Exh.190

IN THE COURT OF SESSIONS FOR GR.BOMBAY AT BOMBAY
SESSIONS CASE NO. 240 OF 2013
(C.C. No.490/PS/2005)

The State of Maharashtra)
(Bandra P. Stn. C.R. No.326/2002) ...**Complainant**

V/s.

Salman Salim Khan)
Age: 49 yrs., Occ. Cine Artist)
Add. Galaxi Apartment, B. J. Road,)
Bandstand, Bandra (W.), Mumbai.) ...**Accused**

CORAM : His Honour The Additional Sessions Judge Shri D.W. Deshpande (C.R.No.52)

DATE: 6th May, 2015.

Mr. Gharat, Special P. P. for State.
Mr. Shivade, Counsel for accused, along with Advocate Mr. Anand Desai, Advocate Mr. Nirav Shah, Advocate Ms. Chandrima Mitra and Advocate Mr. Manhar Saini i/b. M/s. DSK Legal.

J U D G M E N T

1. Accused Salman Salim Khan, famous Cine Actor, faced trial on the allegation that in the intervening night of 27.9.2002 and 28.09.2002 at about 02.45 a.m. drove Toyota Land Cruiser bearing No.MH-01-DA-32 in a rash and negligent manner, under the influence of alcohol with knowledge that people were sleeping on the footpath in front of American Express Laundry, caused death of one person and also injured four others by running car over them and rammed the shutter of American Express Laundry punishable under Sections 304 Part-II, 337,

338 of the Indian Penal Code and under Sections 134(A)(B) r/w.187, 181 and 185 of the Motor Vehicles Act, 1988.

2. The prosecution case against the accused is as under:-

3. Complainant Ravindra Himmatrao Patil was deputed as a Body Guard of accused. He was having the duty hours from 08.00 p.m. to 08.00 a.m. He used to remain along with the accused as a part of his duty. On 27.09.2002 at about 08.00 p.m. Ravindra Patil joined his duty as a security person for accused.

4. On 27.09.2002 at about 09.30 p.m., the accused and his friend Kamal Khan came out side of the house as they wanted to visit Rain Hotel, Juhu. The accused was having vehicle Land Cruiser bearing no.MH-01-DA-32 (for the sake of brevity, hereinafter referred to as the "said car"). The complainant Ravindra Patil, Kamal Khan sat in the car. The accused drove the said car. The car reached near Rain Bar and Restaurant. The complainant was asked to wait outside and the accused and Kamal Khan went inside the hotel.

5. Sohel Khan is brother of the accused Salman Khan. Sohel Khan was also having a bodyguard (PW-6 Balu Laxman) at relevant time who met Ravindra Patil out side Rain Bar. PW-6 Balu Laxman informed Ravindra Patil that Sohel Khan had also come there.

6. At about 01.30 a.m. the accused and Kamal Khan came outside the Rain Bar. From Rain Bar, the accused then started for going

to J.W. Mariot Hotel. The accused was driving the vehicle. Complainant Ravindra Patil sat on the seat near driver's seat. Kamal Khan sat on the rear seat. Then they went to J.W. Mariot Hotel. The accused and Kamal Khan went inside the hotel and complainant Ravindra Patil was waiting outside.

7. At about 02.15 a.m. on 28.09.2002 the accused and Kamal Khan came out from the hotel. The accused sat on the driver's seat and complainant Ravindra Patil sat near driver's seat. The said car came on St. Andrews Road. The accused was drunk and was driving the said car at the speed of 90 to 100 kilo meters per hour. St. Andrews Road and Hill Road joined at the junction. Prior to reaching the car at the junction of St. Andrews Road and Hill Road, the complainant Ravindra Patil informed the accused to lower the speed of the car in view of the right turn ahead. The accused did not pay any attention. The accused could not control his car while taking right turn and went on the footpath. The people were sleeping on the footpath. The said car ran over the persons sleeping on the foot path and climbed the three stairs and rammed the shutter of American Laundry. Thereby the said car broke the shutter and went inside about 3 and ½ feet.

8. The people on whose person the said car ran shouted and thereby other persons gathered. The people gathered surrounded the car. The people became furious because of the incident. Somehow the complainant, Salman Khan and Kamal Khan came out of the said car. The complainant Ravindra Patil showed his identity card and informed them that he is a police personnel, thereby the people were pacified.

9. The accused Salman Khan and Kamal Khan ran away from the spot. Complainant Ravindra Patil saw one person seriously injured beneath the said car having multiple injuries and also there were four injured persons below the car. Control Room was informed. Within 5 minutes, Bandra police arrived. The police rescued the injured persons and dead body of Nurulla was removed from beneath the car. The injured were sent to Bhabha Hospital.

10. PW-26 Rajendra Kadam received a telephone call from an unknown person at about 02.45 a.m. on 28.09.2002 about the incident. He immediately came on the spot with police. He saw one Land Cruiser vehicle rammed into the shutter of American Express Laundry. The Police Inspector Pardhi and staff also arrived on the spot. Ravindra Patil was also present on the spot. A crane was called to lift the vehicle in order to remove the person lying beneath the car.

11. PW-26 Rajendra Kadam drawn spot panchanama (Exh.28) in presence of PW-1 Sambha Gauda. The spot was shown by the complainant Ravindra Patil. PW-26 Kadam seized the articles lying on the spot i.e. fiber glass, bloodstained soil, name plate, pieces of broken glass, sample of colour scratch of shutter of American Express Laundry. PW-26 Kadam also opened the doors of the vehicle and took out the papers of the vehicle as well as the key. The articles came to be seized and sealed and also label having signatures of panchas and PW-26 Kadam was also affixed.

12. PW-26 also made inquiry with the complainant Ravindra Patil who is eye witness to the incident. He recorded the complaint of complainant Ravindra Patil (Exh.P-1).

13. In the incident, Nurulla was expired and PW-2 Muslim Shaikh, PW-3 Mannu Khan, PW-4 Mohd. Kalim Iqbal Pathan, PW-11 Mohd. Abdulla Shaikh were injured in the incident. Abdulla and Muslim Shaikh sustained grievous injuries. Mannu and Mohd. Kalim Pathan sustained simple injuries. The dead body of Nurulla was sent for postmortem.

14. The postmortem report (Exh.20) was admitted by defence as well as injury certificates of the witnesses Abdulla Rauf Shaikh, Kalim Mohd. Abdul Pathan and Muslim Niyamat Shaikh are also admitted by the defence (Exh.21, Exh.22, Exh.23 respectively). In the evidence of Investigating Officer PW-27 Shengal, exhibits were given to injury certificates of Kalim Mohd. Pathan (Exh.151), Munnabhai Khan (Exh.152), Abdul Rauf Shaikh (Exh.155) and Muslim Shaikh (Exh.156) being admitted by defence.

15. PW-26 Kadam recorded statements of Abdul and Muslim. The offences u/s.304-A, 279, 338 of the IPC and u/s.134 of the Motor Vehicles Act were registered. PW-26 Kadam also drawn map (Exh.143) of the spot of incident in presence of complainant Ravindra Patil.

16. PW-26 Kadam also visited Galaxi Apartment where the accused was residing, but he was not found. The spot of incident was at

the distance of 200 meters from the house of the accused. The investigation was then entrusted to Police Inspector Pardhi.

17. On 29.09.2002 PW-19 Rajendra Keskar, RTO Inspector, inspected the vehicle and submitted a report (Exh.84). No mechanical defect was noticed in the vehicle.

18. PW-27 Kisan Shengal was working as a Senior Police Inspector in Bandra Police Station. PW-26 also informed him in the early hours of 28.09.2002 about the incident. Immediately PW-27 Kisan Shengal came to the police station and while coming to the police station, he visited the spot of incident. P.I. Pardhi already deployed bandobast on the spot.

19. PW-27 Shengal proceeded to Galaxy Apartment to search the accused, but he did not find the accused in the house. PW-27 received a secret information about visit of the accused at the house of his Advocate in Almeda Park. Accordingly, the accused was traced out in the house of Advocate Mr. Jamir Khan. The accused was taken in possession and brought in the police station where arrest panchanama was drawn at about 11.00 a.m. The accused was then sent to Bhabha hospital for medical examination and also for blood sample along with PSI Suryavanshi and police staff. Suryavanshi informed PW-27 that in Bhabha Hospital there is no facility for collecting the blood sample. The accused was then sent to J.J. Hospital at about 01.30 p.m. along with Suryavanshi, PSI Salunkhe and police staff. Blood sample of Salman Khan for alcohol was taken by PW-20 Dr. Shashikant Pawar. The sealed

envelop containing the blood sample of Salman Khan was then brought to the police station. As there was Saturday and Sunday, PW-27 kept the blood sample in fridge. The accused was also released on bail. PW-27 Shengal also demanded licence from the accused. No licence was produced. Offence u/s.3 r/w.181 of the Motor Vehicles Act also registered against the accused. Police Inspector Pardhi also recorded the statements of witnesses. PW-27 Shengal also investigated the address of the registered owner from the xerox copies of the documents found in the car. The vehicle was registered in the name of Mohd. Abdul Rehman, resident of 55 Shivkrupa Building, L.J. Road, Mahim, Mumbai, but the address was found false. The statements of Amin Kasim Shaikh, Ram Suresh Ram Lakhan Sonkar, Sachin Gangaram Kadam and others were also recorded. PW-27 Shengal also recorded supplementary statement of complainant Ravindra Patil on 01.10.2002. He sent letter to C.A. on 30.09.2002. The team of Forensic Laboratory inspected the vehicle and took some scrapings from the vehicle as well as collected the samples from the spot and also incriminating material. PW-27 Shengal sent the samples to the C.A. He also sent the blood sample of the accused to C.A., Kalina, on 30.09.2002 through Constable PW-21 Borade.

20. PW-27 Investigating Officer Shengal also recorded statement of Ram Adhar Pandey on the spot. He also visited J.W. Mariot Hotel and Rain Bar Restaurant, Juhu. He also recorded statements of Anurudha Subroto Nandi, Wilfred George Kutti and others. PW-27 also recorded statements of PW-9 Rizwan Ali Rakhangi from Rain Bar and PW-5 Malay Bag, waiter from Rain Bar. PW-27

Shengal also collected the hotel bills (Exh.50-A to Exh.50-D) about consumption of alcohol and snacks.

21. PW-27 Shengal also collected parking tag from PW-12 Kalpesh Verma who was working as a Parking Assistant in J.W. Marriot Hotel. The said parking tag is not on record. The statement of Kalpesh Verma was also recorded. Bandra Police Station also received C.A. report on 01.10.2002. C.A. report of the blood sample for alcohol test is at Exh.81. The said report is prepared by PW-18 Dattatray Bhalshankar (Assistant Chemical Analyzer). PW-27 also recorded the statements of injured persons Kalim Mohd. Pathan and Munna Khan. On 02.10.2002 PW-27 also sent the articles collected by earlier Investigating Officer for forwarding to C.A. On 03.10.2002 PW-27 Shengal also sent a letter to R.T.O., Tardeo, Andheri, and sought information about licence of the accused. RTO informed the police station that no licence was issued to Salman Khan. The statements of Mannu Khan, Kalim Mohd. Pathan, Ram Asare Pandey were also recorded u/s.164 of the Cr. P.C. by the ld. Metropolitan Magistrate, 12th Court, Bandra. The statement of Kamal Khan was also recorded on 04.10.2002.

22. On 07.10.2002 PW-27 Shengal added Section 304-II of the IPC and accordingly, information was submitted to the Metropolitan Magistrate Court. The vehicle Land Cruiser bearing No. MH-01-DA-32 was returned to accused Salman Khan on the bond of Rs.15 Lacs as per the Court order.

23. The accused voluntarily surrendered in the police station on 07.10.2002 and arrest panchanama (Exh.154) was drawn. PW-27 Shengal also recorded the statements of other witnesses. He also collected the Medical Certificates of the injured.

24. After completion of investigation, charge-sheet came to be filed on 21.10.2002 in the 12th Metropolitan Magistrate Court, Bandra, Mumbai. After submitting the charge-sheet, PW-27 Shengal also received C.A. reports which are at Exh.157-A to Exh.157-E.

25. The ld. Metropolitan Magistrate, 12th Court, Bandra, Mumbai, on 31.01.2003, committed the case to the Court of Sessions as the offence punishable under Section 304-II of the I.P.C. is exclusively triable by the Court of Sessions.

26. It is pertinent to note that the accused filed the Miscellaneous Application bearing No.463/03 in the Sessions Court contending that Sec.304-II of the IPC is not attracted, but the said application was rejected by the Sessions Court.

27. It appears that the then In-Charge Sessions Judge Shri Dholakia framed the charge against the accused u/s.304(II), 308, 279, 338, 337, 427 of the I.P.C. and u/s.134(A)(B) r/w. Sec.187, 3 r/w. Sec.181, 185 of the Motor Vehicles Act and u/s.66(i)(b) of the Bombay Prohibition Act. The accused pleaded not guilty to the charge and claimed for the trial.

28. The accused also preferred Criminal Writ Petition bearing No.2467/2003 u/s.482 of the Cr. P.C. in the Hon'ble Bombay High Court. The Hon'ble Bombay High Court was pleased to allow the said application and the order of the Sessions Court framing the charge under Section 304-II of the IPC was quashed while maintaining the order of the other charges. The order of the Hon'ble Bombay High Court was challenged before the Hon'ble Apex Court by the State of Maharashtra by filing Criminal Appeal bearing No.1508/2003. The Hon'ble Apex Court set aside the order of the Hon'ble High Court as well as the trial court and held as under:-

> "Therefore, we think it appropriate that the findings in regard to the sufficiency or otherwise of the material to frame a charge punishable under Section 304, Part II, IPC of both the courts below should be set aside and it should be left to be decided by the court trying the offence to alter or modify any such charge at an appropriate stage based on material produced by way of evidence."

29. Further the Hon'ble Apex Court observed in the order that pursuant to the Judgment of the High Court, the Metropolitan Magistrate Court, Bandra, has already framed fresh charges under Section 304(A) IPC and other provisions mentioned herein above and trial has commenced. The Hon'ble Apex Court further observed as under:-

> "At any appropriate stage, if the ld. Magistrate comes to the conclusion that there is sufficient material to

> charge the respondent for a more serious offence than the one punishable under Section 304-A, he shall proceed to do so without in any manner being hindered or influenced by the observations or findings of the High Court or Sessions Court, shall be purely based on the material brought in evidence of the trial."

30. It is pertinent to note that the prosecution has examined in all 17 witnesses in the Court of Metropolitan Magistrate, Bandra. The APP in the trial Court filed an application for framing additional charge under Section 304(II) of IPC and contended that the case be committed to the Court of Sessions. The accused also submitted the reply (Exh.28) to the said application. The ld. Additional Chief Metropolitan Magistrate allowed the application of the APP and committed the case to the Court of Sessions on 31.01.2013 u/s.209 of the Cr. P.C. as offence u/s.304-II of the IPC is exclusively triable by the Court of Sessions.

31. It is pertinent to note that the accused also moved Revision Application No.220/2013 in the Sessions Court against the order of the ld. Additional Chief Metropolitan Magistrate, but on 24.06.2013, the said revision application was rejected.

32. Charge is framed by my ld. Predecessor (H.H.J. Shri U.B. Hejib) against the accused u/s.304-II, 337, 338 of the I.P.C. and u/s.3(1) r/w.181, 134 r/w.187, 187 and u/s.185 of the Motor Vehicles Act.

33. The contents of the charge were read over to the accused to which the accused did not plead guilty and claimed for the trial.

34. It is pertinent to note that the point arose before me as to whether the evidence led before the trial Court before committal is to be read or whether fresh trial is required to be ordered again. It is pertinent to note that after framing the charge, the matter was fixed for submitting the list of witnesses and also filing list of documents u/s.294 of the Cr. P.C. The ld. APP Mr. Kenjalkar submitted that the evidence led in the trial court before committal can be accepted otherwise the trial would be delayed. However, the ld. Advocate Mr. Shivade opposed the contention of the ld. APP and submitted that the charge u/s.304-II of the IPC framed against the accused is a serious offence and punishment is provided to the extent of 10 years or with fine or both.

35. The ld. Metropolitan Magistrate committed the case u/s.209 of the Cr. P.C. The ld. Advocate Mr. Shivade also quoted Section Section 323 of the Cr. P.C. before this Court. According to ld. Advocate Mr. Shivade, when the case is committed to the Court of Sessions, then Chapter XVIII shall apply to the commitment. It is pertinent to note that Chapter XVIII is dealing with the case before the Court of Sessions. The said Chapter deals with the provisions of Section 225 to 235 of the Cr. P.C.

36. After hearing the ld. APP and the ld. defence Counsel, this Court after considering the provisions of Section 209, 323 of the Cr.

P.C. and also the provisions incorporated under Chapter XVIII and also provisions of Section 326 of the Cr. P.C., passed the detailed order below Exh.1 on 05.12.2013 that afresh trial be ordered against the accused. Neither state nor accused challenged the order of this court dated 5.12.2013.

37. The prosecution has examined 27 witnesses before me and they are as under:-

PW-1 Sambha Kanappa Gauda (Exh.27)	Panch witness on spot panchanama (Exh.28)
PW-2 Muslim Niyamat Shaikh (Exh.32)	Injured.
PW-3 Mannu Khan s/o. Meli Khan (Exh.33)	Injured witness.
PW-4 Mohd. Kalim Iqbal Pathan (Exh.36)	Injured witness.
PW-5 Malay Semerendra Bag (Exh.39)	At the relevant time, he was working as a Waiter in Rain Bar and Restaurant and on point of visit of the accused to Rain Bar and Restaurant.
PW-6 Balu Laxman Muthe (Exh.40)	Security Guard for Cine Actor Sohail Khan
PW-7 Fransis Daiman Fernandes (Exh.43)	Present on the spot after hearing the commotion. Independent witness.
PW-8 Ramasare Ramdev Pande (Exh.47)	Visited the spot of incident after hearing the noise and saw accused getting down from the right front side of the car, his statement was recorded u/s.164 of the Cr. P.C. Independent witness.

PW-9 Rizwan Ali Rakhangi (Exh.49)	At the relevant time, worked as a Manager in Rain Bar & Restaurant, in his evidence, the bills (Exh.50A to Exh.50D) proved.
PW-10 Sachin Gangaram Kadam (Exh.52) - Hostile	He had seen one big car went on the bakery and also over the persons sleeping on the platform of American Cleaners.
PW-11 Mohd. Abdulla Shaikh (Exh.53)	Injured.
PW-12 Kalpesh Sarju Verma (Exh.69)	Was working at the relevant time in J.W.Marriot Hotel as a Parking Assistant and on the point of visit of the accused to J. W. Mariot.
PW-13 Amin Kasam Shaikh (Exh.70)	After hearing the noise, he went on the spot and saw vehicle white in colour went in American Bakery and shutter of American Laundry was broken. Muslim and Abdul found beneath the car.
PW-14 Salim Majid Patel (Exh.72)	Custom Clearing Agent, cleared the vehicle Land Cruiser from the customs.
PW-15 Alok @ Chikki Sharad Pandey (Exh.73)	Known accused and duty of the car was paid by cheque by father of Salman Khan.
PW-16 Gurucharan Abnashiram Malhotra (Exh.77)	Insurance Agent
PW-17 Mark Marshal D'Souza (Exh.78)	Worked as a Counter clerk in American Laundry since 1988, had seen Salman Khan

	who used to pass from his laundry and on Hill Road.
PW-18 Dattatray Khobrajirao Bhalshankar (Exh.79)	Assistant Chemical Analyser, did analysis of blood sample of accused for alcohol test and prepared the C.A. report (Exh.81) and found 0.062 mg. alcohol in the blood of accused.
PW-19 Rajendra Sadashiv Keskar (Exh.83)	RTO Inspector, inspected the vehicle involved in the incident and submitted a report (Exh.84).
PW-20 Dr. Shashikant Janardan Pawar (Exh.96)	Medical Officer in J.J. Hospital in the year 2002, extracted blood from Salman Khan for alcohol test.
PW-21 Sharad Bapu Borade (Exh.115)	He had taken the blood sample to Kalina Laboratory, Carrier
PW-22 Vijay Manikrao Salunkhe (Exh.118)	Brought accused along with police staff to J.J. Hospital for examination and for taking blood sample.
PW-23 Raghuveer Singh Nagsingh Bilawar (Exh.119)	Assistant Inspector in RTO examined by the prosecution to show that accused was not possessing licence on the day of incident.
PW-24 Sangita Annasaheb Mahadik (Exh.126)	Woman Police Naik, examined by the prosecution to show that Dr. Sanap who conducted the postmortem on the dead body of the deceased is residing in U.S.A.
PW-25 Kailash Himmatrao Behere (Exh.139)	Brother of complainant Ravindra Patil (deceased examined by prosecution to show that Ravindra Patil was expired on 03.10.2007.

Complainant Ravindra Patil (Exh. 141) examined in the Court of Additional Chief Metropolitan Magistrate Court.	His evidence is taken on record u/s 33 of The Indian Evidence Act.
PW-26 Rajendra Genbapu Kadam (Exh.142)	Recorded FIR of Ravindra Patil and also drawn spot panchanama and seized the articles from the spot and also recorded the statements of Abdul and Muslim, prepared map of the spot of incident.
PW-27 Kisan Narayan Shengal (Exh.147)	Investigating Officer, recorded supplementary statement of complainant Ravindra Patil, arrested the accused under panchanama (Exh.148), sent the accused to J.J. Hospital for taking blood sample, sent the blood sample to C.A., made investigation regarding the address of the registered owner of the vehicle, recorded statements of staff members of Rain Bar, visited J.W. Marriot Hotel and Rain Bar Restaurant, collected hotel bills, parking tag from Kalpesh Sarju Verma, recorded statement of Kalpesh Verma, sent letter to RTO seeking information regarding the licence of the accused, statements of witnesses Mannu Khan, Kalim Mohd. Pathan, Ram Asare Pandey were recorded by M.M., 12th Court, Bandra. Recorded statement of Kamal Khan on 04.10.2002. On 07.10.2002 added Section 304-II of the IPC in the crime, returned the vehicle as per court order, the accused was surrendered on 07.10.2002 after adding Section 304-II of IPC, arrest panchanama (Exh.151) was drawn, recorded statements of witnesses, collected the Medical Certificates of injured and filed charge-sheet on 21.10.2002 before 12th Metropolitan Magistrate Court, Bandra. Submitted C.A. reports.

38. Before recording evidence of PW-26 Rajendra Genbapu Kadam and PW-27 Kisan Narayan Shengal (Investigating Officers), ld. SPP Mr. Gharat moved an application (Exh.131) u/s. 33 of the Indian Evidence Act for taking the evidence of Ravindra Himmatrao Patil and Dr. Sanap on record and also admitting the same u/s.33 of the Indian Evidence Act. The evidence of Ravindra Patil was recorded before the Metropolitan Magistrate Court, Bandra, in C.C. No.490/PS/2005 prior to committal. Complainant Patil was expired on 3.10.2007. According to ld. SPP, the accused had cross-examined the complainant Ravindra Patil thoroughly and the ingredients of Section 33 are fully attracted. The ld. defence Counsel objected the said application by filing the reply (Exh.136). The ld. Advocate Mr. Shivade also relied on the judgment of the Hon'ble Apex Court in **Bipin Shantilal Panchal Vs. State of Gujarat and Another [(2001) 3 Supreme Court Cases 1].** Ld. Counsel Mr. Shivade fairly submitted that the evidence of Mr.Ravindra Himmatrao Patil can be taken on record and be exhibited and the admissibility of the evidence of Ravindra Patil can be decided at the time of final argument. Ld. SPP Mr. Gharat also fairly considered the said issue. Hence, in view of the ratio laid down in the case of **Bipin Shantilal Panchal**, the evidence of complainant Ravindra Patil recorded in C.C. No.490/PS/2005 in the Court of Additional Chief Metropolitan Magistrate was taken on record and exhibited **(Exh. 141)**. The admissibility of the evidence of Ravindra Patil would be decided after final hearing in the judgment in view of the ratio laid down in **Bipin Shantilal Panchal and State of Gujarat and Another.** The prosecution as well as defence were permitted to refer the evidence of Ravindra Patil during the examination of PW-26 Rajendra Genbapu

Kadam and also the Investigating Officer PW-27 Kisan Narayan Shengal for proving omissions and contradictions, if any.

39. It is pertinent to note that in the say (Exh.136) submitted by the defence to the application (Exh.131) u/s.33 of the Evidence Act, it is contended by the defence that "the defence is not challenging the injuries suffered by the deceased and cause of death mentioned in the postmortem report and no prejudice is caused to the defence, if Dr. R.L. Sanap is not examined". So in view of the contentions of the defence and also considering the said aspects and as defence admitted the postmortem report, if Dr. R.L. Sanap is not examined, no prejudice would be caused to prosecution also. Hence, application (Exh.131) is partly allowed on 07.03.2015. Whether the evidence of Ravindra Patil recorded in the Court of Metropolitan Magistrate before committal is relevant, admissible and can be relied under Section 33 of the Indian Evidence Act will be discussed in the later part of judgment.

40. The statement of the accused is also recorded u/s.313 of the Cr. P.C. It is the defence of the accused that at the time of the alleged incident, he was not driving the vehicle, but one Ashok Singh was driving the said vehicle and the tyre was burst in the incident. According to the accused, Ashok Singh went to the police station to state that he was driving the vehicle, but the police did not record his statement. Further according to the accused, PW-18 Dattatray Khobrajirao Bhalshankar is not an expert and he did not examine the blood sample. According to the accused, false case is filed under the pressure of Media. The accused also submitted his further statement

vide Exh.171-A. According to the accused, there were four persons present in the car at the time of the incident. Ashok Singh was driving the vehicle. The accused was sitting near the driver's seat at the left side. The complainant Ravindra Patil was sitting behind the driver and Kamal Khan sat on the back left seat. According to the accused, when car reached Hill Road via Manual Gonsalves Road, suddenly front left tyre of the car was burst, thereby the car was pulled to the left side. Ashok Singh tried to apply breaks and tried to control the car, but by then the car had climbed on the steps of American Express Laundry and hit the shutter and stopped. There was no footpath outside American Express Laundry at that time. Further according to the accused, he tried to get out of the car, but found the door next to him was jammed. Ashok Singh, with great difficulty, got down from the driver's side. By that time, a lot of people had gathered around and there was a lot of confusion and chaos. As the left front door was jammed, the accused crossed over to the driver's seat from the front left seat, where he had been sitting and got out from the driver's door. According to the accused, he wanted to move the car, but then he realized that people were trapped beneath the car and shouting for help. According to the accused, they tried to lift the car, but could not do so as it was dangerous to move the car manually. According to the accused, he instructed Ashok Singh to call the police for help and inform Bandra Police Station about the incident. The accused saw Francis Fernandis and his wife, to whom the accused knew, had also come to the spot. They asked the accused to leave the spot as the crowd was getting violent and they had also beaten Ravindra Patil and Ashok Singh. The accused waited there for a few minutes. Francis's wife stopped a

passing car and they made the accused sit and asked him to go home for his safety. They also told the accused that they would be taking the injured to Holy Family hospital. Kamal Khan had already gone away.

41. According to the accused, he came to know later that one person had died and four persons were injured. At about 10.30 a.m. on 28.09.2002, the accused received a message that Ashok Singh had been detained in Bandra Police Station. The accused went to Bandra Police Station to find out what had happened and noticed that a violent mob had gathered outside and they were shouting slogans against him. Ashok Singh came and told the accused that there was something wrong as the police had not recorded his statement. The accused met police officer who told him that there was tremendous pressure on him to arrest the accused. The accused told the police that he was not driving the car, but the police did not listen and arrested him in a false case. According to the accused, he went to Bhabha Hospital and then to J.J. Hospital and in both hospitals, the Doctors applied spirit to his hand and took his blood samples. According to the accused, PW-18 Dattatray Bhalshankar does not know anything about the chemical analysis and he is not an expert. PW-12 Kalpesh Verma was never present and he has been planted by the police as the real valet Yogesh Kadam refused to give false statement as desired by police. According to the accused, PW-19 Rajendra Keskar has never inspected the car and given the report to suit the prosecution case. According to the accused, the police have prepared the false statements of the witnesses and filed the false charge-sheet.

42. I have heard Mr. Gharat, ld. SPP for State, and Mr. Shivade, ld. Advocate for the accused, at length. Exh.181 written notes filed by SPP and Exh. 184 written notes filed Ld. Adv. Shri Shivade. I have also gone through the evidence recorded before me minutely.

