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. Accused)

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:

DICTATION ON 7th 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



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



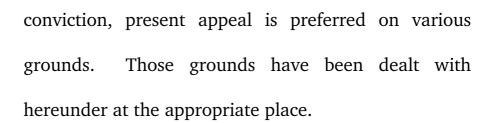
Code and sentenced to suffer Simple Imprisonment for a period of three (3) months and to pay fine of Rs.500/(Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of one (1) month.

- 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 period of two (2) months and pay fine of Rs.500/ (Rupees Five only), Hundred in default 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

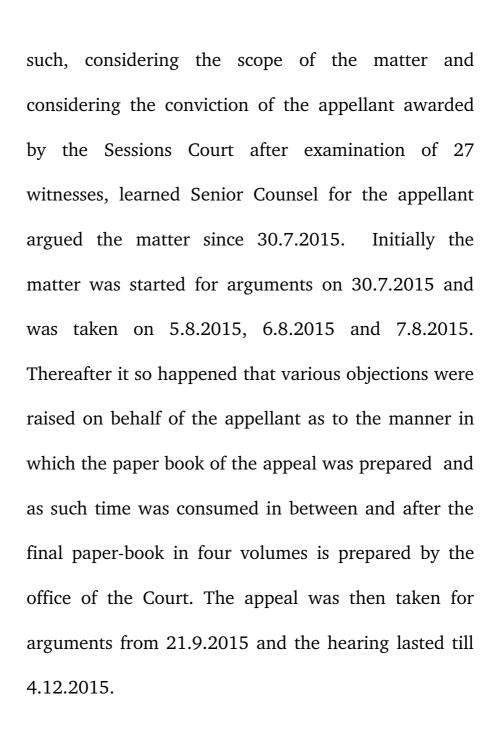


to suffer Simple Imprisonment for a period of two (2) months and to pay fine of Rs.500/ (Rupees Five Hundred only), in default to suffer Simple Imprisonment for a period of seven (7) days.

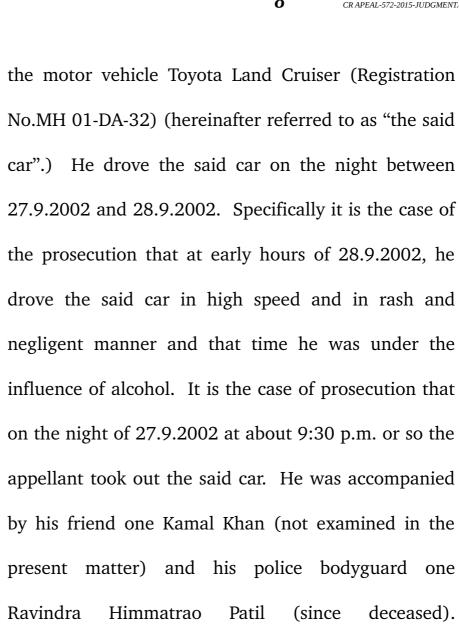
- 7. All the substantive sentences shall run concurrently.
- **8.** The accused is on bail. He shall surrender his bail bonds.
- 9. Set off be given to the accused u/s.428 of the Code of Criminal Procedure for the period undergone by him in the prison.
- **10.** The seized articles be destroyed after 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



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



5. It is the case of prosecution that the present appellant, a famous film star of Hindi cinemas drove



the

to

case

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

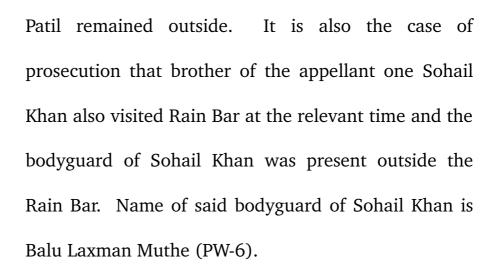
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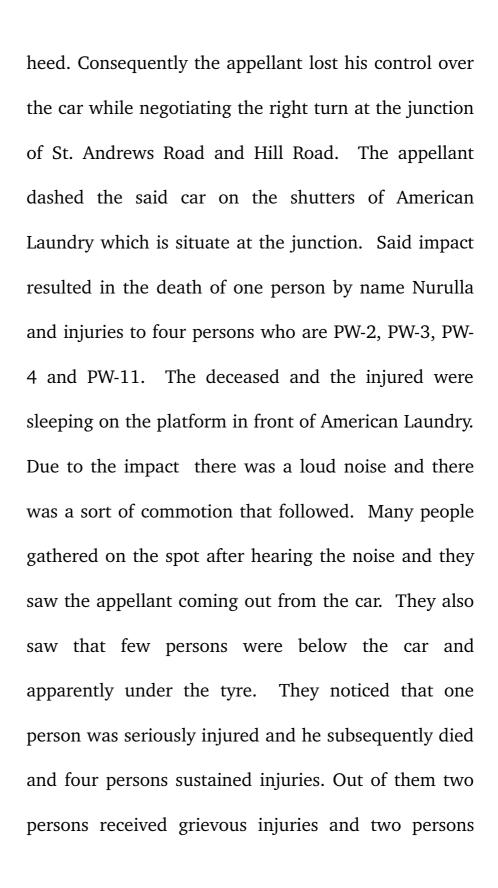
According



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

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



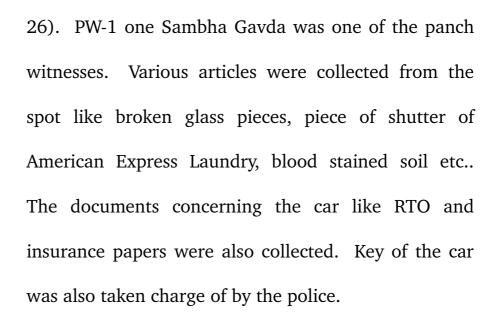


received simple injuries.

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

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-



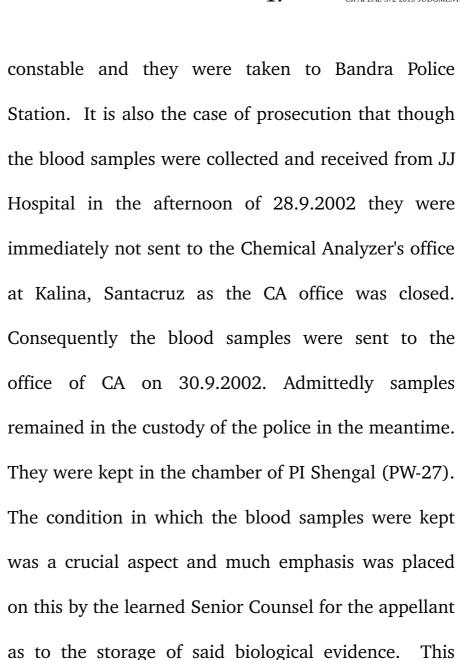
10. Ravindra Patil, the bodyguard of the appellant was enquired at Bandra Police Station. He lodged his complaint. It was later on marked as Exhibit-P-1 during the recording of the evidence before the Metropolitan Magistrate Court when the case was first tried there when the main offence against the 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



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



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 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



aspect shall also be dealt with in detail when minutely

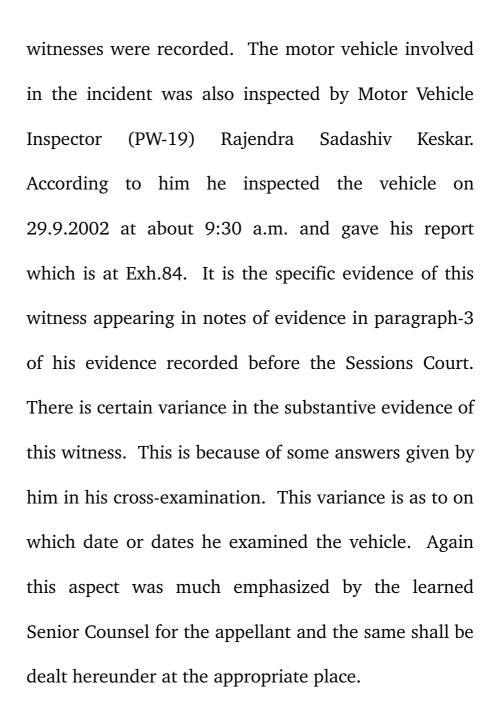
the arguments advanced on behalf of the appellant

prosecution as to drunken driving and causing death

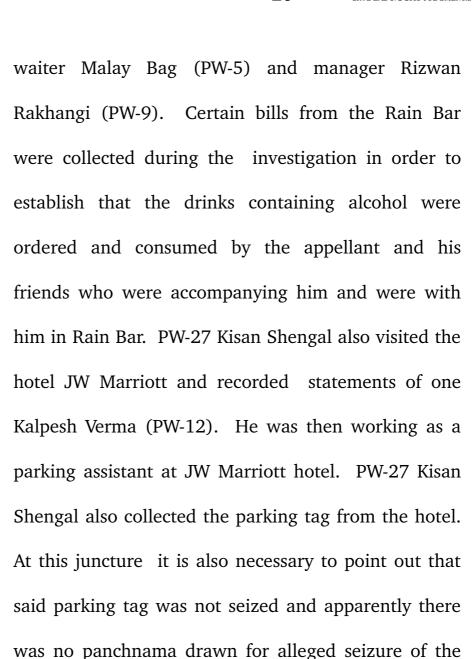
be considered for analyzing the case of

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



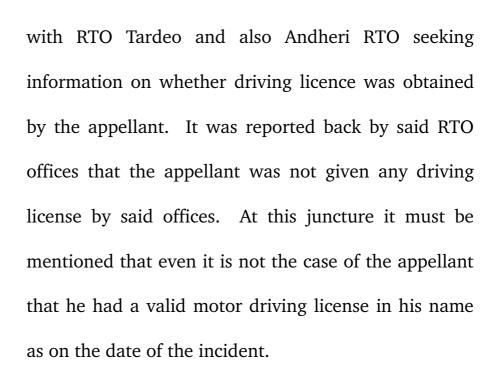
14. During investigation Sr. P.I. Shengal (PW-27) visited Rain Bar and recorded the statements of the



15. During investigation, enquiries were made

parking tag and this factual position has been

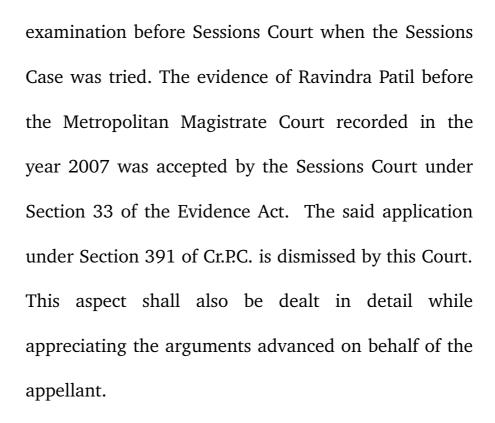
substantiated by evidence of PW-27.



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



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-

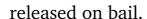


17. On 1.10.2002 supplementary statement of Ravindra Patil (since deceased) bodyguard of the appellant, was recorded. It must be mentioned that for the first time the prosecution came with a case that the appellant had consumed alcohol during the incident on 28.9.2002. Apparently this theory of the appellant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



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



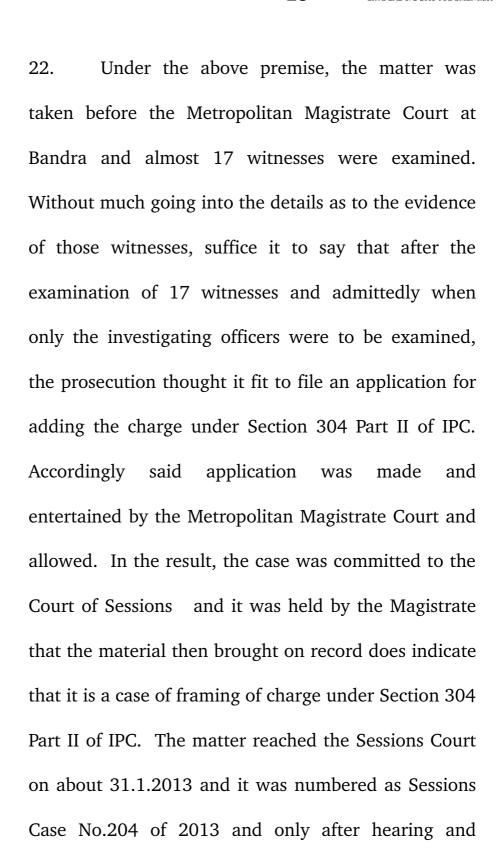
After completion of investigation charge-sheet 19. was filed before 12th Metropolitan Magistrate Court, Bandra on 21.10.2002. On 31.1.2003 the case was committed to the Court of Sessions as the offence then applied under Section 304 Part II of IPC was exclusively triable by the Court of Sessions. The 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

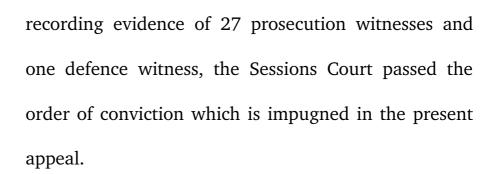
181 and 185 of M.V.Act, 1988. In fact the offence under Section 66(i)(b) of the Bombay Prohibition Act was also framed.

- 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



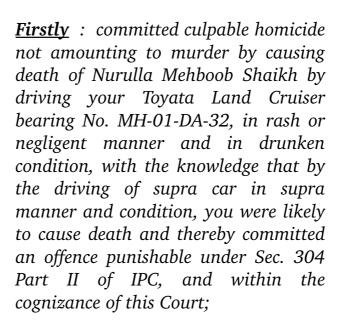
appropriate stage by the learned Metropolitan Magistrate Court as by that time it was the factual position that the learned Metropolitan Magistrate Court, Bandra had already framed fresh charges including the main charge for the offence under Section 304A of IPC. This was the action taken by M.M. Court 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.





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:

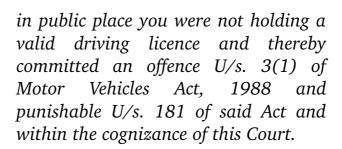
"That on 28/09/2002 at about 2:45 a.m., near American Express Cleaners, St. Andrews Road and Ramdas Nayak Marg (Hill Road), Bandra (West), Mumbai – 400 050:-



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

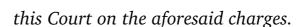


Fifthly: That at the aforesaid date, time and place you did not take reasonable steps to secure medical aid to the victim persons by conveying them to nearest medical practitioner or hospital and thereby committed offence U/s. 134 of Motor Vehicles Act, 1988, P/U/S. 187 of Motor Vehicles Act, 1988 and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

<u>Sixthly</u>:- 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



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

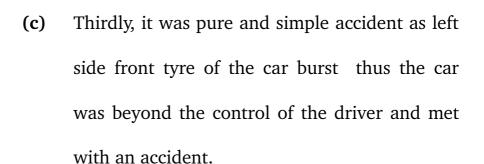


framing of the charge, a question arose before the Sessions Court as to whether the evidence earlier recorded before the Metropolitan Magistrate Court, when the charge was mainly for the offence punishable under Section 304A of IPC, is to be treated as an evidence in the sessions case after the committal. 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

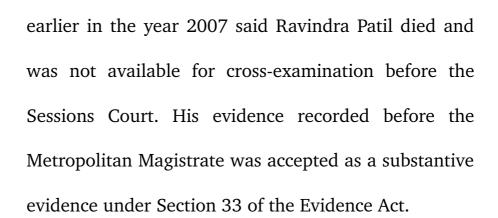
was examined before the Sessions Court. Considering the substantive evidence sufficient to establish the guilt of the appellant/accused for the charges framed against him and considering the effect of defence witness and rejecting the evidence of the defence witness even on preponderance of probabilities, the trial Court convicted the appellant/accused for all the charges as mentioned earlier at the threshold of this judgment.

- 26. During the arguments various issues were 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



27. above broad **Apart** from the three 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



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-avis 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

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.

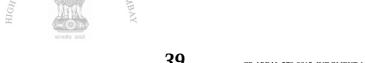
PW-11 injured witness Mohd Abdulla Shaikh who received grievous injury and sustained abrasion.

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



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



coming out of JW Marriott hotel and sitting on the driver seat of the car.

[B] WITNESSES THE **ASPECT** OF ON CONSUMPTION OF ALCOHOL BY THE <u>APPELLANT/ACCUSED</u>:

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

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.

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] <u>WITNESSES ON THE ASPECT OF BURSTING</u> <u>OF TYRE OF THE CAR:</u>

PW-19 Rajendra Keskar who is the RTO Inspector who

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.

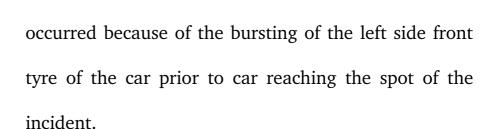
PW-13 Amin Shaikh stated that the tyre of the car was found burst.

PW-26 Rajendra Kadam, investigating officer stated that the vehicle involved in the accident had burst tyre

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



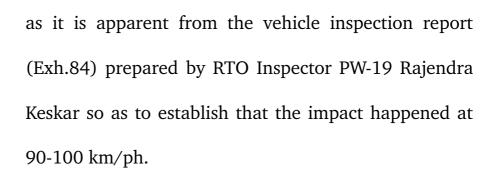
[D] WITNESSES ON SPEED OF THE CAR AND ROUTE TAKEN BY IT TILL REACHING THE SPOT OF INCIDENT:

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.

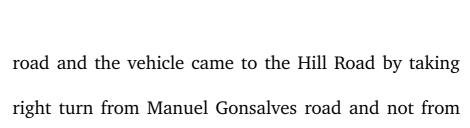
Ravindra Patil is the prosecution witness who mentioned that the car was being driven at the speed of 90-100 km per hour.

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



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



St. Andrews Road.

Another argument on behalf of the appellant 37. 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

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.

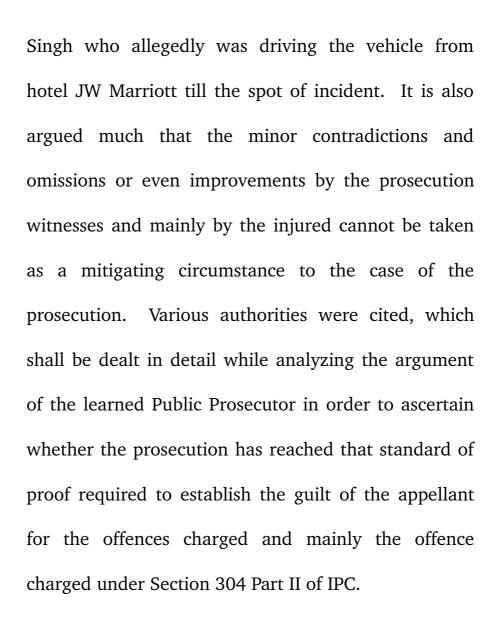
- 38. Apart from the broad and other ancillary points argued on behalf of the appellant there are still other points argued such as whether the death of Nurulla was on account of the incident or whether it was by falling of a car when being lifted with the help of a crane.
- 39. After having broad analysis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



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 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

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



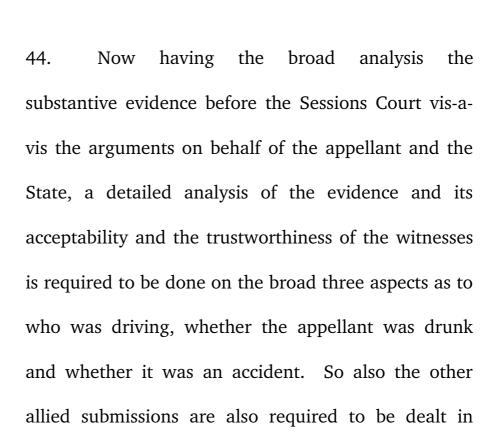
42. It must be mentioned that during the arguments learned Public Prosecutor did not argue much on the collection of the hotel bills from hotel JW Mariott and it was so taken by the learned Counsel for



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 collect the material against the upon to 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.



43. learned Public During the arguments, 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.



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

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detail.



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



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 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 crossexamination it has been brought on record that after



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



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 visa-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



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

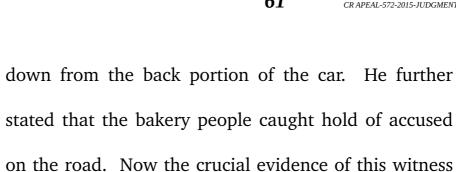


that this answer is required to be taken against the appellant, needless to mention that this answer is required to be construed in juxtaposition of the other explanation given by the appellant/accused in his statement under Section 313 of Cr.P.C.. This aspect as to the compulsive circumstances for the 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



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



in the chief which was vehemently assailed on behalf

of the appellant, is to the effect as follows:

and ran away from the spot."

"Salman was so drunk that he fell down. Salman Khan stood but he again fell down and again he stood

According to the case of the prosecution, 48. 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



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



information known to him or not. All this material, which is brought on record during his crossexamination, 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 record during his cross-examination and on 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



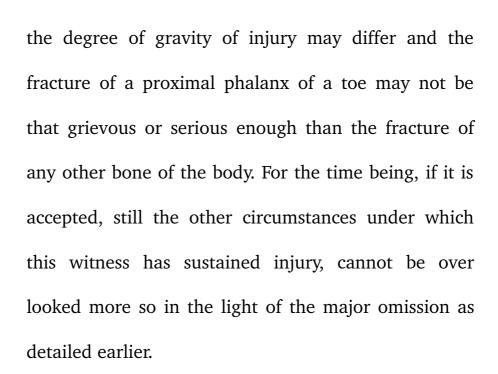
apparently, according to the prosecution is a rustic witness and not an educated person, but still it is a factual position that there was a scope available to the prosecution to counter check the truthfulness or otherwise of the answers given by this witness during his cross-examination and this could 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



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



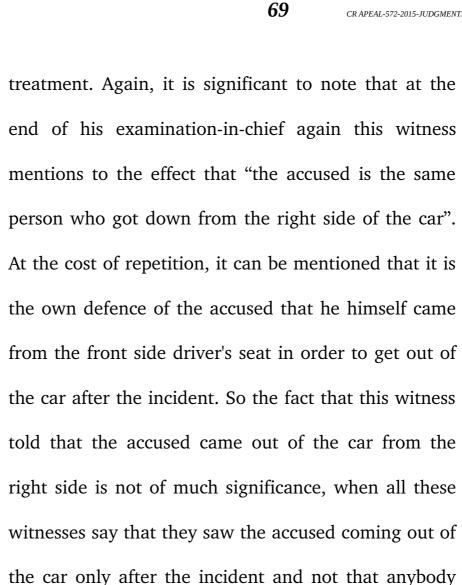
that said PW 3 is, in fact, a natural witness and had seen the incident and in fact also seen the accused driving the car. In order to substantiate his argument, the learned Public Prosecutor stated that said PW 3 was the person who received minor injuries and he had all the opportunities to see how 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



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



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



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

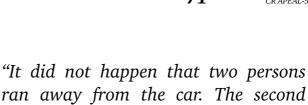
the statement under section 164 of Cr.P.C. because of

the police and the Magistrate. This reference is to the

statement under section 164 of Cr.P.C. In fact, he is



also the witness who answered during the crossexamination 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:



Salman. Two persons were there in the car. I cannot say whether two persons ran away from the car."

person ran away from the spot after

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.

