the earlier issue as to applicability of Section 33 of the Evidence Act has been discussed by this Court and it is in respect of the requirement of that section in the 273 / 305 274 CR APEAL-572-2015-JUDGMENT.doc proviso that the "questions in issue were the same in the first and second proceeding." Though it is argued on behalf of the State that in view of the ratio propounded by Alister Pareira's case, in each and every case of drunken driving and causing death of a person section 304 Part II of IPC may not be applicable.

177. Again on the specific circumstances of the case in the matter of Alister Pareira, the Hon'ble Apex Court has upheld the order of this Court for conviction of the appellant for the offence under section 304 Part II of IPC. The circumstances were very dreadful.

Paragraph no.71 of the authority depicts the circumstances. The vehicle was lying in the middle of the road between the road divider and footpath on the Carter Road at about 50 feet from the north side of Varun Cooperative Housing Society gate and about 110 feet from railway quarters gate on the south side.

274 / 305 275 CR APEAL-572-2015-JUDGMENT.doc The front wheel of the car was broken and mudguard was pressed. The spot panchnama shows 70 feet long brake marks in a curve from west side of the road divider towards footpath on eastern side. It is further seen from the spot panchnama that a tempo, mud digger and two trucks were parked on the road between the railway quarters gate and Varun Cooperative Housing Society gate near the accident spot. That was a case in which the spot panchnama was duly proved by PW 11 and 16. There is nothing in the cross-examination of these witnesses to doubt their presence or veracity. The long brake marks in curve show that the vehicle was being driven by the appellant at high speed; the appellant had lost control of the speeding vehicle resulting in the accident and, consequently, seven deaths and injury to eight persons.

178. In the said authority in paragraph 76 a 275 / 305 276 CR APEAL-572-2015-JUDGMENT.doc reference is made by the Apex Court regarding notice taken by the High Court as to the people sleeping on pavements. The said paragraph 76 is reproduced hereunder :-

> "The High Court took judicial notice of the fact that in Mumbai people do sleep on pavements. The accused was also aware of the fact that at the place of occurrence people sleep as the accused was resident of that area. The High Court took note of the fact that the accused had admitted the accident and his explanation was that the

> accident occurred due to mechanical failure and the defect that was developed in the vehicle but found his explanation improbable and unacceptable. The High Court also observed that the factum of high and reckless speed was evident from the brake marks at the site. The speeding 276 / 305 277 CR APEAL-572-2015-JUDGMENT.doc car could not be stopped by him instantaneously."

179. Of course, though in Alister Pareira, the Hon'ble Apex Court has come to the conclusion of maintaining the charge under section 304 Part II of IPC, it was on the fact situation of that matter, wherein the vehicle was heavily damaged. So far as matter in hand is concerned almost, entire evidence of the prosecution has been discussed in this appeal and various observations have been made by this Court. In the considered view of this Court based on the decision of Alister Pareira, present matter cannot be taken as a case in which there is application of penal section 304 Part II of IPC. Of course, in fact, this is for the academic interest as this Court has already come to the conclusion as to the failure of the prosecution to bring that material on record to establish beyond 277 / 305 278 CR APEAL-572-2015-JUDGMENT.doc reasonable doubt that the appellant accused was driving the vehicle, further more that he was under the influence of alcohol. Moreover, there is still a doubt created as to whether the incident has occurred due to the bursting of the tyre prior to the incident or the tyre got burst after the incident.

180. So far as the ratio in the another case of Sanjeev Nanda (2012) 8 SCC 450. It was also the punishment for the offence under section 304 Part II of IPC and on special circumstances of that case the Hon'ble Apex Court had given the finding as to applicability of Section 304 Part II. Specific observations in paragraph no.29 of that authority are of much significance which read thus :

> "It has also come on record that seven persons were standing close to the middle of the road. One would not expect such a group, at least, at that 278 / 305 279 CR APEAL-572-2015-JUDGMENT.doc place of the road, that too in the wee hours of the morning, on such a wintry night. There is every possibility of the accused failing to see them on the road. Looking to all this, it can be safely assumed that he had no intention of causing bodily injuries to them but he had certainly knowledge that causing such injuries and fleeing away from the scene of accident, may ultimately result in their deaths."