43. Following points arise for my consideration and I have recorded my findings thereon for the reasons as follow:-

POINTS	**FINDINGS**
1. Does the prosecution prove that the evidence of complainant Ravindra Patil recorded in the Court of the Additional Chief Metropolitan Magistrate is relevant, admissible, relied and be admitted u/s.33 of the Indian Evidence Act ?	Yes
2. Does the prosecution prove that on 28.09.2002 at about 02.45 a.m. near American Express Cleaners, St. Andrews Road and Ramdas Nayak Marg (Hill Road), Bandra (W.), the accused drove the car Land Cruiser bearing no. MH-01-DA-32 in a rash and negligent manner, under the influence of alcohol with the knowledge that people are sleeping in front of American Express Cleaners and also with knowledge that by driving the vehicle in a rash and negligent manner and under the influence of liquor, the accused was likely to cause death and thereby caused the death of Nurulla Shaikh and thereby committed an offence punishable u/s.304-II of the IPC ?	Proved.
3. Does prosecution prove that at the same date, time and place, the accused drove the	

vehicle in a rash and negligent manner so as to endanger human life or personal safety of others and caused hurt to Kalim Mohd. Pathan and Munna Khan and thereby committed an offence punishable u/s.337 of the IPC ?	Proved.
4. Does prosecution prove that at the same date, time and place, the accused drove the vehicle in a rash and negligent manner and caused grievous hurt to Abdul Rauf Shaikh and Muslim Shaikh and thereby committed an offence punishable u/s.338 of the IPC ?	Proved.
5. Does prosecution prove that at the same date, time and place, while driving the vehicle in a rash and negligent manner, the accused was not holding a valid driving licence and thereby committed an offence punishable u/s.3(1) r/w. 181 of the Motor Vehicles Act ?	Proved.
6. Does prosecution prove that at the same date, time and place, the accused did not take reasonable steps to secure the medical aid to the victim persons by conveying them to nearest Medical Practitioner or hospital and thereby committed an offence punishable u/s.134 of the Motor Vehicles Act punishable u/s.187 of the Motor Vehicles Act?	Proved.
7. Does the prosecution prove that the accused failed to give information about the incident to the police and thereby committed an offence punishable u/s.187 of the Motor Vehicles Act ?	Proved
8. Does the prosecution prove that the	

alcohol exceeding 30 mg per 100 ml. i.e. . 0.062 % mg was found in the blood of accused and the accused was under the influence of alcohol to that extent so as to incapable of exercising proper control over the vehicle and thereby committed an offence punishable u/s.185 of the Motor Vehicles Act?	Proved.
9. What order ?	As per final order.

REASONS

44. It is vehemently submitted by ld. SPP Mr. Gharat that the prosecution has proved the charges levelled against the accused beyond reasonable doubt that on the intervening night of 27.09.2002 and 28.09.2002, the accused drove the vehicle Land Cruiser car bearing no. MH-01-DA-32 in a rash and negligent manner and was having knowledge that the poor bakery workers were sleeping in front of American Express Cleaners, ran over the car over them and the vehicle climbed on the stairs of the American Express Cleaners and rammed into the shutter of the said laundry. So according to ld. SPP Mr. Gharat, the accused had the knowledge that the said persons were sleeping at the same place daily. Inspite of the knowledge, the accused drove his car in high speed and did not take require care thereby killing Nurulla on the spot and injured four persons, out of which two received grievous injuries. Further according to ld. SPP Mr. Gharat, the accused having brought up in the said area has full knowledge of the topography of the said area, since the accused is residing in the Bandra there from last 35 years.

45. According to ld. SPP Mr. Gharat, it is not disputed that from his house, accused went to the Rain Bar & Restaurant. From Rain Bar Restaurant, the accused then went to J.W. Mariot. According to ld. SPP, the prosecution claims that the accused was driving the vehicle on the day of the incident, but the defence comes with a stand that the vehicle was driven by D.W. 1 Ashok Singh (driver), and not by the accused. The ld. SPP also vehemently submitted that the accused had consumed Bacardi Rum in the Rain Bar Restaurant which gets corroborated by noticing the alcohol to the extent of 62 m.g. in the blood of the accused. Shri Gharat further contended that there is no dispute that the blood of Salman Khan was extracted in J.J. Hospital by PW-20 Dr. Pawar. According to Shri Gharat, the blood extracted for alcohol test was as per the procedure and also there was proper sealing of the blood sample and it was sent for forwarding to Forensic Science Laboratory, Kalina. Further it is contended by ld. SPP Mr. Gharat that PW-19 Rajendra Keskar did not find any mechanical fault in the vehicle and found less air in the front wheel tyre. According to ld. SPP, the defence claimed that the accident occurred due to bursting of front left tyre and it was only a pure accident cannot be established.

46. According to the ld. SPP, there is also evidence of the injured witnesses to demonstrate that the accused got down from the right driver side portion of the car to establish that it was the accused only who was driving the vehicle at the time of incident and none else. Further according to ld. SPP, there is no dispute that the four injured witnesses sustained injuries in the same incident, at the same place and

at the same time. According to ld. SPP Mr. Gharat, the death of Nurulla occurred on the spot due to the dash by the vehicle. The ld. SPP further contended that the spot panchanama is also proved and various articles were recovered. Further it is contended that Ravindra Patil, who was body guard of the accused, lodged the complaint (Exh.P-1) immediately after the incident against the accused. His evidence was also recorded before the ld. Metropolitan Magistrate and he was also cross-examined at length. The complainant Ravindra Patil was expired in the year 2007. His evidence u/s.33 of the Indian Evidence Act is relevant and can be relied, after framing charge under Section 304-II of the I.P.C. According to Mr. Gharat, the evidence of Ravindra Patil inspires confidence and trustworthy.

47. Further it is contended by Mr. Gharat that though there are some omissions, contradictions appeared in the evidence of prosecution witnesses that can be ignored because according to Mr. Gharat, the injured witnesses were labours and illiteratend. They belong to the lower strata. Further it is contended that though there are some lapses, errors noticed in the investigation, that can be ignored and the Court has to evaluate the entire evidence.

48. Further it is contended by ld. SPP Mr. Gharat that the accused had admitted about the occurrence of the accident and also about the bakery workers sustained injuries. However, the specific and pointed defence taken by the accused u/s.313 of the Code of Criminal Procedure is that the defence witness Ashok Singh (DW-1) was driving the vehicle at the time of the incident. According to Mr. Gharat, the

evidence of D.W. 1 Ashok Singh on the point of issue of driving the car is the substantive evidence.

49. The ld. SPP Mr. Gharat contended that the cross-examination of all the prosecution witnesses and the probabilities attempted to be brought on record is the material, revolving around the main substantive evidence of the defence that Ashok Singh was driving the car. Therefore, once the main substantive evidence fails, nothing remains to be corroborated.

50. Further according to the ld. SPP Mr. Gharat that, a cardinal principle of law is that the prosecution case shall stand on his own legs. According to ld. SPP Mr. Gharat, it is true, if the accused faces the trial with his mouth shut and hands tied, the guilt of the accused is to be decided on the basis of the proof of evidence beyond all reasonable doubt. According to Mr. Gharat, the interpretation of the term "Reasonable Doubt", when it seen from the judgments of the Apex Court, it shows that the moment the accused frees his hands and opens his mouth by way of specific defence, the said evidence jumps into the arena of appreciation, balancing and weighing the evidence and becomes the decisive factor for the entire case. According to Mr. Gharat, therefore, when such defence material proves to be illogical and unacceptable, the prosecution case cannot be thrown out as unbelievable. The reason is that the accused has his own stance shuts the other doors to peep through to derive the conclusions favourable to him and to get the benefit of trifling lapses and inconsistencies in the evidence of the prosecution witnesses.

51. According to ld. SPP Gharat, thus, when the defence is specific and other possibilities are ruled out, the question of fixing the liability is only by two ways i.e. as to whether the prosecution story that the accused was driving the vehicle or the specific defence, that Ashok Singh (DW-1) was driving the vehicle. When either of these stories is accepted, the alternate story stands automatically discarded in the light of the fact that no other possibility of any other person driving the car is brought on record.

52. According to ld. SPP Mr. Gharat, the evidence of DW-1 Ashok Singh cannot be accepted as he is a got up witness. Till the statement u/s.313 of the Cr. P.C. is recorded, nothing is brought on record to demonstrate that DW-1 Ashok Singh was driving the vehicle. According to ld. SPP Mr. Gharat, the defence never suggested to any of the prosecution witnesses examined to the effect that the D.W.-1 Ashok Singh was driving the vehicle at the time of the accident. Hence, according to ld. SPP, the evidence of DW-1 Ashok Singh is liable to be discarded from taking into consideration. His conduct is illogical, unnatural, inconsistent and not convincing to the conscious of ordinary prudent man.

53. According to ld. SPP Mr. Gharat, if the entire prosecution evidence is looked into, it will demonstrate that the prosecution has proved the charges against the accused beyond reasonable doubt. The defence raised by the accused is liable to be discarded as the evidence of a liar.

54. The ld. Advocate Mr. Shivade strongly refuted the charges levelled against the accused. According to Mr. Shivade, the ld. Advocate, the prosecution miserably failed to prove the charges levelled against the accused beyond reasonable doubt. The ld. Advocate Mr. Shivade vehemently submitted that Ravindra Patil is a sole solitary eye witness to the alleged incident. His evidence was recorded when the accused faced the charge u/s.304-A of the IPC. After examining 16 witnesses in the Court of Metropolitan Magistrate, the case was committed to the Court of Sessions. In Sessions Court, retrial was held. The complainant Patil was expired in the year 2007. It is contended by Mr. Shivade that the evidence of Ravindra Patil is inadmissible under Section 33 of the Indian Evidence Act. It is further contended that the provisions of Sec.33 of the Indian Evidence Act are not complied with in this case because accused in first proceeding had no opportunity to cross-examine Patil in relation to the offence u/s.304-II as the earlier trial was in relation to the offence 304-A and other sections. Therefore, even if the Sessions Court trial is between the same parties, the recourse cannot be taken to Sec.33. Further according to Mr. Shivade, ld. Counsel, the question and issue in the Magisterial trial and the Sessions Court trial are not substantially the same.

55. Further it is contended that the accused was not driving the vehicle as alleged by the prosecution. DW-1 Ashok Singh was driving the vehicle at the time of the accident. Further it is contended that the car of the accused came to Hill Road via Manual Gonsalves Road driven by DW-1 Ashok Singh. The said road is parallel to St. Andrews Road

and it meets Hill Road before St. Andrews Road. It is contended that there was a sudden tyre burst of the front left tyre and the steering became hard and before driver took turn, the car had climbed the stairs and hit the shutter.

56. It is contended that PW-19 Rajendra Keskar examined the car involved in the accident, but the evidence of PW-19 Keskar does not inspire confidence. According to Mr. Shivade, ld. Advocate, the prosecution has criticized the said expert and even demanded the action against him. According to Mr. Shivade, thus, it was a pure accident for which no one can be blamed. Further it is contended by ld. Advocate Mr. Shivade that if the evidence of complainant Patil is appreciated, then, one can infer that the said evidence does not inspire confidence as the evidence is of the material improvements. There are also omissions in the evidence of Patil and therefore, the ld. Advocate Mr. Shivade urged that it is extremely unsafe to rely on such evidence. It is further contended that the FIR lodged is also at belated stage as the copy of the FIR was not dispatched to the Court of Metropolitan Magistrate within stipulated period as required by law. It is further contended by ld. Advocate Mr. Shivade that the interview given by Patil to Mid-Day published on 30.09.2002 which was admitted by Patil and states that driver Altaf was at the wheel. According to ld. Advocate Mr. Shivade, Altaf was having giddiness at J.W. Mariot Hotel, therefore, he informed Ashok to come to J.W. Mariot Hotel in order to reach the accused at his residence. While returning to the home from J.W. Mariot Hotel, the alleged accident had occurred. According to defence, the incident is a pure accident.

57. Further it is contended that the injured witnesses were under the vehicle, therefore, it was highly improbable that they were in a position to see the accused getting down from the right side portion of the car. Further it is contended that the prosecution has not examined Yogesh Verma and other witnesses from J. W. Marriot.

58. Further it is contended by ld. Advocate Mr. Shivade that after the accident, the mob gathered on the spot which became furious. The persons gathered were armed with the rods and stones. There was danger to the life of accused, therefore, PW-7 Francis has taken the accused away from the mob and the accused was made to sit in the car stopped by wife of PW-7 in order to leave the place. So according to Mr. Shivade, by no stretch of imagination, it can be said that the accused ran away from the spot. According to ld. Advocate Mr. Shivade, story of the prosecution that the accused had consumed alcohol is a fabricated story. The accused never consumed alcohol in Rain Bar Restaurant. There is no strong evidence to that effect adduced by the prosecution. It is contended that the accused was taken to Bhabha Hospital. However, no medical reports of Bhabha Hospital are produced on record. It is contended that IO PW-27 Shengal has attempted to improve the case by saying that API Suryavanshi disclosed that facility of blood extraction was not available in Bhabha Hospital. Further it is contended that Dr. Shashikant Pawar who draw the blood from the accused did not find accused under the influence of alcohol. It is also argued that the Medical Officer Dr. Pawar did not follow the prescribed procedure for extracting the blood, thereby there is violation of Rule 3 and 4 of Bombay Prohibition (Medical & Blood) Rules 1959,

provides these precautions. Further it is also contended that the blood sample was sealed by the ward boy and what precautions were taken by the ward boy while sealing are not forthcoming. Further it is contended that preservative Sodium Fluoride was not added in the sample in order to prevent fermentation. If the preservative is not added, then it will give rise to the fermentation in the blood which generates alcohol, thereby it may affect end result.

59. Ld. Counsel Mr. Shivade attacked heavily on the evidence of PW-18 Bhalshankar who analyzed the blood sample of the accused. It is contended that the blood samples were despatched not within time to the Laboratory. The manner in which the blood samples were kept in police station is also suspicious. No refrigeration was provided in the police station. According to ld. Advocate Shri Shivade, the evidence of PW-18 Bhalshankar is highly unsatisfactory. PW-18 cannot say how he conducted modified diffusion oxidation method. 4 ml blood was found after measuring by PW-18 Bhalshankar, but however, 6 cc blood was sent. According to Mr. Shivade, PW-18 Bhalshankar did not take proper precautions. According to Mr. Shivade, the evidence of PW-18 is suffered from lot of infirmities and therefore, his evidence cannot be accepted and such, the evidence of alcohol consumption needs to be excluded from consideration.

60. Further it is contended by ld. Advocate Mr. Shivade that death of Nurulla was not due to the dash given by the vehicle. According to Shri Shivade, the crane was called to remove the vehicle. When the crane was applied, the bumper came up due to weight of the

car and car fell down. According to Mr. Shivade, Nurulla sustained injuries due to fall of vehicle. It is contended that there are circumstances to show that Nurulla was alive after the accident. So it is contended that the death of Nurulla was not caused due to rash and negligent driving. It is also vehemently submitted by ld. Advocate Mr. Shivade that there are lapses, latches and errors in the investigation which is fatal to the case of prosecution. According to Mr. Shivade, there is no evidence of finger prints produced on record by the prosecution though the finger prints of the accused were sent for comparison with the finger prints appearing on the steering wheel. No photographs of the vehicle are taken about its position after the accident. The front left tyre of the vehicle was not sent to the Laboratory for examination. No parking tag was produced on record which is a valid piece of evidence to show about parking of the vehicle in J.W. Mariot Hotel. Further there are belated statements recorded during investigation. The supplementary statement of Ravindra Patil, bodyguard, was recorded on 01.10.2002 where he made improvements to bring the case against the accused u/s.304-II of the IPC. The Investigating Officer did not record the statements of the Security Guard in the J.W. Mariot as well as Yogesh Kadam. Yogesh Kadam was the Valet at J.W. Mariot Hotel who, according to prosecution, took the car to Valet Park. The name of Yogesh Kadam was written on Valet tag and the prosecution alleged that the tag was given to the accused by Yogesh Kadam. So according to ld. Advocate Mr. Shivade, the evidence of Yogesh Kadam was crucial and by not examining him, adverse inference can be drawn against the prosecution. Lastly it is submitted that the accused is falsely implicated on the pressure of the media.

61. According to ld. Advocate Mr. Shivade, the media, mob was gathered in front of the police station and if the police had named the driver Ashok as accused, there would have been allegations from the mob as well as the media that the police are attempting to save Salman Khan. Hence, according to ld. Advocate, therefore, naming Salman Khan was the best available option for police and strongest possible reason why they implicated the accused. So according to defence, the evidence of DW-1 inspires confidence and he was examined at the right time after conclusion of prosecution evidence and after recording statement of the accused u/s.313 of the Cr. P.C. The stage to examine defence witness would come after recording statement of the accused. This is exactly done in the present case. So according to ld. Advocate for the accused, the accused has demonstrated that it was DW-1 who drove the vehicle. The evidence led by accused is probable and acceptable. Ld. Advocate Mr. Shivade would submit that Investigating Officer interrogated Ashok Singh, but did not record his statement which itself demonstrates how the police are interested in filing the case against Salman Khan. Further it is contended that the evidence led by the prosecution is suffered from infirmities, contradictions and omissions and does inspire confidence at all. The evidence of Ravindra Patil in the Court of Metropolitan Magistrate cannot be admitted and read in Sessions Trial. Lapses, errors and lacunas created in the prosecution story rendered the prosecution case invalid and not worthy to be accepted. Lastly, it is submitted that there is always presumption of innocence in favour of the accused and according to Mr. Shivade, if totality of evidence is taken into consideration, it can safely be said that

the prosecution miserably failed to prove the charge levelled against the accused beyond reasonable doubt and therefore, the accused is entitled for acquittal.

62. In this case, the admitted facts are that, the accused visited Rain Bar & Restaurant. Bodyguard Ravindra Patil was with accused. Accused then visited J.W. Mariot Hotel. The accident occurred and the vehicle climbed the stairs of American Express Laundry and ran over the persons and went into the shutter of American Express Laundry. The defence also admitted the following documents:-

(i) Cause of Death Certificate of deceased Nurulla (Exh.19),

(ii) P.M. report of deceased Nurulla (Exh.20 [Exh.149]),

(iii) Inquest panchanama (Exh.150),

(iv) Injury Certificates of Kalim Mohammad Pathan (Exh.151), Munnabhai Khan (Exh.152), Abdul Rauf Sheikh (Exh.155) and Muslim Shaikh (Exh.156),

(v) C.A. Reports (Exh.157-A to 157-E),

(vi) In the incident, Nurulla Sheikh was expired and four others were injured. The car Land Cruiser was belonging to the accused.

(vii) The third occupant of the car was one Mr. Kamal Khan who was singer and was occupying the back seat of the car.

(viii) The accused was arrested on 28.09.2002.

(ix) The accused was sent for medical examination to Bhabha Hospital and thereafter at about 01.30 p.m. was sent to Sir J.J. Hospital.

(x) The accused admitted that his blood was extracted in J.J. Hospital.

63. The prosecution has tendered in evidence the following articles:-

(i) The Fiber piece of vehicle (Art.1),

(ii) Soil on tyre (Art.2),

(iii) Bloodstained soil (Art.3),

(iv) Pieces of Fiber Glass (Art.4),

(v) Piece of plastic along with label (Art.5),

(vi) Color scratched from shutter (Art.6),

(vii) Soil from spot (Art.7),

(viii) Glass of headlight (Art.8),

(ix) Colour photos of shutter shown to PW-1 by defence (Art.9).

64. In the light of the above said admitted facts, the evidence of the prosecution is required to be evaluated and scrutinized to ascertain as to whether the same is acceptable to say that the prosecution has proved the guilt of the accused beyond all reasonable doubt and also to see as to whether the defence put forth by the accused can be accepted on the touch stone of the logic of an ordinary prudent man. Thus the Court has to see if the defence stands sustained on the theory of preponderance of probability or the depositions of the witnesses do not give room to the doubts which can be said as reasonable doubts.

As to point nos. 1 to 8.

A) Panchanama :-

65. PW-1 Sambha Gauda was running a tea stall near Ram Temple, S.V. Road, Bandra. One Arjun also used to prepare snacks

adjoining to the tea stall of PW-1 Sambha. PW-1 Sambha Gauda is the witness on spot panchanama. On 28.09.2002 at about 03.00 a.m. he was called by Bandra police near American Laundry on Bandra Hill Road. Police informed him that a car was involved in the accident and made request to act as a panch. PW-1 and Arjun had gone to the spot. One police officer, not in uniform, was present there. PW-1 deposed that the said person was Patil. Patil had shown panchas and police the spot of the incident. One big white car entered in the American Laundry. Front portion of the car was damaged. The bumper of the car was also touched the shutter of the laundry. The motor car had climbed three stairs and went in American Laundry. PW-1 deposed that 4 – 5 persons were also found injured beneath the car.

66. It has come in the evidence of PW-1 Gauda that the police had measured the spot, collected the colour scratch of the shutter. The rare side of the wheel of the car was sustained with blood. Police collected blood stains from the spot, collected broken glass pieces and also the number plate. Police also packed the said articles. The panchanama was read over to PW-1 in Hindi and thereafter PW-1 signed the panchanama as well as Arjun signed the panchanama.

67. PW-1 Gauda identified the spot panchanama (Exh.28) and also identified the articles 1 to 8 which are described above. The labels affixed on the envelops bear the signatures of PW-1 Gauda.

68. PW-1 is also cross-examined at length by the ld. Advocate for the accused. PW-1 admitted that he does not possess any licence to

run the tea stall. Municipality used to seize the stall and articles of PW-1 and PW-1 used to pay fine to B.M.C. PW-1 stated in cross-examination that as the police used to call him, he had gone as per the say of police. PW-1 admitted that in order to avoid conflict with police, he used to go on with the police.

69. The ld. Advocate Mr. Shivade vehemently submitted that the PW-1 Gauda is the regular panch available for police and therefore, no reliance can be placed on his evidence. The ld. SPP relied on the reported judgment in the case of **Deepak Ghanashyam Naik v/s. State of Maharashtra, 1989, CRI.L.J. 1181** "In the said cited case, Arun Madhav Zankar (PW-2) was called as a panch witness for taking personal search of the appellant. The said panch witness has been attacked by the ld. Advocate for the accused calling him as a professional panch. Panch witness admitted that he had acted as a panch once or twice. It is observed by their Lordships of the Hon'ble High Court are not able to persuade themselves to agree with the submissions of Mr. Sanghani that he is a professional panch because he is not a person doing nothing and under the police obligation to act as a panch witness. In fact, the panch witness has fruits business. No question was put to him in cross-examination to elicit information about the circumstances in which he happened to act as a panch witness once or twice earlier. In the absence of any question put to him in cross-examination to seek such an explanation, it is not possible to guess in what circumstances he became a panch witness in one or two trial occasions. It is observed that the panch witness is not an idle person or man without means. He is in fact a businessman and there was no

necessity for him to comply with the request of police either for consideration or otherwise or to be in a good books of the police."

70. In our case in hand, the panch witness is a hawker and he was doing the business of tea and has no necessity to comply with the request of the police either for consideration or otherwise to be in a good books of police, then even he has acted as a panch on some earlier occasions, his evidence cannot be doubted.

71. In cross-examination PW-1 Gauda also admitted that panchanama was not drawn in the police station. He had not seen the spot of incident earlier. There is a bakery existed near American Laundry. American Laundry and bakery are adjacent to each other. He also stated that the spot of incident was located on the steps. He signed on the labels on the spot of incident. He does not know timing of panchanama. Panchanama was written down by standing on the footpath on Hill Road. The left tyre of the car was found punctured. The car was found in a same position prior to panchanama and after the panchanama when he left the spot of the incident. PW-1 also stated that he had not seen whether the car was removed with the help of crane in order to remove the injured. He cannot say whether the injured were removed from the spot prior to drawing panchanama or after conclusion of the panchanama. The injured were found in entangled below the left wheel of the car. He stated that people were trying to leave the car from the spot. PW-1 stated that it did not happen that the police entered in the car by opening the door of the car and made inspection and police took RC Book, certified copy of New India

Insurance, keys in their possession. PW-1 contradicted portion marked "A" in the panchanama.

72. PW-1 Gauda also admitted that whatever articles found on the spot were taken in the possession by police and packed in his presence. The police also removed the car with the aid of crane in his presence. PW-1 also stated that he had not seen whether bumper of the car was removed when the crane was touched to that portion at the time of removing the car. Police also had taken the measurement of the car in his presence. When PW-1 signed on the panchanama, car was not present near the shutter. Police also had taken the marking of the car and also had taken the measurement of the distance from the place where the car was found till the road and also the distance from the car till the shutter of the American Laundry. PW-1 Gauda denied in the cross-examination that no panchanama was drawn in his presence and he signed it, in the police station. PW-1 Sambha Gauda saw the blood only on the tyre and not on the other place.

73. If the evidence of PW-1 Sambha Gauda is looked into, I find that his evidence inspires confidence. The spot panchanama was drawn in his presence and there is no reason for him to depose in favour of the prosecution.

B) Whether the evidence of Ravindra Himmatrao Patil recorded before the Additional Chief Metropolitan Magistrate, Bandra, in C.C. No.490/PS/2005 is relevant, admissible u/s.33 of the Indian Evidence Act and can be relied in the proceeding against

the accused :-

74. This is a crucial aspect of the case as to whether the evidence of Ravindra Himmatrao Patil recorded in the Court of ld. Additional Metropolitan Magistrate is relevant, admissible, and be relied in this case. I have also discussed the events after filing charge-sheet in the Metropolitan Magistrate Court, Bandra, and thereafter what had happened in para nos.24 to 31 of the judgment. The ld. SPP Mr. Gharat filed an application (Exh.131) for taking the evidence of Ravindra H. Patil and Dr. R.L. Sanap on record. Ravindra Patil was expired in the year 2007. On 07.03.2015 I have decided the said application and in view of the ratio laid down in the case of **Bipin Shantilal Panchal Vs. State of Gujarat and Another [(2001) 3 Supreme Court Cases 1]** the evidence of Ravindra Patil recorded in the Court of ld. Metropolitan Magistrate is taken on record in the case in hand and it is at **Exh.141**. Dr. R.L. Sanap performed postmortem on the dead body of Nurulla. Dr. Sanap is reported to be residing in U.S.A. The defence specifically mentioned in the say that the defence is not challenging the injuries caused by the deceased and cause of death mentioned in the postmortem report and no prejudice is caused to the defence if Dr. R.L. Sanap is not examined. So the evidence of Ravindra Patil is taken on record in the present case. The prosecution as well as the accused were granted liberty to refer the said evidence during the examination of Rajendra Kadam (PW-26) who recorded the complaint of Ravindra Patil and also Investigating Officer Shengal (PW-27). Further the relevancy and admissibility of the evidence of Ravindra Patil taken on record is to be decided now.

75. It is pertinent to note that the prosecution has examined PW-25 Kailash Behre, brother of Ravindra Patil (deceased/ complainant). According to PW-25, Ravindra Patil was the bodyguard of the accused in the year 2002. After the incident, Ravindra Patil was transferred to LA Division, Tardeo. PW-25 Kailash deposed that Ravindra Patil was not keeping well and he could not recover from the illness and was expired on 03.10.2007. Death Certificate is at Exh.140. The defence also did not seriously dispute about the death of Ravindra Patil.

76. The ld. SPP Mr. Gharat vehemently submitted that the evidence of Ravindra Patil taken on record is relevant and be admitted u/s.33 of the Indian Evidence Act. It is necessary to reproduce Section 33 of the Indian Evidence Act which reads as under:-

> "**33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated :**
>
> Evidence given by a witness in a judicial proceeding or before any person authorised 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 proceedings 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 with in the meaning of this section."

77. It is vehemently submitted by ld. SPP Mr. Gharat that after recording of the evidence of witnesses, the case was committed to the Court of Sessions as the ld. Metropolitan Magistrate was of the opinion that charge u/s.304-II would be attracted. My Ld. Predecessor again framed the charges including charge u/s.304-II of the IPC after committal. As discussed in above paras and in view of the various provisions in Cr.P.C. and after hearing the ld. defence Counsel Mr. Shivade and then APP Mr. Kenjalkar, it was decided to take the evidence afresh. The summons was issued to the witnesses including complainant Ravindra Patil, but it was informed to the Court that Ravindra Patil was expired due to Tuberculosis on 03.10.2007.

78. Therefore, the ld. SPP under such circumstances, contended that Sec.33 of the Indian Evidence Act needs to be invoked. According

to him, Sec.33 of the Indian Evidence Act provides that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of same judicial proceeding, the truth of the facts which is states, when the witness is dead or cannot be found. According to ld. SPP Mr. Gharat, the evidence of Ravindra Patil as PW-1 in the case No.490/PS/2005 was completed before the ld. Additional Chief Metropolitan Magistrate on the facts of the case and full opportunity of cross-examination was given to the accused, which satisfied all the three conditions of the proviso to Sec.33. It is further contended by the ld. SPP that the accused has got full opportunity to rebut the entire evidence of Ravindra Patil. According to ld. SPP Mr. Gharat, facts are to be rebutted, proved or disproved on the touch stone of the cross-examination. According to ld. SPP, truth of the facts was tested in cross-examination of the defence. The accused also confronted the every question available with the accused.

79. According to ld. SPP, the evidence of Ravindra Patil would be the same even after framing the charge u/s.304-II of the IPC. According to ld. SPP,. there are allegations against the accused that on the fateful day of the incident, the accused drove the car in a rash and negligent manner under the influence of liquor and was having knowledge that the labourers were sleeping in front of American Laundry. The accused is residing near the spot of incident and brought up in Mumbai. The FIR was lodged by Ravindra Patil. His examination-in-chief was also recorded in view of FIR filed by him. According to ld. SPP, facts of the case would be the same when charge u/s.304-A of the IPC was framed earlier and after committal, charge

u/s.304-II of the IPC is framed. According to ld. SPP, law imposes certain duties on the person not to drive the car under the influence of liquor and in callous and negligent manner. Moreover, the person also knows that without driving licence, one should not drive the vehicle. So what else would be the knowledge.