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



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

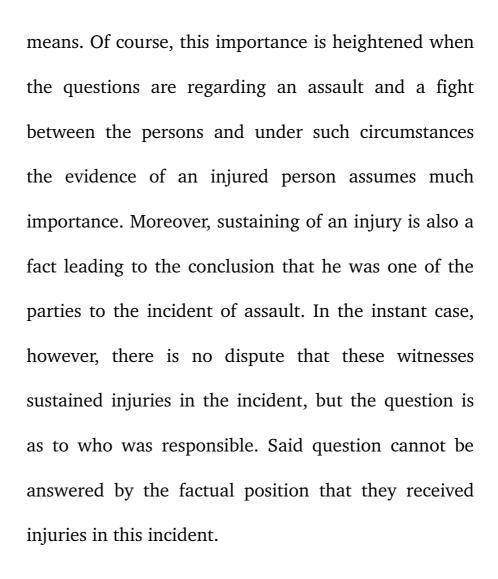


they were. This witness, due to his severe injuries, was hospitalized in Bhaba Hospital for one and half month. Though in the examination-in-chief this witness has stated that bakery men and taxi driver were saying that accident was caused by the accused and though according to him, he stated to that effect while recording his statement by the police, this part of his evidence is brought on record during his crossexamination 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 hear-say as the same was not to his personal knowledge and moreover the value is diminished by

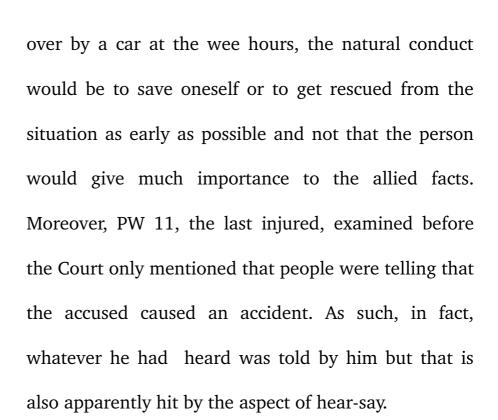


way of omission.

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



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



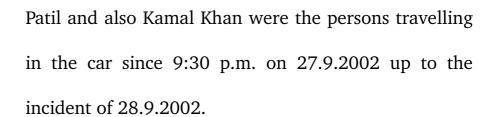
54. Apart from the above, it is brought to the notice of this Court during the argument on behalf of the appellant that there is inter se variance in the substantive evidence of these witnesses. PW 3 says, which is in fact an omission, that the accused was so drunk that he fell twice and then stood up and ran away. However, PW 2 and 4 did not mention anything to that effect. In fact, out of these four

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.

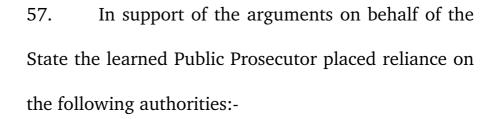
55. During the arguments, learned **Public** Prosecutor for the State stated that these witnesses do not talk of four persons travelling in the car or coming out of the car after the incident. The learned Chief Prosecutor wanted to suggest that non mentioning by these witnesses about four persons is 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



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 these witnesses remaining silent about how way, 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



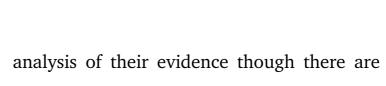
- 56. By pointing out the evidence and the answers given by the witnesses, discussed above, it is submitted on behalf of the appellant that the investigation is not fair in the present case and there is a exaggeration brought before the Court through them, mainly from the evidence of PW 3. The following 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)



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



4] (2015) 1 SCC 323 [State of Karnataka vs. Suvarnamma &

minor discrepancies;

Anr]: This authority is also on the minor discrepancies in the evidence which may not be fatal to the case of the prosecution;

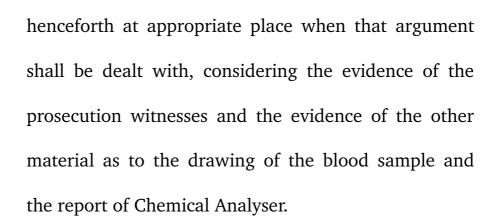
- 58. Needless to mention that in the ratios propounded by the superior Courts on the fact situation of a case, is not squarely binding when the facts of a case at hand are different and can be distinguished.
- 59. Also it is to be ascertained whether the minor contradictions and discrepancies may attain 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



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



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 crossexamination, 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



- 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



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. the substantive As such 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



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."

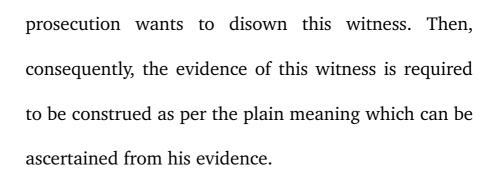
62. Much reliance was placed by learned Senior Counsel on this answer of this witness in examination-



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-inchief 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



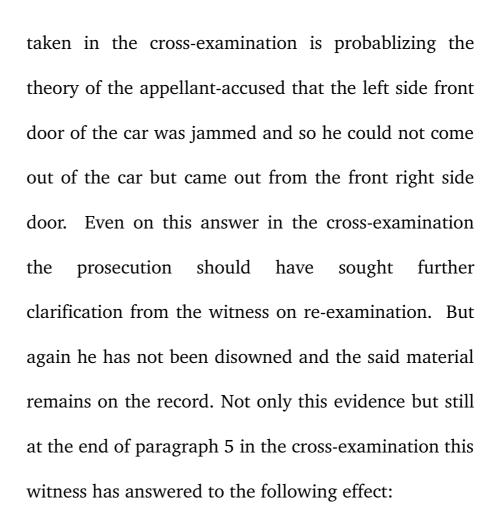
case of the defence, argued on behalf of the appellant. On this argument, learned Public Prosecutor for the State stated that this answer of the witness PW 8 in his examination-in-chief is required to be construed, an attempt by the defence to interfere with the prosecution witnesses. Without there being 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



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



"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

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,

is required to be critically examined and not to be taken as a help to the defence of the appellant.

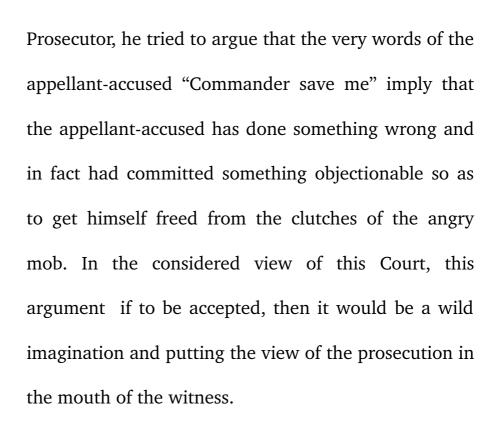
67. Now coming to the substantive evidence of PW 7 again there is argument on behalf of the prosecution that this witness is a partisan witness and in fact in stead of supporting the case of the prosecution he has assisted the appellant-accused in propounding the theory of the defence. This is the argument 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



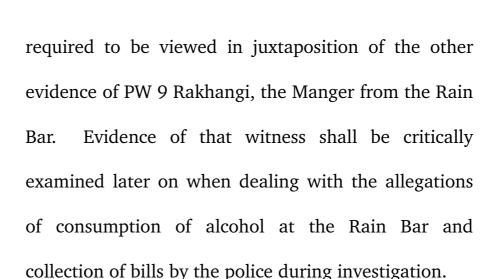
witness has stated that at the time of the incident he was sleeping in his house and he knows the accused since his childhood and the accused calls him name "Commander". After hearing the noise, he got up and then came to the spot. As the people were shouting for help, he came near American Cleaners 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



Gounsel 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

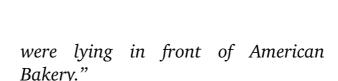


rods in hand and they were pulled by PW 7, it is further argued that the request for saving himself came from the appellant, on account of a particular incident and to save himself from the fury of the mob as the people have spotted him coming out of the car. The request for saving came from the appellantaccused. 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

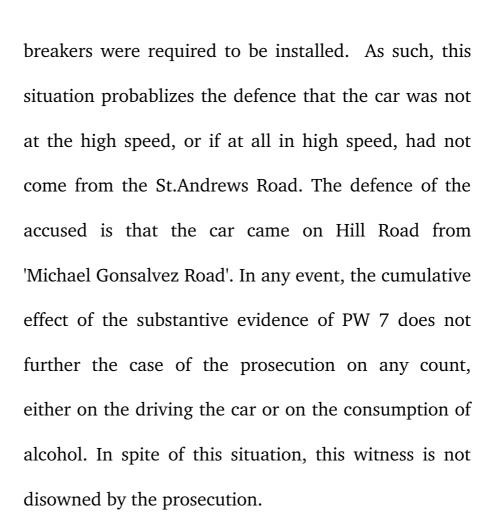


70. Again it is curious to note that even this witness is not disowned by the prosecution. In the cross-examination though this witness has stated, as mentioned earlier, no questions were put to this witness in the nature of cross-examination by the prosecution, more so when specific substantive evidence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



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

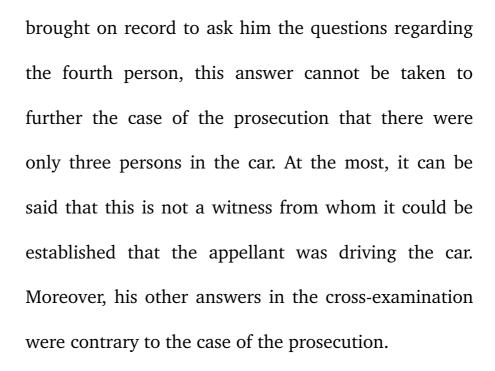


72. When the aforesaid was the effect of substantive evidence of PW 7, an attempt has been made on behalf of the prosecution by taking shelter of the answer given by PW 7 in his cross-examination in paragraph 4. It is to the following effect.

"Salman and two others were present



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

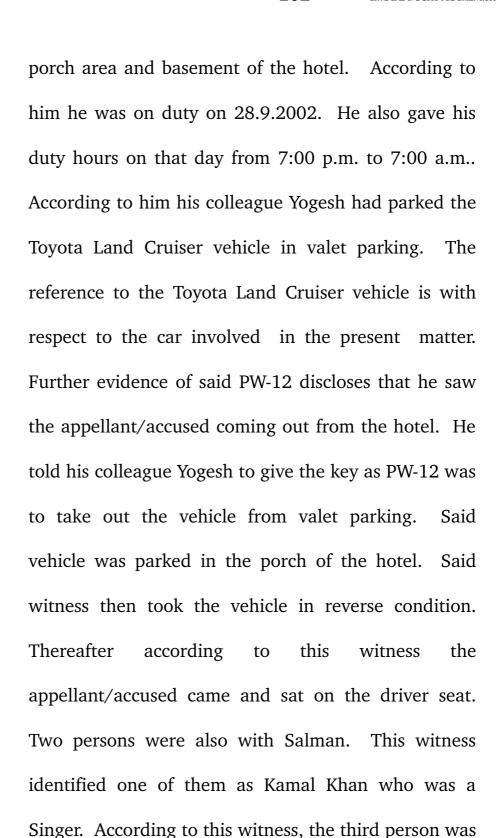


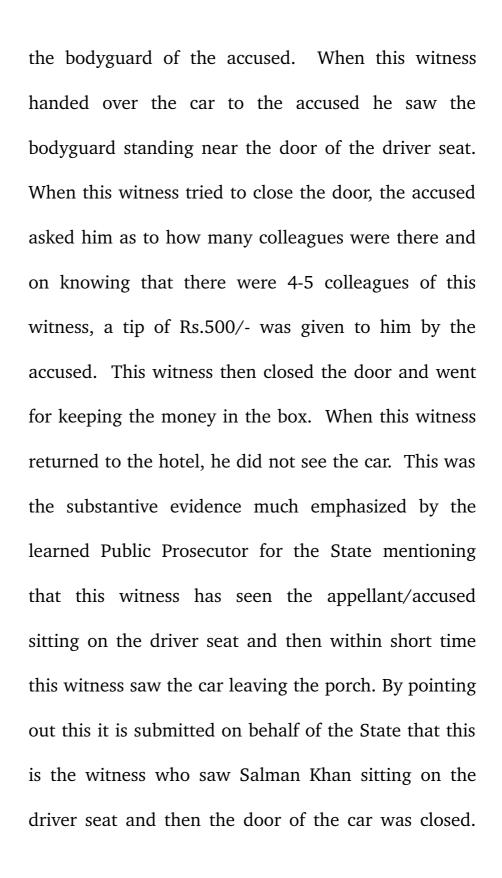
74. Now, one more witness who is relevant in the case of the prosecution as to who was driving the vehicle from JW Marriott Hotel to the scene of the incident is PW 12 Kalpesh Verma who is working as a parking assistant at JW Marriott Hotel and saw the appellant coming out of the hotel and sat on the 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

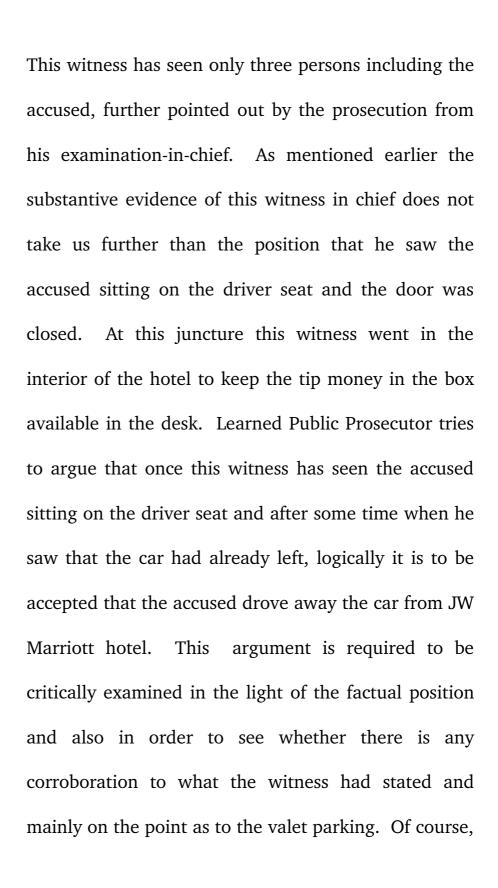
position that at some point of time the appellant-accused was sitting on the driver's seat of the car when the car was halted in front of JW Marriott Hotel, still it is a different thing that a person sitting on a driver's seat drove away the car himself. Moreover, this aspect also touches the another 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.

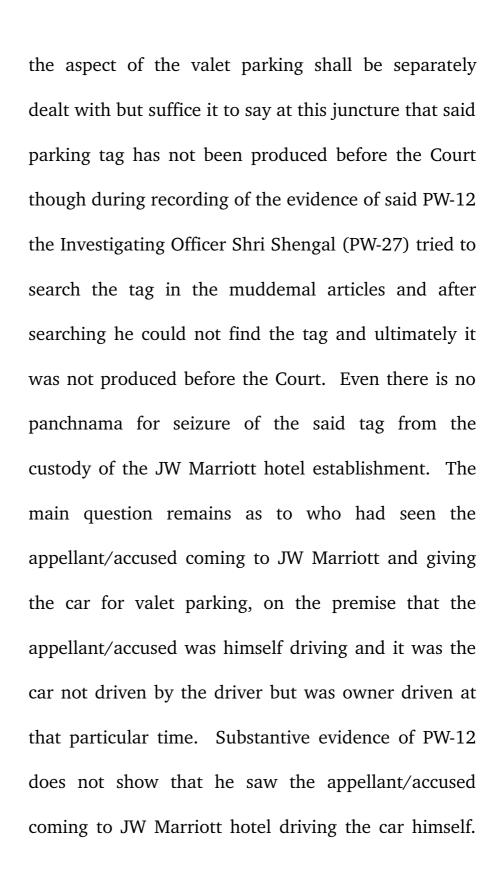
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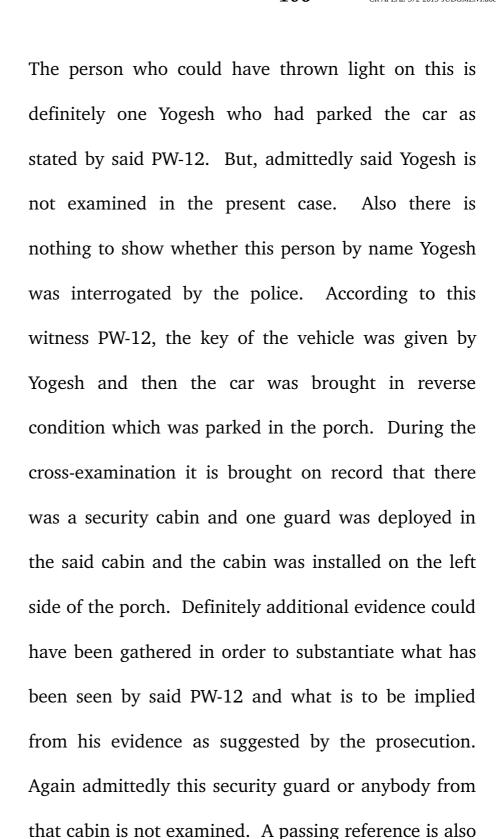
75. The substantive evidence of PW-12 Kalpesh Verma goes to show that during October, 2002 he was serving in JW Marriot Hotel, Juhu as a parking assistant. He used to park the owner driven car in the











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.

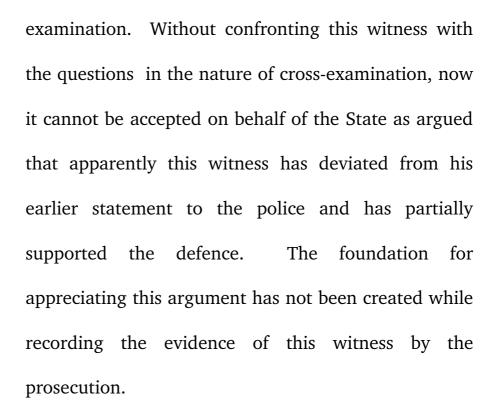
76. Apart from the above, certain answers are obtained from this witness (PW-12) during the cross examination and this part of the evidence is appearing in paragraph-11 of the notes of evidence of this witness. The substantive evidence of this witness reads thus:

"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

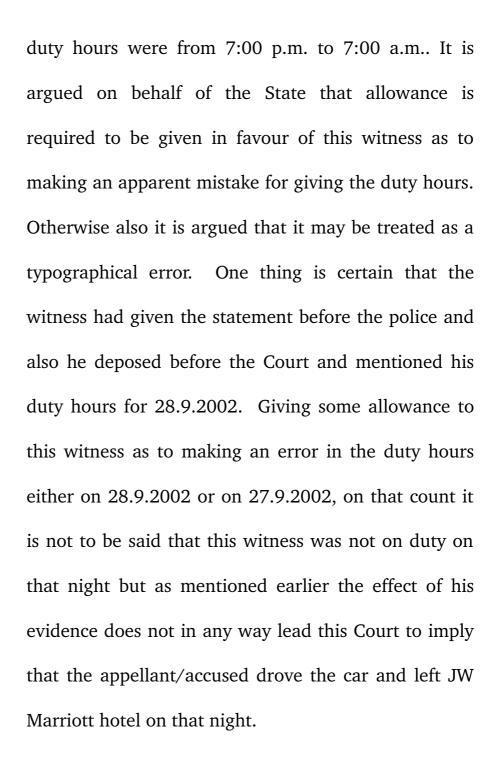


back portion of the car. Police asked me during recording my statement where Kamal Khan sat. I was remembering at the time of giving my statement that on which portion of the back seat Kamal Khan was sitting and he sat behind Salman Khan. Kamal Khan sat in the back portion of the car on the left side."

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 crossexamination no attempt has been made on behalf of the prosecution to get clarification for the anomaly created in the answers, one given in the examinationin-chief and another at the end of the cross-



Tastly, 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

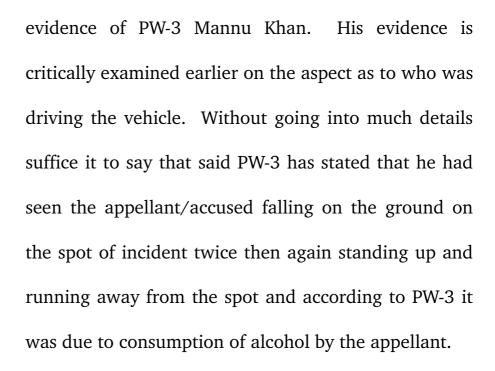


79. Moreover, the contradiction arising from the

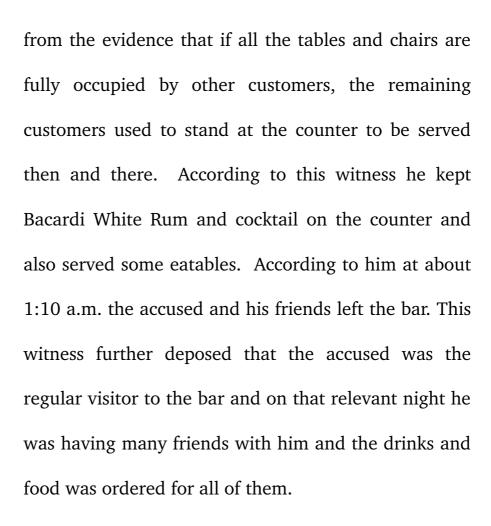
statement given in evidence in chief as compared to the one given in the cross-examination as to the seating position of the accused, creates a substantial doubt in respect of whether the accused drove the vehicle. This doubt is further enhanced as admittedly, this witness was not present when the vehicle was driven away ultimately.

THEORY OF CONSUMPTION OF ALCOHOL

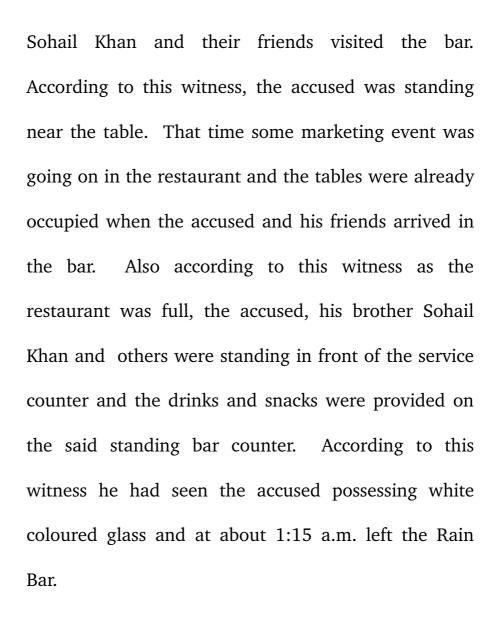
80. As mentioned in earlier part of this judgment, the substantive evidence of mainly two witnesses i.e. PW-5 Malay Bag and PW-9 Rizwan Rakhangi is required to be critically examined and then the evidence of PW-20 Dr. Shashikant Pawar, the Medical Officer from JJ Hospital and PW-18 Assistant Chemical 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



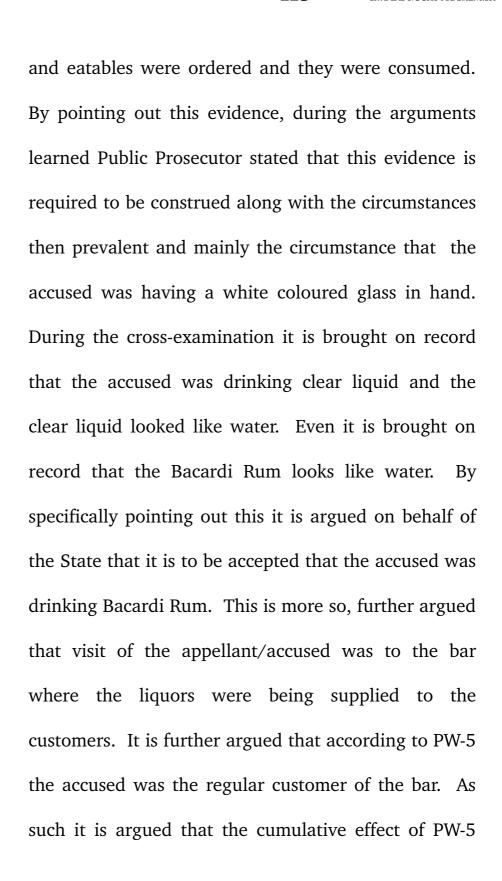
Malay Bag it is seen that he was working in the Rain Bar Restaurant as a waiter and was on duty on the night of 27.9.2002. There was rush in the bar and according to him about 200-250 customers were present. According to him, the area of the bar was admeasuring about 20 ft. X 20 ft.. According to this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



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

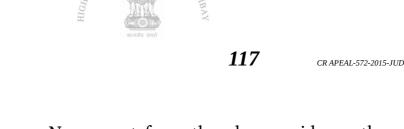


83. Now the substantive evidence of PW-5 and PW-9, as mentioned above, go to show that the appellant/accused visited the Rain Bar on the night of 27.9.2002 and left at early hours of 28.9.2002. Drinks

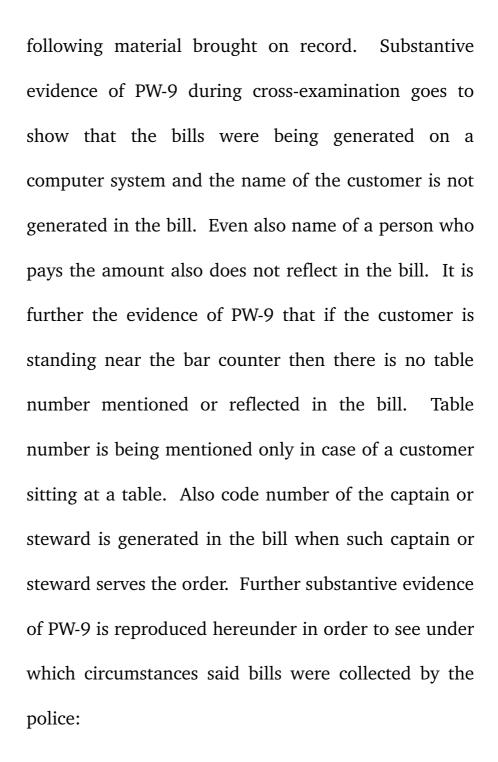


and PW-9 is required to be accepted on the fact that the accused had consumed alcohol in the said bar.