181. Again in the considered view of this Court, ratios in Alister Pareira's case and Sanjeev Nanda's case are to be construed in the light of specific facts of those cases.

182. Now coming to some minor points as to examination of a panch witness, drawing of a site map and the discrepancies in the site map vis-a-vis the 279 / 305 280 CR APEAL-572-2015-JUDGMENT.doc factual position and the presence or otherwise of the footpath at the scene of offence and the topography of the area of the occurrence of the incident certain observations are required to be made prior to disposing of the appeal;

183. PW 1 is the panch witness, one Sambha Gauda he was running a tea stall near one temple at St. Andrews Road, Bandra. At about 3:00 a.m. he was called on the spot on 28.9.2002 by Bandra Police

and was informed that one car was involved in the accident and to act as pancha. He and another person by name Arjun, apparently his friend, both, attended the spot. The important part of his substantive evidence is to the effect that the front portion of the car was damaged. The bumper of the car also touched the shutter of American Laundry. Five persons were beneath the car. Car had climbed the stairs and went 280 / 305 281 CR APEAL-572-2015-JUDGMENT.doc in the American Laundry. The police had measured the spot. According to him, the police collected broken glass pieces and also number plate and also took charge of these articles and also collected the blood stains. Then, according to him, spot panchnama was drawn and he identified it as Exh.28. During cross-

examination he had specifically answered that the left tyre of the car was found punctured. Further, he answered that it did not happen that the police entered in the car by opening the door of the car for inspection and that police found RC book, certified copy of New India Assurance and Police took possession of these documents and key of the car. This witness denied the police having done so and also when confronted with the portion mark "A" from the panchnama he stated that it was not correctly recorded. He further stated that he had not measured the spot personally and that police had done the 281 / 305 282 CR APEAL-572-2015-JUDGMENT.doc marking in his presence. Another important admission he gave is that the police in his presence did not take charge of the portion of the shutter. Whereas in his evidence the portion of a shutter is produced before the Court and by pointing it out it is submitted on behalf of the appellant that, in fact, there is a tampering of the article and various articles were not seized during the panchnama but they were done subsequently seized. This is significant enough when according to the case of the prosecution and as stated by Ravindra Patil the car had entered the American Express Laundry by dashing into the shutter and car entered to the extent of 3 and ½ feet inside. As against this, the evidence of this person did not mention anything regarding breaking of the shutter of the laundry and the car going inside the shop premises. The piece of the shutter is produced before the trial Court. It is not the piece obtained by cutting it 282 / 305 283 CR APEAL-572-2015-JUDGMENT.doc from the entire shutter. It is also not seen having any puncture except that it is slightly bent. This factual position is not in consonance with the case of prosecution as to puncture to the shutter by dash from the car.

184. Apart from the above, it is also brought to the notice of this Court that another pancha, according to this witness and according to the panchnama Exh.28 is by name Arjun and his address is given as Antop Hill, Sion Koliwada.

185. By pointing this out, it is submitted that in the absence of any material on record by the investigating agency as to how this person by name Arjun was brought from Antop Hill, Sion, Koliwada at 3:00 a.m. on 28.9.2002 at Bandra, the presence of said second pancha renders the entire panchnama doubtful.