80. The defence of the accused is that the accused was not driving the vehicle, DW-1 Ashok Singh was driving the vehicle. Charge u/s Sec.304-II of the IPC is framed in this case that the accused drove the car in rash and negligent manner under the influence of alcohol with the knowledge that people are sleeping in front of American express Cleaners and the accused was having knowledge that by driving the vehicle in rash and negligent manner under influence of liquor he was likely to cause death and caused death of Nurulla Shaikh. In the evidence, Ravindra Patil stated all the facts of the incident. So even if charge u/s.304-II of IPC is framed in the present case, the facts would be the same. The defence also cross-examined Ravindra Patil in the Metropolitan Magistrate Court exhaustively and substantively on the various dates. The omissions were also brought on record by the defence. Suggestion was also given to complainant Ravindra Patil that the accused was not driving the vehicle in drunken state. Suggestion was also given to the complainant that the accused was not driving the car in the beginning of incident night. Suggestion was also given to the complainant that on 01.10.2002 his supplementary statement was recorded in order to involve the accused in the case.

81. So fullest opportunity is given to the accused to cross-examine Ravindra Patil in the Additional Chief Metropolitan Magistrate Court and the said opportunity was availed by the accused. So it cannot be said that the accused was not having opportunity to cross-examine Ravindra Patil.

82. Now question remains about knowledge. As stated by me above, the law imposes certain duties on any person that he should not drive the vehicle under the influence of liquor and also without licence. Every person is having the same knowledge. These are the important ingredients of Sec. 304-II of the I.P.C. So every person has knowledge about the above things and the accused exhaustively cross-examined the complainant by putting suggestion that the accused was not driving the vehicle and he was not in a drunken state of health. So in my opinion, it will be safe to admit the evidence of Ravindra Patil in case in hand u/s.33 of the Indian Evidence Act. The ingredients of Sec.33 are fully attracted in our case pertaining to the evidence of Ravindra Patil.

83. The ld. SPP also relied on the judgment of **1881 Indian Law Reporter, page 42,** in the matter of petition of **Rocha Mohato (Appellant) - The Empress v. Rochia Mohato**. It is necessary to reproduce some portion of the said case and the same is as follows:-

> "This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some error of law or misdirection by the Judge. Now it is alleged that we ought to interfere on two grounds: first, that evidence has been wrongly placed before the jury ;

and secondly, that in certain particulars there has been a misdirection, or rather a want of direction by the Judge.

With respect to the first ground that improper evidence has been placed before the jury, the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution and used in the Sessions Court under the following circumstances :

One of these witnesses was the person whom the defendant and his party were accused of assaulting, and who has since died. Now, before the Magistrate the only complaint was a charge of grievous hurt. But in consequence of the death of the person who was hurt viz., Khedroo, other charges were added before the Sessions Judge, -viz, a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, under S. 33 of the Evidence Act, the questions in issue before the Sessions Court, and before the Magistrate, were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt; and therefore the issue that was before the Magistrate was only issue that has been decided against the accused by the jury. It appears to us, that, by “the questions in issue,” it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his

evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible under s. 33, and even if it were not admissible under s. 33, that it would be admissible under the first clause of s. 32 of the Evidence Act. The question whether the proviso to s. 33 is applicable, - that is, whether the questions at issue are substantially the same, - depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the strokes of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased ; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted under s. 33."

84. The ld. SPP also relied on the case of **The State V/s. Suraj Bali & Ors. [1982 CRI.L.J. 1223 (Allahabad High Court, Lucknow Bench)]** wherein it is held as under:-

"Evidence Act (1872), Section 33- Deposition of a dead witness- Admissibility – Direction by Appellant Court for commitment under Section 423 (1) (b) Criminal P. C.

after setting aside conviction – Former proceedings in trial Court not rendered illegal – commitment to Sessions – Death of a witness – His deposition in first trial – Admissible in Sessions Court.

Where an appellant Court, after setting aside conviction, directs the trial Magistrate under Section 423(1) (b), Criminal P. C. to commit the accused to Sessions Court, the former proceedings in the trial Court are not rendered without jurisdiction and illegal and a deposition of a witness in those proceedings can be brought on record in the Sessions Court under section 33 of the Evidence Act if the witness is dead."

85. In this case, the opposite parties Suraj Bali, Misri Lal, Ramanand, Sadgu, Shankar and Motilal were prosecuted under Sections 147, 342, 324 / 149, 323/149 of the Indian Penal Code before the Judicial Magistrate, Lucknow. The Magistrate recorded the statements of the various witnesses including that of one Ramchandra (PW-2). The ld. Magistrate convicted and sentenced the opposite parties to undergo various terms of the imprisonment. The opposite parties appealed and the appellate court was of the view that the evidence indicated the alleged commission of an offence u/s.387 of the Indian Penal Code which was exclusively triable by the Court of Sessions. The conviction was set aside and the matter was remanded to the ld. Magistrate with a direction that he should commit the case to the Court of Sessions on a proper charge. The case was committed u/s.387 of the IPC. It

transpired that PW-2 Ramchandra (who had been examined by the Magistrate) died before, he could be examined at the trial before the Assistant Sessions Judge. The Public Prosecutor presented an application to examine father of Ramchandra to prove the latter death to enable the prosecution to apply for the transference of the deposition of Ramchandra from the record of the Court of the Magistrate on to the record of the Sessions Trial as evidence u/s.33 of the Evidence Act. The said application was rejected. It is held in para 7 by the Hon'ble High Court as under:-

> "7. The learned Assistant Sessions Judge was to my mind not correct when he rejected the application. It is, therefore, directed that the State shall have the liberty to lead evidence to prove that Ram Chandra is dead and to bring his earlier deposition on the record under Section 33 Evidence Act. As to what value should attach to that statement is for the trial Court to decide, and not for this Court."

86. The ld. SPP also relied on the case of **Ramvilas and others v/s. State of Madhya Pradesh (1985 CRI. L.J. 1773)**.

> **"(A) Evidence Act (1 of 1872), S. 33- Applicability – Essential requirements.**
>
> For admissibility of the recorded evidence of a person in accordance with S. 33, one of the essential requirements is that '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 his presence cannot be obtained

without an amount of delay or expense, which under the circumstances of the case, the Court considers unreasonable' . The allegation has to be legally proved like any other fact and the burden or proof rests upon the party which invokes the section. (Para 9)

Where S. 33 was sought to be invoked in respect of a prosecution witness on the ground of her death it was held that it was for the prosecution to prove the alleged death of that witness according to law and it cannot be said that her death was impliedly admitted by not challenging the report regarding her death. In a criminal case, it is not open to the accused to waive its proof. Consent for want of objection on the part of the accused or his counsel to the deposition of a witness being brought on record under the said section cannot make it admissible, if it is not otherwise so. Thus, when the death was not proved by the prosecution, it was not entitled to resort to S. 33 (para 9)

Also S. 33 contemplates (i) a subsequent judicial proceeding in which that person has to be examined as a witness or (ii) a subsequent stage at which that person has to be examined as a witness in the same judicial proceeding as the case may be. (para 10)"

87. In the said case, the appellants were charged with the alleged offences u/s.148, 302, 149, 307/149 and 395/397 of the Indian Penal Code. After holding a trial, the appellants were

convicted. The conviction is based on the solitary testimony of Mrs. Gangadevi (PW-27) and few pieces of circumstantial evidence. Her evidence was recorded on 07.01.1981 on which date she was examined in chief, cross-examined and discharged. Her dying declaration was recorded on 25.12.1981 by the Executive Magistrate Mr. Pandey (DW-2). That statement had not been filed by the prosecution nor had a copy thereof delivered to any of the appellants. The application was filed on 02.02.1981 by the appellants for recalling of PW-7 Gangadevi. The said application was rejected by the Sessions Court, but in Revision the Hon'ble High Court allowed the application. The Sessions Court directed Gangadevi (PW-7) to re-summon for further cross-examination and posted the case to 05.03.1981. The matter was adjourned from time to time. When the matter was fixed on 23.04.1981, the summons report of Gangadevi had been written to the effect that she had died on 08.04.1981. In the above mentioned circumstances, it is contended on behalf of the appellants that the testimony of PW-7 cannot be read in evidence u/s.33 of the Evidence Act.

In the said case, it is held as under:-

"10. But, in our opinion, in the circumstances of the present case, recourse to the said section is not necessary to give relevancy to the testimony of Mst. Gangadevi ((P.W.7) as we shall presently show. No decision of the Supreme Court or this Court on this point has been brought to our notice. The rule contained in the section is an administrative expedient for doing justice between litigants in a particular situation. The court requires a litigant to

furnish evidence of the primary grade if it is within his power to do so. So long, therefore, as the proponent can reasonably be required to cause a witness to repeat his evidence regarding admissible facts given on a former occasion the Court insists that the witness himself be produce. In other words, primary evidence is insisted upon until a satisfactory necessity for offering secondary evidence is made out. When the proponent's necessity for producing evidence of secondary grade is established, the right to submit it is recognised by the Court so long as the original evidence is attainable, evidence which is merely substitutionary in its nature cannot be received. The section states the circumstances and conditions under which secondary evidence of oral testimony may be given. Under those circumstances and conditions, the section makes relevant the evidence already given by a person (i) in a prior judicial proceeding or before any person authorised by law to take it or (ii) at an earlier stage of the same judicial proceeding. That is to say, if a party wants to give the evidence of the same person (i) in a subsequent judicial proceeding or (ii) at a subsequent stage of the proceeding as the case may be, his evidence already recorded earlier can be considered and he need not be examined in the subsequent judicial proceeding or at the subsequent stage of the same judicial proceeding as the case may be if the circumstances and conditions mentioned in the section are fulfilled. The section contemplates (i) a

subsequent judicial proceeding in which that person has to be examined as a witness or (ii) subsequent stage at which that person has to be examined as a witness in the same judicial proceeding as the case may be. In the present case, there is no question of a subsequent judicial proceeding. Here, the question is whether, in the sessions trial, there was any stage at which it was necessary for the prosecution to give evidence of Mst. Gangadevi (P.W.7) again. Her evidence had already been recorded at the trial on 7-1-1981 under S. 231 of the Cr. P.C. 1973 read with S. 137 of the Evidence Act and there was no subsequent stage for giving her evidence. As there was no subsequent stage for giving her evidence, there was no occasion for invoking S. 33 of the Evidence Act for giving relevancy to her evidence recorded on 7-1-1981. The relevancy was never lost by it as it was the evidence of primary grade given at the trial. S. 33 abid states the circumstances under which secondary evidence of oral testimony may be given. When evidence of primary grade has been adduced, there is no occasion to invoke or resort to that section.

11. The fact, however, remains that the appellants were deprived of the opportunity to further cross-examine Mst. Gangadevi (P.W.7) in the light of her earlier statement dt. 25-12-1979 (Ex.D-5) recorded by the Executive Magistrate Sanskar Pande (D.W.2). That opportunity was directed to be given to them vide order dated 20-2-1981 in the

criminal revision referred to in para No. 7 above. That statement (Ex.D-5) could be made use of by the appellants only for contradicting her under S. 145 of the Evidence Act. It has, therefore, to be examined as to how far the appellants are adversely affected or prejudiced thereby. Reference to her testimony becomes necessary at this stage."

88. I have gone through the cited case and with due respect, I find that the facts in the case of **Ramvilas and others v/s. State of Maharashtra** (cited supra) are not applicable to the facts of the case in hand. In our case, the evidence was recorded afresh, after framing the charge u/s.304-II of the IPC after committal. Complainant Ravindra Patil is expired. He has stated the facts in his evidence before the ld. Metropolitan Magistrate as to how the accident took place. Those facts would be the same for the charge u/s.304-II of the IPC. In view of the ingredients of Section 33 of the Indian Evidence Act and in view of the judgment in case of **1881 Indian Law Reporter** and **The State V/s. Suraj Bali & Ors.** (cited supra), the evidence of Ravindra Patil is relevant, and admitted and is taken on record u/s.33 of the Indian Evidence Act in the case in hand. As to what value should attach to the said evidence is to be discussed later on.

89. The ld. Advocate Mr. Shivade vehemently argued that the essential conditions of Sec.33 are not fulfilled by the prosecution. It is contended that the charge and nature of the offence in both the trials are different. The ingredients of Sec.304-A and 304-II of the Indian

Penal Code are dramatically opposite in respect of *mens rea*. The offence u/s.304-A requires an act of omission while Sec.304-II requires an act of commission. It is also argued by ld. Advocate Mr. Shivade that the accused did not get proper opportunity for cross-examination with reference to the charge or issues.

90. Ld. Advocate Mr. Shivade vehemently submitted that in the earlier trial the accused was facing the lighter charge. Sec. 304-A of the IPC punishable with two years or fine. According to ld. Advocate Mr. Shivade, the cross-examination is always permitted to the extend of charge and accused is not supposed to anticipate all the potential charges and cross-examined accordingly. The earlier evidence was recorded in the absence of the accused. According to Mr. Shivade, the accused is now facing a grave charge of culpable homicide not amounting to murder, punishment provided upto 10 years or fine. Ravindra Patil has not been cross-examined in this case. It is contended that the evidence of Patil was tendered at the fag end. Further according to Mr. Shivade, issues involved in both the cases are not substantially the same.

91. The ld. Advocate further contended that the provisions of Section 33 of Indian Evidence Act are not complied with in this case, because the accused in the first proceeding had no right or opportunity to cross examine Patil in relation to offence of Section 304, Part II as the earlier trial was only for Section 304-A and other lesser charges. Therefore, even if the Sessions Court trial is between the same parties recourse cannot be taken to Section 33.

92. Further it is argued by ld. Advocate Mr. Shivade that the question and issue in the Magisterial trial and the Sessions Court trial are not substantially the same because the question of intention or knowledge of the accused in relation to the act done by him was completely irrelevant in the trial u/s.304-A while they are essential in Sec.304-II of the IPC. According to Mr. Shivade, there is always substantial difference between the act causing the death and the act causing the injury. According to Mr. Shivade, in the present case, the case of the accused is that he was not driving. Further according to Mr. Shivade it is also necessary to note the provisions of Section 304-I which required that the act causing death is done with the intention of causing death or causing such bodily injuries as is likely to cause death. Part-II of Sec.304 also contemplates an act done which results in death of the person with the knowledge that such act is likely to cause death, but without any intention to cause death or such bodily injury is likely to cause death. According to Mr. Shivade, therefore, all this is not required to prove, if the person is tried u/s.304-A of the IPC whether he had intention or not, whether he had any knowledge or not. Hence, according to Mr. Shivade, offences u/s.304-A and 304-II are different and are not substantially the same. Section 304-A is an independent charge, it is not lesser offence than Section 304-II of the IPC. Hence, according to Mr. Shivade, the evidence of Patil cannot be held relevant and read in Sessions Court trial. It is contended that the Magisterial trial and, after committal, a Sessions trial is not a later stage of the same judicial proceeding and therefore, Sec.33 of Evidence Act cannot be invoked. According to Mr. Shivade, the accused is deprived of substantial right to cross-examine Patil.

93. I am afraid to accept the contentions of ld. Advocate Mr. Shivade. As discussed above by me, the facts are to be rebutted in cross-examination. The complainant Patil has narrated in his evidence about the facts as to how the accident took place. There are allegations against the accused about driving the vehicle in rash and negligent manner under intoxication. The accused exhaustively cross-examined Patil before the ld. Additional Chief Metropolitan Magistrate Court. Under Section 304-II, knowledge plays the important role. As discussed above, every prudent man is having knowledge that he should not drive the vehicle under the influence of alcohol or without having licence. Every prudent man is having knowledge about the consequences of breach of the above duty. The accused is also resident of same vicinity wherein the spot of incident is located. The accused used to pass from nearby the spot of incident. So the accused was having knowledge that people used to sleep in front of American Express Cleaners. The Hon'ble Apex Court also held in the land mark judgment of **Alister Anthony Pareira V/s. State of Maharashtra** that in Mumbai, people do sleep on the pavements.

94. Ld. Advocate Mr. Shivade relied on the case of **Willie (William) Slaney V/s. State of Madhya Pradesh (AIR 1956 SC 116)**. In the said case, it is held as under:-

> "12. In our opinion, the key to the problem lies in the words underlined. Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter

> resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial or that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once. Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused."

95. It is most important to note here that the evidence of Ravindra Patil would be the same as to the facts of the incident which he has stated and therefore, no prejudice would be caused to the accused when the evidence of Ravindra Patil is relevant, taken on record u/s 33 of Indian Evidence Act. It is presumed that every person has knowledge that one should not drive the vehicle under influence of

liquor and also without licence. So under such circumstances, the arguments of Mr. Shivade that the accused was prejudiced for want of cross-examination of Patil in view of framing charge u/s Sec.304-II of the IPC cannot be accepted. The accused had cross-examined exhaustively and substantially Ravindra Patil before the Additional Chief Metropolitan Magistrate and also suggested him that the accused was not driving the vehicle under the influence of liquor. Omissions and improvements are also brought during cross-examination. What would be the effect of omissions and improvements is another aspect. But in my opinion, the evidence of Ravindra Patil is complete evidence. The facts deposed by him would not be changed, even the charge u/s.304-II of the IPC is framed. Moreover, ld. Advocate Mr. Shivade also contended that the entire prosecution u/s.304-II of the IPC revolves around the intention and knowledge of the accused. I am also afraid to accept the said contention on the ground that u/s.304-II of the IPC, the question of intention does not arise. So after considering all the submissions of ld. SPP Mr. Gharat and ld. Advocate Mr. Shivade, after considering the provisions of Sec.33 of the Indian Evidence Act and also having regard to the nature of the facts pertaining to the incident stated by complainant Ravindra Patil and also the opportunity availed by the defence fully to cross-examine, I find that this is the perfect case wherein evidence of Ravindra Patil would be relevant and admissible u/s.33 of the Indian Evidence Act in case in hand.

C) The most important and crucial point to be ascertained is that whether the accused was driving the car on the intervening night of 27.09.2002 and 28.09.2002.

96. The ld. Advocate Mr. Shivade vehemently submitted that Ravindra Patil being a sole eye witness to the incident, his evidence should be scrutinized with great care and caution. Moreover the evidence of Patil is also to be analysed and appreciated whether it does inspires confidence.

97. The ld. Advocate Mr. Shivade relied on the case of **Vadivelu Thevar V/s. State of Madras (AIR 1957 SC 614**), wherein it is held that,

> "Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:
>
> (1) Wholly reliable.
>
> (2) Wholly unreliable.
>
> (3) Neither wholly reliable nor wholly unreliable."

98. The ld. Advocate Mr. Shivade also relied on the case of **Birappa & Anr. V/s. State of Karnataka [(2010) 12 SCC 182]** wherein it is held as under:-

> "Witnesses-----Solitary eyewitness---Appreciation of testimony of --- Held, where prosecution story rests on single eyewitness, such witness must inspire full confidence, which was not the case herein, where conduct of sole eyewitness was unnatural- Conviction reversed.
>
> The conduct of PW 1 was clearly unnatural which makes his evidence extremely suspicious. As per the prosecution story he had seen his brother being cut up at about 6.00 p.m. at a place half a kilometre away from the village near a temple and in an area which was heavily populated (as Konnur was a large village) and he had rushed home at 6.00 p.m. and then returned at 8.00 p.m. to look for his brother. PW 1 in his evidence did not utter a single word as to the places he had visited while in search or the inquires he had made from the neighbourhood which had a chemist shop, a tea shop, a liquor vend and several residential houses in the fields along a very busy road. Thus, PW 1 was perhaps not an eyewitness and he had lodged the FIR only after the dead body had been discovered. This perhaps explains the delay in the lodging of the FIR."

99. The ld. SPP Mr. Gharat would submit that the evidence of Ravindra Patil is totally trustworthy, credible and believable and cannot be discarded in proof that the accused was driving the vehicle at the time of incident. Further the ld. SPP also submits that it is the specific

and pointed defence of the accused that DW-1 Ashok Singh was driving the vehicle.

100. The ld. Advocate Mr. Shivade relied on the reported judgment of the Hon'ble Apex Court in case of **State of Haryana v/s. Ram Singh in Criminal Appeal No.78 of 1999 with Rai Sahab and Another Vs. State of Haryana in Criminal Appeal No.79 of 1999 [(2002) 2 Supreme Court Cases 426**. Relying on the said authority, ld. Advocate Mr. Shivade submitted that the evidence tendered by the defence witnesses cannot always be termed to be tainted one. The defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witness on a par with that of prosecution.

101. So as stated above, let us appreciate the evidence adduced by the prosecution to demonstrate that it was the accused who was driving the vehicle and also let us appreciate the evidence of DW-1 Ashok Singh that he was driving the vehicle in order to come to the conclusion who either of two was driving the vehicle.

102. The evidence of Ravindra Patil is now taken on record in this case being relevant u/s.33 of the Indian Evidence Act. As per his version, he was the bodyguard working with the accused from 28.08.2002. He used to remain along with the accused as a part of the duty. On 27.09.2002 complainant Ravindra Patil joined the duty at 08.00 p.m. As per his version at about 09.30 p.m. on 27.09.2002

accused and Kamal Khan came out side the residence. They told complainant Ravindra Patil that they are going to visit Rain Bar. The accused is having Toyota Land Cruiser car bearing no.MH-02-DA-32. Complainant Patil, Kamal Khan sat in the car and the accused drove the car. The accused reached at Rain Bar. The accused asked Ravindra Patil to wait out side and the accused and Kamal Khan went inside the Hotel. The visit of Rain Bar is admitted by the accused u/s.313 of the Cr. P.C., but he denied that he was driving the vehicle.

103. The bodyguard of Mr. Sohel Khan (PW-6 Balu Laxman) also met complainant Ravindra Patil out side the hotel. Sohel Khan had also come in Hotel Rain Bar. At about 01.30 a.m. accused and Kamal came out side Rain Hotel.

104. The evidence further reveals that Kamal sat on rear side, the accused sat on the driver's seat and complainant sat on the seat near the driver's seat. The car reached near J.W. Mariot Hotel. The accused and Kamal Khan went inside the Hotel. Complainant Patil waited out side. At about 02.15 a.m. the accused and Kamal Khan came out side the hotel. The accused then sat on the steering of his car. The complainant sat near the driver's seat. The complainant asked the accused whether he will drive the car. The accused neglected complainant Patil. Kamal was sitting at the rear side of driver seat. The vehicle came on the St. Andrews Road which was driven by the accused. Complainant Patil stated in his evidence that the accused was drunk and driving the motor car at 90 to 100 km per hour. Before coming at the junction of Hill Road, complainant told the accused to lower the

speed in view of the right turn ahead. The accused neglected the say of complainant and he could not control the car while taking right turn and vehicle went on the footpath. The people were sleeping on the foot path. The motor car ran over the persons sleeping on the footpath and climbed the three steps of American Laundry and gave dash to the shutter of American Express shop (Laundry). The motor car broke the shutter and went inside about 3 and ½ ft.

105. There was shouting of the people and the people gathered there. The people surrounded the car. However, with great difficulty, complainant, accused and Kamal went out of the car. People were in angry mood. The complainant Patil showed his identity card and told that he is police personnel, therefore, they were pacified. The accused Salman and Kamal ran away.

106. Complainant Patil went to the motor car and saw below it and noticed one person seriously injured having multiple injuries and four injured persons below the car who were trying to come out.

107. Complainant Patil then informed to the Control Room. Within 5 minutes, Bandra police came there. Police rescued the injured persons and body of the dead person was sent to Bhabha hospital. The injured were taken to the hospital. Complainant Patil pointed out the place to the police.

108. Complainant Patil went to Bandra Police Station and lodged the complaint. FIR is at Exh.P-1. According to complainant

Patil, the accused was in drunken state and could not control the speed while taking turn. Further supplementary statement of Patil was recorded on 01.10.2002.

109. So if the evidence of Patil is looked into, he has deposed that the vehicle was driven by the accused. In cross-examination of ld. Advocate Shri Sampat Mehta, complainant Patil admitted that the injured were below the car and the police rescued them from beneath the car and sent to the hospital. Complainant Patil also stated that the dead body of the person was taken out from beneath the car and was sent to the hospital. The police also drew the panchanama of the incident place and then returned to Bandra Police Station. Complainant Patil also admitted that he went to Bandra Police Station and lodged the complaint with Yadav and Kadam (PW-26). According to complainant, his complaint was read over to him and the contents were true and correct. It has come in the cross-examination that the incident had taken place before about 1 hour of recording his complaint. So it appears that the complaint was lodged immediately after the incident and there was no delay.

110. Ld. Advocate Mr. Shivade relied on the case of **Sucha Singh V/s. State of Punjab [(2009) 11 SCC 584]** wherein it is held as under:-

> "In FIR, informant PW 4 stating that his mother sold illicit liquor to maintain her children, while in his evidence he stating that she sold only two bottles of liquor occasionally----Held, if brothers had nothing to do

with sale of liquor, as rightly held by trial court, motive must be held to have not been proved ---- Moreover, PW 5 had categorically denied that his mother sold any liquor or earned her livelihood by doing liquor work--- Further, there were significant contradictions in matter of number of injuries, time and place of occurrence, sequence of events, manner of identification of accused ---- There was also lack of motive and false implication of co-accused M ---- PW 4 had made vital contradictions in his FIR vis-a-vis the supplementary statement when it was found that right hand of M was amputated and he was not in a position to inflict any injury---Hence, impugned judgment reversing the judgment of acquittal and convicting appellant cannot be maintained."

111. During cross-examination, there are some omissions and improvements brought on record. PW-1 admitted that he has not stated in FIR that the accused was in drunken state and was driving the vehicle. However, in FIR (Exh.P-1), there is mention that the accused Salman Khan was driving the vehicle. There is also no mention in the FIR that complainant Patil asked the accused to lower the speed of the car as right turn is coming. However in supplementary statement, the said fact is mentioned. Complainant also stated that there is no mention in FIR that the accused was driving the motor car in high speed and was in drunken state and could not control the speed of the car while taking turn. However, on going through the complaint (Exh.P-1), there is mention that the accused was driving the vehicle in high speed

and he could not control the vehicle while turning on the Hill Road. The vehicle went straight towards the shop on the junction and ran over the persons sleeping on the footpath and on the stairs and rammed the shutter of American Express. It appears that the complainant did not mention in the FIR that the accused was in drunken condition. However, in supplementary statement, there is mention that complainant noticed in view of the body language of the accused that he might have consumed the alcohol.

112. Reliance is placed in case of **Animireddy Venkata Ramana and others V/s. Public Prosecutor, High Court of Andhra Pradesh [2008(4) Mh. L.J. (Cri.)1 (Supreme Court)].** In the said case, it is observed as under:-

> "(b) Contents of FIR-A first information is not meant to be encyclopaedic.
>
> 12. In the First Information Report all the accused persons were named and overt acts on their part were also stated at some length. Each and every detail of the incident was not necessary to be sated. A First Information Report is not meant to be encyclopaedic. While considering the effect of some omissions in the First Information Report on the part of the informant, a Court cannot fail to take into consideration the probable physical and mental condition of the first informant. One of the important factors which may weigh with the Court is as to whether there was a possibility of false

implication of the appellants. Only with a view to test the veracity of the correctness of the contents of the report, the Court applies certain well-known principles of caution.

13. Once, however, a First Information Report is found to be truthful, only because names of some accused persons have been mentioned, against whom the prosecution was not able to establish its case, the entire prosecution case would not be thrown away only on the basis thereof. If furthermore the purported entry in the general diary, which had not been produced, is not treated to be a First Information Report, only because some enquiries have been made, the same by itself would not vitiate the entire trial. Enquiries are required to be made for several reasons.; one of them is to ascertain the truth or otherwise of the incident and the second to apprehend the accused persons. Arrest of accused persons, as expeditiously as possible, leads to a better investigation. Accused No. 1 was a Sarpanch of the village. Accused no. 2 is a fair Price Shop dealer. Accused No. 3 was also admittedly a well-known person. It is also not denied and disputed that other accuse were also related to him.

In view of the fact that such an incident had taken place, indisputably it would immediately be known to the villagers. Those who hold some respectable position

in the village and particularly those who are concerned with the administration of Panchayat were expected to be present."

113. Complainant Patil also stated in cross-examination that the vehicle Land Cruiser did not stop from Hotel J.W. Mariot to the place of incident, once started. Further there is also omission to state in the complaint that the accused neglected the say of complainant to lower the speed. However the said fact is mentioned in supplementary statement of Patil dated 1.10.2002.

114. Complainant Patil denied that the accused was not driving the car from beginning. He also denied that the accused was neither drunk nor driven the car. He also denied that the accused was not driving the car at the speed of 90 to 100 km per hour in the incident night. He also denied that he did not tell the accused to drive the car slowly when it came near junction of St. Andrew Road and Hill Road.

115. Complainant Patil also admitted in cross-examination that there was hue and cry in media, like T.V. press against the accused after happening the incident. He also admitted that the reporters of the newspapers and T.V. channels were taking the interviews of the persons. Complainant Patil also admitted that reporter of Mid-Day had come to him for taking interview of the incident dated 28.09.2002 and he narrated the reporter the incident taken place. The reporter also noted down what complainant had answered him. The reporter also read over to him what they wrote. Complainant also admitted that on

next day i.e. 30.09.2002 interview was printed and published in Mid-day along with photographs. It appears that during cross-examination the questions were asked to the complainant Patil about interview. The Ld. SPP objected defence to put questions to complainant on the alleged interview.