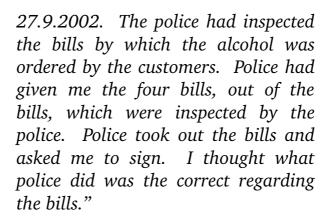
Counter to these arguments, learned Senior 84. Counsel for the appellant vehemently submitted that always it cannot be conclusively presumed that every person visiting the bar necessarily consumes alcohol. Apart from the circumstances narrated by PW-5 and PW-9 there must be some other circumstance either 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.



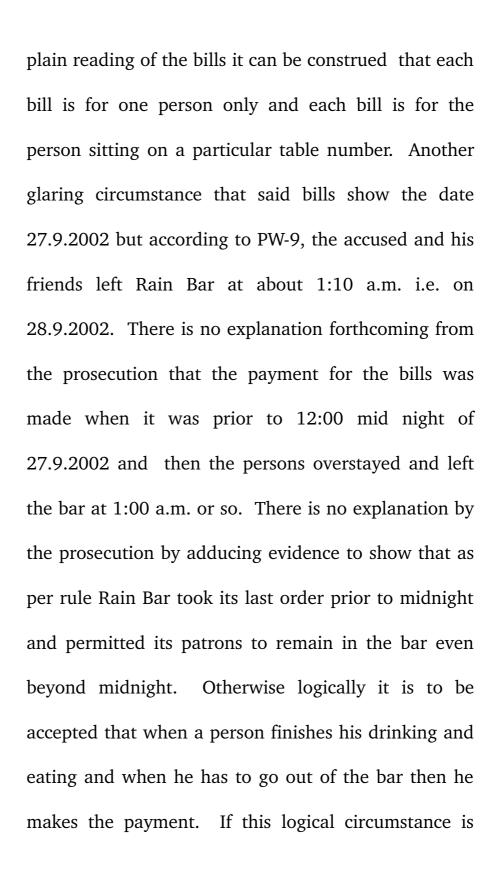
85. Now apart from the above evidence there is another material brought on record by the prosecution by way of four bills which are marked as Exhibit-50A, 50B, 50C and 50D during recording of evidence before the Sessions Court. At this juncture it is to be mentioned that the trial Court had marked these 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



"Prior to recording of my statement, police had visited the restaurant and told us to give the bills of date



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 The total of these bills is Rs.6376/-. liquor. 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



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

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

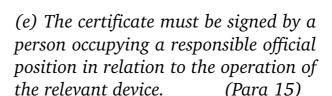
"Electronic record produced for the inspection of the court is documentary evidence Under Section 3 of the Evidence Act, 1872 (the Evidence Act). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in



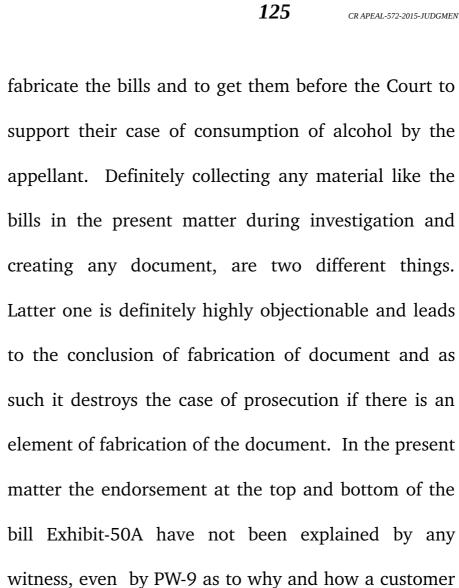
accordance with the procedure prescribed Under Section 65-B of the Evidence Act. The purpose of these provisions is to sanctify secondary evidence in electronic form generated by a computer. The very admissibility of electronic record which is called as "computer output", depends on the satisfaction of the four conditions prescribed under Section 65-B(2) of the Evidence Act. (Paras 7 and 14)

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



- 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



will write on a bill or even a copy of the bill that the

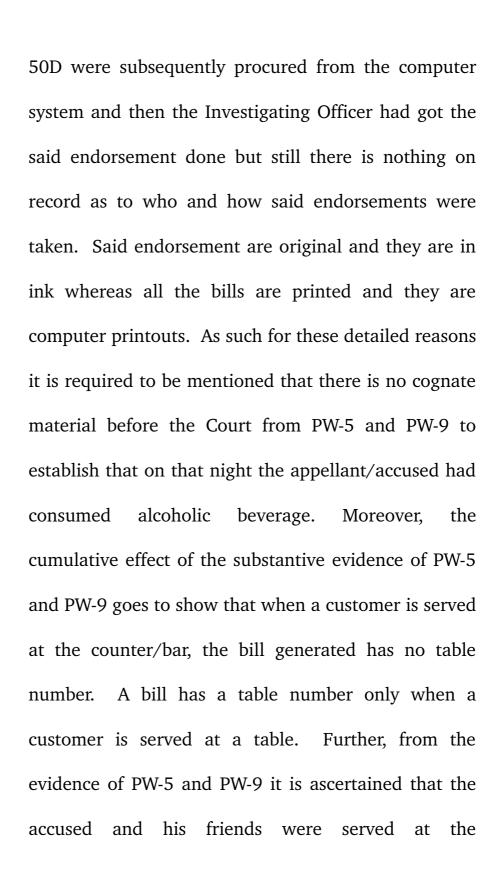
bill is for himself and his friends and how the

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



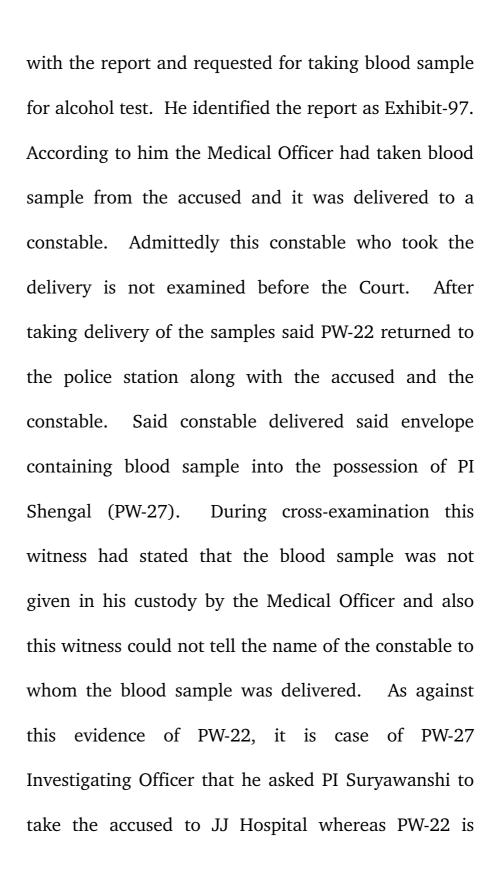
bar/counter. Then in light of such facts, the prosecution has failed to explain how the bills with table numbers (that too four different table numbers) indicate or prove that the accused was drunk. Further, the prosecution has not disowned these witnesses.

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

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.

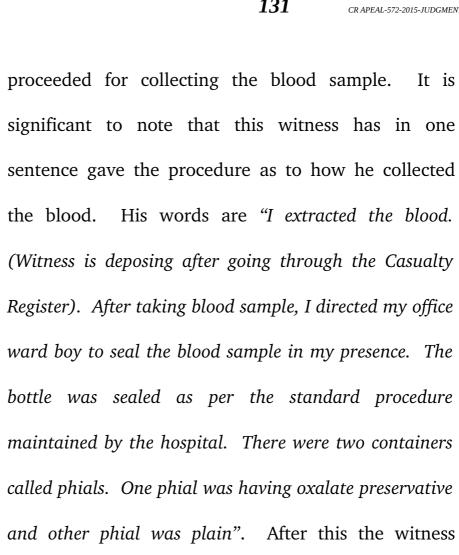
EXTRACTION OF BLOOD & ITS CHEMICAL ANALYSIS:

92. PW-20 had drawn the blood sample of the appellant/accused JJ Hospital at 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



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 JJ Hospital along with the to 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



further deposed that "Bottles(phials) were capped by

lakh was put on the upper and lower end of both the

phials. The labelling of EPR number about, date, time

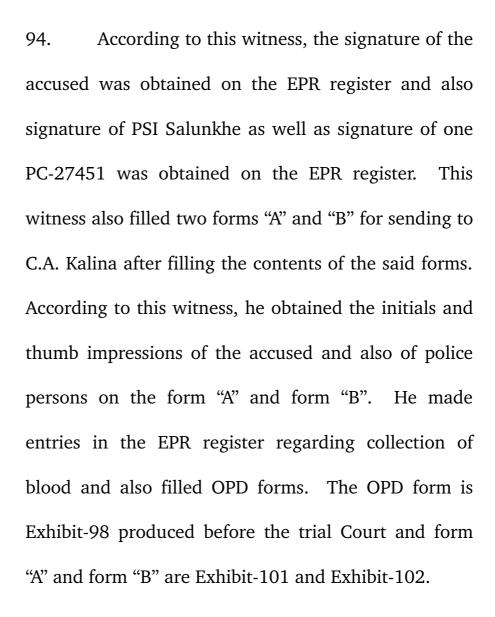
and PC number was done and it was wrapped around

the two phials. I also put my signature on the label."

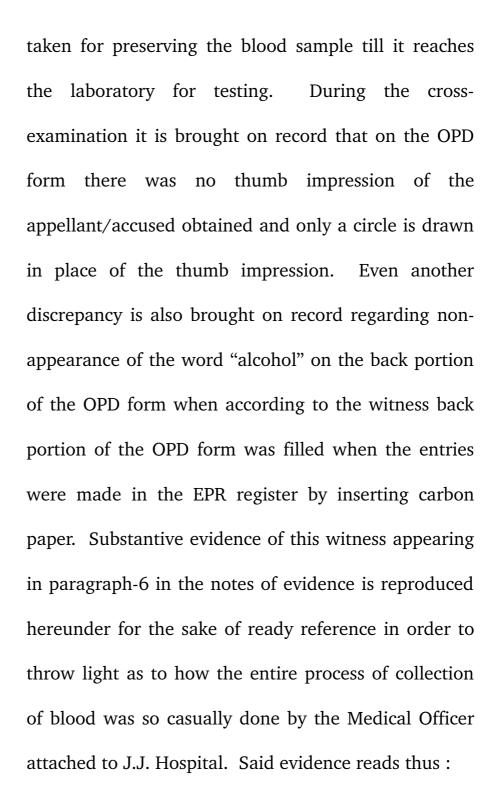
white colour bandage (sticking plaster).

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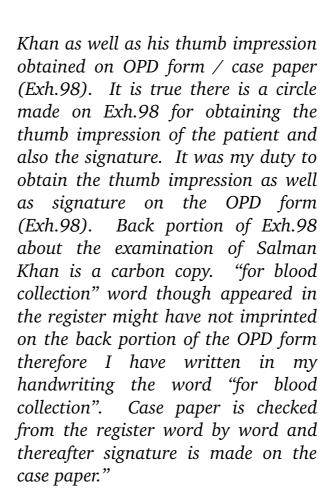
The seal of



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

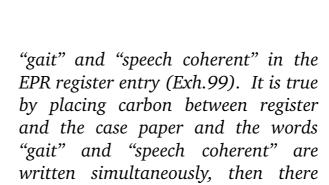


"There is no signature of Salman



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



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



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."

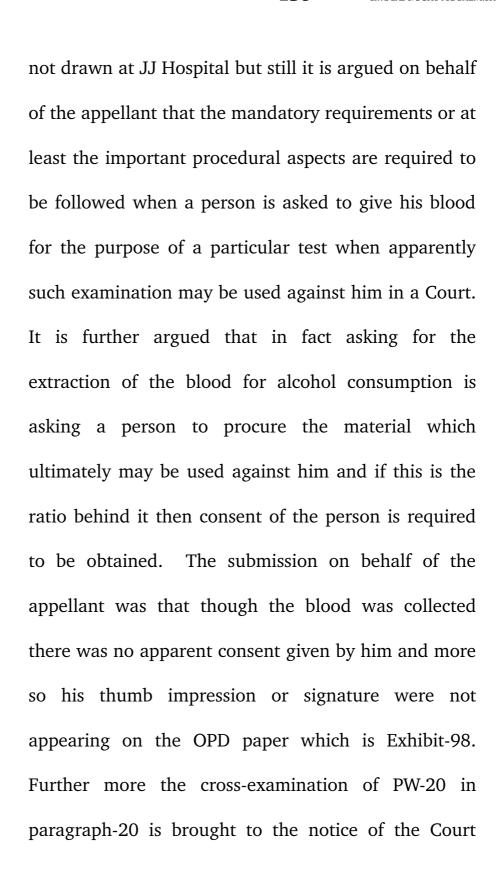
. Further this witness has answered :

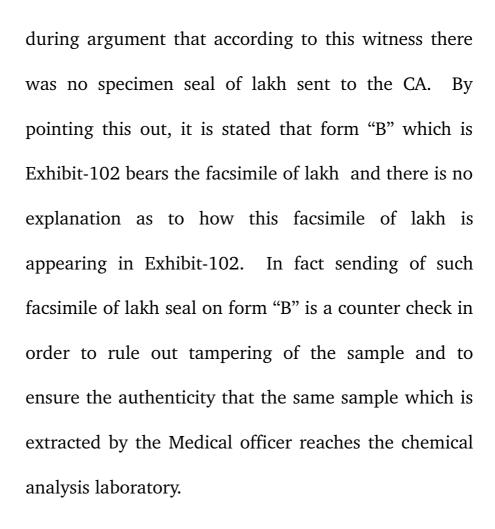
"It is true from the case paper Exh.98 it cannot be said that the patient Salman Khan was smelling alcohol. According to me the word "alcohol" was not printed on the back portion of Exh.98. I cannot say why the word alcohol was not imprint on the back portion of Exh.98. I had compared the entries mentioned 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"

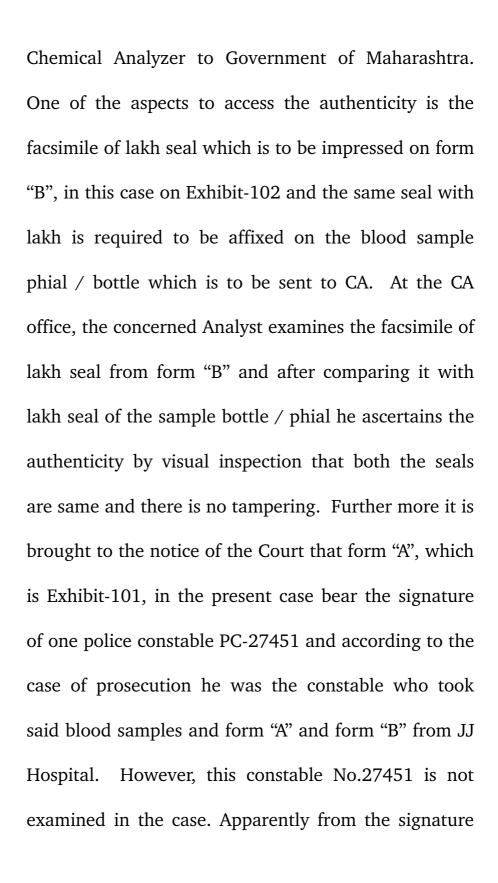
in the OPD papers and apparently such word "alcohol" could not have been also present in the original EPR register. The fact remains that PW-20 has not given any explanation as to why the word "alcohol" is missing from the backside of the OPD paper which is Exhibit-98.

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





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



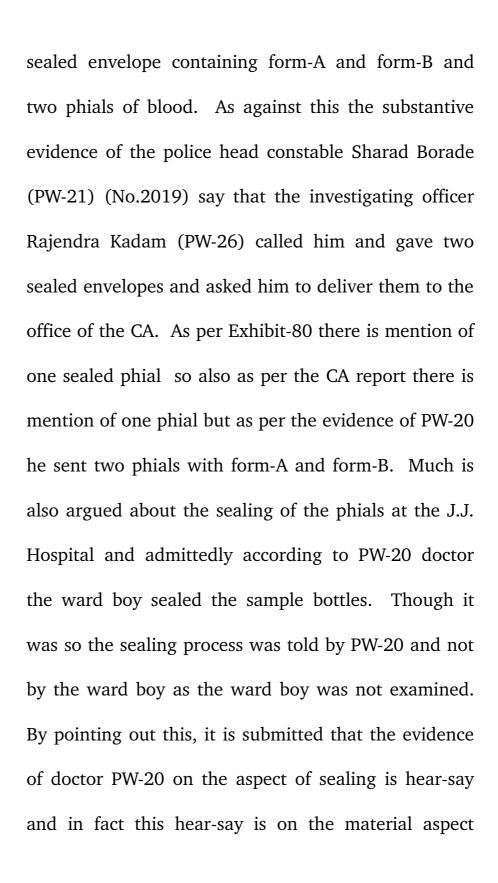
appearing on Exhibit-101 form "A" said PC-27451 is the same constable by name Mane but significantly enough the number of another police constable is mentioned on both these forms "A" and "B" i.e. 101 and 102 and the said constable's PC number is 2985 from Bandra police station.

- 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

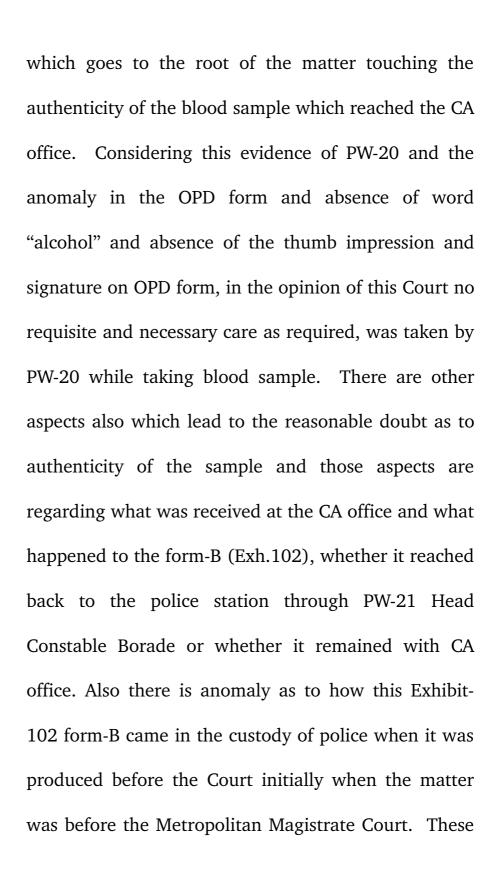
established then the biological evidence is not trustworthy and is required to be discarded as apparently it is the evidence as that of an expert witness. Following authorities are cited on behalf of the appellant:

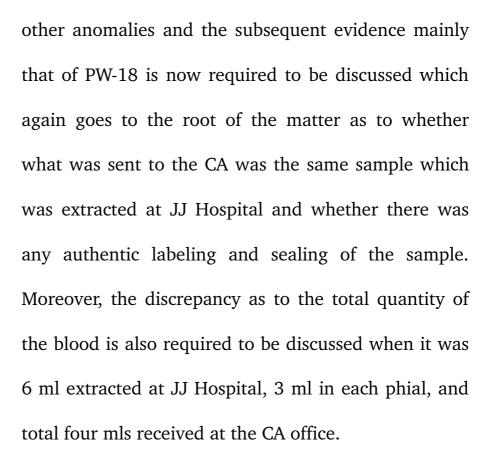
- [I] MANU/MH/1360/2014 [Manoj Mahadev Gawade Vs. The State of Maharashtra]
- [II] 2012 SCC OnLine Del 3375 [Vinay Kumar Vs. State]
- [III] 212(2014)DLT99
 [State through Reference Vs. Ram Singh & Ors. AND Pawan Kumar Gupta Vs. State]
- 103. Another factual position is brought to the notice of this Court 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

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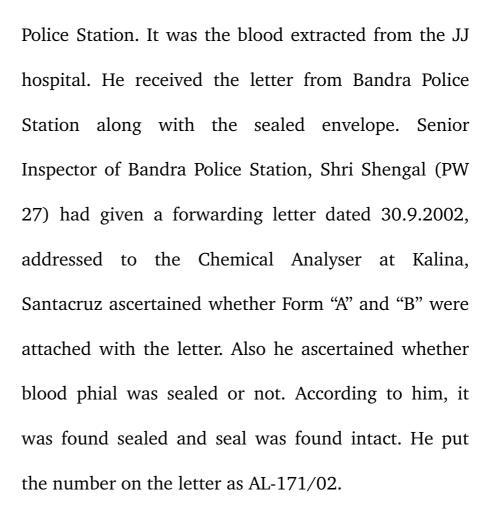


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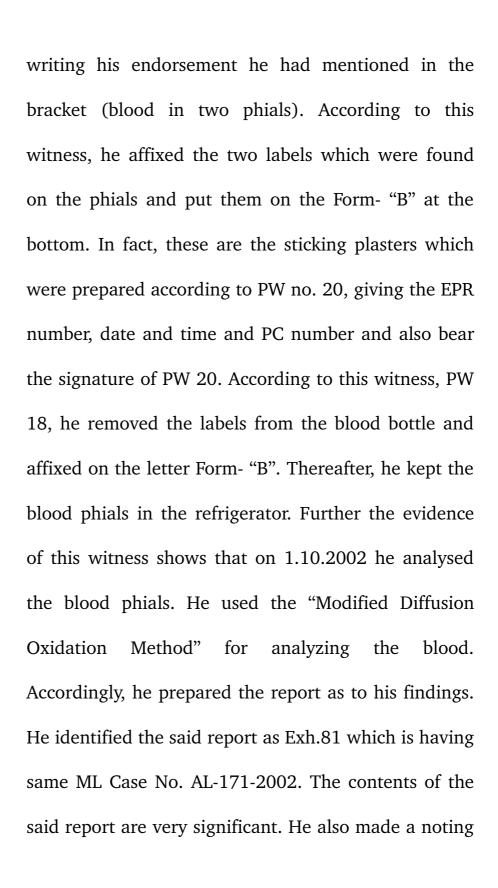




104. In view of the above, now the evidence of PW-18 is of much importance. PW 18 Dattatraya Khobrajirao Bhalshankar was working as an Assistant Chemical Analyser at Forensic Science Laboratory at Kalina, Santacruz. As per his evidence he had received one case from Bandra Police Station on 30.9.2002. He received one bottle along with letter from Bandra



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

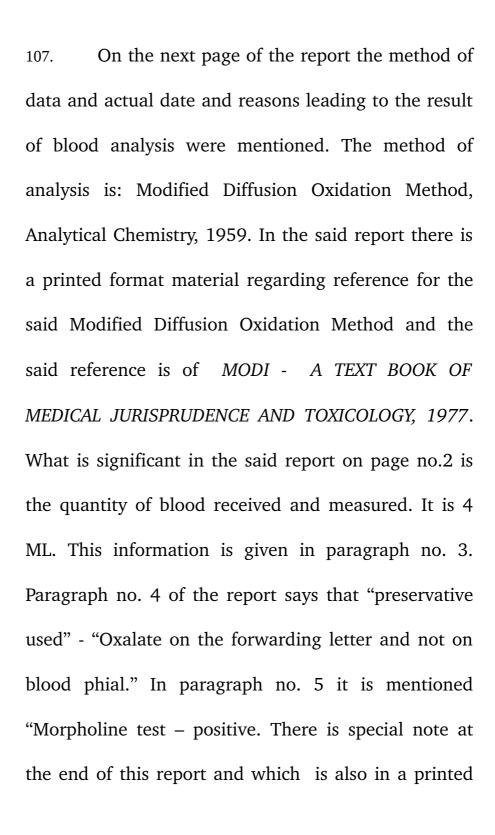


on the report there is specific mention of one sealed phial received from Police Naik No. 20419. This CA report is addressed to the Medical Officer, Sir JJ Group of Hospital, Mumbai. Opening words of this report reads as under:-

"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."