283 / 305 284 CR APEAL-572-2015-JUDGMENT.doc

186. After analysis of the substantive evidence of PW 1 panch witness Sambha Gauda, now a reference is required to be made regarding the arguments as to the topography of the area where the incident had occurred and also whether there was a cement platform in front of the American

Bakery and whether there were any steps i.e. sort of stair-case and whether there was a footpath. Also the aspect as to the interview given by Ravindra Patil to the Mid Day on 29.9.2002 and which is printed and published on 30.9.2002, can be discussed in short. As earlier entire evidence of the prosecution on various aspects has been dealt with in detail, thus, holding that the evidence brought before the Court by the prosecution has not reached that standard of proof which is required to establish the guilt of the present appellant-accused beyond reasonable doubt, no much importance can be given to the argument on minor 284 / 305 285 CR APEAL-572-2015-JUDGMENT.doc points as to the discrepancies appearing in the site map vis-a-vis the contents of the spot panchnana. Site map is at Exh.143 before the Sessions Court and it was prepared by the officer, when, in fact, the vehicle was not on the spot and it was already removed to Bandra Police Station. There is variance in the substantive evidence of the prosecution witnesses and mainly of the injured persons and also of the police officer. PW 3 stated that the right front side tyre was resting on the Ota (platform). According to him, left tyre was in between the laundry and the bakery. PW 4 in his evidence has stated that both the corners of the bumper touched the shutter. Back tyres of the vehicle were resting at the end of the stairs. Also, according to him, both front tyres of the vehicle were resting on the stairs up to the shutter. According to the police officer PW 26, vehicle Land Cruiser had climbed three stairs and the right front wheel was resting on the 285 / 305 286 CR APEAL-572-2015-JUDGMENT.doc stairs of the Laundry. In fact, what is depicted in the site map Exh.143 is not what is appearing from the substantive evidence of these witnesses. Moreover, in fact, it is also not in consonance with what is stated by Ravindra Patil that the car had gone inside the shop to the extent of 3½ feet thereby puncturing the shutter of the laundry. As such this map also does not show the correct position and as such apparently it is also one of the mitigating circumstances to the case of the prosecution.

187. Now coming to the interview given to the newspaper Mid-Day by Ravindra Patil, various questions were asked to him and in fact one of the questions was "whether you have stated to the Reporter of Mid-Day that Altaf was on the wheel when Salman and Kamalkhan returned from Rain Bar and started to Salman's house by car." Ravindra Patil has 286 / 305 287 CR APEAL-572-2015-JUDGMENT.doc answered this question to the following effect :

"I do not remember the interview given to Mid-Day".

188. The next question asked was that whether Salman Khan returned from JW Marriott after 15 minutes and sat on driver's seat of his motor car. The answer was "I have stated so". Further there was a question as to whether this witness has stated to the reporter of Mid-Day that Salmankhan i.e. the accused was driving the motor car at the speed of 70 km per hour. To this question witness answered, "I do not remember". By pointing to these questions and answers, it is submitted on behalf of the appellant-

accused that this witness has conveniently answered to the question that he does not remember and those answers are to the questions as to the driving by Altaf and speed of the car was 70 km per hour when it was 287 / 305 288 CR APEAL-572-2015-JUDGMENT.doc driven from JW Marriott Hotel back to home. As against this, further argued that the answer of this witness Ravindra Patil to the questions that in the valet parking of JW Marriott Hotel car was halted, the accused sat on driver's

seat and the witness answered in the affirmative. By pointing this out, it is submitted that the answers "I do not remember" are required to be construed that he was not sure whether what was asked, did actually happen or not. His answer is not negative to the questions regarding Altaf and regarding speed of car 70 km/hr. Of course, this argument was strongly objected by the learned Public Prosecutor on various counts, firstly it is submitted that the Reporter of the Mid-Day is not brought before the Court to establish the factum that there was, in fact, interview taken and taken in a particular manner contending the circumstances which were put to Ravindra Patil during his cross-examination. In 288 / 305 289 CR APEAL-572-2015-JUDGMENT.doc fact, as per Section 145 of the Evidence Act if at all the witness is to be contradicted then only the said earlier statement of the witness is required to be shown to him. Otherwise, the witness can be asked questions on his earlier statement. As such, considering this legal position and considering the answers given by Ravindra Patil and acceptance by him that he did give interview to the Mid-Day on 29.9.2002, in the opinion of this Court, though what is argued on this aspect cannot be accepted on behalf of the appellant-accused but still the conduct of Ravindra Patil can be seen by way of the answers given. Otherwise also this Court has earlier held as to the non-admissibility of the evidence of Ravindra Patil under section 33 of the Evidence Act.