116. A question was asked to the complainant Patil during cross-examination whether the complainant has stated to the reporter of Mid-Day whether Altaf was on the wheel when Salman and Kamal returned from Rain Bar and started to Salman's house by car. Complainant replied that he does not remember. The interview was given to Mid-Day. Another question was asked to the complainant as to whether the complainant stated before the reporter of Mid-day that after returning from J.W. Mariot Hotel, Salman sat on the driver's seat of the car. Complainant replied that he has stated so.

117. Another question was asked to the complainant whether he had stated to the reporter that the accused was driving the vehicle at the speed of 70 km per hour. Complainant replied that he does not remember. Further question was asked to the complainant whether he has stated to the reporter that Land Cruiser was about to hit at the electric poll. Complainant replied that he has stated so to the reporter. The copy of the Mid-Day is produced on record, subject to objection. The ld. SPP also objected showing the copy of the Mid-Day newspaper to the witness, during evidence recorded in the court of Additional Chief Metropolitan, Bandra.

118. Further complainant admitted that he stated to the reporter that Salman shouted saying, "*gadi nahi ghum rahi* (car is not turning)" and then he lost the control of the vehicle and then he rammed to the American Express Laundry. Further complainant also admitted to have stated to the reporter that mob of 50 people gathered on the spot, started pelting the stones. Complainant also admitted to have stated to the reporter that Salman requested to public to listen but the angry mob kept throwing the stones. Complainant also admitted to have stated to the reporter of Mid-Day that in the meanwhile, Kamal escaped in the crowd and minutes later Salman got into autorickshaw and left. So it appears that the above cross-examination is concentrated on the so called interview by the complainant to the Mid-day newspaper. The copy of Mid-day newspaper dated 30.09.2002 is produced on record and marked as D-1, subject to proving by appropriate evidence. However, the defence failed to take steps to prove the said copy by appropriate evidence, the said material cannot be considered in evidence. The reporter who had taken the alleged interview is not examined by the defence. The defence has not chosen to examine the concerned reporter and therefore, the question by the reporter to complainant and his reply becomes inadmissible in evidence.

119. The ld. SPP relied on the reported judgment of the Hon'ble Apex Court in case of **Tukaram S. Dighole Vs. Manikrao Shivaji Kokate in civil appellate jurisdiction in Civil Appeal No.2829 of 2008 decided on 05.02.2010**. The appeal u/s.116-A of the representation of People Act 1951 is directed against the final judgment and order dated 25.01.2008 rendered by the High Court of Judicature

at Bombay in Election Petition No.13 of 2004 preferred by appellant challenged in the election of the respondent of the Lok Sabha from 69, Sinnar Parliamentary Constituency in State of Maharashtra has been dismissed. The short question for consideration was whether the tribunal was justified in discarding the cassette placed on record by the appellant to prove the allegation of the appeal by the respondent to the voters to vote on communal ground amounting to a corrupt practice within a meaning of Sec.123(3) of the Act.

120. It is observed that the petitioner has produced the cassette on record. However, the petitioner has produced no evidence to indicate that a cassette was true reproduction of the original speeches. The cassette is not a public document. No evidence to indicate that the cassette was obtained from Election Commission. The petitioner who examined himself has not adverted to this video recording in his examination-in-chief. The petitioner has not proved the receipt issued by the Election Commission and failed to prove that VHS cassette was the public document. That being the position, it is not possible to rely on the contents of the cassette. It is held that in the absence of any cogent evidence regarding the source and the manner of its accusation, the authenticity of the cassette was not proved and could not be read in evidence despite of the fact that the cassette is a public document.

121. In our case in hand, the reporter who had taken interview of the complainant is not examined. The Mid-Day paper (Exh.D-1) is not proved in accordance with law. The contents of the interview are also not proved. I find substance in the submission of ld. SPP that the

question by reporter to the complainant and its reply becomes inadmissible in evidence.

122. In the present case, admittedly, the complainant Patil was working with the accused. Nothing was brought on record that the relations of the complainant with accused were spoiled. Even it is not the case that complainant would have stood benefited by implicating the accused in a false case like the promise of being promoted or increasing his salary or benefit of any other sort.

123. The complainant Patil, therefore, has to be considered as impartial witness, in absence of any suggestion to cast reasonable doubt on his evidence that he is intentionally deposing false against the accused.

124. No suggestion was given to complainant Patil in cross examination that Altaf was driving the vehicle from the house of accused upto Rain Bar and thereafter till J.W. Mariot. Even no suggestion was given to the complainant Patil that as Altaf was having giddiness he informed Ashok (DW-1) and called Ashok to J.W. Mariot to take the accused to his house. The defence fails to put their case to the complainant Patil during cross-examination.

125. During cross-examination specific suggestion was given to the complainant that the accused was not driving the car “from the beginning” in the incident night. According to ld. SPP to consider the said suggestion in correct prospective, the defence has admitted that at

some point of time, the accused took charge of the car driving. According to ld. SPP, the said evidence is required to be read in consonance with the question in cross-examination. On page 7 top line, "the incident motor car did not stop from Hotel Mariot to the place of incident once started". This in other words, means that the person who took the control of the wheels of the vehicle from J.W. Mariot hotel was driving the car till the time of the incident. According to the ld. SPP, even in defence version that Altaf was driving the car is accepted and the illogical and false evidence of DW-1 is discarded, there does not remain any excuse to conclude that the accused was not driving the vehicle. According to the ld. SPP, the defence itself has shut the possibilities that neither Kamal Khan nor complainant was driving the vehicle at the time of accident in absence of any suggestion to any of the witnesses and on their own admission of the specific defence of driving by Ashok Singh who has proved to be self condemn liar.

126. Ld. Advocate Mr. Shivade relied on the case of **Yudhishtir V/s. State of Madhya Pradesh [(1971) 3 SCC 436]** wherein it is held as under:-

> "25. In fact the learned Sessions Judge has also held that the evidence of P. Ws. 1 and 6 to the effect that after coming out of the house of Bamdeo they had told the people assembled outside that all the four accused persons had killed Surajkunwar cannot be believed. Similarly the learned Sessions Judge has also held that these two witnesses cannot be believed on the point that along with Bamdeo the appellants had also actively

participated in causing the death of Surajkunwar.

26. Normally on the basis of the above finding recorded by the learned Sessions Judge, on would expect the Court to hold the appellants not guilty of murder. But curiously the learned Sessions Judge proceeds on the basis that though the evidence of P. Ws. 1 and 6 itself would not be sufficient to convict the appellants, some corroboration will have to be found in other independent evidence. We are unable to appreciate this reasoning of the learned Sessions Judge. Corroboration for any evidence given by a witness may be found necessary when a Court is not inclined to reject the evidence of the witness to be false. A Court may be willing to act on the evidence of a witness but it may be of the view that the witness is an interested one and it may not be safe to act on that evidence alone. In such circumstances, in order to enable the Court to act on that evidence, it may seek corroboration from other independent evidence or circumstances. When evidence of a witness, as in this case of P. Ws. 1 and 5 has been rejected as unacceptable, there is no scope for attempting to find corroboration by other independent evidence or other circumstances. If there was any other evidence implicating the appellants, it was open to the Court to consider such evidence even after rejecting as false the evidence of P.Ws. 1 and 6."

127. According to ld. SPP Mr. Gharat, because of improvements in the version of complainant, it cannot be disbelieved that the accused was driving the vehicle at the relevant time since the complainant has no reason to falsely implicate the accused like animus or grudge. On the contrary, presence of the complainant is natural and admitted. The complainant has to accompany the accused wherever accused went for shooting, hotel party in night and day.

128. So if the evidence of complainant and cross-examination is looked into, the evidence of complainant shows that at the time of accident, the accused was driving the vehicle cannot be discarded as false and untrustworthy and unbelievable. On the contrary, the same is fully trustworthy, credible and natural since the presence of the complainant along with accused stands justified and complainant has no animus and grudge to falsely implicate the accused in a serious offence.

129. Further through the cross-examination it is brought on record that within 5 to 10 minutes police arrived. The dead body was removed beneath the car and panchanama was prepared. The said version corroborates the substantive evidence of panch witness PW-1 Sambha Gauda. I find that facts cited in **[(1971),3 SCC 436]** are not applicable to our case in hand.

130. The prosecution also relied on the version of the injured witnesses PW-2 Muslim Shaikh (Exh.32), PW-3 Mannu Khan (Exh.33),

PW-4 Mohd. Kalim Iqbal Pathan (Exh.36) and PW-11 Mohd. Abdulla Shaikh (Exh.53). Accused also admitted u/s.313 of the Cr. P.C. that in the incident, the people were injured. He also admitted that the injured were working in the bakery. In the incident, Nurulla was expired. The statements of PW-2, PW-3, and PW-4 were also recorded u/s.164 of the Cr. P.C. by the ld. Magistrate (Exh.35,36 & 37). The defence also admitted postmortem report of Nurulla (**Exh.20). Exh. 149 is also given to the postmortem report of Nurulla in the evidence of PW-27 I.O].** The defence also admitted the injury certificates of Abdulla Rauf Shaikh [**(Exh. 21) (Exh. 155 given in the evidence of I.O)]**, injury certificate of Mohd. Abdul Pathan **[(Exh. 22) (Exh. 151 is given to the said certificate in the evidence of the I.O)]**, injury certificate of Muslim Niyamat Shaikh **[(Exh. 23) (Exh. 156 is given to the said certificate in the evidence of I.O)]**. **Exh. 152** is the medical certificate of Mannubhai given in the evidence of I.O.

131. PW-2 Muslim Shaikh sustained the grievous injury to his left leg. He was operated on his left leg and rod was inserted. PW-3 Mannu Khan received the injury on his right leg and PW-4 received the injury on his right side leg and on left hand. Both these witnesses were sleeping on the same bed. PW-11 Mohd. Abdulla was sleeping on the same bed with the deceased Nurulla and he sustained fracture to his right leg. Muslim Shaikh suffered injury over his left leg. The car ran over the person of Nurulla Mehboob Shaikh and he was crushed below the tyre. Nurulla succumbed to injury on the spot after some time of the incident.

132. The ld. SPP Mr. Gharat relied on the judgment reported in the case of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat (AIR 1983 SC 753)** and the judgment reported in **Boya Ganganna V/s. State of Andhra Pradesh (AIR 1976 SC 1541)**. The Hon'ble Supreme Court observed that "Minor contradictions are bound to be there when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnesses by another though both are present at the place of offence. It is not right to reject the testimony of such witnesses merely on the ground of minor contradictions."

133. The acceptance of injury certificate in evidence goes to show that the victim suffered the injuries in the same incident and also shows the presence of witnesses at the time of the incident. What is challenged is the opportunity to see. The ld. Advocate Mr. Shivade vehemently submitted that PW-2, 3 and 4 alleged that they saw the accused getting out from the driver's side. It would have been impossible for any of them to have seen who was getting out from which door, as they were under the vehicle. It is contended on behalf of accused that in fact, the accused got down from the driver's seat door being the last of four people in the car in view of the evidence of Ram Asare Pandey. According to prosecution, the car was occupied by three persons at the time of incident who were Ravindra Patil (Bodyguard of

the accused), singer Kamal Khan (friend of accused) and the accused himself. It is pertinent to note that Kamal Khan was occupying the back seat in the car throughout is not challenged.

134. There is also no dispute that the injured witnesses and deceased were serving in American Bakery. As per the version of PW-2 Muslim, at about 02.45 a.m. he alongwith Mannu, Salim and Nurulla were sleeping near American Laundry. He heard the sound and found himself beneath the car. The wheel of the car passed over his left leg. Bakery people helped the injured to remove from beneath the car. PW-2 also deposed that people were saying that Salman Khan was got down from the car. PW-2 was asked to sit down near the left side of the car. One person also got down from the left side of the car saying he was a police man. People then released Salman Khan. Nurulla (deceased), Abdul, Mannu Khan, Kalim were found beneath the car. PW-2 brought to the hospital by police. His statement was also recorded by Bandra Police. PW-2 saw accused getting down from the right side of the car.

135. Ld. Advocate Mr. Shivade relied on the case of **R. Shaji V/s. State of Kerala [(2013) 14 SCC 266],** wherein it is held as under:-

> 24. The learned Senior Counsel for the appellant has urged that statements of certain witnesses were recorded under Section 164 CrPC before the Magistrate, namely, Kalampasha (PW 61) and Dinesh M. Pillai (PW-62). The said statements were not put on record before the trial court, and the same were not marked. Thus,

> the trial stood vitiated as the accused has been denied an opportunity to contradict the aforementioned statements of the witnesses, which were made under oath before the Magistrates, which though are not in the nature of substantive evidence, could well be used for the purpose of corroboration and contradiction. Denial of such opportunity is against the requisites of a fair trial."

136. In our case, statements u/s.164 of the Cr. PC of the witnesses are on record and also accused got an opportunity to contradict the statements.

137. Ld. Advocate Mr. Shivade vehemently submitted that no reliance can be kept on the version of PW-2 Muslim Shaikh in view of omissions and improvements. In cross-examination PW-2 stated that after two and half months of the incident, he had gone to Bandra Police Station and his statement was recorded there. PW-2 also stated in cross-examination that after one day from discharging him from hospital, he went to his native place Uttar Pradesh and returned to Mumbai on 26.04.2014 from Uttar Pradesh, after going on the next day of the discharge from the hospital. PW-2 further stated that on 20.12.2006 he was not present in Mumbai and does not recollect whether his statement was recorded in Police Station on 20.12.2006. He again stated that his statement was not recorded on 20.12.2006. He again deposed that the fact that his statement was recorded in Police station on 20.12.2006 is correct. He admitted that he has not stated

during the course of evidence that he had not seen anybody getting down from the car. Exh.35 is the certified copy of the statement of PW-2 recorded on 20.12.2006 in the Court of Metropolitan Magistrate. He contradicted portion marked "A" in his statement dated 20.12.2006. There is no mention in the statement recorded on 20.12.2006 that Salman has got down from the car. Further there is no mention in the statement dated 20.12.2006 that people caught Salman and at that time, one person got down from the car and told that he is police and therefore, people released Salman. PW-2 also admitted that within a span of 5 to 10 minutes injured reached in Bhabha Hospital. He denied that he was told that he would get enough compensation, therefore, he was asked to tell the name of Salman. So there appears to be improvement made by the witness in the evidence. The ld. SPP Gharat also did not rely much on the version of PW-2. However, it is a fact that PW-2 is a rustic witness and he was injured in the incident. His medical certificate is also admitted by the defence.

138. The prosecution also relied heavily on the evidence of PW-3 Mannu Khan (Exh.33). He also deposed that he along with other injured witnesses and deceased were sleeping near American Laundry. According to him, he was sleeping on Ota (Platform). Suddenly he heard big noise and found himself beneath the car. The car was on his person. Kalim, Muslim, Abdulla and Nurulla found beneath the car. The injured were crying. Many people came there and bakery people rescued PW-3 beneath the car. After some time, people gathered on the spot and saying accused came from the car.

139. According to PW-3 Mannu Khan, the car was white in colour and there were three persons sitting in the car. The accused got down from the driver's seat. One bodyguard was also got down from the car. Third person also got down from the back portion of the car. The evidence of PW-3 also reveals that bakery people caught Salman on the road. Salman was so drunk that he fell down. He stood but again fell down and again he stood and ran away from the spot.

140. PW-3 Mannu was also brought in the hospital and discharged after some time. Abdulla and Muslim were admitted in the hospital. His statement was recorded in police station as well as u/s.164 of the Cr. P.C. before Bandra Metropolitan Magistrate. Exh.34 is the statement recorded before Metropolitan Magistrate and it bears his signature.

141. In cross-examination PW-3 Mannu stated that after 2 – 4 days of the incident, his statement was recorded. He is unable to tell length of the ota (platform) and according to him, two people can easily accommodate on ota. PW-3 further deposed that the American Bakery was also having ota (platform). He stated that one cannot sleep on the stairs. He is unable to tell whether the road passing in front of the bakery is St. Andrews Road. However, he admitted that Holy Family Hospital located on Hill Road at the right side in front of the bakery and at the distance of 200 ft. away from the bakery.

142. PW-3 Mannu then stated in cross-examination about recording of his statement u/s.164 pf the Cr. P.C. According to him, the

police have shown the statement to Bandra Court and stated that it is the statement of PW-3. According to PW-3, after perusing the statement, the Magistrate asked PW-3 the questions. PW-3 told to the Magistrate as per statement and thereafter his signature was taken on the statement.

143. PW-3 Mannu Khan remained on the spot for a period of one hour after the incident. Within 10 – 15 minutes police arrived on the spot after the accident. According to PW-3 Mannu, his head was towards American Bakery and his legs were towards the Dairy when he was lying. Similar is the position of Kalim. According to him, he woke up after hearing the noise and started feeling paid in his body. The front right side of the car was resting on the ota and left side was resting in between stairs of American Laundry and Bakery. The right leg of PW-3 was stuck on the front right wheel of the car. According to PW-3, he could not move from the place till the car was lifted. The same was the position of Kalim. The right foot of PW-3 was stuck under the wheel. PW-3 was removed first than Kalim. PW-3 further stated that back side of the car was resting on the footpath which was in level with the road. As back tyres of the car were resting on the road, this evidence strikes of the defence that the doors of the car were so stuck and jammed with the shutter that the same could not be opened to come out.

144. According to PW-3 Mannu, the car was lifted by holding the bumper at the time of removing PW-3 and he could remove the leg. PW-3 further stated that police also called the crane in order to remove

the car. Within 15 minutes of the incident, crane was arrived on the spot. Nurulla was removed from beneath the car after removing the car by crane. The car was lifted with the aid of crane and 15 minutes time required to remove the car by crane.

145. So if the evidence of PW-3 Mannu is looked into, it can be said that PW-3 was rescued from beneath the car before arrival of the crane. According to him, after 15 minutes of the incident, Salman came out of the car. There is omission in the statement before police on the part by PW-3 to the effect that bakery people caught Salman. The said fact is also not mentioned in the statement recorded u/s.164 of the Cr. P.C. Pw-3 did not state before police that Salman was drunk and he fell down and again stood up. The said fact is also not mentioned in the statement recorded u/s.164 of the Cr. P.C. PW-3 also unable to tell about the position of front left door of the car with reference to the shutter of the Laundry. He is also unable to say at what distance the front tyre and back tyre were located from the shutter. PW-3 had not seen the stone pelting on the car. PW-3 stated in cross-examination that after running away from the spot by Salman, the car was removed by the crane.

146. PW-3 Mannu had not seen the bodyguard earlier and he admitted that the police told him at the time of recording his statement that bodyguard was present in the car and therefore, he thought that whatever police have told must be correct. There is also omission on the part of PW-3 to state in the statement before the Magistrate that third person got down from the back side of the car and also the said

fact does not find place in the police statement. In cross-examination PW-3 stated that third person got down from the back side of the car by left side.

147. PW-3 Mannu admitted that due to incident, he was unable to think, shocked and confused. After 3-4 hours of treatment, he again came to the spot. He denied that on the say of police, he is stating that Salman got down from the driver side. Though there are some omissions brought in the evidence of PW-3, in my opinion, that will not affect his evidence. We have to read whole evidence of PW-3.

148. PW-4 Mohd. Kalim Iqbal Pathan is also examined by the prosecution. He also deposed that he was sleeping in front of American Laundry. Mannu Khan was also sleeping near him. PW-4 heard a big noise and he noticed that one vehicle was over his person. He sustained injury on his right side leg and on his left hand. The other injured and deceased Nurulla were found beneath the car. Bakery people helped to remove injured from beneath the car. PW-4 also stated in cross-examination that the accused got down from the right side of the car. Many people were telling Salman get down from the car, thereby Salman got down from the car and ran away from the spot. Salman Khan ran away from the spot after seeing the crowd. One police bodyguard was also present in the car and he was Patil. Statement of PW-4 was also recorded in Bandra Court u/s.164 of the Cr. P.C. (Exh.37). PW-4 also stated that the accused is the same person who got down from the right side of the car.

149. PW-3 Mannu and PW-4 Mohd. Kalim have deposed that they were made to sit near laundry after the accident. The defence has brought on record in cross-examination that the back tyres of the car were resting on the road i.e. at the end of the stairs. This evidence strikes of defence that doors of the car were so stuck and jammed with the shutter that the same could not be opened to come out. PW-4 also pleads ignorance about the number of the persons occupying the car.

150. PW-4 Mohd. Kalim also stated in cross-examination that after 4-5 days of the incident, police recorded his statement. PW-4 also stated that the news of the incident was published in the newspapers on the next day of the incident. PW-4 stated that the police had shown him the statement. PW-4 stated that he cannot say what had written in the statement but admitted that he thought, whatever written by the police was true. He is unable to tell when he was called in Bandra Court to record the statement u/s.164 of the Cr. P.C. PW-4 admitted that the police told him that the statement is to be recorded in Bandra Court like a statement recorded in police station. He does not know what was written in the statement before the Magistrate, but he signed out the statement because of police and the Magistrate. He admitted in cross-examination that he was sleeping on ota (platform of American Laundry).

151. PW-4 Mohd. Kalim also stated in cross-examination that he heard the big noise and he was not knowing what had happened. His left hand was stuck on the bumper of vehicle. Bakery man helped PW-4 to get away from beneath the car. Bumper was not separated from the

car. After 10 – 15 minutes PW-4 was succeeded to get away from beneath the car. He stated that he was under the shock due to the accident. First Mannu was rescued thereafter PW-4 was rescued. Car was at the distance of 5 to 7 ft away from the place where PW-4 was sleeping. According to PW-4, people did not lift the car. After arrival of crane, the car was lifted. He stated that back tyre of the car was burst. He is unable to tell whether portion marked "A" was stated before the Magistrate while recording the statement. He cannot say whether the bakery people pushed the car. The incident of removing the car by crane was done after 15 minutes of the incident.

152. PW-4 Mohd. Kalim further stated in cross-examination that he had not seen bodyguard of Salman prior to the incident. People were telling that bodyguard of Salman. Bodyguard was present on the spot after the incident for about 15 minutes and then he left the spot and did not return till the time PW-4 was present. PW-4 stated that the road was extended upto the stairs.

153. It has come in the cross-examination that PW-4 Mohd. Kalim had seen both the tyres of the vehicle resting on the stairs upto the shutter. The vehicle went to the shutter and the shutter was bent. Both the corners of the bumper touched the shutter. Back tyres of the vehicle were resting at the end of the stairs. This evidence strikes of the defence that the doors of the car were so stuck or jammed with the shutter that the same could not be opened to come out. PW-4 also had not seen who were sitting on the car. After 10 minutes of the incident, Salman got down from the car. The witness has denied the suggestion,

two persons in addition to Salman ran away from the spot. The second person ran away after Salman. Salman Khan remained on the spot for 5 to 10 minutes period. PW-4 cannot say whether two persons ran away from the car. He cannot say portion marked A-1 stated before the Magistrate by him. He cannot say why portion marked "A" was written in the statement u/s.164 of the Cr. P.C. He also cannot say whether portion marked "A" was correctly recorded in examination-in-chief before the Metropolitan Magistrate.

154. PW-4 Mohd. Kalim denied the suggestion that he had not seen Salman Khan getting down from the right side portion of the car. He also denied that police tutored him to state against the accused in order to claim more compensation.

155. So the evidence of PW-3 Mannu Khan finds corroboration through PW-4 Mohd. Kalim on the material particulars about sustaining injuries in the accident and saw accused Salman Khan getting down from the right side portion of the car (driver side).

156. PW-11 Mohd. Abdulla Shaikh is also injured in the incident and according to him, he along with other injured witnesses were sleeping near American Laundry. Nurulla (deceased) was also sleeping along with him. He also deposed that at about 02.30 a.m. suddenly some heavy object was passed from his leg and his right leg was fractured. Kalim, Mannu and Nurulla sustained injuries in the incident. The injured cried for help, thereby bakery men, taxi driver rescued the injured by removing from beneath the car. PW-11 was also rescued by Bakery men, taxi driver from beneath the car.

157. The evidence of PW-11 Mohd. Abdulla Shaikh further reveals that bakery man and taxi driver were telling that the accident was caused by Salman Khan. PW-11 had seen Salman Khan after he was rescued. Two persons were also with him, but he does not know who were they. According to him, Nurulla was also with him in Bhabha Hospital and he was also crying in pain

158. In cross-examination PW-11 Mohd. Abdulla Shaikh stated that in the incident he and Nurulla were entangled in the car. After accident, because of driving, PW-11 found himself and Nurulla at the short distance from the place where they were sleeping. PW-11 also stated that after the accident, sleeping position of the persons was shifted. Salman Khan was standing there, prior to leaving the spot by PW-11 to the hospital. PW-11 was lying for a period of 10 to 15 minutes beneath the car. He does not know how car was lifted. Till the car was lifted, PW-11 and Nurulla were crying for help. After half an hour of the accident, PW-11 was brought in Bhabha Hospital. There is omission on the part of PW-11 to state in the statement before the police that the bakery man and taxi driver were saying that the accident was caused by Salman Khan. The said fact is not mentioned in his statement.

159. If the evidence of PW-11 Mohd. Abdulla Shaikh is looked into, he has specifically deposed that two persons were with Salman. No suggestion was given by the defence about the four persons travelling by the car. PW-11 also sustained the grievous hurt to his

right leg. So if the evidence of PW-3 Mannu Khan and PW-4 Mohd. Kalim is looked into, they were rescued from beneath the car prior to arrival of the crane and they were conscious. They sustained minor injuries. It has come in the evidence of PW-3 that there were three persons in the car and the accused got down from the driver's side. So also PW-4 corroborated the evidence of PW-3 that accused getting down from the right side of the car and many people were asking accused to get down from the car. Though PW-4 did not know whether the car climbed the stairs, however, it is a matter of common sense that unless the car climbs the stairs, how it would run over the injured sleeping on the otla (platform) near the shutter and would ram into the shutter.

160. In cross-examination complainant Patil admitted that left side of the incident motor car was pressed and there was no condition of the incident motor car to open the left side doors. Complainant Patil also stated in his examination in chief that after accident with great difficulty “we went out of the motor car”. No specific details are given how complainant came out from the car. However, in view of the cross-examination of PW-3 and PW-4, it is brought on record that the back tyres of the car were resting at the end of the stairs i.e. on the road. This evidence strikes of the defence that the doors of the car were stuck and jammed and the same could not be opened to come out. Salman Khan also stated in statement recorded u/s.313 of the Cr. P.C. that he did get down from the driver side of the car. He also stated in the written statement filed u/s.313 of the Cr. P.C. that as left front side door was jammed, he crossed over to the driver seat from the front left seat where he had been sitting and got out from the driver's door. So it

is established that Salman Khan got down from the right side door i.e. from the driver's door.

161. There is also evidence of PW-13 Amin Kasam Shaikh. He also knew the injured. He also used to sleep near A-1 Bakery. He heard big noise as about 2.30 am. He went towards the direction of American Laundry. He saw one vehicle went in American Bakery. He saw Muslim and Abdul were found beneath the car. He removed Muslim from beneath the car. He called rickshaw and Muslim was made to sit in the rickshaw. Kalim Mohd. and Mannu Khan were the other injured. There is also omission on his part to state in the statement that he called rickshaw which was standing near the joint of Andrews Road and Hill Road. He also deposed that people were telling Salman “Come out from the car”. His evidence corroborates evidence of other injured persons about sustaining the injuries by them.

162. PW-8 Ram Asare Pandey was running a Dairy at the time of the incident on Hill Road, Bandra (W.). On 27.09.2002, at about 10.30 p.m. he closed the dairy. At about 02.45 a.m. he heard the big noise and he saw people were crying “Mar gaye Mar Gaye”. People were running from A-1 Bakery towards American Laundry. PW-8 also went there and saw white colour car rammed the shutter of American Express Laundry. One person was found dead and four persons were injured. According to him, the injured were working in the bakery. He saw accused getting down from the right front side of the car. One police person was present in the car who told his name as 'Patil'. Police came on the spot and sent the injured persons to Bhabha Hospital. PW-8

stated that two persons were present in the car in addition to Salman Khan and police constable Patil, but he does not know who were those persons.

163. In cross-examination PW-8 Ram Pandey stated that his statement was recorded after 4 – 5 days of the incident. He also admitted that the Tar Road was touching to the first stair of American Bakery and American Laundry. According to PW-8, within half minute time, one can reach from his dairy to American Bakery. He saw 50 to 60 people gathered there standing around the car. The people who were below the car were crying for help. He also admitted that left front door of the car was so touched to American Bakery, it could not be opened and it was jammed with the shutter. People were trying to pull the car and people were succeeded to open the right front side of the door. People who gathered on the spot were angry in mood and pelted stones on the car.

164. In cross-examination PW-8 Ram Pandey also stated that when Salman got down from the car, he saw the car and Patil was standing out side the car near the driving side. Prior to Salman getting down, Patil was standing near the car. Francis who stays in his building was also present on the spot. Francis helped Salman to leave the spot. PW-8 further stated that he does not know where two people sitting in the car, besides Salman and police constable Patil had gone.

165. As per the prosecution story, there were only three persons i.e. Salman Khan, Patil and Kamal Khan while travelling in the car. If

according to ld. Advocate Mr. Shivade that fourth person would be the driver, then the driver would not be sitting in the car. If really the driver was there, he would have standing out side the car. Even defence never suggested PW-8 to the effect that the fourth person was the driver in the car or the vehicle was driven by Ashok Singh.