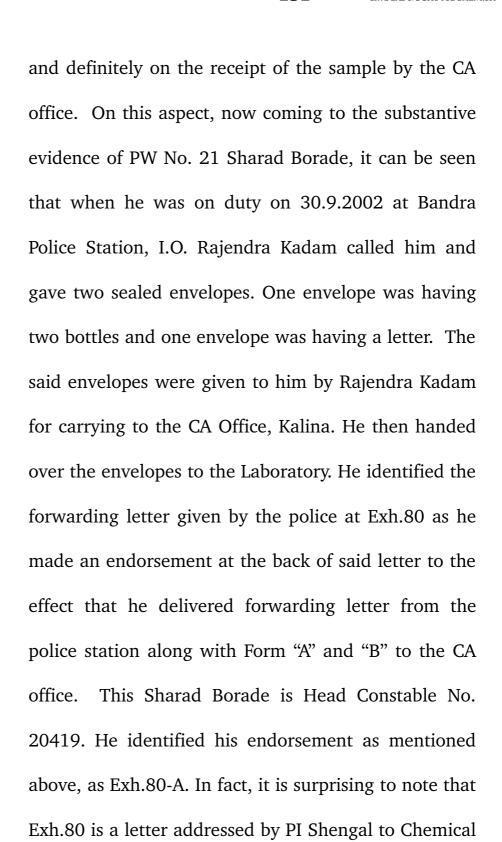
106. The said CA report is in fact a printed format where the variables are the letter number, date, name of the person, date of receipt, EPR number and the name of the messenger and the quantity of the article. The final result of the test of the blood is as under:

"The blood contained 0.062 per cent W/v of ethyl alcohol (Sixty Two mg)."



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."

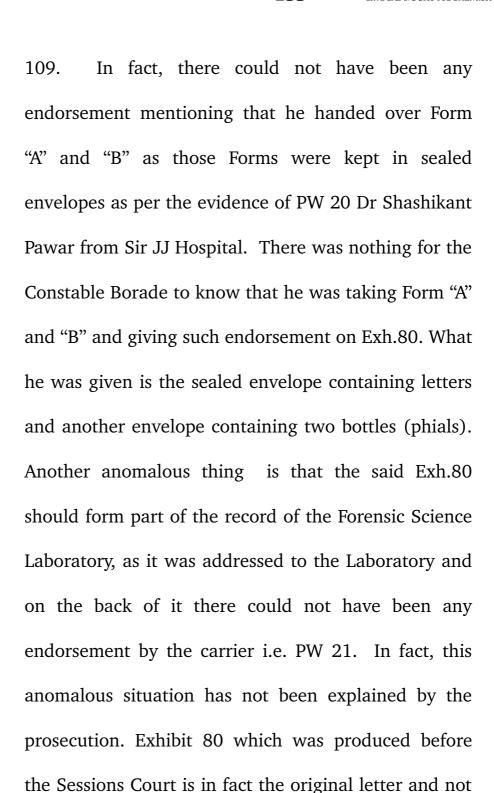
By pointing out these specific contents of the 108. CA report Exh.81, various points were raised on behalf of the appellant by learned Senior Counsel. So also the attention of this Court is drawn towards the specific evidence of PW 18 that he removed the sticking plasters from the sample bottle containing 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



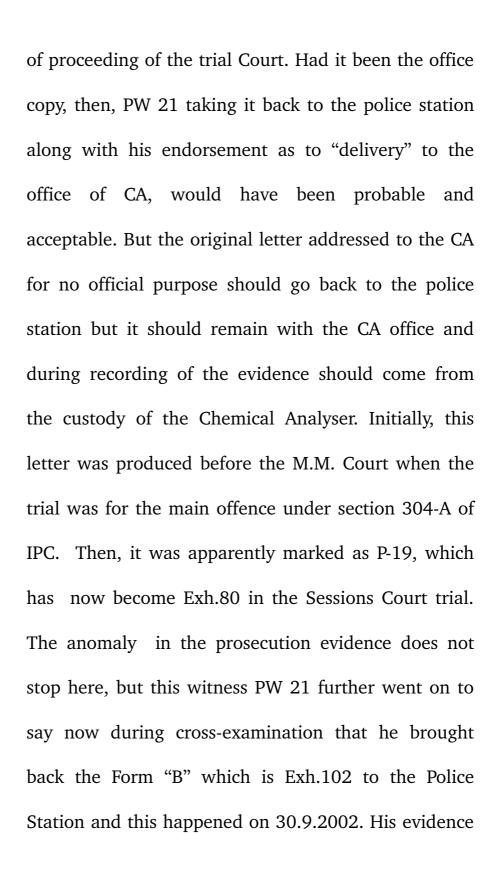


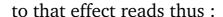
Analyser, Kalina Santacruz. However, the acknowledgement or a sort of endorsement made by PW 21 i.e. the Constable who carried the sample and the letters to CA, is appearing on the back of the same letter and, in fact, he got back that letter to the Police Station that is what is his evidence at the 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 letter along with acknowledgement to the Investigating Officer about delivering the bottles and the letter to Laboratory, Kalina."



the office copy. This fact is ascertained from the record



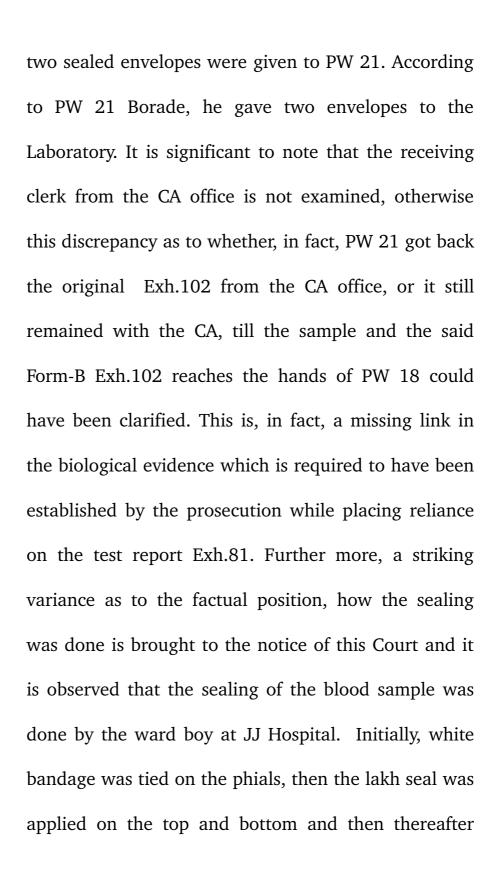


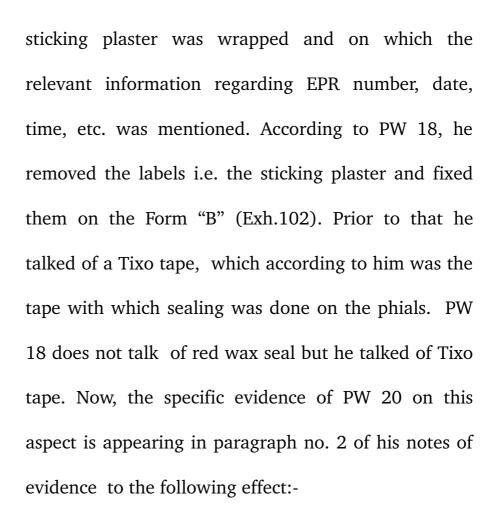
"Exhibit 102 shown to the witness." clerk receiving put endorsement about receipt of the bottle and also my buckle number was mentioned in the endorsement, (B.No. 80429). Buckle number was mentioned in the endorsement made by him and the same Form was returned to me. I then submitted the same Form to 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

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.

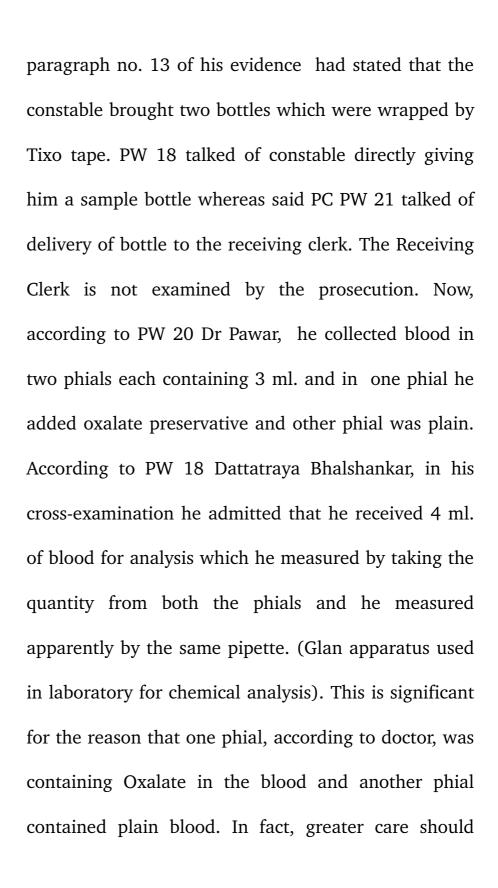
111. By pointing out the above, the evidence as brought before the Sessions Court, it is submitted on behalf of the appellant that there was manipulation in the blood sample and what was extracted at Sir JJ Hospital had not reached the CA office. In order to further this argument, the following factual 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

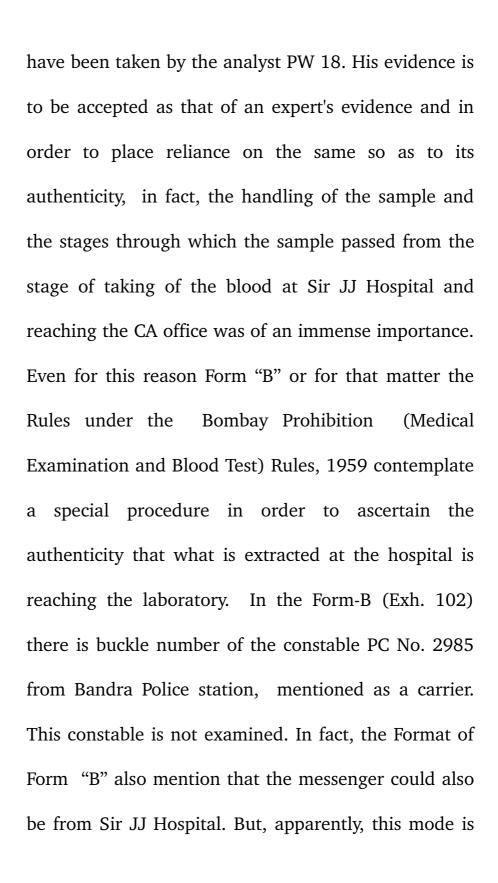


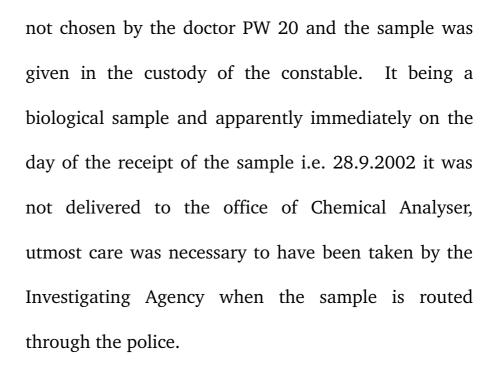


"Bottles (phials) were capped by white colour bandage (sticking plaster). The seal of lakh was put on the upper and lower end of both the phials. The labeling of EPR number about date, time and PC number and it was wrapped around the two phials".

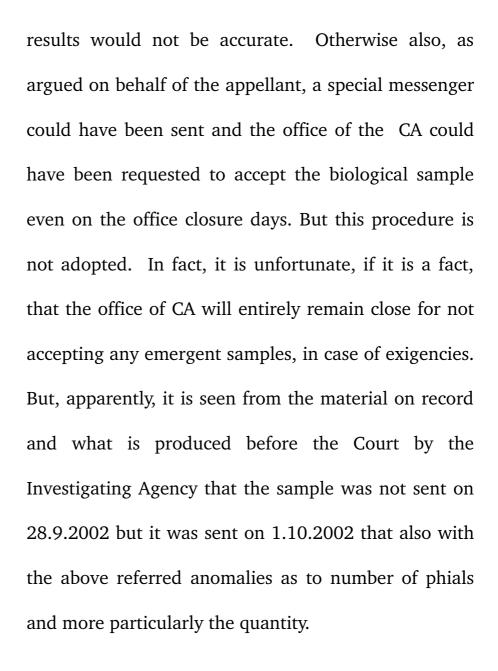
112. As against this, according to PW 18 in



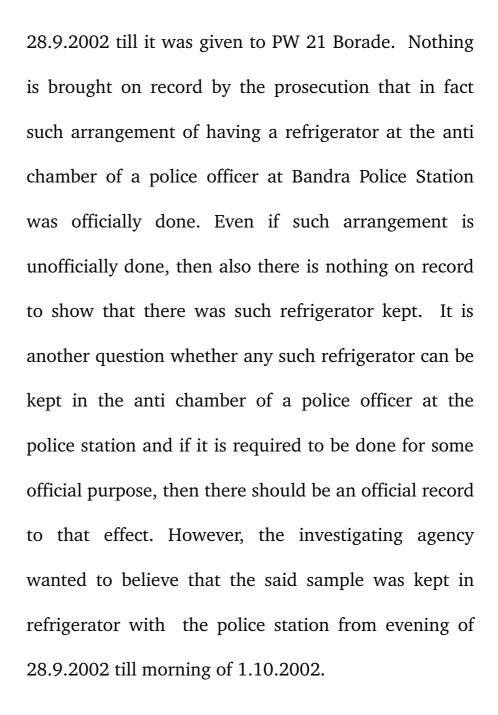




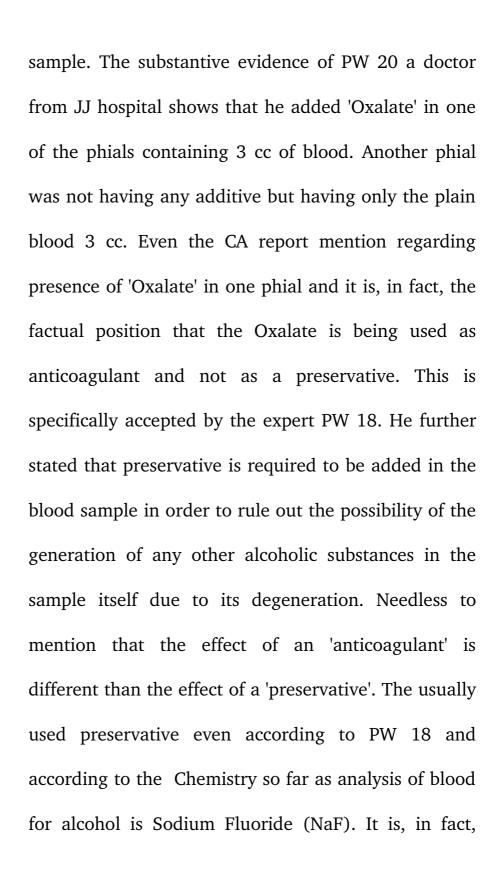
113. On the above aspect, again a glaring anomaly is required to be considered. Though it is the case of the prosecution that on 28.9.2002 and 29.9.2002, the CA office was closed as these were the days falling on Saturday and Sunday and though the sample could not have been sent immediately to the CA, 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

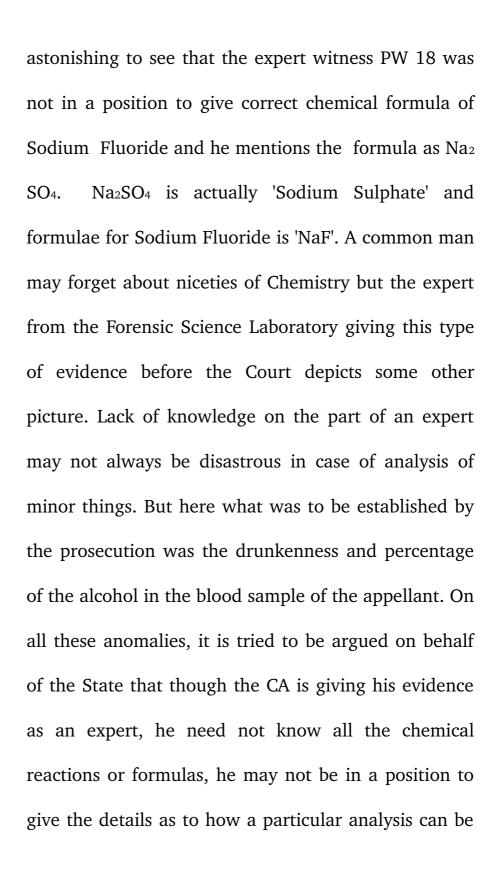


114. Again the anomaly does not stop here. There is the evidence of the IO PW 27 that the sample was kept in his anti-chamber in refrigerator, from



as to whether there was any preservative in the blood



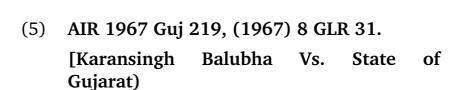


done. But it is to be seen whether he has followed the procedure which was prescribed under the law.

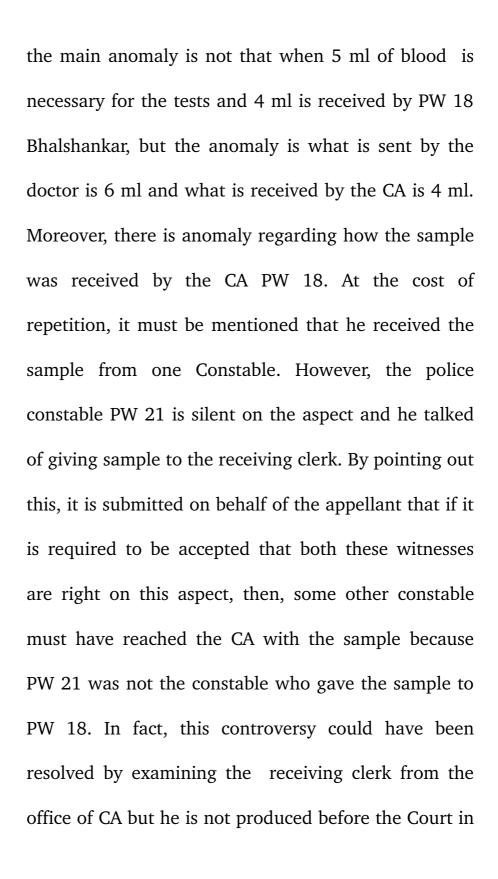
116. According to the prosecution, the CA report Exh.81 is required to be accepted as to containing the alcohol twice the limit than that is permitted by law. To further this argument, it is submitted on behalf of the State that even the Rules 4 and 5 under the Bombay Prohibition (Medical Examination 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

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]



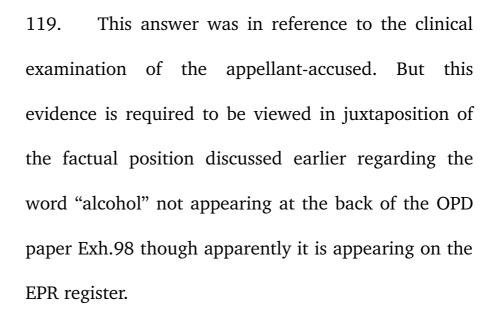
- (6) 1980 Bom.C.R. 947[Suresh Shankar Chavan Vs. The State of Maharashtra]
- (7) AIR 1980 SC 1314
 [State of Rajasthan Vs. Daulat Ram)
- (8) AIR 1967 Bombay 218
 [Narayan Krishnaji Marulkar & Anr Vs. State]
- (9) 1986 (3) Bom.C.R. 341 (Aurangabad Bench) [The State of Maharashtra Vs. Raghunath Madhavrao 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



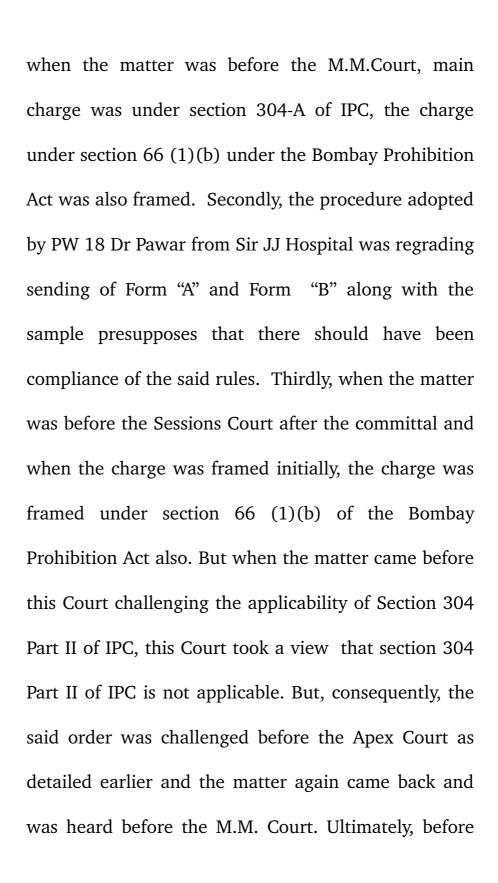
order to establish the link and to suggest that the constable PW 21 is not giving the correct evidence but he gave the sample to PW 18 directly. However, the fact remains that whatever evidence adduced before the Court is required to be viewed with the anomalies which are pointed out above.