189. Now, the last argument advanced on behalf of the appellant-accused is that death of Nurulla was not 289 / 305 290 CR APEAL-572-2015-JUDGMENT.doc due to the accident or due to the driving of the vehicle. During the arguments, it is submitted that there is substantive evidence of witnesses to show that the crane was brought on the spot to lift the vehicle which was immobilized and also had a burst left front tyre. It is an admitted position that crane was called to lift the vehicle and place it aside so that the injured beneath the vehicle could be removed. That time the body of Nurulla was also removed from beneath the vehicle. The argument on behalf of the appellant is that death of Nurulla was because of falling of the vehicle while it was being attempted to be lifted by using a crane. That type of evidence has also come on record that at one point of time the vehicle slipped from the hook of the crane and fell again on the ground. Apparently, the body of Nurulla was below the vehicle. By pointing this out, it is tried to suggest that by that time said Nurulla was alive and his death 290 / 305 291 CR APEAL-572-2015-JUDGMENT.doc was only due to the heavy impact of the vehicle when it fell down due to slipping from the hook of the crane.

As against this argument learned Public Prosecutor brought to the attention of this Court, the injuries reported in postmortem report. The postmortem report is Exh.149 before the Sessions Court. Column no. 16 of the postmortem report show both arms crushed and lower legs extended. Column no. 17 regarding surface wounds and injuries show multiple crushed injuries over head, neck, chest and abdomen.

All internal organs crushed badly. So far as column 19 is concerned regarding injuries on the head and skull, the finding is "crushed completely." The same finding is for thorax, lungs and other parts of the body. Even the abdomen was crushed completely. Even the spine and spinal cord were crushed up to T-20 and cause of death was haemorrage and shock due to multiple crushed injuries (unnatural). Apparently, by single fall 291 / 305 292 CR APEAL-572-2015-JUDGMENT.doc of a heavy vehicle whatever might be the weight of the vehicle, as suggested on behalf of the appellant, such type of injuries are not possible and on this count argument on behalf of the appellant cannot

be accepted that the death of Nurulla was due to falling of the vehicle when it was tried to be lifted. It must be taken that the death was due to the running over by the vehicle when Nurulla was sleeping on the platform. Though this is the finding from the postmortem report and after analyzing the evidence and arguments on this point, still it will not lead this Court to hold more than this as earlier this Court has held that the prosecution has failed to establish the case against the accused on all the counts as to driving that also in a drunken state.

190. Now, again this Court needs to consider whether the offence punishable under section 134 of 292 / 305 293 CR APEAL-572-2015-JUDGMENT.doc the Motor Vehicles Act read with section 187 of the said Act is to be attracted so far as the present appellant-accused is concerned. Though this court has held that the prosecution has failed to establish that the appellant-accused was driving the vehicle during the incident, still it is a factual position that he was present in the vehicle and this position cannot be negated. As such, the import of section 134 of the Motor Vehicles Act, 1988 is required to be construed.

Section 134 reads thus :

> "When any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall-
>
> (a) unless it is not practicable to do so on account of mob fury or any other reason beyond his control, take all reasonable steps to secure medical attention for the injured person, [by conveying him to the nearest medical practitioner or hospital, and it shall 293 / 305 294 CR APEAL-572-2015-JUDGMENT.doc be the duty of every registered medical practitioner or the doctor on the duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities], unless the injured person or his guardian, in case he is a minor, desires otherwise;
>
> (b) give on demand by a police officer any information required by him, or, if no police officer is present, report the circumstances of the occurrence, including the circumstances, if any, for not taking reasonable steps to secure medical attention as required under clause (a), at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence;
>
> [(c) give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely:-
>
> (i) insurance policy number and period of its validity;
> (ii) date, time and place of accident;

295 CR APEAL-

(iii) particulars of the persons injured or killed in the accident;

(iv) name of the driver and the

particulars of his driving licence.