166. It is pertinent to note that PW-7 Francis is an important independent witness. Both prosecution as well as defence relied on his evidence. In cross-examination it has come on record for a period of half an hour, PW-7 remained on the spot. He also knew the people who were present on the spot. That during half an hour period of remaining on the spot, PW-7 did not see Ram Pandey on the spot. He stated specifically in the cross-examination that during half an hour period he did not see Ram Pandey on the spot. So fact that, PW-8 Ram Asare Pandey visited the spot and if really he had seen four persons sitting in the car including Salman and his bodyguard raises a doubt.

167. There is also evidence of PW-9 Rizwan Rakhangi. He was the Manager of Rain Bar & Restaurant. He has deposed about the visit of accused, Sohel Khan to Rain Bar. After returning Salman Khan from Rain Bar, he accompanied Salman Khan and Sohel Khan. In cross-examination he saw four persons including Salman sitting in the car.

168. It is pertinent to note that from Rain Bar and Restaurant Salman Khan visited J.W. Mariot. No suggestion was given to the said witness as to whether Altaf was driving the car. It is the case of the accused that Altaf drove the car from his house upto J.W. Mariot via

Rain Bar Restaurant. At J.W. Mariot, Altaf felt giddiness thereby he called Ashok to take Salman to the house. So who was the fourth person other than bodyguard Patil, Salman Khan and Kamal Khan sitting in the car. If according to defence the fourth person was Altaf, then it ought to have been suggested to the witnesses, but that is not done. Even complainant Patil never stated in his evidence that Altaf was driving the vehicle upto J.W. Mariot from the house. Even there was no suggestion given to Ravindra Patil on behalf of the defence. It has come on record only when accused u/s.313 of the Cr. P.C. stated about Altaf.

169. There is also evidence of PW-6 Balu Laxman Muthe. He was bodyguard of Sohel Khan and was on night duty on 27.09.2002. According to him, at about 10.30 p.m. Sohel Khan started to go to Rain Bar by car. PW-6 Balu was with him. Sohel Khan went inside the bar. PW-6 was asked to stand outside the restaurant. After sometime, Salman Khan and his friend also came with bodyguard. The name of friend was Kamal Khan. Salman Khan entered in the restaurant and PW-6 and Ravindra Patil were chitchatting out side the restaurant. At about 01.45 a.m. Salman Khan and Sohel Khan came out. Kamal Khan and Vikram Phadnis also came out. Sohel Khan, Vikram Phadnis and PW-6 returned to Galaxy Apartment at about 02.00 a.m.

170. PW-6 Balu Muthe admitted in cross-examination that after 15 minutes of entering Sohel Khan in the restaurant, Salman Khan arrived near Rain Bar. PW-6 was standing near the gate of restaurant. PW-6 stated that he had not seen the car of Salman Khan near the restaurant.

171. If really Altaf drove the vehicle by taking Salman at Rain Bar, then PW-6 Balu would have noticed the said fact or would have stated about Altaf in his evidence. Defence never suggested PW-6 Balu that vehicle was driven by Altaf upto Rain Bar Restaurant.

172. PW-12 Kalpesh Verma was entrusted with the duty of Parking Assistant in J.W. Mariot Hotel. He used to park the owner driven car in the porch area. The parking of the owner driven car is also termed as “valet parking”. According to him, at the time of parking the owner driven car, one tag is to be delivered to the owner and another tag with the key used to remain with the hotel. At the time of leaving the hotel, the owner return the tag to the hotel and after matching the key with tag number, the vehicle used to deliver in the possession of the owner.

173. As per the version of PW-12 Kalpesh Verma, his colleague Yogesh had parked the Land Cruiser vehicle in the valet parking. He also saw Salman coming out from the hotel. PW-12 told his colleague Yogesh to give the key as PW-12 was to take out the vehicle from valet parking. According to PW-12, Land Cruiser was parked in the porch of the hotel. PW-12 then took the vehicle back in reverse position. Salman came and sat on the driver's seat. Two persons were with Salman Khan. One was Kamal Khan. Third person was the bodyguard of Salman Khan. Kamal Khat sat on the back seat of the driver's seat. According to PW-12, when he handed over the car to Salman, he saw bodyguard (Patil) was standing near the driver side door. When PW-12

tried to close the door, Salman asked how many colleagues of PW-12 were there. PW-12 replied that 4 – 5 colleagues of him were there. Salman took Rs.500/- from Kamal and gave PW-12 by way of tip. PW-12 then closed the driver side door and then left the place for keeping the money in a box available in the desk in porch area. When PW-12 returned to the hotel, he did not see the car.

174. If the above evidence is looked into, then it was quite natural that bodyguard Patil was standing near the driver side door. When Salman sat on the driver's seat. Patil being bodyguard was entrusted the duty of security of Salman Khan. Therefore, he was standing near the driver side door. Further when the key was given by Salman Khan, it is presumed that Salman Khan started to leave the place. Tip is to be given at the time when one leaves the place. PW-12 nowhere stated about the presence of fourth person.

175. In cross-examination PW-12 Kalpesh Verma admitted that there is cabin existing on the left side of porch. One security guard is deployed on the cabin. The keys having tags available in cabin. Entrance door is double door and 15 to 20 ft. in width. One has to enter from the entrance gate and for leaving hotel, exist door is provided. There is also a door available on the left side of the entrance gate for taking luggage, articles in the hotel. PW-12 also stated in cross-examination that in the lobby of the porch, four pillars are existing and there may be distance of 100 ft. between two pillars existing in post lobby. The vehicles are not allowed to park in front of the entrance lobby.

176. According to PW-12 Kalpesh Verma, one can reach parking slot from the key cabin within one or two minutes. He also admitted that near about 100 to 150 vehicles used to arrive in the hotel.

177. PW-12 Kalpesh Verma also admitted that on the tag, the date is mentioned as well as time of arrival and departure is mentioned. There is also mentioned car number, name of valet driver mentioned on the tag. Valet driver used to sign the tag. At the time of handing over the car, the person who hands over the car also signs on the tag.

178. Further PW-12 Kalpesh Verma stated in cross-examination that during investigation, police took the tag. According to PW-12, parking tag is the evidence regarding parking the vehicle as well as returning the vehicle at the time of leaving the hotel to the person who takes the vehicle. PW-12 stated that in the present case, the person who parked the Land Cruised filled the parking tag and PW-12 did not fill the tag at the time of parking. Name of Yogesh Kadam was mentioned on the tag.

179. PW-12 Kalpesh Verma further admitted that the doors of the car used to close so that there should not be any obstacle for other cars passing near the car. The person sitting in the car is not allowed to remain open the door till the other occupants are arrived as it may cause obstruction to the other cars passing nearby. Pw-12 also admitted that he did not see at what time and in what manner the Land Cruiser left the hotel. He stated in cross-examination that Kamal Khan sat on

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. PW-12 some how improved in cross-examination that he was remembering at the time of giving statement that on which portion of the back seat Kamal Khan was sitting and he sat behind Salman Khan. PW-12 stated that Kamal Khan sat back side of the car on left side. He denied that he is deposing false that Salman Khan was sitting on driver's seat.

180. If entire evidence of PW-12 Kalpesh Verma is looked into, one finds that there were only three persons i.e. Salman Khan, Kamal Khan and bodyguard Patil present in the car. Salman Khan sat on the driver's seat. He gave Rs.500/- tip to PW-12 Kalpesh. The tip used to be given at the time of leaving the place. According to defence, DW-1 Ashok came and took the charge of the vehicle. However, this fact cannot be digested because PW-12 Kalpesh could have noticed Ashok coming in the porch near the car. Moreover, it has come in the cross-examination that one can reach parking slot from the key cabin within one or two minutes. It is highly improbable that PW-12 would not have noticed Ashok if really he had come at the place where car was standing. What would be the effect of non production of the parking tag and non examination of Yogesh Kadam will be discussed later on.

181. It is not the case of the accused that since beginning Altaf was at the wheel when Salman Khan started for going to Rain Bar Restaurant from his house along with complainant Patil and Kamal Khan. It is also not the specific defence since beginning of the accused that the Ashok was driving the vehicle from J.W. Mariot. It is also not

the defence of the accused since the beginning that Altaf felt giddiness and informed Ashok to come to J.W. Mariot in order to reach Salman to his house. It is pertinent to note that in the evidence of PW-8 Pandey and in cross examination of PW-9 Rizwan, it has come on record about the presence of four persons including Salman Khan, his bodyguard and Kamal Khan. It seems that the defence then developed the theory that the fourth person must be a driver and the car was driven by him. Such inference cannot be probable and acceptable. The defence has to put his case specifically, positively since beginning which is not done in the present case. Defence cannot take the advantage of the improvements of the witnesses which is made in our case regarding four persons. It is pertinent to note that it was never suggested to any prosecution witness since beginning about Altaf driving the vehicle from the house of Salman Khan till Rain Bar Restaurant and thereafter upto J.W. Mariot. At J.W. Mariot, Ashok Singh took the charge of vehicle. So it cannot be acceptable, there was fourth person present in the car and he was a driver in the absence of positive suggestions to the witnesses.

182. Now turning to the most important twist of the case brought in the case by defence when Salman Khan examined u/s.313 of the Cr. P.C. Salman Khan stated u/s.313 of the Cr. P.C. that on 27.09.2002 at about 11.00 p.m. he went to Rain Bar on calling of his brother Sohel. Kamal, bodyguard Patil were with Salman and the car was driven by Altaf. Salman sat on the left front side next to Altaf who drove the car to Rain Bar. After spending some time in Rain Bar, Salman Khan went to J.W. Mariot Hotel at Juhu. At about 01.30 a.m. on 28.09.2002, Altaf told Salman that he was not feeling well thereby

he called Ashok and Altaf would leave the car keys with the hotel valet. Valet then brought the car to the porch, but Ashok had not reached. So Salman waited for him by sitting on the driver's seat and put on air conditioner. Patil was standing next to the car. After arrival of Ashok, Salman sat on the front left seat. Kamal continued sitting on back left sit and Ravindra Patil sat behind the driver.

183. It is pertinent to note that the fact about Altaf and Ashok driving the vehicle came on record for the first time after stating by Salman u/s.313 of the Cr. P.C. Till the statement recorded u/s.313 of the Cr. P.C. not a single suggestion was given to any of the prosecution witnesses examined so far. Even in the statement u/s.313 of the Cr. P.C. Salman never disclosed the name of the witness to whom he wanted to examine. Then the accused examined Ashok Singh (DW-1) in defence. DW-1 Ashok stated in his evidence that he is working as a driver with Salim Khan, father of accused, since 1990. There were no fixed duty hours of work but whenever services are required, DW-1 was called. Altaf and Datta were two drivers working in the year 2002.

184. DW-1 Ashok narrated in his version that on 27.09.2002 he was sleeping in his house and he received phone call from Altaf at about 01.30 to 01.45 a.m. Altaf then informed DW-1 that Altaf was not feeling well and he left the keys with valet parking. DW-1 after changing his clothes, went by rickshaw to J.W. Mariot from Andheri. He went to porch of the hotel and saw Land Cruiser vehicle standing in the porch. DW-1 saw bodyguard Patil standing outside the vehicle and he saw Salman sitting on the driver's seat and A.C. was on. DW-1 then

sat on driver's seat. Salman Khan went to the seat next to the driver's seat. Ravindra Patil, bodyguard, sat behind him in the back portion of the car and fourth person was Kamal Khan sitting behind Salman Khan.

185. DW-1 Ashok then deposed that he took the vehicle on Linking Road, on Gonsalves Road and took right turn for going to Hill Road. Vehicle came on the Hill Road and proceeded at some distance then front left tyre of the vehicle burst, thereby vehicle pulled towards the left side. Steering wheel became hard to turn up. According to DW-1, he tried to apply the breaks, but by then the vehicle had climbed the stairs of the Laundry. The vehicle then stopped.

186. DW-1 Ashok Singh further deposed that he got down from the driver's side. Salman tried to open the door at the left side, but the left door was jammed. There were people beneath the car who were shouting. Salman also got down from the car from driver's side. PW-1 and Salman tried to lift the car to rescue the people found beneath the car, but car did not move. Salman also told DW-1 to inform police. In the meantime public gave pull and push to DW-1 and also Ravindra Patil who got down from the car. DW-1 then proceeded to Bandra Police Station but it was told that police had already left the spot. DW-1 narrated the incident to police station. DW-1 was asked to sit in the police station. At about 10.30 am on 28.9.2002 Salman came to the police station and DW-1 informed that police did not entertain his complaint. Police then took Salman outside by arresting him and Salman returned to police station at about 4.30 pm.

187. DW-1 Ashok Singh is cross examined at length by Ld. SPP Shri Gharat. DW-1 stated that the Land Cruiser Vehicle is a model land Cruiser laxis and engine is V-8. The vehicle has power steering, power brakes, power windows, ABS brake system etc. The said vehicle is also called as SUV (Sport utility vehicle). DW-1 admitted that the said vehicle is bigger than other Sport Utility Vehicle. The tyres of the Land Cruiser were radial and were having a large width in size. The said vehicle is a strong vehicle and also runs on the road like muddy and marshy places, on stones and uneven surface. The shock absorbing system of the Land Cruiser was very good. There was indicator panel facility provided in the vehicle. DW-1 also admitted that if the engine oil, coolant and brake oil are found decreasing, then the said fact is indicated on the panel. He also admitted that if anything found wrong hand brake, timing brake, wrong in the brakes, the said fact is indicated on the panel indicator.

188. DW-1 Ashok also admitted that Salman Khan used to provide help to the needy persons including staff members. DW-1 also admitted that he was devoted to Salman Khan.

189. DW-1 Ashok also admitted that he was knowing if he committed wrong then he has to visit police station. DW-1 also knew that if the case is filed then witnesses are to be deposed in the Court and the Court then pronounce the verdict. DW-1 stated that he came to know later on that one person lost his life and four persons were injured in the accident. DW-1 admitted that he came to know about the said fact after few hours of the incident.

190. If really DW-1 Ashok was driving the vehicle at the time of accident, then after the accident, at that very moment DW-1 would know that one person has lost his life and four persons were injured in the accident.

191. DW-1 Ashok also admitted that he came to know in the police station that Salman Khan was arrested by police. DW-1 also came to know that Salman Khan was prosecuted and chargesheet was filed and Salman Khan is being tried. Salman Khan was released on bail on the same day and was again re-arrested and was detained in jail.

192. DW-1 Ashok also admitted that he know how Salman Khan is busy and also about the time value of the Salman Khan being a leading actor.

193. DW-1 Ashok also admitted in the cross examination that he felt bad that accident occurred when he was driving the vehicle and Salman had to attend the dates of hearing in the court. DW-1 also admitted that Salman Khan did not tell him to keep mum and he will face the prosecution.

194. DW-1 Ashok also admitted that he was aware that Salman khan had engaged the advocate to defend him. DW-1 also stated that he felt that accident occurred when he was driving the vehicle, but Salman Khan had to face consequences and also his valuable time was lost. DW-1 also admitted that he never thought to seek help from Salman Khan in the present matter.

195. Questions were also asked by Ld. SPP to the DW-1 Ashok during his cross examination. DW-1 stated that he was not aware what he had to seek any help from the lawyer. DW-1 stated that he did not visit advocate or seek any help from any understandable person. DW-1 also stated that he was always thinking that wrong was going on as DW-1 committed the accident but he did not know what to do.

196. A question was asked to DW-1 Ashok that since September-2002 till recording his evidence as a defence witness, can DW-1 assign any reason as to why DW-1 did not come to the Court on his own to narrate the truth ? DW-1 replied that, he was not having any understanding nor did it strike to him that he has to come in the Court. DW-1 further deposed that Salim Khan told him to go to the Court and to tell the truth. DW-1 also stated that has has come to the court on the say of Salim Khan.

197. DW-1 Ashok also admitted that he watch television in the house and also read newspapers about Salman Khan.

198. Question again asked to DW-1 Ashok “whether you have told news media that whatever was going on was wrong ?” DW-1 answered the question “I was not having understanding and also I am not aware about it, therefore I did not tell news media. Then questions were asked during cross examination to the witness at to what precautions driver should take. DW-1 stated that he used to drive vehicle as per the situation on the road and traffic. He also admitted

that whenever he reaches near T Junction he has to release the accelerator in order to lower the speed of the vehicle. While approaching the junction, DW-1 had to apply the brakes to reduce the speed while taking the turn. If the vehicle is in speed, then DW-1 have to release the accelerator to reduce the speed. Further DW-1 has to look towards the right direction and also from the left side about incoming vehicles and after verifying he have to take the right turn. DW-1 stated that at that moment generally the vehicle would have maintain the speed at about 20-30 km per hour.

199. DW-1 Ashok also admitted that the road till the spot of incident is a tar road and smooth to drive the car. The tyres of the vehicle were strong. The tyre may get burst if comes in contact with the pointed object or with sharp edge. DW-1 stated that he did not receive any signal on the panel indicator before the incident. DW-1 then asked after arrival in J. W. Mariot, DW-1 asked Salman whether to take vehicle to his house. Salman did not tell him that he was in hurry to go some place. According to DW-1 within one or two minutes he reached near the car from the gate and he was not attentive to see whether any person is passing from near him through the ingate of the hotel.

200. DW-1 Ashok also stated that there was a security cabin near the gate and there were entry gate and exit gate to the hotel.

201. Though DW-1 Ashok was not attentive to see any person passing from near him through the ingate of the hotel, however if really he had visited the J. W. Mariot then DW-1 could have noticed by PW-12

Kalpesh. DW-1 also stated that in the porch area the driver may wait for one and two minutes in a car and can open the door if another vehicle does not come.

202. Further DW-1 Ashok Singh also stated in the cross examination that in the incident he was hearing the shout from the people beneath the car. According to him nobody was found near the front tyre of the car and under the tyre. DW-1 was not present at at time of removing injured from beneath the car. He went away from the spot prior to Salman.

203. Further DW-1 Ashok also stated that after the incident people gave pull and push to him and to Ravindra Patil and pull and push was not given to Kamal and Salman Khan. Witness volunteers that there were speed breakers on St. Anderws Road and there was only one speed breaker near Holly Family Hospital.

204. DW-1 Ashok also admitted that when Salman came to the police station at about 10.30 am at that time media persons and crowd were standing in front of the police station. DW-1 also replied to the question asked by SPP Shri Gharat that he did not tell the media persons or mob standing in front o the police station as he as in police station and also he cannot say something against the police.

205. DW-1 Ashok also stated that he was not having understanding or knowledge to tell media or people that police did not listen him. AT about 4.30 pm when he left the police station and after

Salman Khan was bailed out he was with Salman Khan. DW-1 also replied to the question that there was no fear in his mind when he joined Salman Khan. After joining Salman Khan, DW-1 and Salman Khan left the police station. Media persons came running to snap the pictures. DW-1 also replied to the question that he was not having understanding or he was not knowing to tell the media persons about what had happened.

206. DW-1 Ashok also admitted that prior to taking the vehicle in hand, he used to check the vehicle. DW-1 also volunteers that he used to check oil, water, tyre in order to ascertain whether there is air in the tyre or not. After switching the engine, DW-1 used to see on the panel whether the vehicle is okay in all respects. He also admitted that whenever he starts the Land Cruiser, he used to check panel indicator. He also admitted that Salman was helpful to police. There was no reason for police to harass and trouble Salman. DW-1 denied the suggestion that the story put forth by the defence about driving the vehicle first by Altaf and thereafter by DW-1 is fabricated, false and after thought.

207. It is further submitted by the ld. Advocate Mr. Shivade that the accused being an actor used to busy in the shooting and it will be highly impossible that the accused could drive in the night. According to Mr. Shivade, there were Ashok, Datta and Altaf were working as drivers with the family the accused. Ld. SPP vehemently submitted that on the contrary, the lighter mood of the accused is admitted if the acceptance of fact that, on the date of accident, the accused enjoyed at

Rain Bar initially and thereafter before starting for home, had visited the J.W. Mariot Hotel. According to the ld. SPP, the defence has miserably failed to establish the convincing defence that the tired person after a very busy and hectic continued day schedule, would keep late nights to enjoy in Restaurant and Hotels, then only the question as to he would have the mood to drive would arise. I find substance in the submission of ld. SPP and therefore, the submission of Mr. Shivade that it is highly improbable that the accused would drive the vehicle in the night cannot be accepted.

208. The ld. Advocate Mr. Shivade vehemently submitted that the accused has examined DW-1 Ashok Singh at the proper time. After closure of prosecution evidence, the stage has come to record statement u/s.313 of the Cr. P.C. So according to Mr. Shivade, it cannot be called as "twist" in the case. According to Mr. Shivade, if suppose the trial concluded in the Metropolitan Magistrate Court, then in that court also after closure of the prosecution evidence, defence would have examined the witness. Further according to Mr. Shivade it is not expected to take the mike in hand to address to media that the incident had not taken place because of fault of the accused, but it was a pure accident. Further the accused was not driving the vehicle and because of the tyre burst, the alleged incident took place and for that, no one can be held at fault.

209. The ld. SPP vehemently submitted that the evidence of DW-1 Ashok is liable to be thrown away as threshold. After more than a decade, DW-1 came forward to state in what manner the accident took place and the accused was not at fault. According to Mr. Gharat, ld.

SPP, can such evidence is probable, appealable and agreeable to the conscious of a prudent man. According to Mr.Gharat, conduct of the witness is to be seen as this witness came in the Court on the instructions of Salim Khan and not his own accord. According to Mr. Gharat, the witness has deposed that Salim Khan told him "to tell truth" and therefore, he came to the court. According to Mr. Gharat, "why the truth was not disclosed since beginning." Further according to Mr. Gharat, DW-1 is serving with the family of the accused and the family of the accused is fully aware that DW-1 is the culprit and the accused, innocent son of the family, inspite was being arrested twice, kept in custody for days and thereafter making trips to the court, the services of DW-1 were accepted and he continued to serve the family as the honest man and accused was suffering, can it be probable and appealable to the conscious of the prudent man. According to Mr. Shivade, can it be accepted that Mr. Salim Khan, father of the accused, waited with calm and quiet mind, bearing and tolerating before his eyes the sufferings to which his son was put by the ordinary driver during all this period of 12 years, till the turn of the defence witness came and the said culprit driver kept serving the family throughout entire period of more than 12 years. Can accused also tolerate such person and pulled down with him, who without any shame, continued to serve the accused throughout all these years. According to Mr. Gharat, "the thought which prompted the family to send the said driver for evidence, on the date, why was not prompted throughout these years. Even the witness was having ample opportunity to approach the Advocate at least of Salman Khan, to approach the police, if not to the police then to the court and if not to the court, then to media who was few feet away

when the witness claims to have made him to sit on the bench out side of the police station till 04.30 p.m. from 03.00 a.m. after the incident. Even after accused was bailed out, the witness was with accused faced the camera of the media and press, but failed to declare that the accused was innocent and he was the culprit and kept total silence thereafter for more than 12 years is not acceptable to any prudent man with logic and the witness has proved that he is lying on oath. The ld. SPP sought prayer that notice be issued to him for showing reason as to why DW-1 should not be prosecuted for the offence of perjury.

210. The ld. Advocate Mr. Shivade also relied on the reported judgment **State of Haryana v/s. Ram Singh [(2002) 2 Supreme Court Cases 426**. In this case, it is held that how the evidence of defence witness can be appreciated.

> "19. Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram – no independent witness could be found in the aforesaid context – is it deliberate or is it sheer coincidence - this is where the relevance of the passage from Sarkar on Evidences comes on. The ingenuity devised by the prosecutor knew no bounds – can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be, more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same have been tailor-made or not and in

the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully hereinbefore. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omnipresent. Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the court has to consider the same upon proper scrutiny. In our view, the High Court was wholly in error in not considering the evidence available on record in its proper perspective. The other aspect of the matter is in regard to the defence contention that Manphool was missing from the village for about 2/3 days and is murdered on 21-1-1992 itself. There is defence evidence on record by DW-3 Raja Ram that Manphool was murdered on 21-1-1992. The High Court rejected the defence contention by reason of the fact that it was not suggested to Budh Ram or Dholu Ram that the murder

had taken place on 21-1-192 itself and DW-3 Raja Ram had even come to attend the condolence and it is by reason therefore Raja Ram's evidence was not accepted. Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one – the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by the defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution witnesses, in particular PW-10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself – what more is expected of the defence case : a doubt or a certainty – jurisprudentially a doubt would be enough : when such a suggestions has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet – it is the prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence – this itself is a circumstance, which cannot but be termed to be suspicious in nature."

211. On going through the above cited case law, I find that it is rather helpful to the case of the prosecution. The Hon'ble High Court rejected the contention by fact that it was not suggested Gudram or Joluram that murder has taken place on 21.01.1992 itself and DW-3 Rajaram had even come to condolence and it is by reason therefore, Rajaram's evidence was not accepted. The Hon'ble Apex Court observed suggestion was there to prosecution witness, in particular PW-10 Gholuram his father Manphool was missing for about 2 / 3 days prior to day of occurrence itself. What more is expected of the defence case, a doubt or a certainty, juries prudentially the doubt would be enough. when such a suggestion has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence.

212. In our case in hand, no suggestion was given to the complainant Patil that Altaf was driving the vehicle from the house of Accused upto Rain Bar and thereafter to J.W.Mariot. No suggestion was given to complainant Patil that Altaf felt giddiness and he informed Ashok in the night to come to J.W. Mariot to take Salman to his house. No suggestion was given to complainant Patil that Ashok then drove the vehicle and while driving the vehicle by Ashok, the tyre burst, thereby Ashok could not control the vehicle resulting in the incident. No suggestion was given to the complainant Patil that it was a pure accident and Ashok was not at fault.

213. Further it is important to note here that the injured witnesses who were examined before me, also nowhere suggested by defence during cross-examination that Ashok was driving the vehicle and as the tyre was burst the vehicle could not be controlled resulting in incident. No suggestion was given to the independent witness PW-7 Francis that Ashok was driving the vehicle and the accident was occurred due to bursting of the tyre.

214. In this case, PW-26 Kadam recorded FIR. PW-26 Kadam and Investigating Officer PW-27 Shengal were examined before me. No suggestion was given to PW-26 Rajendra Kadam that accused was not driving the vehicle. It was never suggested to PW-26 Kadam that at the time of incident, DW-1 Ashok was driving the vehicle. It was not suggested to PW-26 Kadam that front left side tyre was burst resulting the accident. It was never suggested to PW-26 Kadam that initially Altaf was driving the vehicle from the house of Salman upto J.W. Mariot and as he felt giddiness, he called Ashok to J.W. Mariot.

215. It is also important to mention that the defence also never suggested to the Investigating Officer that initially Altaf was driving the vehicle from the house of accused upto J.W. Mariot Hotel on the day of incident. Thereafter Altaf called Ashok to J.W. Mriot Hotel as he felt giddiness. No suggestion was given to Investigating Officer PW-27 that Ashok driving the vehicle. No suggestion was given to Investigating Officer that left front tyre was burst. No suggestion was given to the Investigating Officer that accused was not driving the vehicle.

216. So it appears that absolutely defence never put their case to the complainant Patil or thereafter to all the witnesses examined before me. When the accused knew that accident occurred when Ashok was driving the vehicle, then it ought have been brought on record by giving suggestion or by putting the case to the prosecution witnesses. Surprisingly, till the statement of accused u/s.313 is recorded, for the first time, after a period of 13 years, the fact is brought on record by the defence that the vehicle was in fact driven on the day of incident by DW-1 Ashok.

217. It is important to note here that u/s.313 Salman Khan stated that he wants to examine witness in his defence, but he did not specify on what ground the witnesses are to be examined and also about his name. So after a period of 13 years, an attempt was made by defence to demonstrate that the vehicle in fact was driven by DW-1 Ashok. The defence relied on the case of **(2002) 2 SCC 426**. It helps to the prosecution. Having regard to the para 19 of the said judgment, in our case also, the accused never put their case, rather never made any specific suggestions to the prosecution witnesses that earlier Altaf was driving the vehicle, thereafter Ashok was driving the vehicle and there was tyre burst.

218. In our case, where the prosecution case is partially supported by the statement of the accused i.e. accident admitted to have occurred, people were injured and on top of it, the cross-examination of the prosecution witnesses does not establish any consistent line of the defence.

219. So having regard to the defence evidence, I am of the opinion that the said witness DW-1 appears to be a got up witness that too after a period of 13 years. It has brought on record that Ashok was driving the vehicle. Such defence evidence cannot be accepted as it is not probable, appealable and agreeable to the conscious of common prudent man, hence, it is liable to be discarded straight way.