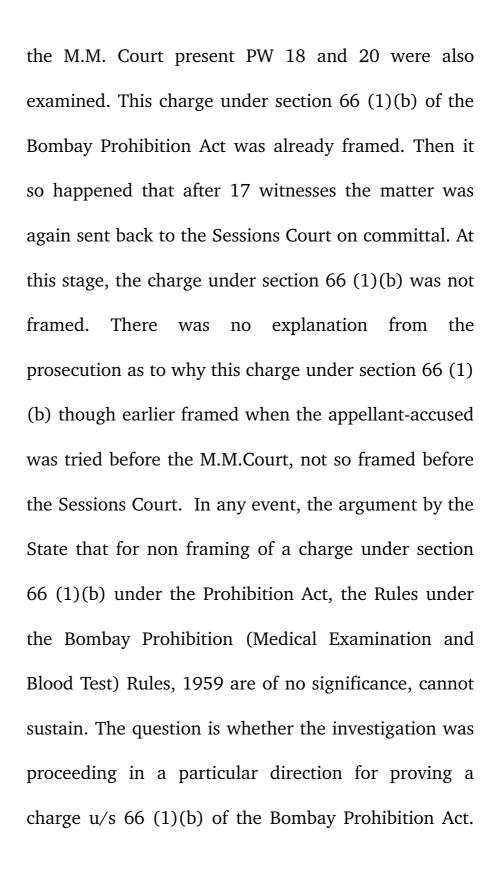
118. Again on the above aspect as to the drunkenness and testing of the blood of the appellant for alcohol content, it is again significant to note that except Dr Pawar PW 20, no other witness of the prosecution is saying that the accused was smelling of alcohol. Even Ravindra Patil did not mention this 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:-

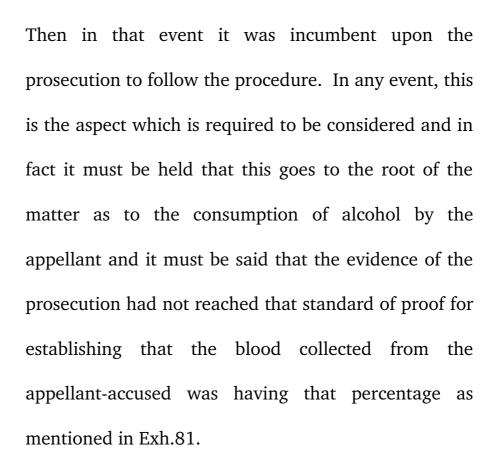
"I noticed breath was smelling alcohol."



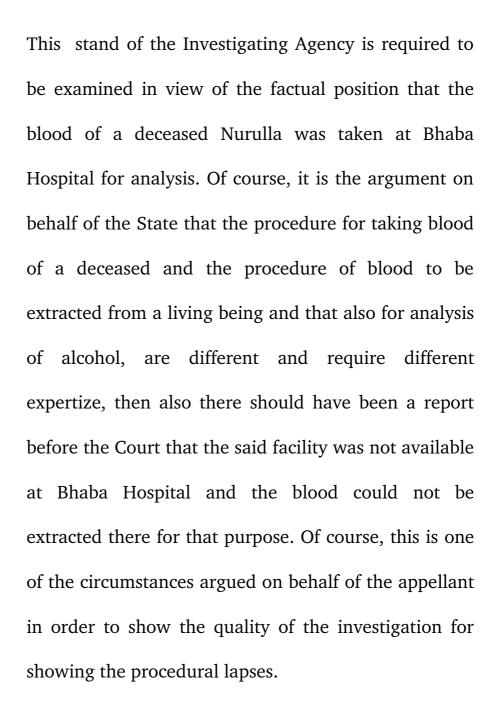
120. One more aspect on this alcohol consumption and the tests and the precautions to be taken while taking the sample and the carrying out the analysis, is required to be mentioned. It is argued on behalf of the State that the rules under the Bombay Prohibition (Medical Examination and Blood Tests) 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







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.



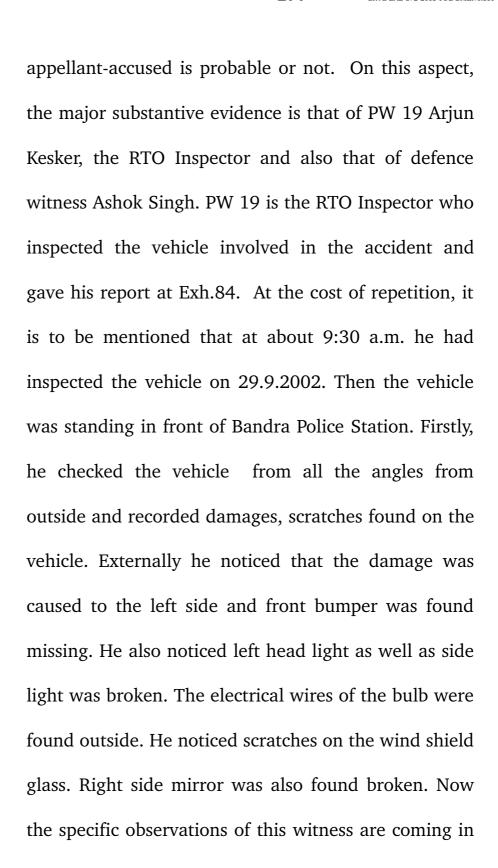
122. This aspect was also dealt with before the Sessions Court. However, apparently the Sessions

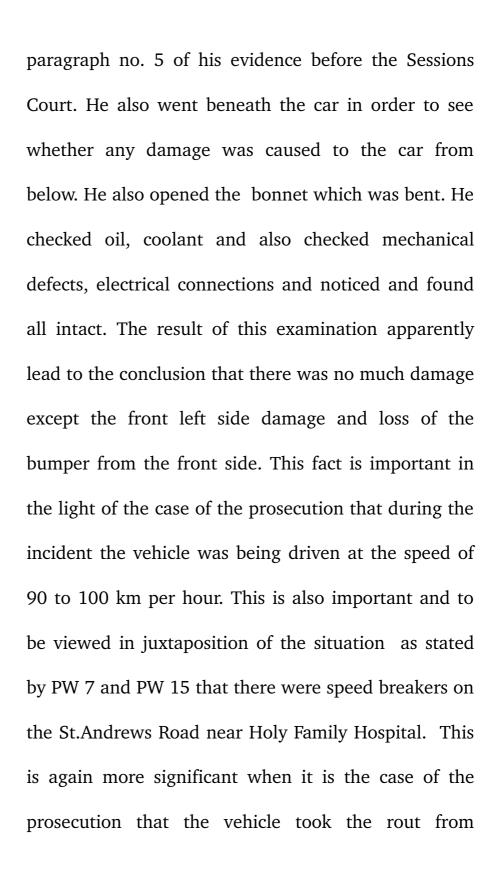


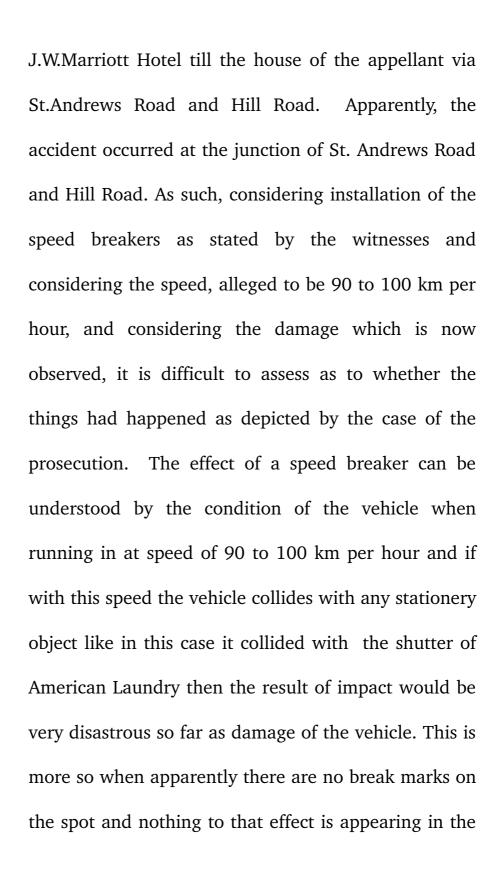
Court came with a different analysis saying that the judicial notice could have been taken that if the blood is extracted from a person then always there should be a sticking plaster on his arm or on the part from where the blood is extracted. By no stretch of any imagination can it be said that this 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.

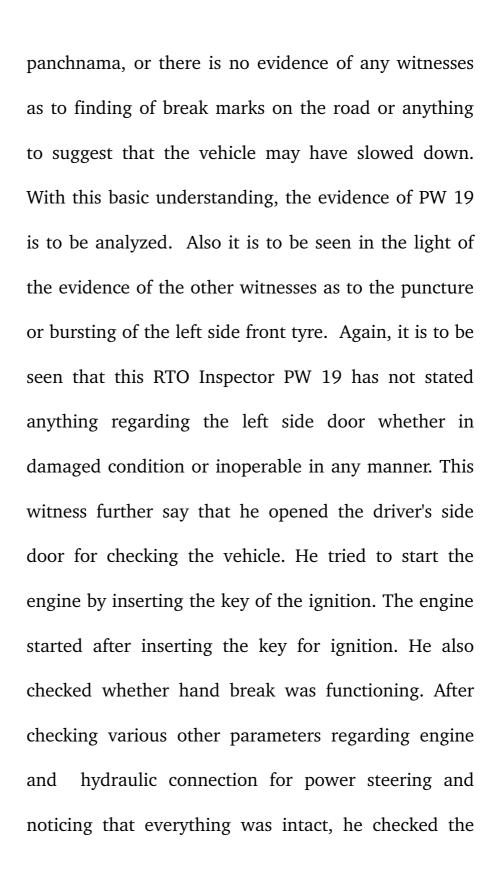
TYRE BURSTING:

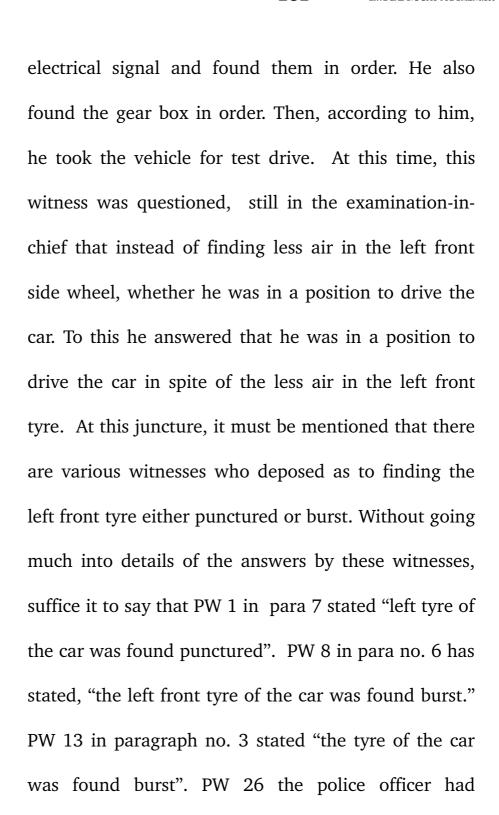
123. Now, coming to the third major aspect as to whether it was a pure and simple accident due to bursting of the left front side tyre of the car and whether the said defence raised on behalf of the









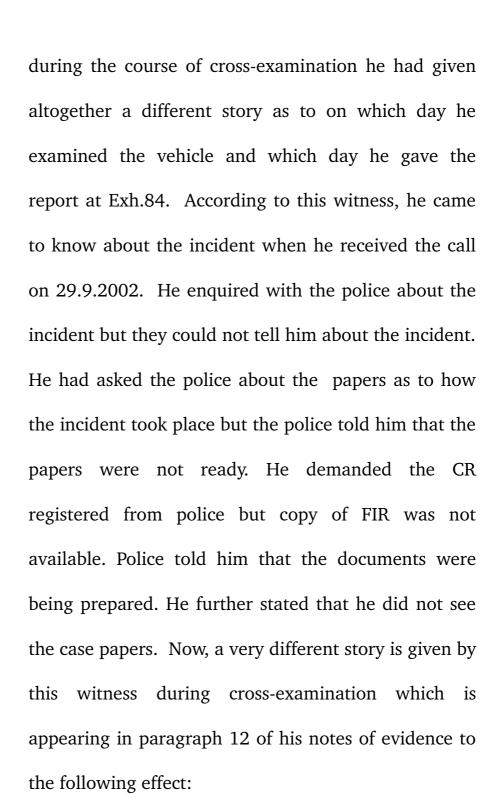


specifically stated and agreed that the vehicle involved

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."

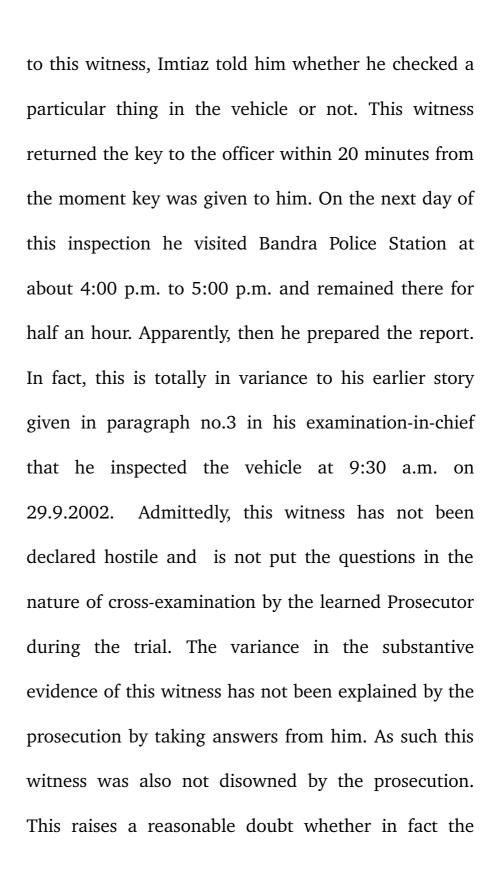
- By the above, this witness accepted that the tyre was burst but he did not take any measures to find out the cause, much less to ascertain whether it was due to the impact of the incident or because of the bursting the incident occurred i.e. whether it is the final result of the incident occurred, or it is the cause for the incident."
- 125. Now coming back to the evidence of PW 19,





"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."

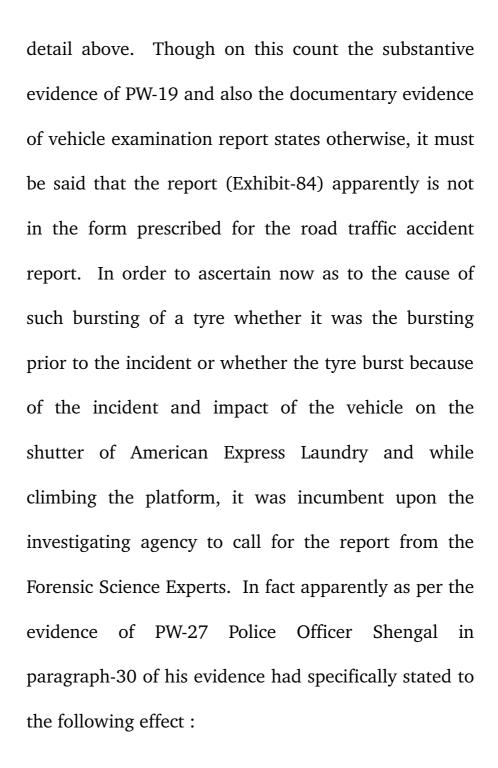
answered that he knew one police officer Imtiaz. He was Inspector working with him and was senior to him. According to this witness, Imtiyaz also accompanied to Bandra Police Station. Imtiyaz came with him as he was residing near Bandra Police station. According to this witness, it happened on 28.9.2002 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



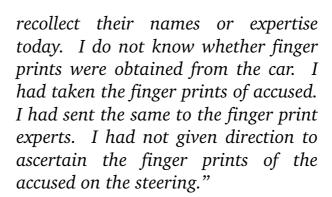
inspection of the vehicle was done by him as stated. More so by driving the vehicle when it was admittedly immobilized and was required to have been taken from the spot of the incident to the police station by towing. Considering these circumstances and the evidence of the other witnesses mentioned above, 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:

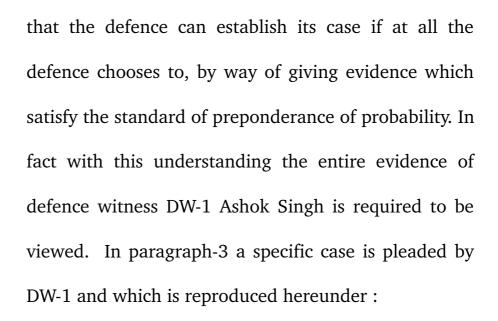
127. In view of the above observations it is ascertained that the vehicle involved in the accident had a punctured / burst tyre and in fact this position has been depicted by various witnesses as discussed in



"I had called the Forensic team for examination of the vehicle. I do not

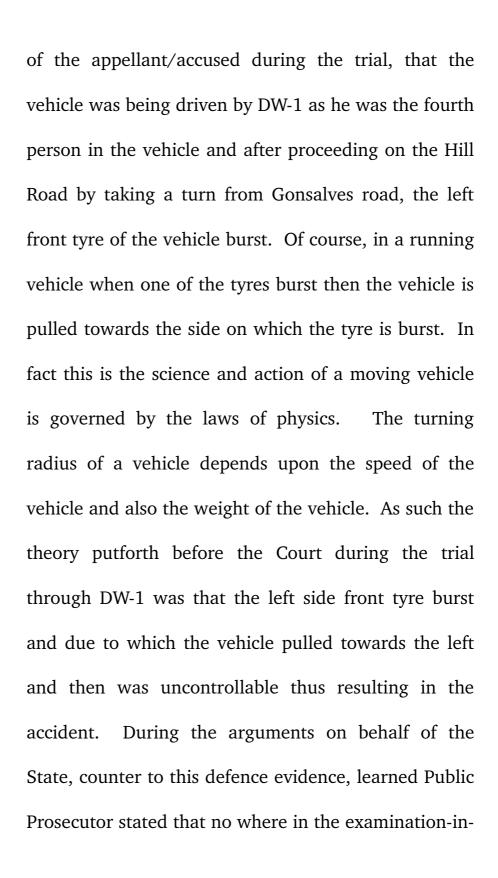


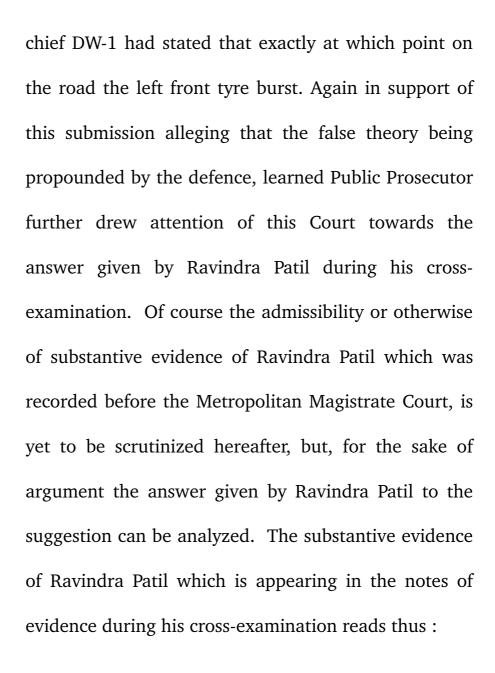
agency calling for the Forensic Science team for inspection of the vehicle then definitely it was required to ascertain the cause of bursting of the left side front tyre. In this context the defence of the accused is required to be seen. Needless to mention that in a criminal trial it is the duty of 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



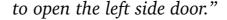
"I then took the vehicle on Linking Road, then on Gonsalves Road and took the right turn for going to Hill Road. Our vehicle came on Hill Road. *Our vehicle proceeded* at distance on hill Road, then the front left tyre of our vehicle burst, thereby our vehicle pulled towards the left side. I tried to 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 Laundry. Our vehicle the then stopped."

129. By placing this defence material before the Court through DW-1, it is tried to establish on behalf





"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



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

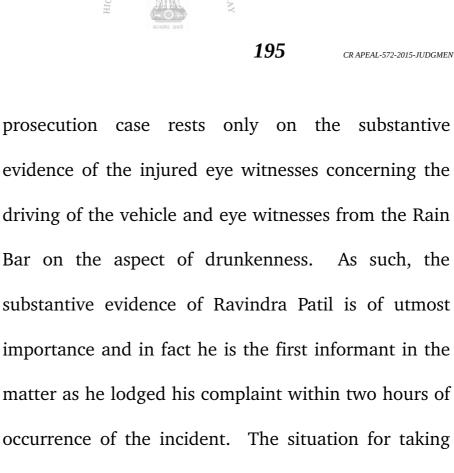
answer given by Ravindra Patil is to be construed as the bursting of the tyre was due to the impact. If there are two views possible, needless to mention that a view which supports the accused is required to be considered still considering the onus on the defence to establish its case on preponderance 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

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



recourse to Section 33 of the Evidence Act occurred

because of the specific circumstances in the present

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

homicide not amounting to murder, specifically a

the offence under Section 304A of IPC.

there was no charge of culpable

As detailed earlier in the beginning of this

195 / 305

Consequently

case.

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 any person proceeding, or before 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;

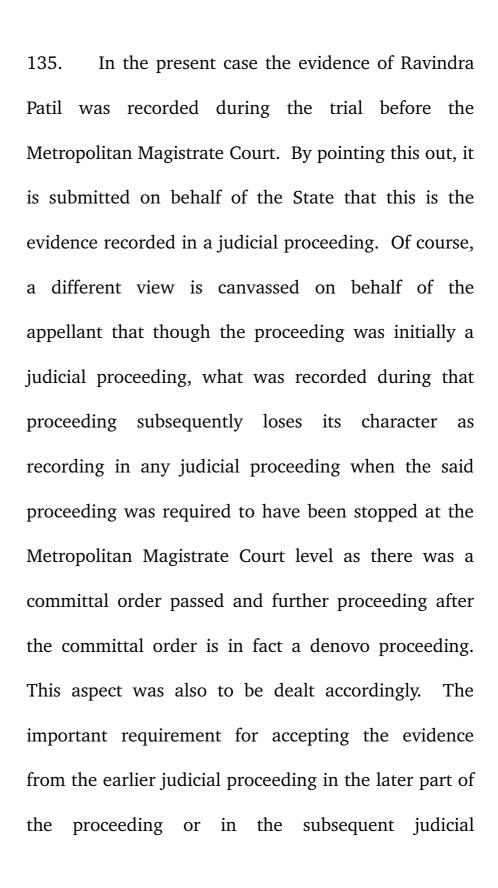


that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

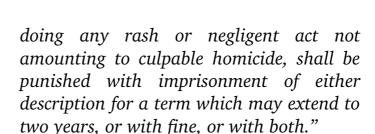
Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

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.