Explanation. - For the purposes of this section the expression "driver" includes the owner of the vehicle.]"

191. The above section contemplates that there was a duty imposed by law on a person to give medical assistance / help and this duty is cast not only on the driver of the vehicle but also every person in-

charge of the vehicle. Though it is not established that the appellant-accused was driving the vehicle still he comes under the later part as 'a person in-charge of the vehicle' and as per the explanation to the said section, 'driver' includes the owner of the vehicle. Now the question arises whether the circumstances on the spot were such that the act of the appellant-accused in 295 / 305 296 CR APEAL-572-2015-JUDGMENT.doc leaving the spot without apparently giving any medical assistance or to take reasonable steps to secure the medical aid to the injured. On this aspect, it is submitted on behalf of the appellant that after the incident a mob of many people had gathered and the mob was in aggressive mood and some of the members were also armed with rods and other articles. Even according to the witnesses and also the injured who had been on the spot, the mob was furious and in fact there could have been a law and order problem and it in fact happened as the mob had spotted the appellant-accused coming out of the vehicle and the vehicle had caused death of one person and injuries to other four persons. As such considering this argument and the factual position that the circumstances were such that in order to escape from the fury of the mob and these circumstances were beyond the control of the 296 / 305 297 CR APEAL-572-2015-JUDGMENT.doc

appellant, no such appropriate steps were taken to secure the medical aid to the injured persons. Of course, on this aspect, it is argued by learned Public Prosecutor that if not immediately after the incident but subsequently also there is no step taken by the appellant to see what is the condition of the injured and whether they require any medical help. In fact, the law requires as mandated by section 134 of the Motor Vehicles Act that such aid is required to be given by the driver and also the other persons in-

charge of the vehicle when any person is injured or any property of a third party is damaged as a result of the accident in which motor vehicle is involved. So this presupposes that such assistance is immediately given at the time of the incident and in near proximity in time. As such, in the considered view of this Court, even this charge under section 134 of the Motor Vehicles Act cannot be attracted in the present case 297 / 305 298 CR APEAL-572-2015-JUDGMENT.doc considering the circumstances.

192. Now, in summing up, it must be mentioned that on the main broad aspects as to the driving and drunkenness the prosecution has not brought that material on record to point out only the guilt of the appellant-accused as almost entire evidence of the prosecution is in the nature of circumstantial evidence though the evidence of Ravindra Patil can be considered as a evidence of a direct nature, still this Court has earlier held as to its inadmissibility and has subsequently also marshalled his evidence as to his evidential value.

193. While arriving at the above findings this Court is not oblivious of the perception or the opinion of members of general public. However, it is well settled principle that a Court must decide the case on the material brought on record and which can be 298 / 305 299 CR APEAL-572-2015-JUDGMENT.doc accepted as an evidence as per the procedure laid down by law. The court shall not be swayed away by any popular belief that a particular person considering his avocation, profession or standing, must have committed such an offence and must be held guilty.

The Court is expected to be impervious to the pressure from the public and also from the Media. It is for good reasons that the law of Evidence has no place for the general public opinion as a factor that should weigh with the Court while deciding a case at hand.

Probably because such opinion or such perception is many a times gathered on the basis of the information/news that is constantly being told / broadcasted by the Media and other institutions. It often happens that a proposition that is repeatedly fed to the general public has the possibility of achieving the status of 'truth'. This is as far as the general public at large is concerned. However, this so 299 / 305 300 CR APEAL-572-2015-JUDGMENT.doc called 'truth' i.e. the proposition is required to be proved before a Court of law and in which the established principles of law of evidence are required to be followed. Even the basic cardinal principle of Criminal Jurisprudence and the burden on the prosecution cannot be forgotten and any strong suspicion cannot be considered as a material to hold a person guilty of a particular offence. Bearing in mind the above principles, in the considered view of this Court, the prosecution has failed to establish its case of all charges.