220. It is further argued by ld. Advocate Mr. Shivade that according to DW-1 Ashok, the car was taken on Linking Road, then on Gonsalves Road and took the right turn for going to Hill Road. The vehicle came on the Hill Road and the vehicle proceeded at some distance at Hill Road, when front left tyre of the vehicle was burst. So according to defence, the vehicle also travelled on Gonsalves Road. It is pertinent to note that as per the complaint lodged by Ravindra Himmatrao Patil, at the time of the incident, the vehicle was coming by Andrews Road and while turning towards right side of Hill Road, the accused could not control the vehicle and went towards the American Express shop. It is pertinent to note that there is word mentioned Gonsalves Road, which is also scratched and also initial was made near scratching and the St. Andrews Road mentioned. There was no cross-examination to the complainant Patil that the vehicle came by Gonsalves Road. Even no suggestion was given to Investigating Officer PW-27 Shengal as well as PW-26 Kadam who recorded FIR about Gonsalves Road. The evidence of DW-1 is discarded from taking into consideration and therefore, the argument advanced by ld. Advocate Mr. Shivade that DW-1 Ashok was driving the vehicle and the vehicle

was travelled on Gonsalves Road cannot be accepted. The map is also brought on record by ld. Advocate during the course of argument. As the evidence of DW-1 Ashok is rejected from taking into consideration, the map showing the situation of the road by which DW-1 Ashok drove the vehicle is also of no use.

221. One more circumstance is also noticed by me when I have gone through the Record and Proceeding of this case. In the Court of Metropolitan Magistrate an application Exh.26 is filed by the prosecution on 14.03.2011 that charge u/.s.304-II of IPC be framed against the accused and the case may be committed to the Court of Sessions. The accused submitted a detailed reply Exh.28 on oath to the application for prosecution. The said reply is notarized filed on 31.03.2011. During the course of argument, attention of the ld. Advocate for the defene is drawn to para 2 of the reply. Para (2) of the reply is reproduced as under:-

> "2. The Accused submits that it is regrettable that an accident has taken place resulting in the death of one person. The alleged incident had taken place at mid-night, when it was extremely dark and many people had gathered at the scene of the accident. Prima facie, it is amply clear that there was absence of any motive or intention to kill someone. The act as alleged is not an act of culpable homicide but an unfortunate incident, beyond the control of the accused, such as an act of God."

222. The ld. Advocate for the defence contended that the unfortunate incident beyond the control of the accused means the accused was not driving the vehicle. It is pertinent to note that in reply nowhere it is mentioned that Ashok was driving the vehicle. According to Mr. Shivade, after closure of prosecution evidence, the accused is entitled to lead defence evidence. There is no dispute in the said proposition. However, the specifically pointed defence that Ashok was driving the vehicle and there was a tyre burst was never put to Ravindra Patil who was admittedly present in the car. When this Court examined 27 witnesses, the said specifically pointed defence about driving the vehicle by Ashok was also not put to the independent witnesses, PW-26 who recorded FIR of Ravindra Patil and also to the Investigating Officer PW-27 Shengal.

223. The ld. Advocate for the accused also relied on the reported judgment in case of **Des Raj v/s. The State of Punjab [1971(3) Supreme Court Cases 235]**.

224. In this case, the appellant was charged u/s.406 of the Indian Penal Code for having committed criminal breach of trust of Rs.4,000/- entrusted to him. It appears that Banga Urban Co-operative Thrift and Credit Society, Banga, passed a resolution to raise a loan of Rs.4,000/- from Nawanwsher Central Co-operative Bank, Banga. The society authorized appellant, a member of society to receive Rs.4,000/- from the bank on the basis of promissory note executed by some members on behalf of the society. According to the Manager of the Bank, security of the society Mehngaram had accompanied the

appellant when payment was made to him in the bank and also attested the signatures of the persons on the management of the co-operative society. The resolution does not contain any instruction as to what appellant had to do with the money, but according to the President of the society, the appellant had to pay money to the Cashier Balvir Singh who would make the entry in the accounts. Balvir Singh unfortunately is dead. Notice was issued to the appellant that he had withdrawn amount of Rs.4,000/- but the amount so received not entered in the book of the society. Reply was given by the appellant that amount was given to Mengaram, Secretary of the society and he did not know as to whether the entry was taken into the account. According to the appellant money was paid to the Secretary Mengaram in the presence of Sarwanram, Piara Singh and Satlam Singh at the retail shop of Sarwanram. The appellant examined these three witnesses in his defence. DW-1 Sarwanram stated that appellant paid the money in his presence to Mengaram, but he did approach to the police and told them that the payment had been made in his presence, but he did not make any written application to anybody.

225. DW-2 Piara Singh also deposed that Rs.4,000/- was paid to the Secretary by the appellant, but no question was put to him. DW-3 Satnam Singh also supported the defence story. The ld. Magistrate disbelieved the defence witnesses on the ground that they had not represented at the earliest to any higher authorities against false implication of the appellant.

> "9. This Court ordinarily does not go into the question of facts and appreciate the evidence but in this

case both the Trial Court and the learned Sessions Judge have, relying on conjectures and surmises, disbelieved the evidence of the defence witnesses. In the first place, they did not give due weight to the fact that Meghna Ram had, in fact, accompanied the appellant to the Bank. He knew about the resolution and the receipt of the money. If the money had not been paid, it is surprising that nobody came to know about it till the audit of the accounts of the Society. This sum had been borrowed by the Society and the money had to be utilised for non-agricultural purposes. It seems to us that the defence version cannot be disbelieved merely because if the money had not been paid, as stated by the appellant, it would have been expected that the non-payment would be known to the President and the Cashier much sooner. In our view the only foolish thing the appellant did was what he delivered the money and did not take the receipt from Meghna Ram. As stated above the evidence of the defence witnesses has been disbelieved on pure conjectures and surmises. It is not common, as far as we are aware, that the persons who are witnesses to a transaction go about complaining to the higher authorities if the transaction is impugned. We cannot allow a person to be convicted on mere suspicion and we are accordingly constrained to allow the appeal."

226. Relying on the said authority, Mr. Shivade vehemently submitted that it is argued by ld. SPP that as accused or DW-1 did not make any complaint to higher authorities that it was Ashok who was driving the vehicle, inference cannot be drawn even if not mentioning before media or not lodging any complaint, can the evidence of the defence witness be disbelieved on pure conjunctures and surmises.

227. It is pertinent to note that in our case, since beginning the accused never put up his defence demonstrating that the vehicle was driven by DW-1 Ashok and the accused was not driving the vehicle. Even the accused nowhere demonstrated by suggesting the witnesses that Altaf was driving the vehicle initially. I find that the facts of the cited case are not applicable to the case in hand.

228. So after analyzing the evidence of complainant Patil, I am of the opinion that there is no reason for the complainant to state false against the accused. The ground put forth by the accused that because of pressure of media, the accused is falsely implicated does not appeal to the conscious of the prudent man. The evidence of DW-1 is rejected by me from consideration. He is got up witness. Admittedly, it is nobody's case that complainant Patil or Kamal Khan drove the vehicle on the day of incident. So only irresistible inference can be drawn that it is the accused only who drove the vehicle at the time of the incident.

229. It is pertinent to note that the injured witnesses also deposed that the accused got down from the right side of the car i.e. from the driver's side. It is established that the accused, Kamal Khan

and complainant Patil were only in the car. The accused admitted the incident and also admitted that the people were injured, but Ashok Singh was driving the vehicle. The said evidence is already discarded from taking into consideration.

230. In this case, the important witness is PW-7 Francis Fernandes. The accused also submitted the further written statement u/s.313 of the Cr. P.C. (Exh.171-A). In para 11 of the written statement it is mentioned by the accused that Francis asked accused to leave the spot as the crowd was getting violent and they had beaten Ravindra Patil and Ashok. The accused then left the place by a car stopped by Francis's wife. Kamal had already gone away.

231. It is pertinent to note that the evidence of PW-7 Francis is recorded at Exh.46. He never stated in examination-in-chief about presence of Ashok on the spot. He also never stated that people assaulted Patil and Ashok. It was never suggested to PW-7 Francis during his cross-examination that Ashok was also present on the spot and the people from the mob also assaulted complainant Ravindra Patil and Ashok. So the defence taken by the accused appears to be contradictory.

232. It is further contended by ld. Advocate Mr. Shivade that complaint of Ravindra Patil cannot be treated as FIR as the same is not first in point of time and thus, cannot be used for corroboration. According to Mr. Shivade, the FIR was registered at about 05.45 a.m. i.e. 3 hours of the incident. Further it is submitted that VHS register is

not produced by the prosecution to show that whether Patil had phoned the Control Room or Ashok Singh had phoned the Control Room. According to Mr. Shivade, collection of information in respect of the calls could have thrown some light i.e. the name of the caller and the details of the information communicated by the caller. This information depending upon its nature could have been treated as First Information Report. Further according to Mr. Shivade, complainant Patil did not disclose the incident to police prior to filing of complaint.

233. It is pertinent to note that after the accident, the complainant Patil remained on the spot till arrival of Kadam. PSI Kadam rushed to the spot, drawn panchanama, made inquiry with complainant and then complaint of Patil was recorded in police station. I find that no irregularity is committed. It is the duty of the police to rush to the spot first in order to render help to the victim or injured in the incident. In this regard, the reliance is placed on the reported judgment of the Hon'ble Apex Court in case of **Animireddy Venkata Ramana and others V/s. Public Prosecutor, High Court of Andhra Pradesh [(2008) 5 Supreme Court Cases 368]** wherein it is held as under:-

> "A. Criminal Procedure Code, 1973---Ss. 154, 156 & 157 and 162-- FIR----Need not precede the information regarding commission of cognizable offence received by the officer in charge of a police station which required him to reach the place of occurrence as early as possible.
>
> B. Criminal Procedure Code, 1973—S.154---FIR---General diary---Held, general diary containing noting of a

report regarding cognizable offence, cannot be treated as FIR.

C. Criminal Procedure Code, 1973 – Ss. 154 and 162 – FIR – Telephonic information received by IO – Later FIR recorded – Held, telephonic information not in the nature of FIR.

11. The dead body of the deceased was brought down from the bus and taken to the house. The conductor of the bus sent an information to the Depot Manager of the State Road Transport Corporation at Tuni. The investigating officer was also informed. A report to that effect might have been noted in the general diary but the same could not have been treated to be an FIR. When an information is received by an officer in charge of a police station, he in terms of the provisions of the Code was expected to reach the place of occurrence as early as possible. It was not necessary for him to take that step only on the basis of a first information report. An information received in regard to commission of a cognizable offence is not required to be preceded by a first information report. Duty of the State to protect the life of an injured as also an endeavour on the part of the responsible police officer to reach the place of occurrence in a situation of this nature is his implicit duty and responsibility. If some incident had taken place in a bus, the officers of Road Transport Corporation also could not ignore the same. They reached the place of occurrence in another bus at about 1 a.m. The deceased and the

injured were only then shifted to Tuni Hospital.

12. A first information report was recorded at about 3 o'clock in the night. In the aforementioned situation, it cannot be said that the information received by the investigating officer on the telephone was of such a nature and contained such details which would amount to a first information report so as to attract the provisions of Section 162 of the Code."

234. Ld. Advocate Mr. Shivade relied on the case of **Dr. V. Rugmini V/s. State of Kerala & Ors. (1987 Cri. L.J. 200)** wherein it is held as under:-

"When information regarding a cognizable offence is furnished to the police that information will be regarded as the FIR and all enquiries held by the police subsequent thereto would be treated as investigation, even though the formal registration of the FIR takes place only later. The other proposition emerging from those decisions is that the statements made by witnesses to the police prior to the formal registration of the FIR will fall within the scope of S. 162 of the Code."

235. Considering the facts and circumstances and considering ratio in the judgment **(2008) 5 Supreme Court Cases 368**, I find that complaint of Patil is the FIR (Exh.P-1) which is proved in accordance with law. Hence, submission of ld. Advocate Mr. Shivade cannot be accepted.

236. Further ld. Advocate Mr. Shivade submitted that the report was lodged at belated stage. According to him, on 29.09.2002, PW-19 Keskar, RTO Inspector, demanded the document from the police. Police told him that the papers were not ready. Copy of the FIR was not available. The documents were being prepared. According to Mr. Shivade, copy of the FIR was not sent to the Magistrate within time. According to PW-27 Shengal, Investigating Officer, the copy of the FIR was sent within the time. According to ld. Advocate Mr. Shivade, PW-27 Shengal, attempted to give vague excuse that it was holiday and therefore, the FIR could not have been sent. Ld. Advocate Mr. Shivade placed reliance on the case of **Bir Singh and others V/s. State of Uttar Pradesh [(1977) 4 SCC 420]** wherein it is held as under:-

> "In these circumstances we place no reliance on the evidence of this witness. The High Court indulged in another conjecture that the F.I.R. must have been sent to the P. P. and to the Elaqa Magistrate. This was not however a matter of which judicial notice could be taken but had to be proved like any other fact. There was absolutely no evidence led by the prosecution to show when the F.I.R. was sent to the Elaqa Magistrate or to the P.P's office and in the absence of any evidence on this point the High Court was not justified in drawing an inference in order to demolish the positive and categorical statement of PW 5 Umesh Chandra Verma the Investigating Officer."

237. It is pertinent to note that 28.9.2002 was a fourth Saturday and 29.9.2002 was a Sunday. Though there is no evidence on the record to show that when the copy of FIR was sent to the Magistrate, I am of the opinion that, that would not hamper the case of prosecution as there was no delay to lodge the complaint by Patil.

238. Further ld. Advocate Mr. Shivade relied on the case of **Marudanal Aagusti V/s. State of Kerala [(1980) 4 SCC 425 : AIR 1980 SC 638]** wherein it is held as under:-

> "Criminal Procedure Code, 1973--- Section 154---- FIR---- Once FIR is held to be fabricated or brought into existence long after the occurrence, the entire prosecution case would collapse---Omission to mention names of eyewitnesses in FIR giving minute details, and unexplained delay in despatch of the FIR to magistrate besides other infirmities, held, would throw serious doubt on prosecution case."

239. Further ld. Advocate Mr. Shivade relied on the case of **Ganesh Bhavan Patel & anr. V/s. State of Maharashtra [(1978) 4 SCC 371]** wherein it is held as under:-

> "Delay in recording F.I.R., on facts, held fatal to the prosecution case."

240. From the evidence it transpires that after drawing panchanama, immediately FIR was lodged by complainant Patil. Hence, it cannot be said that FIR is lodged at belated stage. Looking to the

evidence, the FIR was lodged promptly after drawing the panchanama. Hence, I find no substance in the submission of ld. Advocate Mr. Shivade. There is no reason for the police to lodge the FIR at belated stage against the accused. In view of the seriousness of the incident, the FIR was lodged promptly by Ravindra Patil who remained on the spot after the incident till arrival of police and also shown the spot to the police.

241. Most important and vital aspect of the case is, who was driving the vehicle at the time of the accident. Considering the above evidence, I conclude that, it was the accused Salman Khan who was driving the vehicle at the time of the accident. Evidence of complainant Patil, PW-3, PW-4, PW-11 corroborate with each other on material particulars. PW-2, PW-3 & PW-11 injured in the evidence. Complainant Patil is a natural witness who was present at a time of the incident. It is established beyond reasonable doubt by the prosecution that accused was driving the vehicle. Defence of the accused that DW-1 Ashok was driving the vehicle cannot be accepted. The prosecution also alleged that accused was under influence of liquor and also without licence and drove the vehicle in rash and negligent manner. I will discuss the said aspect at the appropriate stage in my judgment.

D) <u>Theory of tyre bursting</u>:-

242. The accused also raised a defence that the accident occurred because of the front left tyre burst, thereby the car was pulled to the left side, DW-1 Ashok tried to apply the brake and he tried to control the car, but by then the car was climbed on the stairs of

American Express Laundry and hit the shutter and stopped. There was no footpath outside the American Express Laundry at that time.

243. It is pertinent to note that after the incident and after drawing panchanama, the car was removed from the spot with the aid of crane and brought in front of Bandra Police Station. PW-19 Rajendra Sadashiv Keskar is the R.T.O. Inspector who inspected the said vehicle. Admittedly, there was no mechanical defect noticed in the car. The said fact is also admitted by the defence during the course of argument. The ld. Advocate Mr. Shivade heavily criticized the evidence of Pw-19 Rajendra Keskar on the ground that the said witness has repeatedly given contradictory answers during course of cross-examination, knowing that one of the answers was false. According to Mr. Shivade, the said witness has no regard to the truth and has molded his defence to suit false case of the prosecution. According to Mr. Shivade, the prosecution also criticized the said expert and also demanded action against him. Ld. Advocate Mr. Shivade relied on the case of **Abinashchandra Sarkar V/s. Emperor (ILR 65 Cal 18)** wherein it is held as under:-

> "The Crown has suggested, through not in so many words, that we ought to look with suspicion upon the evidence of these witnesses, because they belonged to a faction in the company which was not favourably disposed towards N. C. Chaudhuri. A more unusual and a more impossible suggestion, I have never heard advanced. These are witnesses produced by the Crown and put forward as witnesses of truth in support of the

> case for the prosecution. It has not been suggested that they turned hostile, nor during the whole trial were they treated as hostile witnesses, nor has any one openly suggested that they were not truthful witnesses. The prosecution cannot be permitted to blow hot and cold as best it suits them, If these were not truthful witnesses, they ought never to have been called by the prosecution and so recommended to the court as witnesses of truth. There is no reason whatever for preferring the evidence of N. C. Chaudhuri to theirs, in fact the case as a whole leads me rather to regard his evidence with suspicion than otherwise."

244. Further it is contended by Mr. Shivade that the witness Rajendra Keskar has not used the proforma prescribed by the Motor Vehicle Act. This renders his report incomplete and bad in law. According to Mr. Shivade, new proforma requires to be inspected the site as well as the condition of the tyres and the road at the time of accident, which the witness did not do.

245. Further it is contended that the story given by the witness about test drive of the vehicle is improbable. Further according to Mr. Shivade, PW-19 Keskar in his examination-in-chief changed the story of deflation a front left tyre and substituted a new story of having less air in the left front wheel. According to Mr. Shivade, this improvement is to be covered up the obvious, non-performance of a test drive by this witness. According to Mr. Shivade, PW-26 Kadam admitted that the

tyre was burst and the rim was exposed. According to Mr. Shivade, it would be an impossible task to take a test drive. Hence, it is contended by Mr. Shivade that if the prosecution introduced a story of less air, and gives up a story of deflation of tyre, then there is no reason why the court should not accept the story put forth by the defence i.e. bursting of the tyre.

246. Further it is contended by Mr. Shivade, that the burst tyre was never sent to the Forensic Laboratory or any tyre expert to find out the impact was internal or external (from within). According to Mr. Shivade, the ld. Advocate, the condition of the edges of the burst tyre could have thrown some light as to whether margins of the burst are averted or inverted just like entry and exist wound of a bullet. Further according to Mr. Shivade, PW-19 Keskar admitted that if a pointed stone comes in contact with tyre, it can be burst and car will pull to the side of the tyre. Further in that event, steering will become hard. According to Mr. Shivade, all these admissions clearly support the defence of the accused. Further it is argued by Mr. Shivade that sudden tyre burst and restricted movements of steering will definitely result in to the loss of control and accident.

247. The ld. SPP Mr. Gharat vehemently submitted that the car involved in the accident was sturdy and tough vehicle and had radial and tubeless tyres. The vehicle can be driven if one tyre is punctured, as deposed by the witness. According to SPP Mr. Gharat, the accused could not control the vehicle on turning as the vehicle was in speed and then went on the footpath and caused injuries to the poor bakery people

and also caused injuries to the poor bakery people sleeping on the platform and climbed the stair of American Express and dashed against the shutter.

248. PW-19 Rajendra Keskar has deposed that he joined as a Motor Vehicle Inspector in 1999 in R.T. O. Department. On 29.09.2002 at about 09.30 a.m. he had inspected the vehicle involved in the accident standing in front of Bandra Police Station. He inspected the vehicle from all angles and externally noticed the damage caused to the left side fender, left head light was broken and the front bumper was missing, noticed scratches on the left side of wield shield glass, right side glass was broken. He also noticed less in front left tyre, he checked the oil, coolant, checked mechanical leakage, electrical connections and noticed all to be intact.

249. Further the evidence of Pw-19 Keskar reveals that he tried to start engine by inserting the key and engine started after inserting the key.

250. PW-19 also did not notice any defect in the hand break, hydrolic power steering. The brakes were found in tact in order. He did not notice

251. PW-19 Keskar took the test drive by driving the vehicle about ½ km. He prepared the report (Exh.84). According to PW-19, the vehicle was found in the order. The tyres of the vehicle were in good condition. The sensors of the car were not showing that the tyres were in bad condition or whether there was any leakage in engine.

252. PW-19 Keskar also stated that in case of a minor puncture, or in case of any impact, there may be chances of decreasing the air in the tyre. He also stated that in case of hydrolic power steering the vehicle would not go to left or right after applying the brake immediately, however, in case of less air in tyre, the vehicle would divert little bit to the left side. If a driver turned the vehicle towards right side, it would turn towards right side in the case where there would be less air existing in the tyre.

253. PW-19 Keskar also admitted that he was having experience of 4 years in examining the vehicles.

254. PW-19 Keskar has gone through grueling cross-examination. He admitted that there are provisions mentioned in the Motor Vehicles Act and the Rules regarding the vehicles involved in the accident. He also admitted that the particular proforma in respect of the accidental case is prescribed in the Maharashtra Motor Vehicles Rule, 1989, but he did not utilize the said proforma.

255. It is pertinent to note that PW-19 stated in cross-examination that he visited the spot after 15 days of the incident at the time of going near the site of the incident. He did not prepare a document mentioned in proforma about his visit to the spot. According to PW-19, he had seen the spot by passing near the spot of the incident, like others. It appears that PW-19 had seen the spot while going along with his friend and 2-3 seconds required to see the spot. It is highly improbable that one can see the spot within 2 – 3 seconds.

256. It is pertinent to note that PW-19 had also undergone training in Research Institute, Ahmednagar, for a period of one day. The vehicle was Tata Indica on which training was given. PW-19 stated that actual training of imported cars was not given to him. The vehicle MH-01-DA-32 was an imported car. He also examined Land Cruiser vehicle for the first time and till the date of evidence, he did not examine any Land Cruiser vehicle. The said vehicle comes under Sport Utility Vehicle. He also admitted that as per proforma in the year 1994, the proforma is required to be prepared regarding inspection of the vehicle. He also admitted that he did not visit the spot of the incident, but again he stated that he visited the spot after 15 days of the incident at the time of going near the site of the accident. The ld. Advocate Mr. Shivade vehemently submitted that the approach of the witness to his work is required to be seen. According to Mr. Shivade, the witness ought to have visited the place of incident before making inspection of the vehicle.

257. Further according to Mr. Shivade, PW-19 Keskar seen the spot within 2 – 3 seconds. Further the witness stated that he inspected the vehicle probably on Saturday. Further according to him, record is prepared regarding inspection of the vehicle in the office of the RTO as well as in the concerned police station. He admitted that for the first time he had examined Land Cruiser and till today, he did not examine any other Land Cruiser vehicle. He submitted that as per law, proforma is required to be prepared regarding inspection of vehicle.

258. It is pertinent to note that the vehicle involved in the incident was removed and brought before the Bandra Police Station and therefore, according to PW-19 Keskar, he could not inspect the vehicle on the spot.

259. Further PW-19 Keskar admitted that the format which he had prepared is not as per the format prescribed in the Maharashtra Motor Vehicles Rules. The said witness volunteers that he used the format given by the Government. During the course of evidence, the proforma from Maharashtra Motor Vehicles Rules, 1989 was shown. According to witness, the said proforma may be more exhaustive than the proforma used by him.

260. PW-19 Keskar also admitted that he came to know in the morning of 28.09.2002 that the incident had occurred. He had inspected the vehicle on the same day of the incident. He demanded the C.R. register from the police. Copy of the FIR was not available. Police told him that the documents were being prepared. One Imtiyaz was senior to him who accompanied PW-19 to Bandra Police Station. On 28.09.2002 at about 09.00 to 09.30 a.m. key of the car was delivered to the witness for inspecting the vehicle. Imtiyaz was telling him as to whether PW-19 had checked the particular thing or not in the vehicle. PW-19 also asked Imtiyaz about technical words such as fender, side running board.

261. Further it has come in the evidence that PW-19 Keskar returned the key to the officer within 20 minutes from the movement it

was received. Next day also PW-19 visited Bandra Police Station in order to see case papers and Inspector Kadam was not available. PW-19 did not receive the particulars of the car either on 28.09.2002 or 29.09.2002, he could not fill the particulars of the car in the accident report. He admits that he did not have the details of the validity of the car, motor driving licence and also about the name of the driver. He also had not taken the photographs of the vehicle at the time of inspecting, nor the police took the photographs of the vehicle. PW-19 obtained the accident form from Imtiyaz Khan. On 28.09.2002 due to emergency call, there was no accident form available with him. According to PW-19, on 29.09.2002 he carried accident form along with him till the police station. The first copy is to be given to the police station. The second copy remains with R.T.O. office and third copy remains with the record. PW-19 also stated in cross-examination that he had filled the information regarding inspection carried out on 28.09.2002. He further stated that as his accident form book was utilized completely, he had taken the accident form from Mr. Imtiyaz. He also admitted that accident form is the only evidence about what he had done while inspecting the vehicle.

262. There are some omissions brought on record by the defence. It appears that earlier evidence of PW-19 Keskar was recorded before the Metropolitan Magistrate. PW-19 admitted that he did not depose before the Magistrate that he went beneath the car in order to see whether there was any damage caused to the car and he checked the oil, coolant, mechanical leakages and electrical connections. A question was asked to the witness about the types of oils and also about the viscosity of the oil.

263. Further PW-19 Keskar also admitted that there is no mention by him in the accident report form that electrical connections were checked, oils, coolant, mechanical leakages were checked and all found to intact.

264. In cross-examination PW-19 Keskar also stated that he had examined front left side tyre for a period of one or two minutes by pressing it by hands. He noticed front left side tyre deflated. He also admitted that one cannot predict how accident occurred because of condition of the tyres. He admits that tyre is one of the factors in the accident. He also admitted that neither he mentioned in the accident report form that the tyres were found good in condition, nor he stated before the Metropolitan Magistrate about it. He also admitted that he is not the expert of the rubber of the tyre and tyre. He also cannot tell the category of the tyre inspected by him such as tubeless, radial, run flat, tyre with tubes. He also admitted that if the vehicle is in a position to drive, the vehicles are then removed by driving, otherwise vehicles are removed by towing. He also admitted that in front tyre of the vehicle found to be puncture, in that situation, the vehicle may be removed from towing. He admitted that as per the Motor Vehicles Rules, the vehicle is to be preserved in its original condition till inspection is over.

265. According to PW-19 Keskar, air pressure measures in LBS and he cannot say exactly how much air pressure was existing. Normally the tyre examined by him in respect of the vehicle in question. The reason given by PW-19 is that the vehicle is imported. There is no

mention in the accident report form about the air pressure found in the tyre at the time of the inspection. PW-19 also did not verify from the police as to whether the bumper had gone. PW-19 also admitted that he did not remove the front tyre for sending it to laboratory in order to ascertain the reason of deflation of tyre. PW-19 admitted that while running the car, if pointed stone comes in contact with the tyre, then tyre may be deflated.

266. PW-19 Keskar also admitted that he did not prepare report of inspection immediately. After 24 hours of inspection, he had written the accident report form.

267. PW-19 Keskar also stated that while calculating the speed of vehicle, the engine horse power is not relevant. Witness again says that engine horse power is relevant for the calculation of speed of vehicle. He stated that one statement is correct and one statement is wrong. Immediately he came to know that he made wrong statement. According to him, horse power is not relevant for calculation of the speed is not correct.

268. It has come in the cross-examination that PSI Kadam did not give papers to PW-19 Keskar about panchanama of the car when demanded by him as Kadam was to record the statements of the witnesses.

269. PW-19 Keskar also admitted in cross-examination that if a car hits an object in speed, then there would be more impact and then

in that event, damage would be more. In slow speed, the damage caused would be less in the incident. PW-19 stated that air bags are safety features but were not deployed in the incident. Sensors are available at the front side of the car. To deploy the air bags and to send the signal to the sensors come under the operation of electronic system in the car. PW-19 admitted that he had not stated in the accident report form or deposed before the Metropolitan Magistrate court that he checked the electronic signal and they were in order or not. He also admitted that if the vehicle was not in speed, then in that event, the air bags would not deploy.

270. PW-19 Keskar also stated that the vehicle was having front brakes and there is also Anti-lock Braking System (ABS) available in the car. ABS is useful in order to operate the brakes to all four wheels simultaneously and also to prevent the car from skidding in the incident. PW-19 admitted that if the tyre is deflated then in that even the vehicle would tilt in that direction, depending upon the air pressure in the tyre. If the front left tyre is deflated in running condition, then the car will be pulled towards the left side. He also stated that electronic control unit, electronic power steering, power system and electronic control model were existing in the car inspected by him. He also admitted that in case the tyre is punctured and at the same time if there is leakage failure, then in that case, the car would tilt more. He also admitted that in case of puncture of tyre or leakage failure, the control of the power steering may be affected slightly. Again witness says that in case of puncture or leakage failure, the steering control would not be affected. So the witness gave two different answers.

271. PW-19 Keskar stated that he cannot say whether if a car it tilted after puncture or failure of leakage, then the steering of the car would be affected.

272. Then PW-19 stated about the test driving. He stated that he placed the key in the car and engine was started by start button. It has come in the evidence that the key which was given to him was an electronic key. The key requires to be placed in side the car. He further stated that he does not remember whether the slot is available for inserting the key. He deposed that engine started in a single push of the button.