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



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, 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,

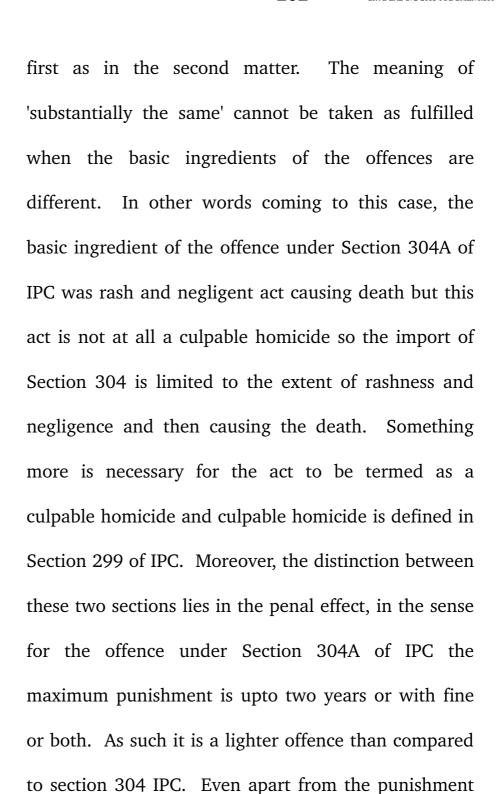
or with imprisonment of either description for a term, which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

CLASSIFICATION OF OFFENCE

Para I : ----

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

By plain reading of these Sections, as 136. 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



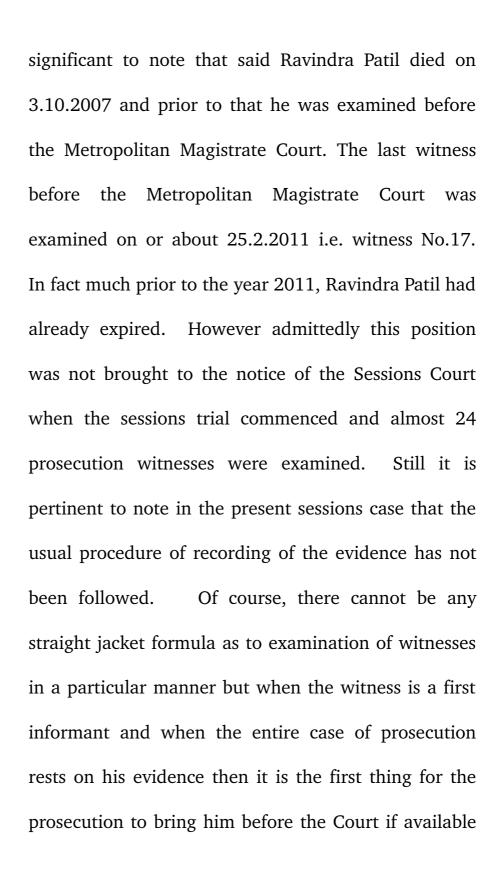
the offence under Section 304A is bailable and triable

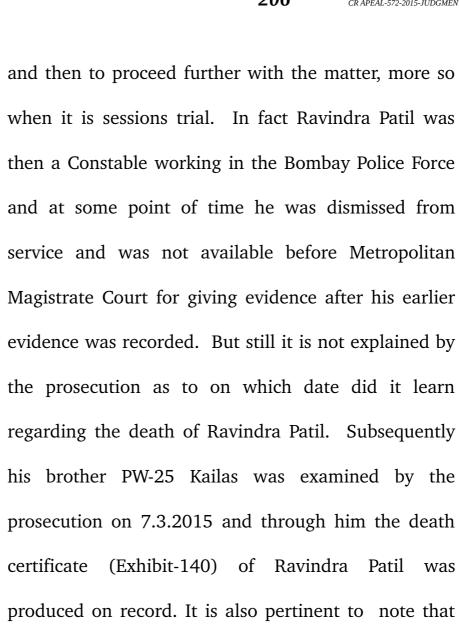


by the Magistrate of First Class whereas the offence under Section 304 Part II, as in this case, attracts the maximum punishment for imprisonment of 10 years or with fine or with both and it is a non-bailable The ingredients to satisfy the respective offence. offences are wholly different. The nature 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. 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.



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





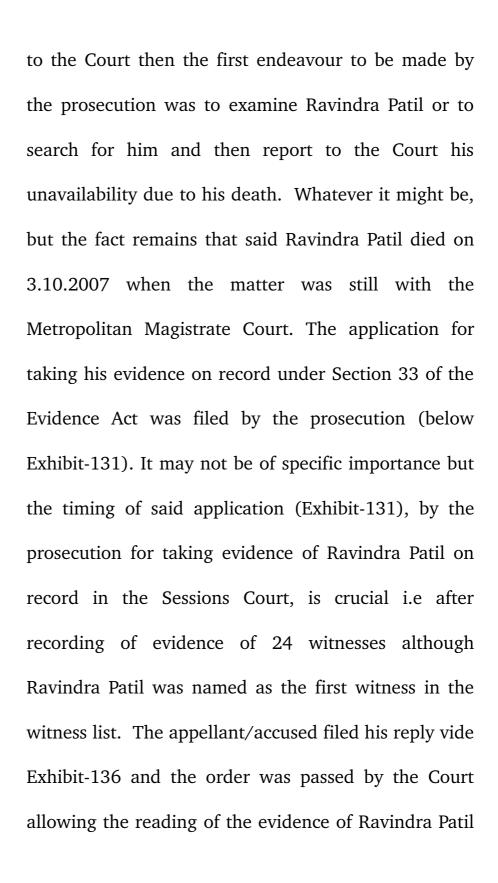
even till recording of 24 witnesses before the Sessions

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



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

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.

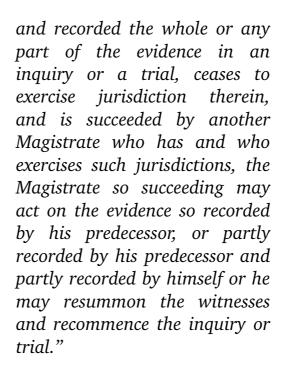
140. Following authority is placed before the Court

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



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

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:



"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 crossexamine 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



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. 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

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.

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

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

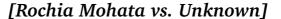


homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304-A has to make room for the graver and more serious charge of culpable homicide."

[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

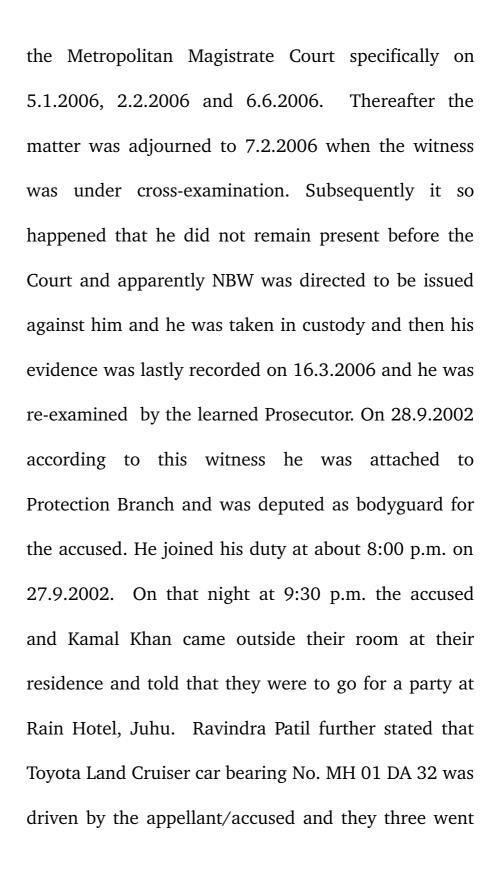


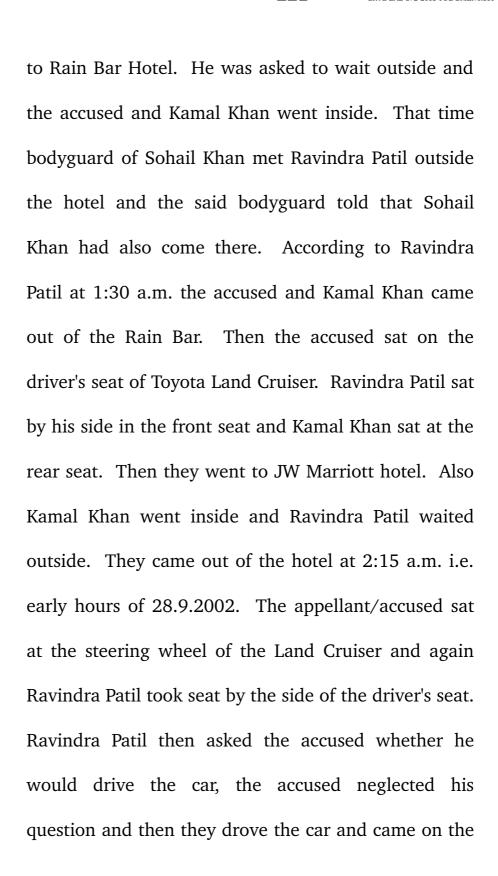
From the said authority, following observations were brought to the notice of this Court by learned Public Prosecutor :

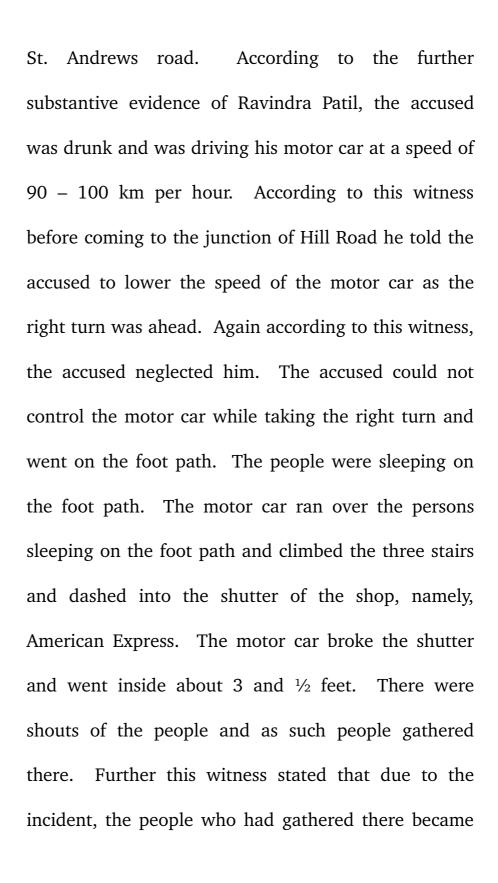
"The question whether the proviso to Section 33 is applicable, that is, whether the questions at issue are substantially the same, depends upon whether the same evidence applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conducted bring about that result to 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."

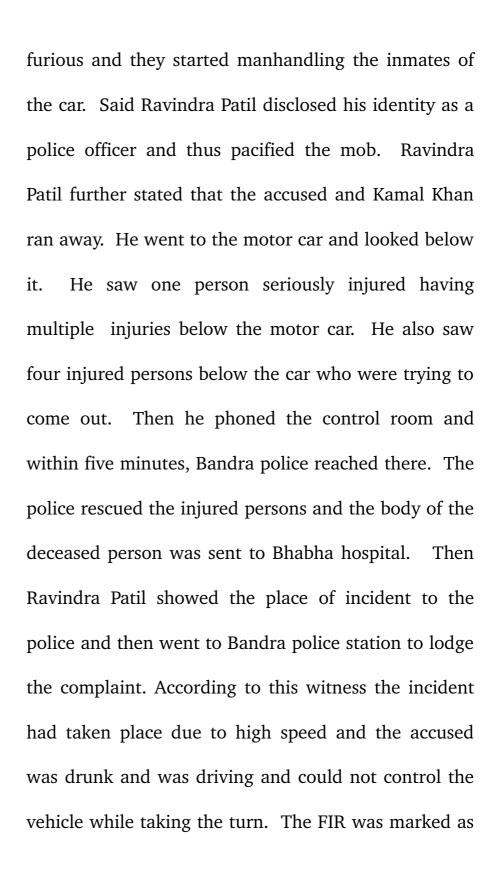
EFFECT OF RAVINDRA PATIL'S EVIDENCE:

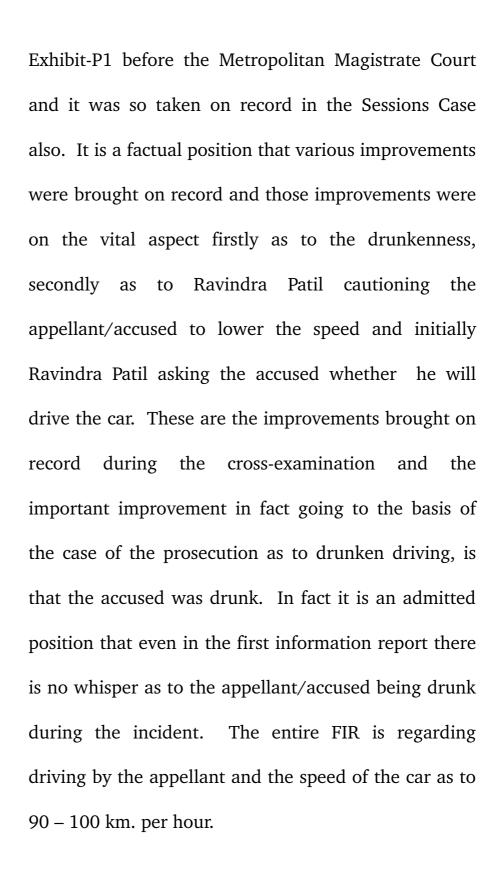
143. Rayindra Patil's evidence was recorded before

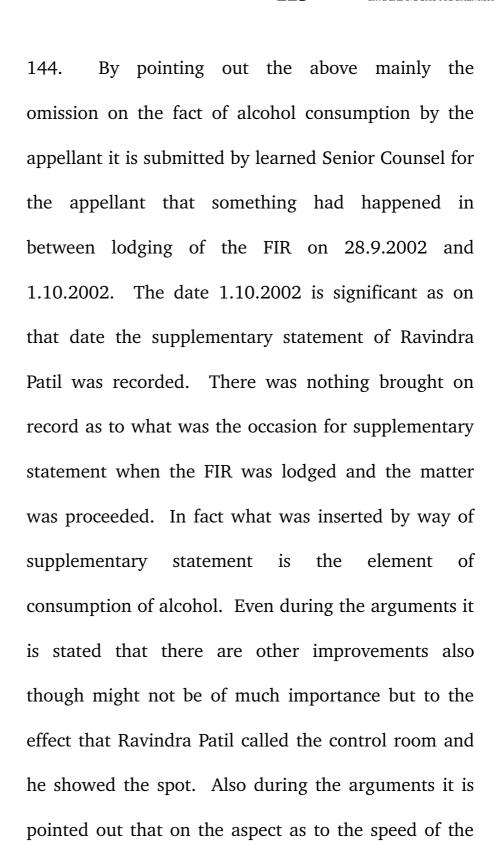


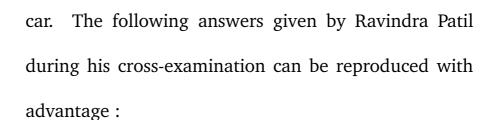






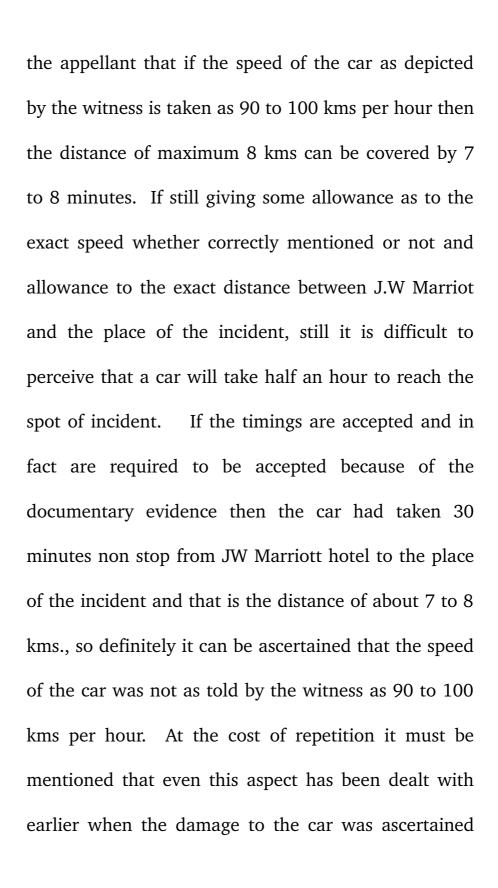






"I cannot say the name of the road on which the incident car driven from Hotel J.W. Marriot to the place of the incident. I am also unable to tell how many turns towards the left side or right side were taken by the incident car during the journey from hotel J.W. Marriot to the place of the incident. 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. 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



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:

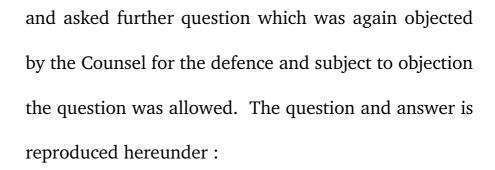
"What did you say before the police?"

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

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."

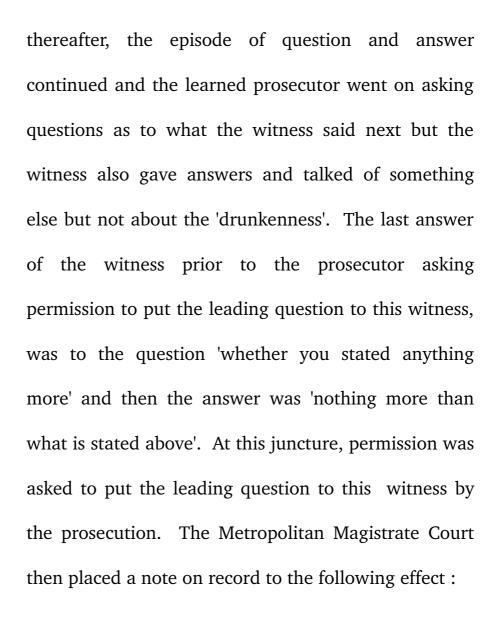
148. Apparently it so happened that with this answer also the learned prosecutor was not satisfied



"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

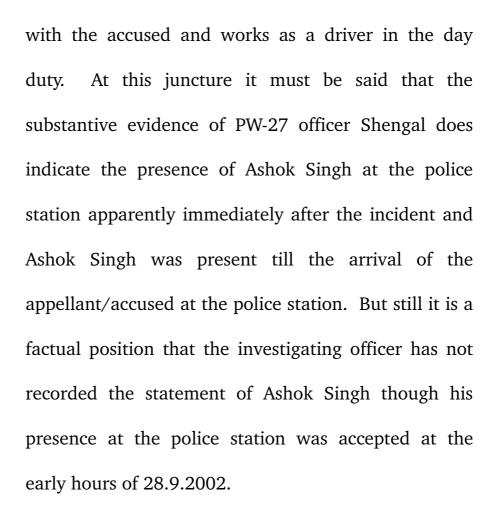


"Heard Spl. P.P. According to him, such question can be put when the witness has not supported on material point and before declaring him hostile after taking his answer. (Considering both the sides, I am of the opinion that such leading question can be asked with the permission of the Court. Hence, objection is over

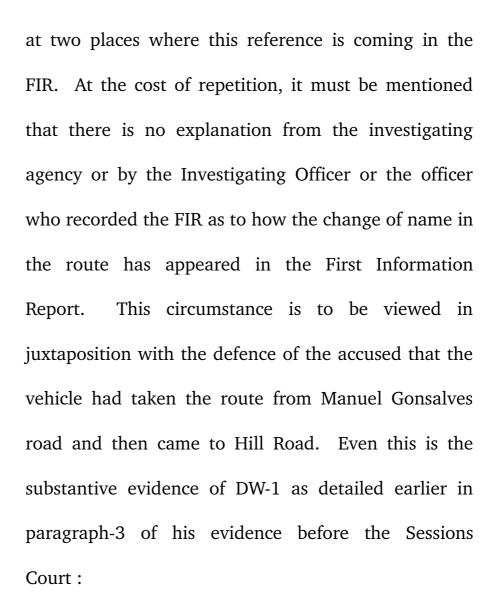
ruled.)"

- 150. Even still the leading questions were asked.

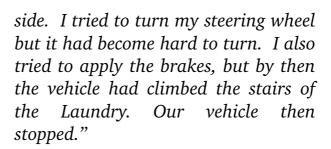
 The last answer of this witness was that "My supplementary statement was recorded as per my say."
- 151. By pointing out the above conduct of the witness Ravindra Patil it is strongly submitted on behalf of the appellant that it is in fact an unnatural conduct on the part of Ravindra Patil to say so, 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



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



"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



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

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.

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

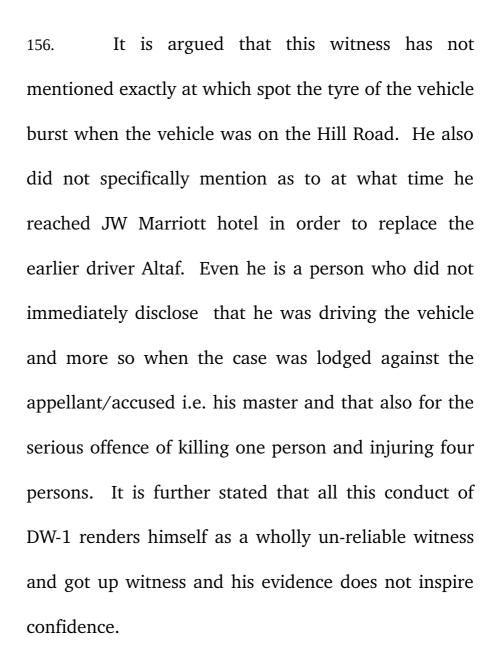


accused but when it comes to partially reliable witness then independent corroboration is needed and if the witness is wholly unreliable then there is no question of asking for corroboration to the version of said witness. In the opinion of this Court Ravindra Patil is a witness who cannot be considered 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

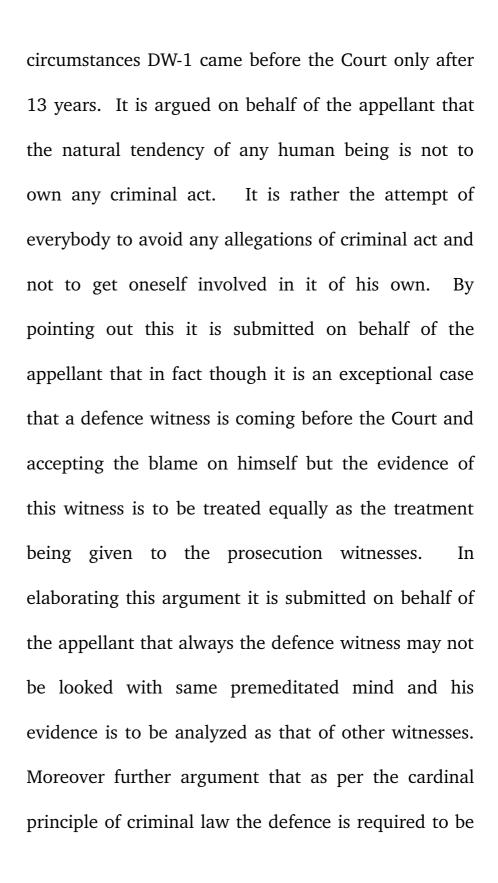
also the parking assistant at JW Marriott PW-12 Kalpesh Verma. Again this circumstance is to be viewed in juxtaposition of the evidence of other witnesses i.e. PW-7 and PW-8 as to mentioning of four persons in the car.