194. Needless to mention that in every criminal trial the burden of establishing the guilt of an accused is on the prosecution and that guilt is to be proved beyond reasonable doubt. The benefit of every reasonable doubt which arises out of the evidence adduced, must necessarily be given in favour of the 300 / 305 301 CR APEAL-572-2015-JUDGMENT.doc accused. In this case, considering the various weaknesses in the case of the prosecution, various shortcomings such as non-examination of necessary and appropriate witnesses, the omissions and contradictions in the evidence of the injured witnesses which go to the root of the matter, definitely a doubt has arisen as to the involvement of the appellant for the offences with which he is charged. On the basis of this type of evidence the appellant cannot be convicted though the apparent perception might be different as appearing in the mind of a common man. Moreover, from the careful analysis of the evidence collected during the investigation without expressing any conclusive opinion this Court feels that there are following hypothesis possible:

195. Firstly, though the investigation might be impartial, it was conducted in such a careless a faulty 301 / 305 302 CR APEAL-572-2015-JUDGMENT.doc manner with scant regard to the established procedure laid down in law more particularly, the procedure required for establishing the chain of evidence when the case is based on the biological evidence, or, ii) secondly, the investigation was so conducted to loosen the prosecution case.

196. Existence of any of the above hypothesis is, in fact, highly deplorable but always it is a duty of the Court to weigh the evidence which is brought before it and to ascertain whether the offences are proved against the accused beyond reasonable doubt.

197. Lastly, in the considered view of this Court, the appreciation of the evidence as is done by the trial Court in the present matter is not proper and legal as per the settled principles of Criminal Jurisprudence.

For example, it can be said without giving all the details that the trial Court had erred in accepting the 302 / 305 303 CR APEAL-572-2015-JUDGMENT.doc Bills which were recovered without there being any panchnama and the bills altogether saddled with the fabrication. Secondly, evidence of Ravindra Patil was not marshalled properly and thirdly evidence to establish biological chain regarding alcohol consumption is not appreciated as per the mandate of law. As such, consequently, it must be said that this is not a case in which the prosecution has successfully established its case for all the charges and as such resultantly the appeal is required to be disposed of with the following order :-

:: O R D E R ::

1) Criminal Appeal No. 572 of 2015 preferred by appellant Salman Salim Khan is allowed;

2) The impugned judgment and order dated 6th May, 2015 passed in Sessions Case No. 240 of 2013 is hereby quashed and set aside;

3) The appellant-accused Salman Salim Khan 303 / 305 304 CR APEAL-572-2015-JUDGMENT.doc is acquitted of all the charges. The bail bonds of the accused shall stand cancelled;

4) If the fine amounts which are imposed in view of the impugned judgment and order, are already paid, the same shall be refunded back to him;

5) In view of the provisions of Section 437-A of Cr.P.C., the appellant shall execute a P.R. bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand) with one or two sureties in the like amount;

6) On the request on behalf of the appellant-

accused provisionally a cash security of Rs.25,000/-

(Rupees Twenty Five Thousand only), shall be accepted by the office for a period of two weeks and within this time the surety procedure shall be completed. The bail procedure be complied before the office of this Court;

7) As the bail bonds of the appellant-accused stand cancelled, which were given at the time of 304 / 305 305 CR APEAL-572-2015-JUDGMENT.doc admission of the appeal, Bandra Police Station is directed to hand over the Passport of the appellant to him on proper identification;

8) Appeal is disposed of accordingly. Criminal Application No. 1041 of 2015 does not survive in view of disposal of appeal and hence it is accordingly disposed of.

(A.R. JOSHI,J) TRANSCRIBED BY :

DESHMANE AND LADDA (PS) 305 / 305