273. It is pertinent to note that PW-19 stated that after putting the key in the slot, engine was started, but subsequently, he stated that by pressing the ignition button, the engine started. He then deposed the manner he took the test drive of the car. According to him, he went to half kilometer towards Hill Road and 45 minutes are required to reach half kilometer distance. He denied that the road on which the test drive was taken was the busy road. PW-19 further stated the if the front tyre is found deflated, then the vehicle would be driven like a vehicle which runs normally. If the second tyre is found deflated, then the engine would require more power to run the vehicle. If the third tyre is also found deflated then in that event the vehicle will move. Further he stated that he cannot say how much time would be required for complete deflation of the front tyre inspected by him, if it is punctured. He also admitted that if the front left tyre is found deflated then steering will become hard while taking turn towards right side.

274. PW-19 also admitted that there is no mention in the accident report form that inspite of finding less air, in left side portion, he was in a position to drive the car. There is no mention in the accident report form that he drove the vehicle about half kilometer and then parked the vehicle. He also stated that he has not mentioned in the accident report form that the tyres of the vehicle were found in good condition and the sensors of the car were not showing that the tyres were in bad condition and whether there was any leakage in the engine.

275. In cross-examination PW-19 Keskar denied that he never inspected the vehicle and given false report on the say of Police and Imtiyaz. He also denied that the left tyre of the vehicle was deflated, therefore, the vehicle was not in a position to be driven. He also denied that left front tyre was found burst. The ld. Advocate Mr. Shivade vehemently submitted that PW-19 no where stated in evidence that front left side tyre deflated due to the impact. Though it is mentioned in the accident report form, but PW-19 no where deposed the said fact. According to Mr. Shivade, the accident report form is not as per the Maharashtra Motor Vehicle Rules 1989.

276. According to me, the said accident report form (Exh.84) is duly exhibited during the course of evidence and it bears the signature of the witness. So one can keep reliance on the accident report form.

277. Ld. Advocate Mr. Shivade relied on the case of **The Branch Manager, National Insurance Company Limited, Pudukkottai V/s. Janaki and others [2011 (1) TN MAC 366]**. In the said case, it is held in para 11 as under:-

> 11. Thus, it is proved that there was bursting of front tyre of the Car. While driving, once the right side front tyre bursts that would lead to the loss of control of the vehicle. It was an admitted fact that the deceased driver attempted to overtake a bullock Cart and at that time, the tyre burst took place. It was the case of the Appellant-Insurance Company that at the time of accident, a bus came in the opposite direction. However, the insurance Company is not able to give the details of the alleged bus that came in the opposite direction. These are all the aggravative factors. Already the driver lost the control due to tyre burst and the Car went to the right side of the road and crossed the mud portion and thereafter, hit against a banian tree. Therefore, the aforesaid evidence, more particularly Exh. A4, would make it clear that the driver was not responsible for the accident. The driver could not be stated to be negligent in causing the accident. The accident was due to the front right side tyre burst.

278. The defence comes with the story that there was a sudden burst of front left tyre and the steering became hard and thereby car had climbed the stairs and hit the shutter. Pw-19 Keskar denied that

the tyre was burst. In panchanama also, there is mention that front left tyre was punctured. PW-1 Sambha Gauda is the witness on panchanama (Exh.28). In cross-examination by the accused, PW-1 stated that left tyre of the car was found punctured. The said fact is brought in the cross-examination of PW-1 Gauda. No suggestion was given to him that the front left tyre was found burst. PW-26 Kadam stated differently in cross-examination that front left tyre was burst and only wheel base had remained. However, on perusal of photograph (Art.F), the front left tyre was found to be punctured and was not found to be burst, displaying wheel base.

279. The ld. Advocate Mr. Shivade vehemently submitted that after accident, internal parts of the vehicle show no damage and there was some damage to the left head light and dent on the left side. Further the fiber bumper was intact. According to him, there is evidence of two witnesses admitting that after the incident the bumper was attached to the car and it came up only when the car was lifted by crane tying the hook to the bumper. Further according to Mr. Shivade, fiber bumper would not survive, if the car hits against the stationary object with a speed of 90 to 100 k.m. per hour. Further ld. Advocate Mr. Shivade submitted that PW-19 admitted that high speed would cause more damage whereas low speed would cause low damage. It is pertinent to note that the vehicle was brought from abroad in the year 2000. So it appears to be new vehicle at the time of incident. The vehicle has power steering automatic. The vehicle is having power brakes, power window. The vehicle was having ABS System. The tyres of Land Cruiser were tubeless. The said fact is admitted by DW-1 Ashok

Singh. Further the car is sturdy and sport utility vehicle. The tyre was having large width in size. It also runs of the road, on stones and on uneven surface.

280. Further it is contended by ld. Advocate Mr. Shivade that in the incident, air bags of the vehicle were not deployed. According to Mr. Shivade, this demonstrates that the vehicle was not in speed and there was no impact. It is pertinent to note that the vehicle after dashing Nurulla and running over him and over other labourers climbed three stairs of American Express and also rammed the shutter. In that process, the speed of the vehicle may be slowed down and the possibility of not deploying air bags cannot be ruled out.

281. Further it is vehemently submitted by ld. Advocate Mr. Shivade that the RTO Inspector Mr. Keskar did not take test drive. RTO Inspector admitted that there is no mention in the accident report form that he had taken the test drive. There appears to be a contradictory version in order to start the vehicle by the witness. PW-19 Keskar stated that he insert the ignition key in the ignition slot initially. However during the course of evidence he stated that he pushed the button to start the engine after pressing the electronic key in the car. If really Keskar had taken the test drive, he would have mentioned in the accident report. So evidence in respect of taking test drive is not satisfactory. However that does not mean that the testimony of the Keskar is liable to be thrown away. Admittedly there was no mechanical defect in the vehicle. According to the defence the tyre was burst which is denied by PW-19 Keskar. On perusal of the photograph

(Article F), it would reveal that tyre was not burst. Though according to Shri Shivade the wheel base is exposed but the photograph article F no where shows the said fact. Moreover when the car ran over the persons and the front tyres dashed against the stairs of the American Express and car had climbed two-three stairs of the Laundry, in that case possibility of front tyre deflated cannot be ruled out.

282. The ld. Advocate Mr. Shivade also contended that RTO Inspector PW-19 Keskar used the old proforma. According to ld. Advocate Mr. Shivade, as per Maharashtra Motor Vehicles Rules 1989, the inspection of the vehicle must be shown in the proforma prescribed under the said Rules. Though RTO Inspector did not use the proforma as contemplated by the Motor Vehicles Rules 1989 and appears to be used old proforma, in my opinion, that will not fatal to the case of prosecution as admittedly, there was no mechanical defect in the vehicle. Only disputable point is whether the left front tyre was burst or not.

283. If the argument of Mr. Shivade is accepted that the car was not in speed, then, it is very difficult to digest that when the car was in slow speed, the tyre would burst. If the vehicle was driven slowly according to Mr. Shivade, then the vehicle was having the ABS system and if the brakes were applied, then in that circumstances, the question of skidding the vehicle does not arise.

284. Moreover, it is brought on record that the tyres of the vehicle were tubeless. If the tyres were tubeless and if punctured, the

tubeless tyres let the air out slowly. But in tube tyres (normal tyres), the deflation is fast, thereby damaging the tyre and the tube. So the deflation is fast in tube tyres thereby damaging the tyre. However, in tubeless tyres, which the vehicle was having at the time of incident, some time will require for complete deflation.

285. It is also pertinent to note that if the vehicle was going in slow speed as argued by Mr. Shivade, then the vehicle could be stopped by applying brakes and the vehicle could not be skid due to ABS system. However, what happened on our case is that the vehicle leaves the road went on the footpath ran over the persons sleeping on the footpath and climbed 2-3 stairs of American Express. It means that the vehicle was in speed, however, after running over the bakery persons and climbing the stairs would naturally affect the speed of the vehicle and its impact. However, some noise would occur which was heard by PW-7 Francis who had rushed to the spot. So the argument of Mr. Shivade that the tyre was burst is ruled out. The vehicle could not be controlled while turning on the Hill Road and the vehicle went straight on the footpath and climbed 2 - 3 stairs of American Express Laundry. So naturally speed of the vehicle would have slowed down after running over the labourers and climbing 2-3 stairs and in that, the possibility of not receiving damage more to car cannot be ruled out. So it cannot be said that the accident occurred due to tyre bursting. The accident occurred due to rash and negligent driving while not controlling the vehicle properly on the turning. If according to Mr. Shivade the tyre was burst and only wheel base remained, then in that circumstance, it will be impossible that car will climb 2 – 3 stairs. It means that there must be

less air in the tyre enabling vehicle to climb over 2-3 stairs. Even Art. F shows that the tyre was not burst and contention that only wheel base remained is not correct. Considering the evidence, the theory of the front left tyre burst cannot be accepted. The facts in the cited case **[2011 (1) TN MAC 366]** will not be applicable to our case at hand.

E) <u>Evidence of alcohol consumption</u>:-

286. The prosecution claims that at the time of incident, when the accused was driving the vehicle, he was under the influence of liquor. The prosecution has examined PW-5 Malay, Waiter working in the Rain Bar & Restaurant, PW-9 Rizwan Rakhangi, Manager at the relevant time in Rain Bar & Restaurant. The prosecution also claims that there is evidence of PW-20 Dr. Pawar who has extracted blood sample for alcohol test from Salman and after sealing the bottle as per procedure maintained in J.J. Hospital, the said sealed blood sample was also sent to the Forensic Science Laboratory, Kalina. Pw-18 had analyzed the blood sample and found 62 mg. ethyl alcohol in the blood of accused.

287. It is pertinent to note that the accused never disputed his visit to Rain Bar & Restaurant at about 11.00 p.m. It is the defence of the accused that he only drank water. According to ld. Advocate Mr. Shivade, there is no evidence to show that the accused drank alcohol in the Rain Bar & Restaurant.

288. The evidence of PW-5 Malay Bag reveals that on 27.09.2002 he was on duty in the bar as steward, he used to provide

food and beverage to the customers. As per his version, at about 12.00 mid night, Salman Khan and his friends visited the bar. There was rush in the bar. 200 to 250 customers were present in the bar. Salman Khan and his friends were standing at the bar counter. It is pertinent to note that Sohel Khan also visited in the night on 27.09.2002 to Rain Bar. PW-6 Balu Muthe, bodyguard of Sohel Khan, also confirmed the said fact. It is also not disputed by the accused that Sohel Khan visited Rain Bar & Restaurant.

289. The evidence of PW-5 Malay Bag further reveals that Salman Khan and his friends were standing in the Bar. They gave order to the Manager. Manager asked PW-5 to provide service to Salman Khan and his friends. PW-5 kept Baccardi and white rum and cocktail on the table. Prawns, Chickens were also ordered and supplied by PW-5. The friends of Salman Khan also ordered prawns, chicken. At about 01.10 a.m. Salman Khan and his friends left the Bar. According to PW-5, Salman Khan is a regular visitor of Bar, therefore, he knew him.

290. Ld. Advocate Mr. Shivade also cross-examined PW-5 Malay at length. There is no dispute that at the relevant time, there was big event going on in the bar. PW-5 admits that bill for the order is to be prepared on the computer. Hall of Rain Bar might be admeasuring 20 ft x 20 ft. in area. There is also a bar counter in the hall where drinks are supplied directly to the customers. Pw-5 Malay Bag in his examination-in-chief stated that Salman and his friends were standing at Bar counter. So if really Salman Khan and his friends did not want to consume alcohol, what was occasion for them to stand at bar counter

where drinks are supplied. Further in cross-examination PW-5 stated that the tabled are arranged in the hall. The customers occupying the table are reflected in the column covered in the bill. PW-5 and other Stewards who used to take orders of food and beverages supplied information at the time of preparation of bills. If a single customer is occupying one table, then the said person comes under the column covered as one. If 8 customers occupied the table, then the said customers came under the column covered in the bill. Every table is allotted a number in order to identify at the time of the preparation of bill and the said table number is also displayed in bill. At Bar counter person would take order for providing bills, as particular number is also mentioned in the bill. If two persons took the order at the bar counter then there is different code of two persons.

291. In cross-examination Pw-5 Malay is admitted that if an order is given to provide the drink at the table occupied by 8 – 9 persons, then some persons sitting on the table may consume the drink, others may not. The order for the drinks was given by the friends of Salman and not by Salman. There were dim lights existing in the hall and loud music was playing. Pw-5 admitted that one cannot see from one table to other table which customers were consuming food or beverage. Further PW-5 admitted that the place where Salman and his friends were sitting was not visible from the place where Rizwan was standing. As Salman and his friends were standing in the hall, table number could not be reflected in the bill.

292. PW-9 Rizwan also deposed that at about 11.00 p.m. Salman Khan, Sohel Khan and their friends visited Hotel Rain Bar. They gave order to PW-5 Malay. As restaurant was full, Salman and Sohel Khan were standing in front of Service Counter. Drinks and snacks were provided on the standing bar counter.

293. It has come in examination-in-chief on record of PW-9 Rizwan that he had seen Salman possessing white colour glass. In cross-examination PW-9 admitted that the bill only shows the order given by the person occupied by the particular table. No name of the customer is generated in the bill and the name of the person who pays the money of bill, also does not reflect in the bill.

294. Further PW-9 Rizwan admitted that table nos.38, 40, 13 and 18 were different and also placed at different place in the restaurant. According to PW-9, police had visited the bar and told to give the bills on 27.09.2002. The police had inspected the bills by which the alcohol was ordered by the customers. Police had given PW-9 four bills inspected by the police and told PW-9 to sign.

295. In cross-examination PW-9 Rizwan stated that Bacardi rum looks like water. Salman Khan was drinking clear liquid. PW-9 stated that clear liquid looks like water. Relying on his cross-examination, it is argued by the ld. SPP that by no stretch of imagination, it can be said that Salman Khan was drinking only water. It has come on record in the evidence that Salman Khan is a regular visitor to Rain Bar. No one in the night may visit the bar for the purpose of drinking water.

According to Mr. SPP, 0.062 mg. ethyl alcohol was found in the blood of Salman and therefore, it can safely be inferred that it was Salman who drank backardi rum which looks like water. I have also gone through the bills produced on record which was seized by Pw-27 Shengal, Investigating Officer. Even for the sake of moment, the said bill excludes from the consideration, when it shows the different table number in the hall and Salman and his friends were standing at the bar counter, however, the fact remains that the accused drank clear liquid which looks like bacardi rum and the said fact is also corroborated by presence of alcohol in the blood sample of the accused.

296. Further ld. Advocate Mr. Shivade vehemently argued that PW-9 Rizwan admitted that Salman Khan was found walking normally while leaving Rain Bar. When person consumed liquor or drink, then while talking with the said person one can smell alcohol from the said person. According to Mr. Shivade, ld. Advocate, PW-9 admitted that he did not notice any smell of alcohol from Salman. Further ld. Advocate Mr. Shivade also contended that from Rain Bar the accused went to J.W. Mariot and if really the accused had consumed alcohol, then the said fact was also noticed by PW-12 Kalpesh Verma, parking assistant of the porch where car of Salman was parked. Further it has come in the evidence of complainant Patil (Exh.141) that Salman was drank. However, there is omission on his part to mention in the FIR lodged by him. However, in supplementary statement recorded on 01.10.2002 complainant Patil deposed that the body language of Salman was looking as such as he drank alcohol. However, we have to scrutinize the evidence of Doctor who is an expert in order to come to the correct

finding as to whether 0.062 mg. ethyl alcohol was found in the blood of Salman.

297. Now turning to the evidence of PW-20 Dr. Pawar. The Ld. Adv. Shri Shivade also criticized the evidence of PW-20 Dr. Pawar. The evidence of PW-20 Dr. Pawar reveals that he was on duty on 28.09.2002 from 02.00 p.m. to 06.00 p.m. Salman Khan was brought to the Casualty Department of J. J. Hospital. PC 2895 and PC Salunke (PW-22) were with Salman Khan. Salman Khan was brought to J.J. Hospital for extracting blood sample for alcohol test. The memo of police station is also identified by PW-20. The ld. Advocate Mr. Shivade objected for giving exhibit to the said memo. According to me, when witness deposed that the accused was sent along with memo by Bandra Police Station, and also when Salman admitted u/s.313 of the Cr. P.C. that his blood was extracted in the J.J. Hospital, the ground of objection taken by defence about exhibiting memo does not survive.

298. PW-20 DR. Pawar also clinically examined Salman Khan. The accused denied to have consumed alcohol. According to PW-20, breath was smelling alcohol. Pupils of accused were slightly dilated, git was normal, speech was found coherent. Pw-20 also asked Salman for verbal consent of extracting the sample. Identity mark of accused was noted. His left thumb impression was obtained on the register as well as his signature was taken.

299. The ld. Advocate Mr. Shivade vehemently submitted that it was incumbent on the part of Dr. Pawar to obtain the written consent

from Salman. Moreover, there is silence about oral consent taken in the evidence of PW-20 recorded before the Metropolitan Magistrate. In my opinion that will not affect the evidence of PW-20 Pawar adduced before this Court.

300. Then PW-20 Pawar narrated in evidence about extracting the blood. The blood sample was sealed in his presence by Ward Boy, as per the standard procedure maintained in J. J. Hospital.

301. As per the version of PW-20 Dr. Pawar, one phial was having oxalate preservative and other phial was plain. Blood sample was taken from Anterial Cubital Fossa of the right hand of Salman. 6 cc blood was transferred from Salman and out of it, 3 cc each was transferred to two phials respectively.

302. The ld. Advocate Mr. Shivade vehemently submitted that the accused was firstly sent to Bhabha Hospital. The accused u/s.313 of the Cr. P.C. also stated that his blood sample was taken in Bhabha Hospital. Further it is contended by Mr. Shivade that there was no alcohol noticed in the blood taken at Bhabha Hospital, therefore, accused was sent to J.J. Hospital.

303. I find no substance in the submission of Mr. Shivade on the reason that no suggestion was given to Dr. Pawar at the time of extracting the blood of accused that there is also a mark on the hand of the accused for extracting the blood sample. The judicial notice can be taken that whenever one subjected for blood sample, then after taking

blood sample, a very small piece of sticking plaster is applied to the place from where blood was extracted. However, no suggestion was given to Dr. Pawar that in Bhabha Hospital, blood was taken.

304. Further the Investigating Officer Shengal also stated that PSI Suryavanshi informed him that there was no facility of blood extraction in Bhabha Hospital at the relevant time. Ld. Advocate Mr. Shivade submitted that the said evidence is hearsay evidence. I find that it was the duty of the Investigating Officer to explain as to why blood sample was not taken in Bhabha Hospital. We have to go to root of the case and therefore, according to me, it will not be hearsay evidence. Even though PSI Suryavanshi is not examined by prosecution, no efforts were made by the defence to call the record from Bhabha Hospital about Salman Khan. When the accused examined DW-1 Ashok in his defence to demonstrate that Ashok was driving the vehicle, then the accused would have examined the witness from Bhabha Hospital. One who alleged or assert then it is incumbent on the part of the accused to show that the blood was taken in the Bhabha Hospital. Further it is highly improbable that one can notice presence of alcohol in the sample when initially it was drawn before doing analysis of the blood sample. So I find no force in the argument of Mr. Shivade that blood sample was also taken in Bhabha Hospital.

305. It is also important to note here that ld. Advocate Mr. Shivade while arguing also attacked on the sealing process by ward boy. According to him, the actor's blood sample sent for alcohol analysis could have been handled by Government hospital ward boy who was

drunk. It is also argued that "we have heard that in many Government hospital ward boys are drunk on duty". According to Mr. Shivade, if ward boy was drunk and had touched the tape at a timing of sealing, the chances of contaminating sample bottle cannot be ruled out.

306. I find no substance in the submission of Mr. Shivade that what is the evidence on record led by accused in support of allegation against ward boy. The blood phials were sealed in presence of PW-20 Dr. Pawar by ward boy and anything if found otherwise, PW-20 would not have allowed the said ward boy to do the sealing.

307. It has come in the evidence of PW-20 Dr. Pawar that the blood sample was transferred from syringe to two phials. Bottles 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 the date, time and PC number was done and it was wrapped along with two phials. PW-20 also signed on the label. The signature of the accused was obtained on EPR register. Signature of PSI Salunke (Pw-22) as well as signature of PC 27451 was also obtained on EPR register. He also obtained the initial and thumb impression of the accused and also the police officers on form "A" and "B".

308. There are entries in the EPR register regarding collection of the blood sample of the accused. OPD form (Exh.98) is in the handwriting of PW-20 Dr. Pawar. He also brought original casualty register in the Court at the time of examination. PW-20 also highlighted all the entries in the register in examination of the accused.

Exh.99 are the entries in EPR register. There is also a thumb impression of accused obtained in the said entry.

309. Exh.100 and Exh.100-A are the form A and B in the handwriting of Dr. Pawar and signed by him. It is also gave form "A" and "B" in a sealed envelop along with sealed bottled to Bandra Police Station for chemical analysis. PW-20 also signed on the two seals.

310. There is grueling cross-examination on behalf of the accused conducted by Advocate Mr. Shivade. PW-20 Dr. Pawar denied that in the year 2002, there was glass injection syringe utilized. It is pertinent to note that a judicial notice can be taken that "disposable syringe termed as use and throw came in existence and they were available in the year 2002". When PW-20 denied that in the year 2002, there were glass injections utilized, it means that at that time, disposable syringe were utilized. The judicial notice of the said aspect can be taken.

311. The ld. Advocate for the accused contended that PW-20 Dr. Pawar committed breach of the rules of Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, more particularly Rule (3) and (4).

312. The ld. Advocate Mr. Shivade also relied on the reported judgment of Hon'ble Bombay High Court in case of **Tulsiram Gangaram Raykar V/s. The State of Maharashtra [1977 U.C.R. (Bom.) 532] Criminal Revision Application No.38 of 1975, with**

Criminal Revision Application No. 544 of 1975, decided on 28-1-76. In the said case, it is held as under:-

> "Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, Rules, 3, 4 and 5.--- Procedure for taking and testing blood.
>
> Rule 3 refers to provision of Sec. 129A of the Act, and empowers Medical Officer to collect the blood of such person and furnish to officer by whom he was produced, in a certificate, in Form A, containing his examination.
>
> Rule 4, deals with manner of collection and forwarding of blood.
>
> The Rules are mandatory, in the view taken by Supreme Court. The question is whether words of Medical Officer, should be acted upon without corroboration ; when he speaks to contents of his own certificate.
>
> Held, some of these symptoms would appear in a person who has consumed toddy. Doctor's evidence cannot be accepted beyond impeach, and introduces an element of doubt, to which, the accused would be entitled."

313. Mr. Shivade also relied on the reported judgment in case of **State of Maharashtra v/s. Raghunath Madhavrao Marathe [1986(3) Bom C.R. 341 (Aurangabad Bench)] Criminal Appeal No. 161 of 1985, decided on 28-8-1986**. In the said case, it is held as under:-

"(A) Bombay Prohibition Act, 1949, Sec. 66(1) (b) & (2)---Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, R 4---- Charge under section 66(1) (b)---Acquittal ---Validity----Non-compliance with requirements of Rule 4 of Blood Test Rules--- Presumption under section 66(2) not available ---Acquittal valid.

The Doctor did not say in his evidence that syringe was sterilized. He also did not say in his evidence that no alcohol was touched by him at any stage while extracting the blood from the body of the accused. He further did not say in his evidence that the blood collected in the syringe was transferred into a phial containing anticoagulant and preservative and that the phial was then shaken vigorously to dissolve the anticoagulant and preservative in the blood. Held the accused would be liable to be acquitted of offence punishable under section 66(1)(b), as important precautions were not taken in collecting the blood to be sent for chemical analysis. Except pointing out that the Chemical Analyser would not have been able to carry out his analysis and would not have sent his report and would have made a grievance about the blood being not in proper condition, no positive material was placed to show that there was substantial compliance with the above requirement of Rule 4. Further, if the report of the chemical analysis could not be accepted as correct

for non-compliance with the requirement of Rule 4 the presumption under section 66(2) would not be available to the prosecution as it is clear from section 129-A and 129-B, that it his report is to be read as evidence, then it has to be in the manner prescribed under Rule 4. It is open to the prosecution to establish its case without treating it as presumptive evidence under the aforesaid provisions. Even if the said report could be used as evidence under section 293 of the Code of Criminal Procedure the said report does not show whether the above requirements of the rule were substantially complied with. Only because the report the shows that certain conclusions are arrived at, it would not follow that the blood was in proper conditions and that the results of the chemical analysis were correct. Therefore, the accused was rightly acquitted."

314. Mr. Shivade also relied on the reported judgment in case of **Shravan Ganpat Randhir V/s. State of Maharashtra (1979 Bom. C.R. 419) Criminal Revision Application No. 177 of 1979, decided on 10-7-1979**. In the said case, it is held as under:-

"(B) Bombay Prohibition Act, 1949, Secs. 66(2)---Bombay Prohibition (Medical Examination and Blood Test) Rules, 1959, Rr. 4 & 5---Collection and forwarding of blood----Presumption under section 66(2) of the Act---Held, prosecution solely relying on report of Medical Analyser for blood concentration, will not be entitled to

benefit of presumption under section 66(2) of the Act. Requirements in the Rule 4 are mandatory as was held by Gujarat High Court in ruling referred two in absence of any evidence of compliance, held, report of Medical Analyser will lose all evidential value.

There is absolutely no evidence before the Court to come to an conclusion in favour of the prosecution that the syringe in question was sterilized in the present case with boiling water before being used for taking the blood. Nor is there any evidence before the Court to come to a conclusion in favour of the prosecution that the Medical Officer cleaned with sterilized water and swabbed the skin surface of that part of the body from which blood was intended to be drawn. Nor is there any evidence before the Court to come to a positive conclusion in favour of the prosecution that the blood collected in the syringe was transferred into a phial containing anti coagulant and preservative nor any evidence before the Court to conclude that the phial was then shaken vigorously to dissolve anti-coagulant and preservative in the blood. These indeed are important requirements, if the report of the chemical Analyser is to be simplicity relied upon by the Court in order to reach conclusion one way or the other in a prosecution as of the instant nature. (Para 6)"

315. In all these cases, charge u/s.66(1)(B) of the Bombay Prohibition Act was framed. In our case in hand, no charge is framed u/s.66(1)(B) of the Bombay Prohibition Act. However, the charge is framed against the accused u/s.185 of the Motor Vehicle Act.

316. It is pertinent to note that after framing the charge by my ld. Predecessor, neither prosecution nor defence made any grievance before me that charge u/s.66(1)(B) was not framed before adducing evidence. **Reliance is placed on the landmark judgment of the Aliester Pareira V/s. State of Maharashtra in Criminal Appeal No.430 of 2007 filed by State of Maharashtra against Aliester Pareira with Criminal Appeal No.566 of 2007 State of Maharashtra through Khar Police Station v/s. Aliester Pareira with Criminal Appeal 475/07 filed by Alister Pareira against State of Maharashtra.** All these three appeals came to be decided by the Hon'ble Lordships of the Division Bench. It is observed by Their Lordships of the Division Bench of the Hon'ble High Court, Bombay in para 66 that "the argument on behalf of the accused that non compliance of the statutory provisions prescribed in the rules framed under Bombay Prohibition Act could vitiate the trial is also without merit. Firstly though the accused was not charged for the offence punishable u/s.66(1)(B) of the Bombay Prohibition Act, both parties stood to the trial without any protest. In our opinion and for the purpose of the present case, relevant provisions of law have been substantially complied with. The blood sample was taken by the Medical Officer and it was examined by the Chemical Analyzer as per the rules and procedure. Reliance on some of the cases cited on behalf of the accused to substantiate the plea that in such

accident cases only offence that would be made out would be Sec.304-A of the IPC, is without substance and merit. Every case has to be examined on its own facts."

317. In the present case, there is no charge u/s.66(1)(B) of the Bombay Prohibition Act. The charge u/s.185 of the Motor Vehicle Act is framed. If alcohol percentage is higher than .30 mg. in blood then provisions u/s 185 Motor Vehicle Act would be attracted.

318. Further in our case, Dr. Pawar denied in the cross-examination that the glass syringe was utilized. As discussed above the judicial notice can be taken that disposable syringes, use and throw commonly called are used. Therefore, though the Doctor did not state in his evidence that the syringe was sterilized is of no consequence. Further in cross-examination Dr. Pawar admitted that without applying antiseptic at the place where blood sample was taken taken from Salman, so the theory of applying spirit or antiseptic at the place before drawing the blood is also ruled out. Even the Doctor has stated that he transferred 3 c.c. blood of Salman into a phial having oxalate preservative and 3 cc blood in plain phial. So substantial compliance is made by Dr. Pawar. What will be effect of non adding 5 gms of sodium fluoride in blood sample and its effect would be a question to be discussed later on in the judgment. Moreover, as stated above the charge is not framed u/s.66(1)(B), therefore, blood test rules of the year 1959 are not applicable to our case in hand.