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:

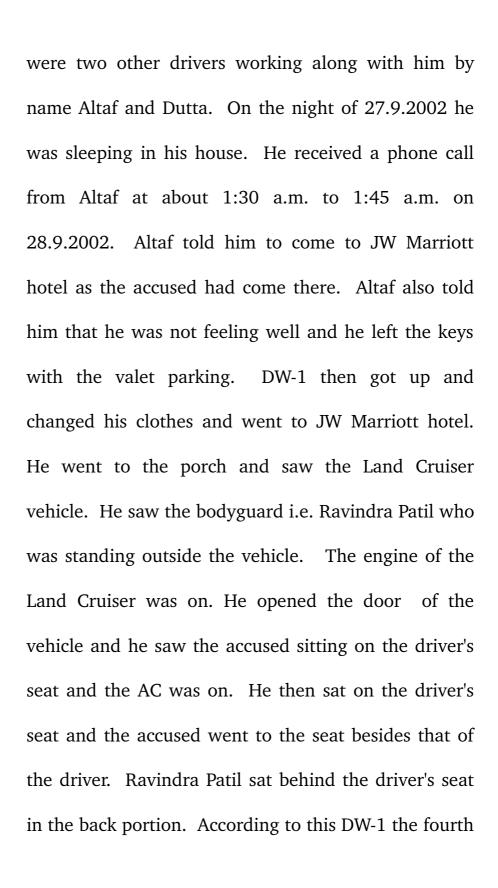


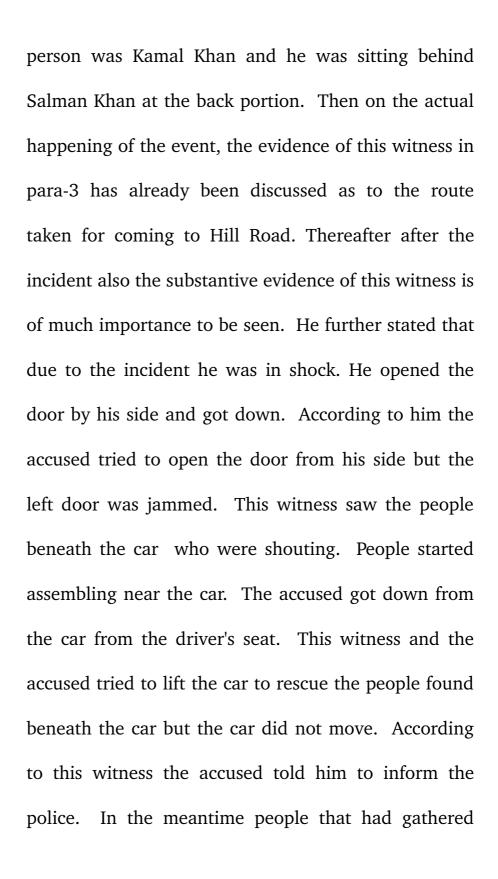
157. Counter to above arguments, various aspects were placed before the Court and learned Senior Counsel argued at length mentioning under what

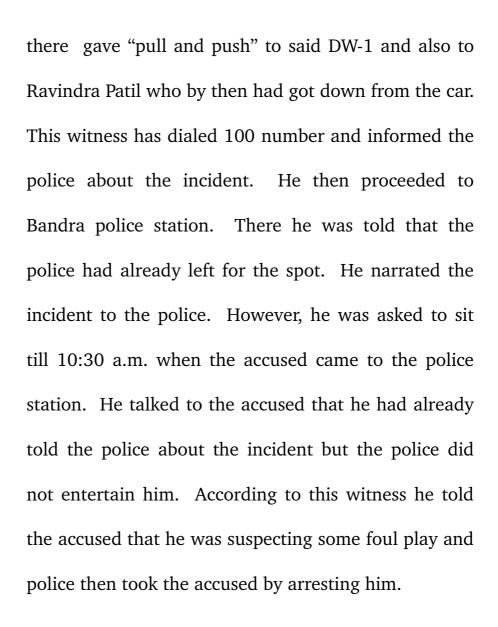


established by placing certain facts which are acceptable on preponderance of probabilities. In support of these submissions following authorities are cited before the Court :

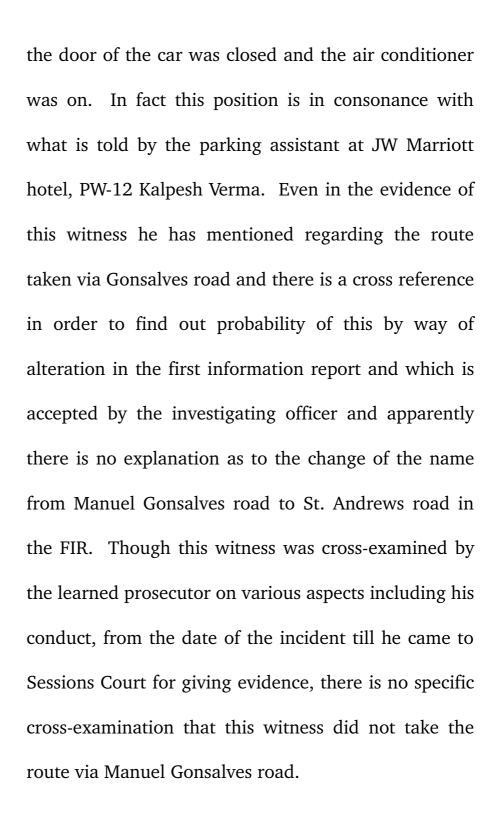
- [I] (2002) 2 SCC 426 [State of Haryana vs. Ram Singh]
- [II] (1976) 4 SCC 233 [Sri Rabindra Kumar Dey vs. State of Orissa]
- [III] 1971(3) SCC 235 [Des Raj Vs. The State of Punjab]
- 158. Further it is argued on the conduct of this DW-1 as to not approaching any Court for saying that he was driving 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

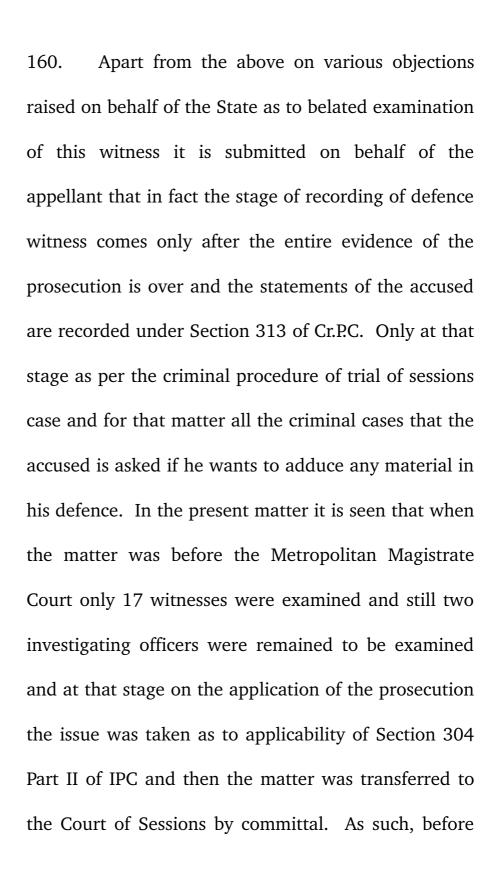


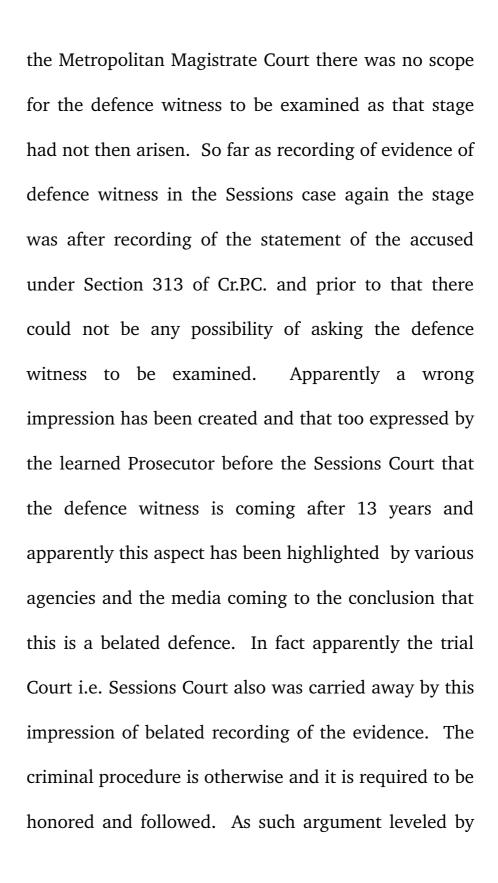


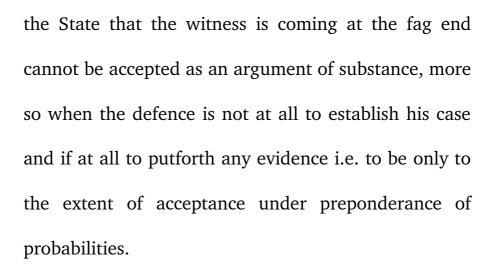


159. In fact, this is the sum and substance of the examination-in-chief of this witness in which he indicates that when he arrived at the JW Marriott hotel he saw the accused sitting on the driver seat and

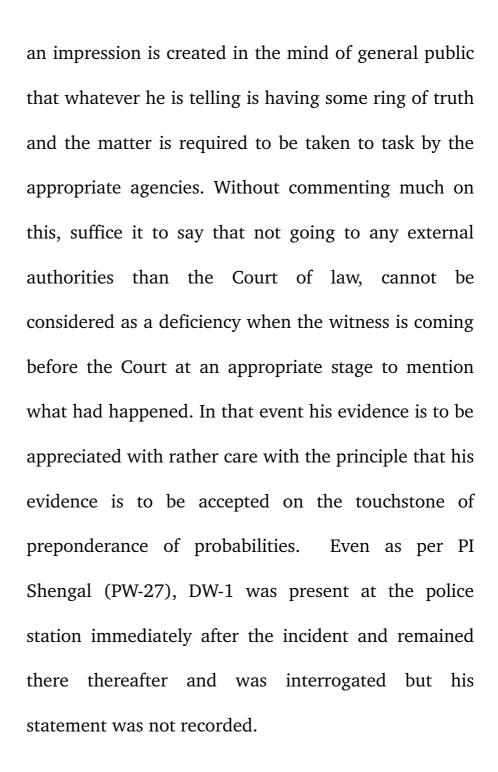




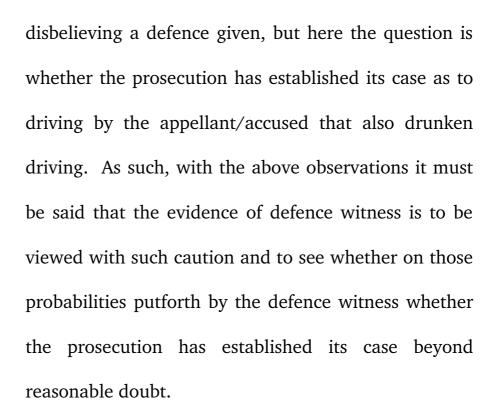




161. Lastly on this point it is argued on behalf of the State that if not before the Court for giving the evidence but at least a person could have approached some other institutions. By this argument learned Prosecutor presupposes that this defence witness should have gone to the Media. In each and 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

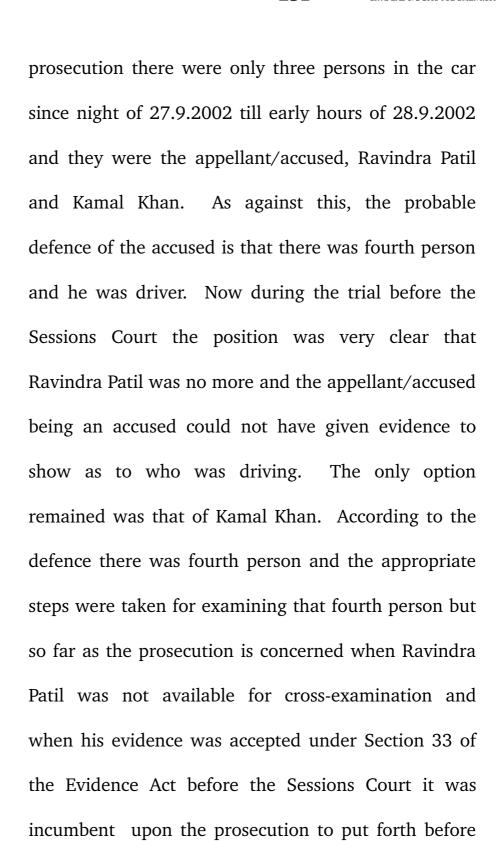


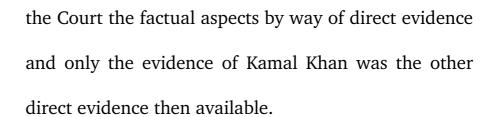
162. Here it is not a question of believing or



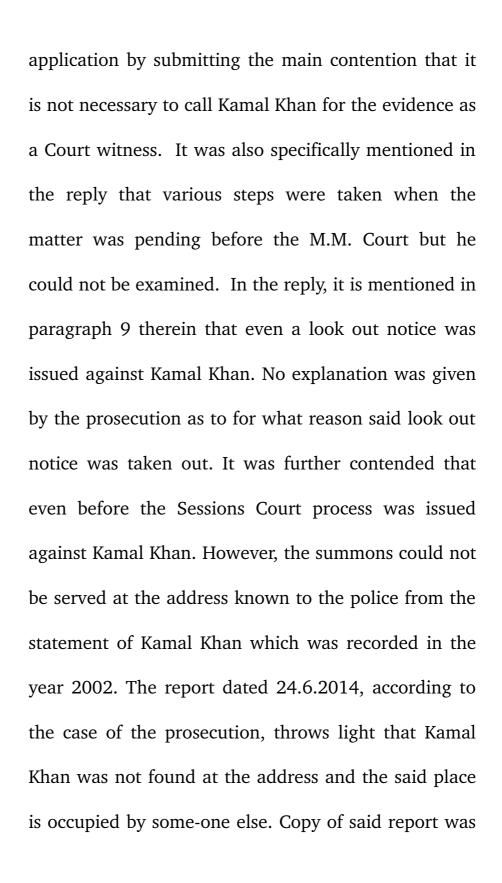
NON-EXAMINATION OF KAMAL KHAN:

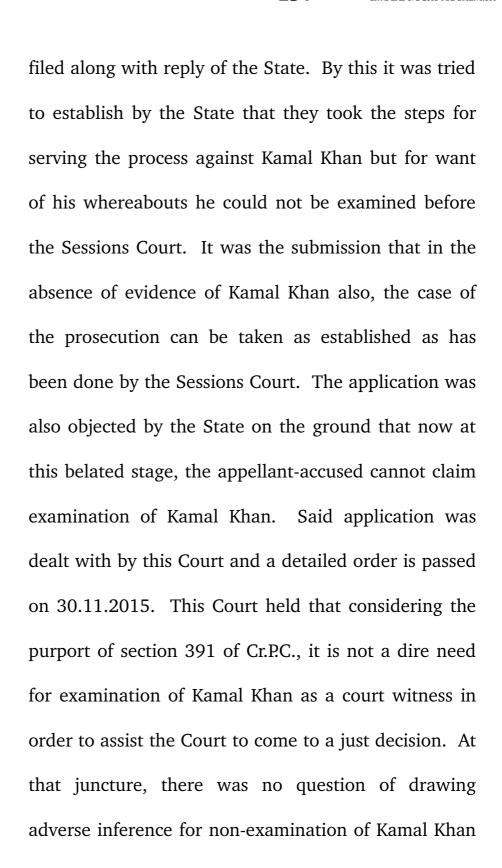
163. With these observations now the another concept is required to be taken as to whether on non-examination of Kamal Khan an adverse inference can be drawn. Prior to coming to this aspect as to non-examination of Kamal Khan and whether adverse inference can be drawn, certain basic factual position is required to be narrated. According to the case of

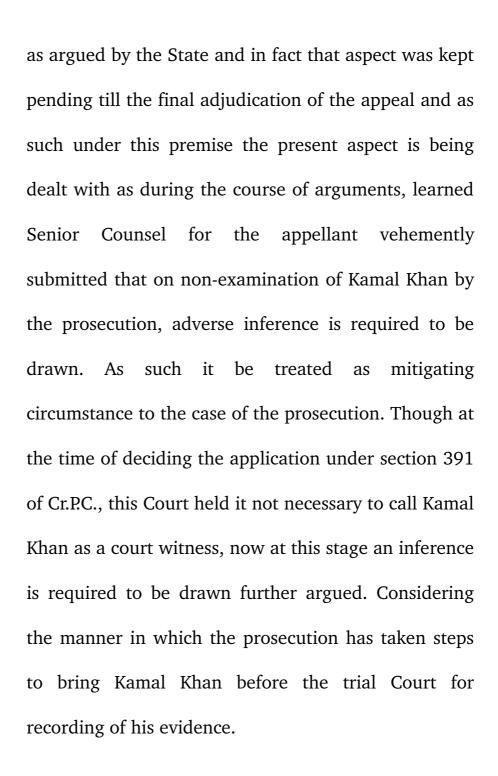




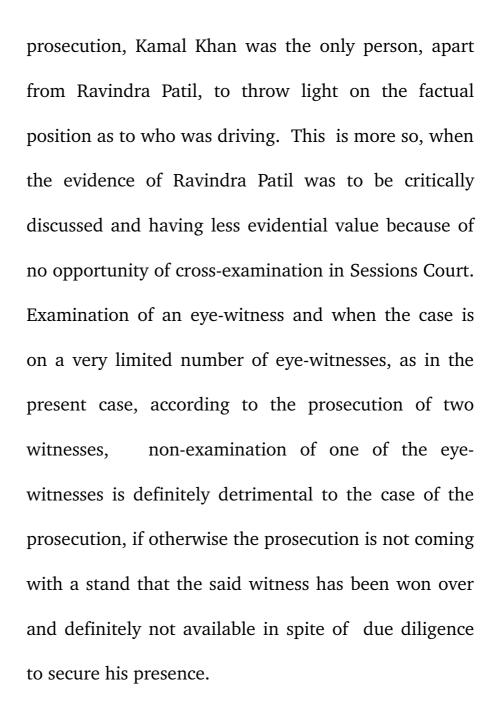
164. In view of the above factual position as to according to the case of the prosecution out of three persons travelling in the car only the person Kamal Khan was not examined and the evidence of Ravindra Patil was taken from the M.M. Court from the earlier proceeding. As such, during the arguments 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



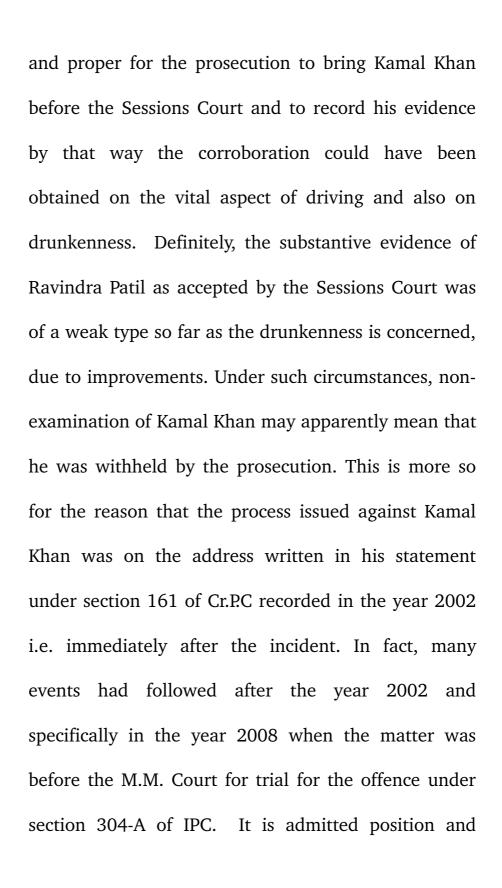


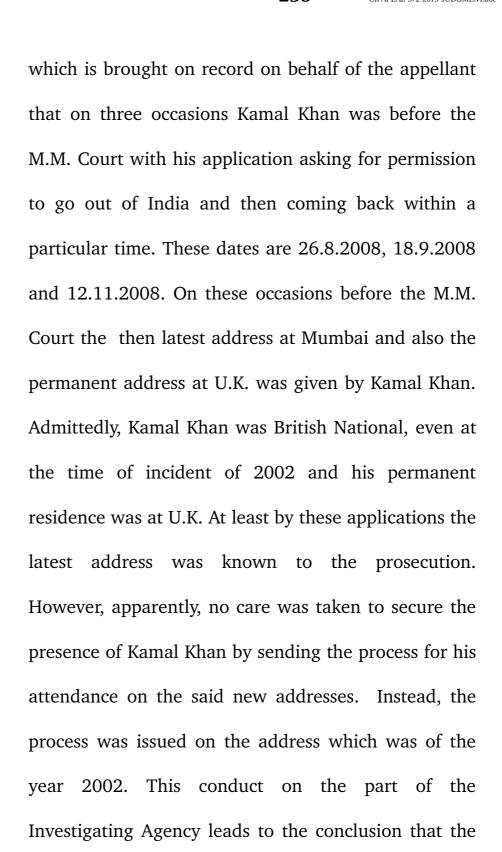


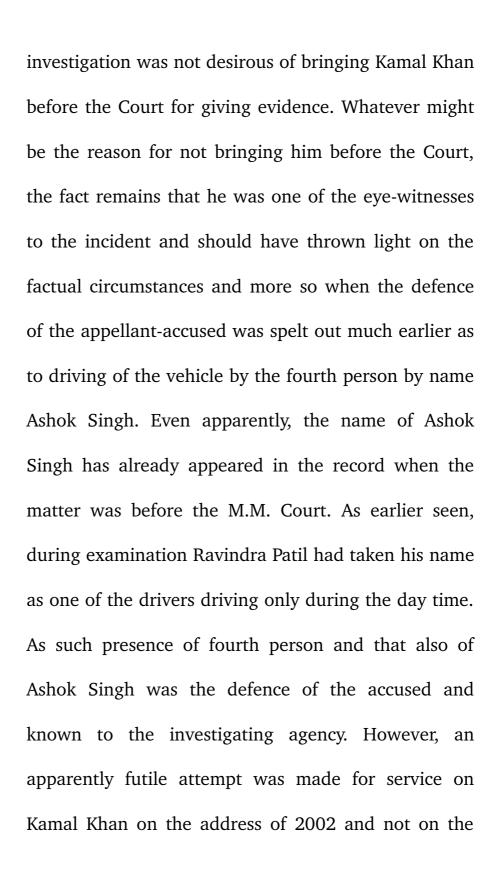
165. In fact, it is certain that according to the



166. In the present case, both the things as mentioned above are to be tested, whether it was just

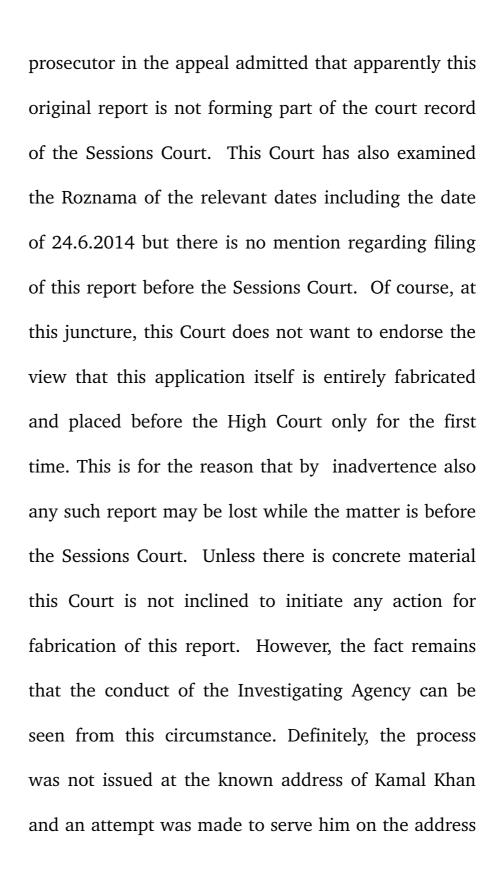


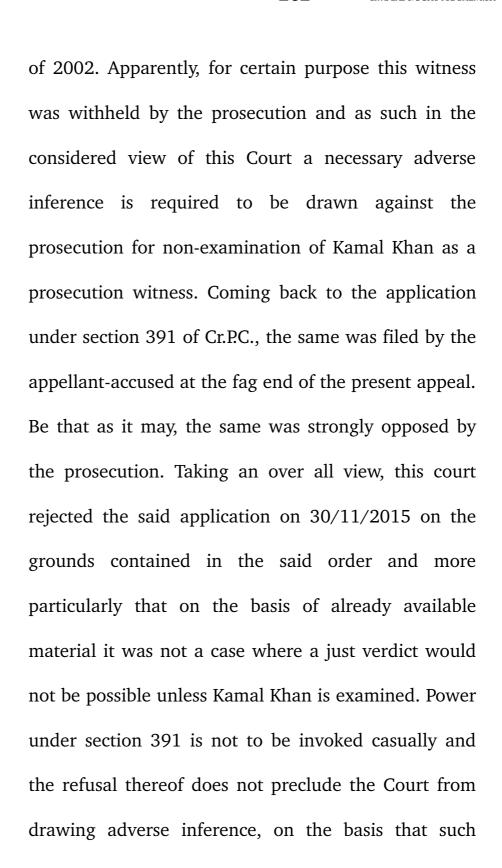


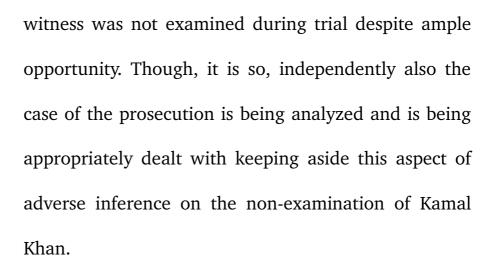


address which was given to M.M. Court in the year 2008.

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







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

Arthur Paul Benthali)

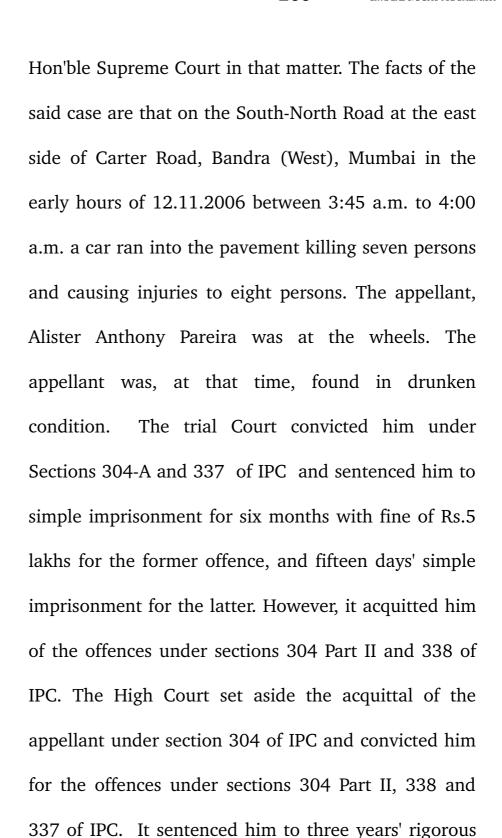
- 5) 2001 (2) A.W.C. 1447 (S.C.)
 Oriental Insurance Co. Ltd vs. Hansrajbhai V.
 Kodala (S.C.)
- 6) (2010) 13 SCC 657 (Sunil Kumar Sambhudayal Gupta (Dr) and Ors Vs. State of Maharashtra)
- 169. Even on this issue the following authority is cited on behalf of the State:-

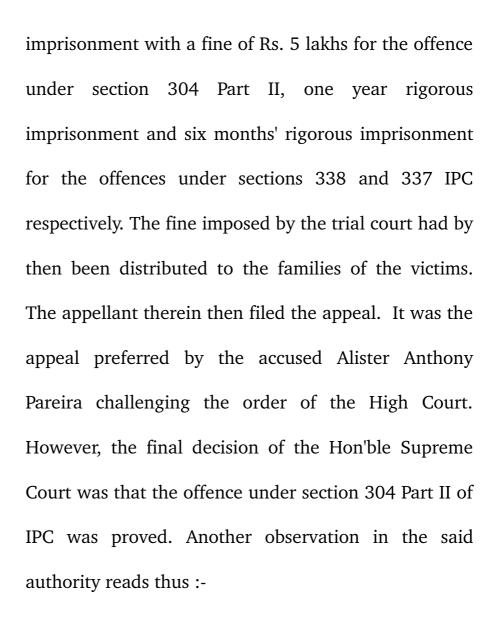
2001 6 SCC 145 (Takhaji Hiraji Vs. Thakore Kubersing Chamansingh & Ors)

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

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.

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





"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



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

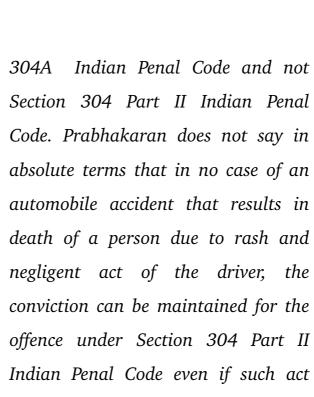


driven by the convict ran over a boy aged 10 years. The prosecution case was that bus was being driven by the Appellant therein at the enormous speed and although the passengers had cautioned the driver to stop as they had seen children crossing the road in a queue, the driver ran over the student on 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



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 held that the appropriate was conviction would be under Section



(rash or negligent) was done with the

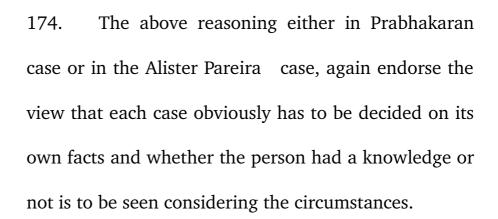
knowledge that by such act of his,

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.



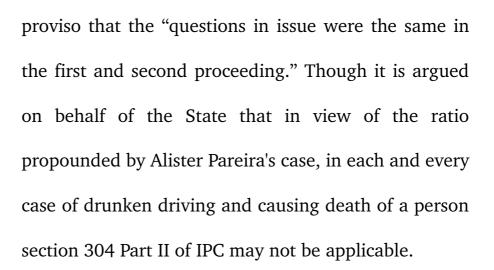
175. Another observations in the said authority which are appearing in paragraph no.41 in the Alister Pareira's matter are reproduced:-

"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 -

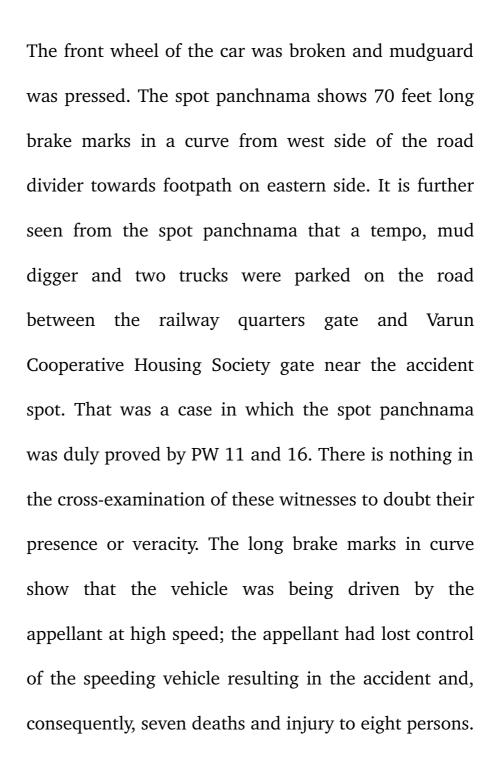


in view of the provisions of the Indian Penal Code - the cases which fall within last clause of Section 299 but not within clause 'fourthly' of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous and consequences may entail punishment under 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."

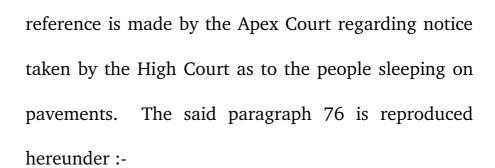
176. In fact, this observations of the Apex Court are also to be construed and to be accepted when the earlier issue as to applicability of Section 33 of the Evidence Act has been discussed by this Court and it is in respect of the requirement of that section in the



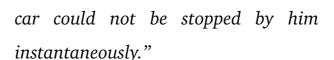
177. Again on the specific circumstances of the case in the matter of Alister Pareira, the Hon'ble Apex Court has upheld the order of this Court for conviction of the appellant for the offence under section 304 Part II of IPC. The circumstances were very dreadful. Paragraph no.71 of the authority depicts 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.



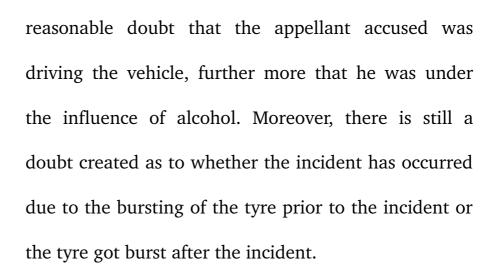
178. In the said authority in paragraph 76 a



"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



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



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

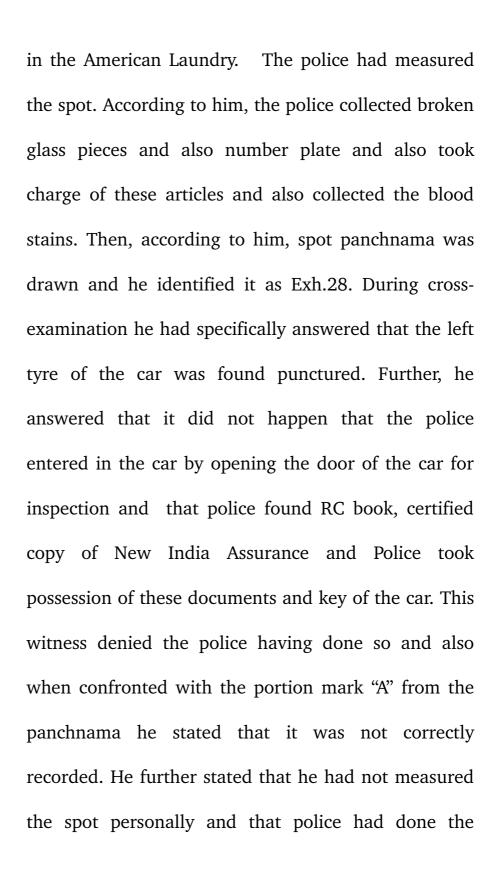


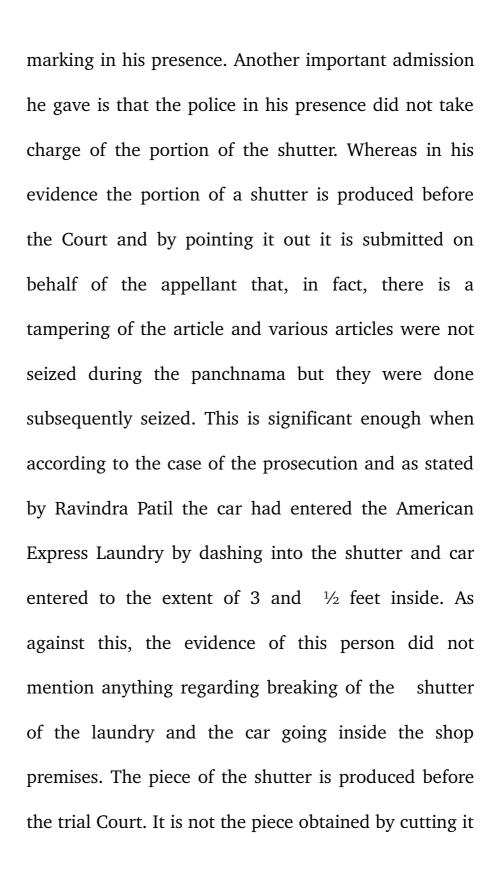
place of the road, that too in the wee hours of the morning, on such a wintry night. There is every possibility of the accused failing to see them on the road. Looking to all this, it can be safely assumed that he had no intention of causing bodily injuries to them but he had certainly knowledge that 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

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



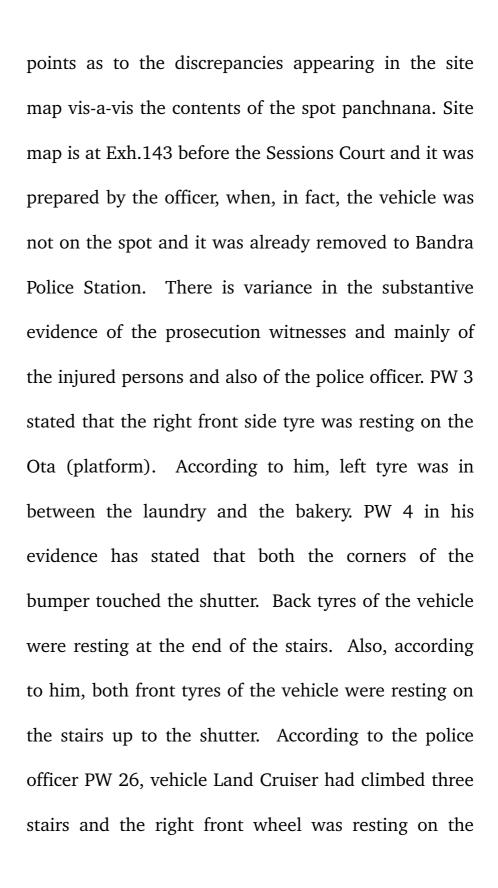


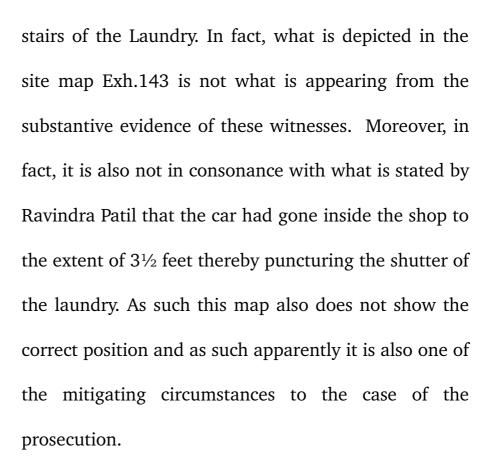
from the entire shutter. It is also not seen having any puncture except that it is slightly bent. This factual position is not in consonance with the case of prosecution as to puncture to the shutter by dash from the car.

- 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.



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





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

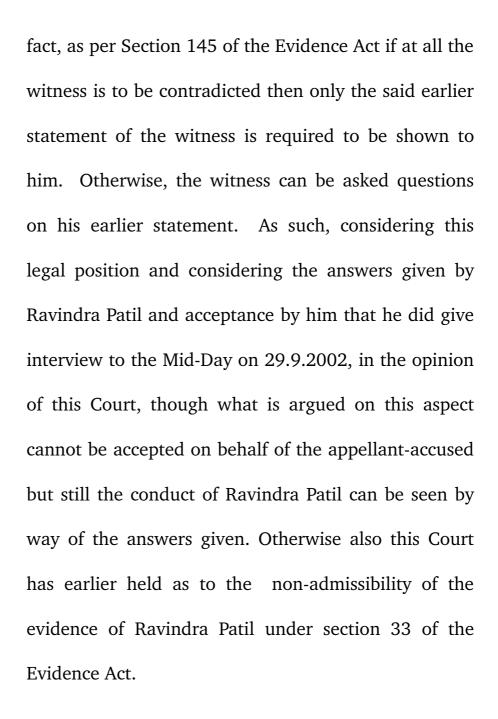
answered this question to the following effect:

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

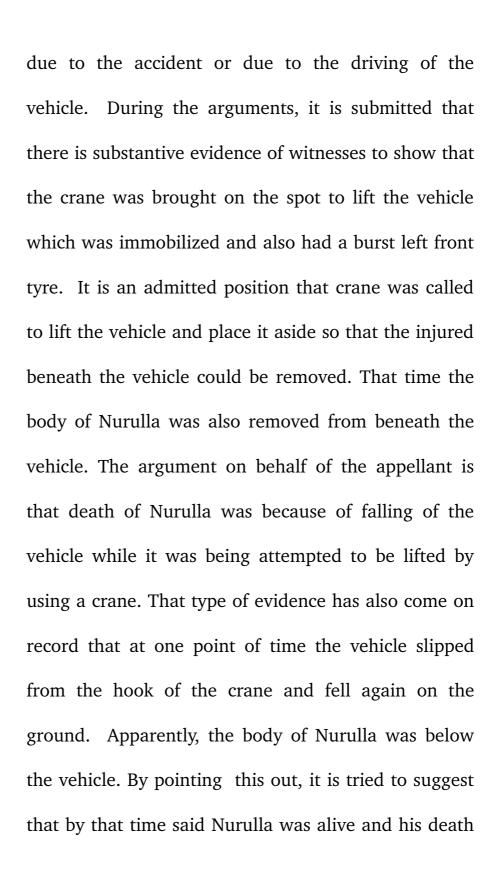
188. The next question asked was that whether Salman Khan returned from JW Marriott after 15 minutes and sat on driver's seat of his motor car. The answer was "I have stated so". Further there was a question as to whether this witness has stated to the reporter of Mid-Day that Salmankhan i.e. the accused 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 appellantaccused 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

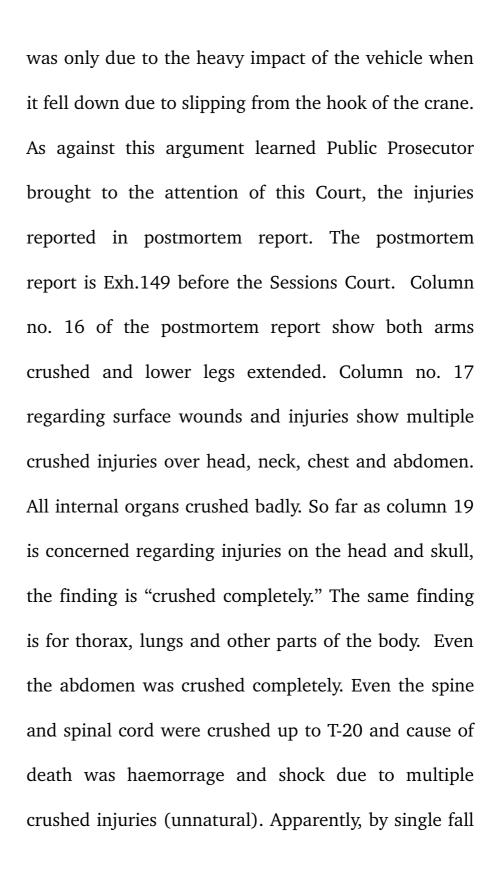


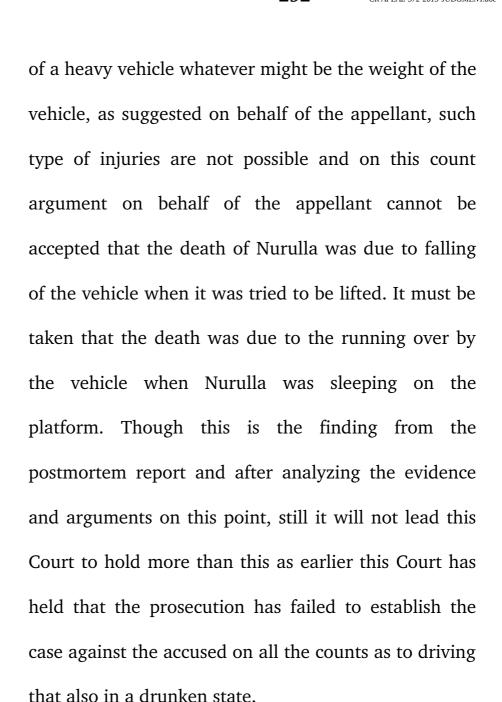
driven from JW Marriott Hotel back to home. As against this, further argued that the answer of this witness Ravindra Patil to the questions that in the valet parking of JW Marriott Hotel car was halted, the accused sat on driver's seat and the witness answered in the affirmative. By pointing this out, 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.



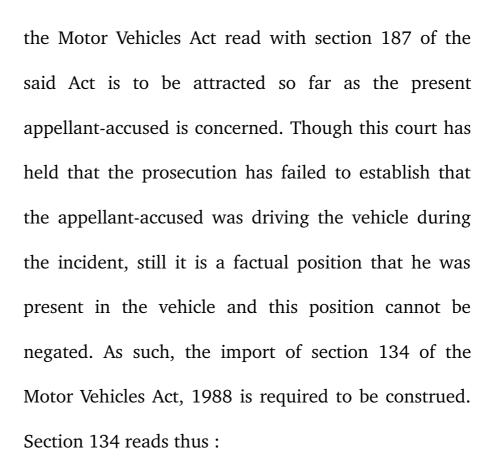
189. Now, the last argument advanced on behalf of the appellant-accused is that death of Nurulla was not





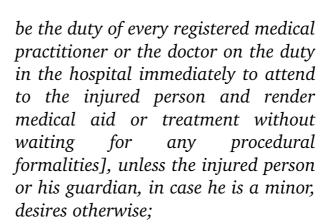


190. Now, again this Court needs to consider whether the offence punishable under section 134 of



"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



- (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;



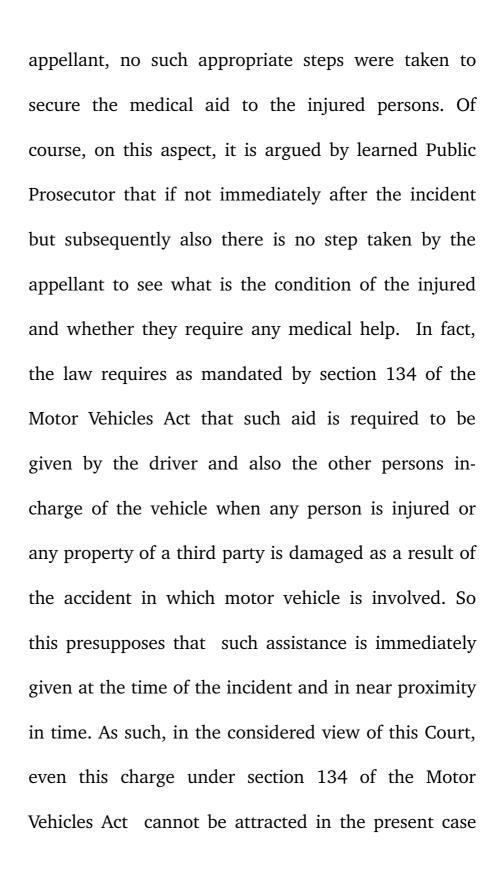
- (iii) particulars of the persons injured or killed in the accident;
- (iv) name of the driver and the particulars of his driving licence.

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 incharge 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



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





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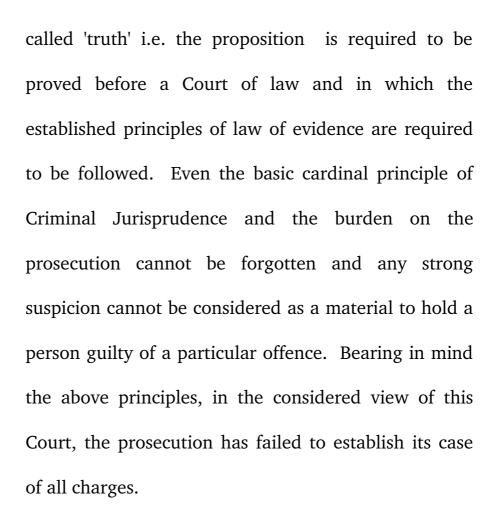
considering the circumstances.

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.

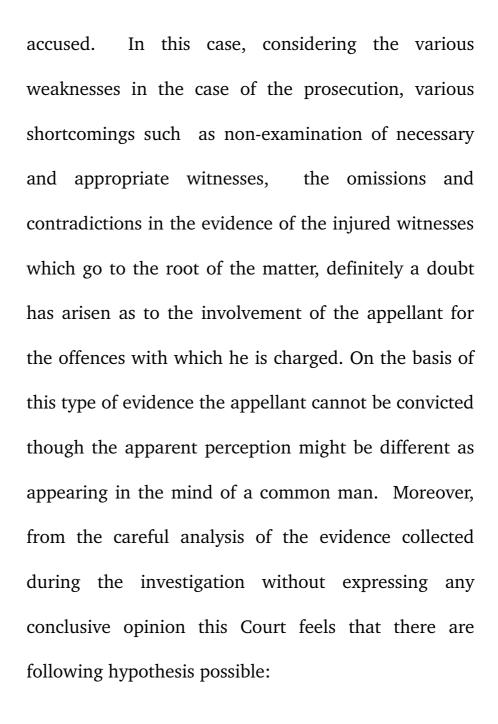
193. While arriving at the above findings this Court is not oblivious of the perception or the opinion of members of general public. However, it is well settled principle that a Court must decide the case on the material brought on record and which can be



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 times gathered on the basis of the many a 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



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



195. Firstly, though the investigation might be impartial, it was conducted in such a careless a faulty

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

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

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;
- 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;
- 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



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admission of the appeal, Bandra Police Station is directed to hand over the Passport of the appellant to him on proper identification;

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)