319. Exh.98 is the OPD form and one can call it as case paper. No thumb impression was obtained on the said form. Back portion of Exh.98 about Salman Khan is a carbon copy. It appears that Dr. Pawar had written the word “for blood collection” on the back portion of Exh.98 as it was not imprint. According to Mr. Shivade, Exh.98 is the fabricated copy. In Exh.98 case papers, there is no mention about the consent obtained from accused prior to his examination. PW-20 also admitted that the dilation of the pupils is not conclusive test of consumption of alcohol. He also admitted that on the back portion of Exh.98 there is no mention that breath smells alcohol. In EPR register, it is mentioned to that effect. PW-20 also cannot say why the word “alcohol” was not imprint on the back portion of Exh.98. If really the said case paper was the fabricated document as argued by ld. Advocate Mr. Shivade, then it would be very easier to Dr. Pawar to write about alcohol by ball pen. This is not done by Dr. Pawar. Dr. Pawar has no enmity or grudge against the accused to implicate accused.

320. Dr. Pawar admitted that he does not know about the blood test rules. In my opinion, every Doctor who takes the blood in prohibition case must know about the rules for taking sample. However, in view of the above discussion, the evidence of Dr. Pawar cannot be thrown away.

321. PW-20 Pawar also gave evidence in the Metropolitan Magistrate Court. He had carried EPR register along with him in the Court of Magistrate at the time of giving evidence. He also admitted that there is an endorsement in his handwriting on 20.11.2010 that

copy of the Art. B case paper marked in the lower Court regarding true copy and he endorsed that contents in Art. B i.e. case papers are as per EPR book. Art. B is at Exh.103. It is pertinent to note that accused was examined in J.J. Hospital and according to Mr. Shivade, the evidence as regards the examination of accused is contradictory. PW-20 Dr. Pawar denied that the accused was discharged at about 02.30 p.m. from the room. Portion marked "A" also shown to him from the cross-examination that at about 02.30 after collecting the blood sample the patient was discharged from the room, is recorded as per his say. Portion marked "A" is at Exh.104.

322. PW-20 also admitted that Salman Khan brought at 02.25 p.m. In cross-examination he admitted that at the relevant time, no blood special kit for collection of blood was provided. He also admitted that the place for keeping phials is in examination room. The syringes were also kept near phials in examination room. He also admitted that rubber stoppers are provided for phials or bottles. He also cannot say who brought the box containing phials from store room in examination room. The two bottles were kept by him on the platform in examination room till he draw the blood. The phial is having oxalate preservative is having white colour. He cannot comment whether preservative used in the phial to prevent fermentation, coagulation and also enzamatic reaction in the blood. The preservative also used to prevent haemolysis. Witness stated that the phial which was having oxalate was a labelled phial. The oxalate keeps the blood whole in tact. He admitted that after extracting of blood, the process of coagulation of blood starts. However, he unable to tell how much time would require for coagulation, the blood transferred in phial.

323. PW-20 Dr. Pawar also admitted that oxalate is known as Anticoagulant of the blood. Therefore, in the medical field, the oxalate is called as preservative.

324. PW-20 Dr. Pawar also stated that he heard about sodium fluoride for collecting of the blood for testing the blood sugar level. According to him, prior to sealing the plain bottle of 3 cc blood, coagulation of blood must have started. He cannot say whether if alcohol test is done, when the percentage of alcohol would find more in serum than rest of the blood components. He also unable to tell whether oxalate preservative is not used in phial, then in that case, in the blood, fermentation, coagulation, enzamative reaction and haemolysis would ensue.

325. Further Pw-20 Pawar also admitted that in the atmosphere as well as the vicinity there are different microorganisms existing. He cannot comment whether a glass of juice is kept open, without any cover or lid, then the process of spoiling the juice will start. PW-20 also stated that he heard that beer is manufactured by fermentation process. Fermentation process is common and natural in everyday's life i.e. because of yeast. Yeast is a microorganism and is available every where, when one touches, in air. After opening the cover or lid of the juice bottle, the juice exposes to the air. PW-20 unable to comment whether if the fermentation is caused in respect of the juice, there would be alcohol fermentation. According to him, if the conditions are right, blood would ferment. He cannot say the quantity of oxalate in

grams used in phial. He presumed that quantity of oxalate in phial is correct as per the size of phial. Even he cannot tell how much quantity of the oxalate is required for the particular of blood in C.C.

326. PW-20 also admitted that protocol is defined as what sort of care, precaution and procedure is to be following while drawing the blood sample. He also stated that micro organism are not visible by necked eye. According to him, at one side of sticking plaster, there is adhesive gum existing. Adhesive side of the sticking plaster is pasted with the bottle or phial at the time of wrapping it. PW-20 also stated in cross-examination that the ward boy had cut the sticking plaster from the roll for wrapping the bottle. The time was not noted. Two phials were wrapped and sealed by ward boy within 2 to 3 minutes time. PW-20 also admitted that the constable to whom he delivered the sample is supposed to be keep the custody of the sample till the sample reaches to the C.A.

327. PW-20 Dr. Pawar also admitted that as per the memo (Exh.97), Bandra police requested him to take blood sample. He put the time 03.00 p.m. below the signature. He also did the clinical examination of the accused.

328. According to PW-20, 5 to 6 minutes time is required to note the entry in register and 4 minutes time is required to fill form “A” and “B” together. PW-20 stated that he started extracting the blood from Salman around 3.00 p.m. According to PW-20, as per Exh.102, the time of sealing is written as 02.25 p.m. Witness also stated that it is the EPR

number and time was written while preparing the number. Further PW-20 admitted in Exh.102, time of drawing the blood mentioned as 02.30 p.m. which is correct.

329. Ld. Advocate Mr. Shivade vehemently submitted that there is a discrepancy about timing of drawing blood. It is pertinent to note that Salman Khan also admitted u/s.313 of the Cr. PC that in J.J. Hospital blood was extracted. Salman Khan never stated u/s.313 of the Cr.P.C. that Dr. Pawar drew blood for two times. Even if there appears any discrepancy about the time mentioned in the case paper about drawing blood of Salman, I find that that would not vitiate the case of prosecution, when accused admitted u/s.313 of the Cr. P.C. about extracting the blood by Dr. Pawar.

330. Further PW-20 Pawar also stated that the lakh is melted by a ward boy in front of him at the time of doing the seal. 1 minute time was required for ward boy for putting the lakh on phial and also putting the seal. During the course of evidence, the witness is shown Second Edition Book of Writer Shri V.V. Pillay of "Comprehensive Medical Toxicology". He was shown para 3(a). He agree with the column 3(a) which is "Several antihistaminic, decongestant, multivitamin, and cough syrups contain varying percentage of alcohol (2 to 25%). Mouthwash is base of alcohol. He also agrees that "Solven for after-shaves, colognes, mouthwashes and perfumes, the alcohol content in these is variably (15 to 80%).

331. The defence also put some computerized research papers to PW-20. He stated that he is not aware about "blood alcohol concentration in plasma were approximately 11% higher than the whole blood and those in supernatant sample were about 5% higher". According to witness, he has not read the research paper. It was also suggested to the witness that some hospitals may only test the serum . Producing blood alcohol concentration for blood sample, one may produce blood alcohol count levels upto 25% higher than the whole blood results. Further according to PW-20 he has not read the research papers. Further PW-20 is also not aware when it was suggested, "when human blood decomposes, naturally occurring microbes can change the sugar in blood in alcohol. This is the same type of fermentation that occurs in the manufacture of beverage and alcohol. Further portion now shown to him is from research papers as follows:-

> "Clearly, the risk of fermentation will vary according to the mount of preservative used. However, it will also be directly affected by the length of time the sample is stored, and by the temperature at which it is stored. Sodium Fluoride of 1 percent or less concentration is stable for only about two days, Dr. Kay's article concludes that less than 1 percent sodium fluoride (100 mg/10 ml blood) "can allow microorganisms to grow and can also inhibit glycolysis and thus provide and thus provide glucose for the unkilled microorganisms to ferment into alcohol." Dr. Dubowsky, however, reflects common law enforcement practice in recommending that 15 mg/10 ml blood is sufficient. An Australian study concluded that 1 percent of sodium

fluoride was the only preservative and strength found effective in preventing fermentation. That study also concluded that, despite the presence of preservative. "significant increase in the concentration of ethyl alcohol may occur when blood samples taken at autopsy are left at room temperature for two days."

332. PW-20 Dr. Pawar stated that paper shown to him is from research paper and he is not expert in Forensic Medicine.

333. Further portion shown to him from research paper as follows:-

"As has been previously indicated, the production of alcohol in blood caused by among other agencies, yeasts such as Candida albicans, is a constant problem. As researchers have observed. C. albicans is commonly found in man, usually in the oral cavity and digestive tract, and less commonly in the vaginal tract of women. Though generally harmless, it can manifest itself as a pathogen. The organism has been called the most common and most serious pathogen of man. The legal ramifications of this are obvious. If an organism common to man is capable of producing ethyl alcohol in stored blood, the question arises. Are the results of alcohol analysis reflective of an individual's level of intoxication or post-testing fermentation?"

334. Further PW-20 Pawar stated that he cannot agree or disagree with the portion. He is not a post-graduate person and therefore, cannot opine about what has mentioned in the portion which is reproduced above.

335. During cross-examination, PW-20 stated that he cannot say if fermentation occurs in the blood then to what extent percentage of blood would notice in the blood analysis. He cannot say candida albicans is one of the organism shown for fermentation of blood sample inside the tube. PW-20 stated that blood gets fermented, then it would produce the alcohol and it is possible that it can cause false high test result of the alcohol. According to him, haemolysis is the breakage of the red blood cells membrane and haemolysis is a common occurrence in blood sample. It may cause fermentation.

336. According to him, Sodium fluoride is one of the preservative preventing fermentation and glycolysis in the blood. During evidence, Civil Medical Code was shown to the witness and according to him, he has not read it. There are directions given in Maharashtra Civil Medical Code that in prohibition cases, the Medical Officers should take 5 mg. of sodium fluoride and 15 mg of potassium oxalate as anti-coagulant for 5 ml. of the blood to be collected in it.

337. According to PW-20 he had taken 3 cc blood sample each in in two phials totaling 6 cc. Because of the practice following in J.J. Hospital, he had not put 5 cc of blood in the phial. According to him, in order to draw correct conclusion, it is necessary to send two phials to Chemical Analyzer.

338. PW-20 Pawar stated that if there is no preservative in the phial and phial is stored without refrigeration, then decomposition would start. He also admitted that Sodium Fluoride is one of the preservative used for prevention of glycolysis which may prevent fermentation. He cannot tell what changes would occur in sample having no sodium fluoride used as preservative.

339. Further in cross-examination PW-20 stated that Exh.100 and Exh.101 are the labels according to him. Exh.100 And Exh.101 were not having seal or lakh. He also stated he has not mentioned in Exh.102 that two phials were sealed.

340. Further PW-20 also admitted that there is no distinction written on the two labels as to which phial is having oxalate and which phial is a plain phial. He cannot say as to whether Exh.100 and Exh.101 are the labels were pasted on phials having oxalate or pasted on plain phial. There is no marking on the plain phial whether the preservative has added or not. Further there is no endorsement in Form "A" and "B" that sealed envelops were sent and also in EPR register (Exh.99). Further there is no mention in (Exh.99) EPR Register that two sealed phials were handed over to PC 2985 and his acknowledgment taken on the register. He admits that it is necessary to write the buckle number and signature is to be obtained in whose custody said sample of blood is delivered. PSI Salunke (PW-22) was present at that time. In Exh.98, it was written that the blood sample was handed over to PC 2985 and PSI Salunke.

341. PW-20 Pawar also admitted that there is no endorsement in the case papers (Exh.98) that the sample was sealed and was handed over to PC 2985 and PSI Salunke and also no endorsement in form “A” and “B” to that effect.

342. In cross-examination, suggestions were given to PW-20 that he did not follow the rules and regulations and he is deposing falsely that he obtained the blood sample from Salman and also sealed in his presence. Further he has not stated in the evidence recorded before the Metropolitan Magistrate, Bandra, that he had obtained verbal consent from Salman for extracting the blood sample. He also stated that it did not happen that two sealed phials and form “A” and “B” were put in one envelop which was sealed by lakh. It is pertinent to note that the defence never put suggestion to the said witness that the accused never consumed any alcohol.

343. PW-22 Vijay Salunke took Salman Khan on 28.09.2002 to J.J. Hospital for medical examination for blood alcohol test. He also identified report (Exh.97). According to him, Medical Officer drawn the blood from Salman at the request of Bandra police. After extraction the blood sample was given by Medical Officer in the possession of Constable to deliver the said envelop in to the possession of PW-27 Shengal. In cross-examination he stated that he does not recollect the name of constable to whom the blood sample was delivered by the Medical Officer after extracting from Salman Khan. PW-22 also admitted in the cross-examination that in his presence, the constable

has handed over the blood sample to PW-27 Shengal. So it is established on record that after extraction blood sample was given to PW-27 Shengal.

344. PW-21 Sharad Bapu Borade had brought the blood sample of accused to C. A. Laboratory. As per his version, investigating officer Shri Kadam gave him two sealed envelopes. One envelope was having two bottles and one envelope was having a letter. **Exh. 80** is the said letter. PW-21 also made endorsement on the back of the letter Exh. 80 that he received the letter of Police Station along with Form 'A' & 'B' and also he deposited two sealed bottles of blood. The endorsement is at **Exh. 80-A.** He also signed below the endorsement. He also obtained the acknowledgment from the Laboratory for delivering the bottles. During cross examination, **Exh. 102** shown to the witness which is a letter written by Casualty Medical Officer to C. A. The receiving clerk put an endorsement about the receipt of the bottles and also his buckle number was mentioned in the endorsement made by him. PW-21 stated that the form was returned to him, which he submitted to the Police Station. Generally, the letters written to the C. A. from Police Station need not return to police station. In my opinion that would not hamper the case of the prosecution. PW-21 was also examined in the Court of Metropolitan Magistrate. He denied that Rajendra Kadam gave him one sealed envelope and two sealed bottles. According to him portion marked 'A' read over to him from his deposition is not correct. He also denied that he was asked to carry the bottles in iron box. He contradicted portion marked 'B'. He stated that it did not happen that the sample bottles were not covered with the seal. He also contradicted

portion marked 'C'. In my opinion though PW-21 contradicted portion marked 'A' to 'C' from his evidence recorded in the Court of Metropolitan Magistrate, that would not affect his evidence before me on material fact of carrying the blood sample to Kalina.

345. Another crucial evidence is of PW-18 Assistant Chemical Analyser Dattatray Bhalshankar. The ld. Advocate Mr. Shivade heavily criticized the said evidence. According to ld. Advocate Mr. Shivade, after going through the entire evidence, one may find that, PW-18 Bhalshankar is not an expert, has no qualification of an expert, did not take proper precautions. There is discrepancy about the seals and method of analysis. The ld. SPP would contend that nowhere during cross-examination the witness has been confronted about any laps in taking precaution in actual analysis of the blood sent to him for analysis. According to Mr. Gharat, ld. SPP, the rule of evidence is repeated that when a particular thing is required to be done in a particular manner, presumption is that, it is done and performed in that particular manner only. According to him, if the other side wants to rebut the same, the onus is upon them to show that, that particular thing is not done or not performed in that particular way and there is lapse in the performance of the duty.

346. As per the version of PW-18 Bhalshankar, in the year 2001, he came to Mumbai as an Assistant Chemical Analyzer in Forensic Science Laboratory. He has analyzed 1000 cases till 2002. On 30.09.2002, he had received a blood bottle along with the letter from Bandra Police Station. Form “A” and “B” were also sent along with the

said letter. According to him, it bears stamp of his office on the same letter about receiving the letter of Bandra Police Station, the analysis of the blood was sought by Bandra Police Station in order to ascertain percentage of the alcohol in the blood sample sent for analysis.

347. The evidence of PW-18 further reveals that he also ascertained whether form "A" or "B" were attached with the letter or not. According to him, the blood phial was found sealed. The seal was found in tact. He also put the number "AL – 171/02" on the said letter. He signed the letter after ascertaining about the sealed bottle whether it was intact or not. The noting is in his handwriting on the letter "one sealed phial sent in tact as per the copy sent (blood in two phials)". PW-18 also affixed two labels on the letter dated 28.09.2002 removed from the blood bottle. The labels were removed from the blood bottle and affixed on the letter dated 28.09.2002 form "B".

348. PW-18 Dr. Bhalshankar also deposed that after receiving the blood phial, it was kept in the fridge. On 01.10.2002 PW-18 analyzed the blood phial and used the modified diffusion oxidation method. Pw-18 also measured the quantity of the blood which was admeasuring 4 ml. According to him, the preservative was added in the blood phial. He also conducted marpholin test. He also took the noting of the test. According to him, the test result was found positive. According to him, he then started analysis of the blood to ascertain the percentage of the alcohol.

349. PW-18 Bhalshankar found 62 milligrams (Mg) of ethyl alcohol in the blood which was analyzed by him. According to him, 62 mg. of ethyl alcohol was found in 100 ml. of the blood. In general 30 milligrams (mg) ethyl alcohol might be found in the blood of human being. Percentage of the methyl alcohol may be increased upto 40 to 42 mg., if the medical treatment is taken by the person. PW-18 prepared the report (Exh.81).

350. In cross-examination PW-18 Bhalshankar stated that he was working in Prohibition Department between 2003 to 2008 at Pune. Further he stated that he cannot say how many samples were analyzed by him till today in his career. He also admitted that private samples other than referred by the Government are also received by the Laboratory for the analysis purpose. He also admitted that with the advancement of Science, the procedure of analysis changes. He also admitted that Head Space technology is utilized to determine alcohol percentage. He also stated that he also heard about the Gas Chromatography. He cannot say whether Liquid Gas Chromatography is also a method used to detect exact percentage of alcohol in the blood. He cannot say whether Gas Chromatography method is used in Laboratory in Mumbai since prior to 2002. He cannot say whether Gas Chromatography method is fairly accurate to determine alcohol percentage. He also admitted that Chemical Analysers working in the Forensic Laboratory should update themselves. He also admitted that he did not update himself in respect of Gas Chromatography, Liquid Gas Chromatography and Head Space technology. Further in cross-examination, PW-18 stated that he did B.Sc. in general Chemistry. In

1980 he has joined as a Scientific Assistant in Forensic Laboratory. He has not obtained degree, diploma or certificate course in Forensic Science. He did not do any research. He also analyzed the cases from Excise Department.

351. PW-18 further stated in his evidence that the reaction mixture is the first stage of starting analysis. While preparing reaction mixture, blood sample is kept in the refrigerator. According to him, after preparing the reaction mixture, one hour period is required for completing the procedure for analysis. Further he cannot say the time when he began to prepare reaction mixture. It is impossible for the witness to state about the time after a gap of 13 years. He is also unable to tell when he began to prepare reaction mixture in the morning, afternoon or evening. Further he cannot tell whether completion of blood sample analysis was in the morning, afternoon or evening.

352. During cross-examination PW-18 also stated that while doing the analysis, he made noting. At the time of evidence, he had brought the noting. PW-18 further stated that the Police Constable had brought the blood sample to him. There is a Section situated on the ground floor of the Laboratory for receiving the samples. He then volunteers that at the first floor the samples are received. He also verified from seeing the bottle whether it is containing the blood. The ld. Advocate Mr. Shivade submitted that PW-20 Dr. Pawar wrapped sticking plasters from the bottle, how one can notice if bottle was containing the blood. PW-18 admitted that there is reference of only

one bottle in the letter. However, during further cross-examination he stated that there were two blood bottles wrapped by the tape. According to him, the blood bottle which was showed to him was wrapped by plastic tixo strip. Much was argued by ld. Advocate Mr. Shivade that Dr. Pawar had wrapped sticking plaster, but PW-18 stated about the plastic tixo strip and therefore, doubt is created. I do not find any force in the submission on the ground that even if PW-18 stated about the plastic tixo strip, PW-18 might be stating about the plastic tixo strip instead of sticking plaster that too after 13 years period.

353. The evidence of PW-18 Bhalshankar further reveals that the name of Salman Khan was written on blood sample bottle. He also admitted that after receiving the sample, the sample has to be analyzed as expeditiously as possible and if there is a delay, then the sample would deteriorate. As per the Civil Medical Code, blood sample is to be sent within 7 days from police station for analysis. In our case, on 28.09.2002 blood sample was taken and it was deposited in the police station. On 30.09.2002 blood sample of accused was sent to C.A. in Laboratory. On 30.09.2002 the blood sample was kept in fridge. On 01.10.2002 PW-18 analyzed the blood. So it can be said that there was no delay for analyzing the sample.

354. PW-18 also admitted that there was no mention on the label that preservative was added or not. According to him, he came to know from the papers that the blood of Salman was extracted on 28.09.2002. PW-18 further stated in cross-examination that **"the blood is extracted and without adding preservative the blood, the blood**

lasts for the period of two days, if properly sealed by the Doctor who extracted the blood". It is pertinent to note that PW-20 Dr. Pawar had sealed the bottles and also PW-18 Bhalshankar also noticed the blood bottles in tact.

355. PW-18 also stated that Sodium fluoride is a preservative to be added in the blood sample. There was no reference about Sodium Fluoride in the paper. During evidence a book of Garriori's Medicolegal Aspects of Alcohol, 6th Edition, Page No.285, 10.4 was shown to the witness. PW-18 stated that he is not in agreement with 10.4, **"Preservation of Biological Specimens, Sodium Fluoride has historically been used to prevent microorganisms from causing the loss or gain of ethanol in biological specimens".** Further PW-18 was also in agreement with the propositions 10.4 in the book of Garriori's Medicolegal Aspects of Alcohol, **"These reports indicated that at room temperature sodium fluoride did not prevent the production of some ethanol".**

356. On the day of analysis, PW-18 Bhalshankar removed the tape and saw two blood bottles. He measured the blood in both the bottles by same pipette. There was milimetre marking on the pipette. 4 ml blood was measured. According to PW-20 Dr. Pawar, he withdrew 6 c.c. PW-18 also stated that it is not always that there used to be difference between quantity of blood sent by Medical Officer for analysis and the blood noticed at the time of analysis. PW-18 further stated that in all cases there used to be difference in the quantity of blood sent for examination and at the time of measuring it for analysis.

357. Ld. Advocate Mr. Shivade argued much on the said difference. It is pertinent to note that the blood was measured by pipette. There must be one or two drops of the blood might be remained in the pipette or there may be some minor difference in calibration of the syringe for drawing the blood with the calibration of measuring the blood. It is pertinent to note that 0.5 ml blood is necessary for defused oxidation method test. PW-18 also took 0.5 ml blood sample out of the blood sample. So even if there appears to be some difference in the quantity of blood sent and received, that will not vitiate the blood analysis. Dr. Mahal a landmark authority in the process of analysis in his paper also stated that 0.5 ml blood sample is used for modified diffusion oxidation method. Further there is also an endorsement on Exh.102 letter sent by Dr. Pawar to the Laboratory. There is also an endorsement by Pw-18 on the said letter (Exh.102), "one sealed phial, Seal intact as per copy." (Blood in two phials). Even there is also an endorsement of constable buckle no.20419 that sealed bottles were deposited. Much argued by ld. Advocate Mr. Shivade that in (Exh.80) letter sent by PW-27 Investigating Officer Shengal to Chemical Analyzer that in the said letter it is mentioned about sealed bottle of the blood and sealed envelop is sent along with Constable buckle no.20419 (PW-21). According to ld. Advocate Mr. Shivade, whether blood sample was in one bottle or two bottles sent to C.A. In view of the evidence brought on record, there were two bottles sent wrapped together by sticking plaster and even on Exh.102, there is an endorsement of PW-18 about blood in two phials and one sealed phial, seal intact. So it goes to show that two bottles were together wrapped by sticking plaster and it was sealed.

358. PW-18 further stated in cross-examination that he analyzed the blood bottles. He further stated that the Doctor extracting the blood should send only one blood sample and also should not incorrectly preserve the blood sample. He also admitted that there are Government instructions that Sodium fluoride should be added in the blood sample. There is no mention in Exh.102 that Sodium fluoride was added as preservative in the blood sample. It will be a serious mistake, if Sodium Fluoride is not added in the blood sample.

359. PW-18 also stated that haemolysis means, there would be coagulation of the blood and in analysis of the blood where haemolysis occurs, result would not be accurate. It is pertinent to note that in our case, the phial in which 3 cc blood was transferred by PW-20 Dr. Pawar is a labelled bottle having oxalate preservative. Potassium Oxalate prevents haemolysis. PW-18 further stated that after extracting the blood from the person and after it comes in contact with air, the blood would coagulate. It is pertinent to note that PW-20 Dr. Pawar after extracting the blood immediately transferred the blood from syringe into the phial having oxalate preservative. So in that situation, question of coagulation will not arise.

360. PW-18 Bhalshankar further stated that in morpholine test one cannot ascertain the percentage of alcohol in the blood. He also stated that morpholine test is useless for ascertaining the percentage of alcohol in blood. Much was argued by ld. Advocate Mr. Shivade that PW-18 Bhalshankar deposed in the evidence before Metropolitan

Magistrate that he used the Morpholine test and does not mention about modified diffusion oxidation method. Pw-18 denied that analysis was made by him by morpholine test. He contradicted portion marked "A" in the certified copy of his evidence (Exh.128) produced on record. It is pertinent to note that in his report (Exh.81), there is mention that modified diffusion oxidation method was used and morpholine test was positive. So modified diffusion oxidation method was utilized to ascertain the percentage of the alcohol in the blood. In my opinion, the evidence of PW-18 cannot be thrown away on the ground that he denied to have stated before the Metropolitan Magistrate about doing analysis by morpholine test.

361. The evidence of PW-18 Bhalshankar further reveals that Dr. Mahal had developed the method of modified diffusion oxidation. Dr. Mahal had brought in existence the said method and he was the Director of Forensic Science Laboratory. The ld. Advocate Mr. Shivade vehemently submitted that PW-18 also did not state correctly the formulas. Even ld. Advocate Mr. Shivade stated that PW-18 Bhalshankar did not go through the papers of Dr. Mahal. Much argued was ld. Advocate for accused that PW-18 Bhalshankar is unable to tell whether the phial was sterile or not. It is pertinent to note that the labelled phial was provided for transferring the blood after extraction. It is presumed that the labelled phials were proper in order to receive the blood for collection. Pw-18 Bhalshankar also unable to tell the strength of Sulphuric acid and at what stage of analysis iodine is used. According to Mr. Shivade, PW-18 does not know about the idometric and isometric titration . He stated that the titration which is conducted

in the process of modified diffusion oxidation method is called as oxidation titration. According to PW-18, after completing the process of oxidation, potassium iodide is to be added.

362. Further PW-18 Bhalshankar also stated that the solutions which are used for analysis are prepared earlier before process of analysis and the solutions prepared can be utilized for one or two weeks. Pw-18 is unable to tell the name of the person who has prepared the solution before analysis. According to PW-18 Bhalshankar, the person who was knowing the reason for what purpose the solutions prepared were, to be utilized. Potassium dichromate and sulfuric acid were the solutions. Pw-18 also stated that he had not prepared the solution of potassium dichromate and whatever solution was available, he used it. No question was asked to the witness that solutions were unfit for analysis. When a particular thing is required to be done in a particular manner, presumption is that it is done and performed in that particular manner only. So whatever solutions are prepared in Laboratory were prepared in a particular manner, required in the Laboratory.

363. There was grueling cross-examination of PW-18 Bhalshankar. Questions were asked to him about the weighing balance used in the Laboratory. PW-18 is also unable to tell difference between mechanical and electric balance. The ld. Advocate Mr. Shivade contended that the Laboratory at Kalina is not having the ISO mark. PW-18 Bhalshankar is unable to tell whether Directorate of Forensic Science, Mumbai, is not accredited to the National Accreditation Board

for testing and calibration in Laboratories. Further PW-18 Bhalshankar is unable to tell the difference between qualitative analysis and quantitative analysis. Pw-18 also stated that modified diffusion oxidation method was used first, thereafter Liquid Gas Chromatography and Gas Chromatography was introduced in 1997. Thereafter Head Space Technology was used. He cannot tell whether in which category, accuracy was increased in alcohol test examination. He is also unable to tell how 0.1 N solution of Sodium dichromate is prepared and also 0.5 Sodium Thiosulphate solution without going through the book.

364. The ld. Advocate Mr. Shivade vehemently submitted that no reliance can be placed on the evidence of PW-18 Bhalshankar as he cannot tell how he conducted the modified diffusion oxidation method test. It is pertinent to note that PW-18 was subjected to grueling cross-examination. He is the person who was going to retire shortly and working in Forensic Science Laboratory since many years. Generally, Chemical Analysers are not subjected to cross-examination in view of the fact that their reports are directly admissible in evidence as proved u/s.293 of the Cr. P. C. So under the grueling cross-examination, if the witness is unable to tell the formulas and also about the test, that does not mean that he is not expert and does not know anything. He had conducted the test which is required to be done in a particular manner and presumption is that, it is done and performed in that particular manner only. Therefore, in my opinion, even if the witness under the heat of cross-examination is unable to tell the formulas or the method, no doubt can be raised against him. There is no reason for him to state lie against the accused. It is also important to note that the witness had

brought the noting of the examination at the time of his evidence. It was never suggested to the witness that modified diffusion oxidation method has proved to be a wrong method for determining the alcohol percentage. Even it was never suggested that the procedure applied by the witness is incorrect. Merely because advanced techniques are not used, opinion cannot be faulted, unless the technique used is faulty.

365. PW-18 Bhalshankar further stated in cross-examination that he cannot say who had made calibration of the apparatus and equipments at the relevant time. He also cannot tell whether at the relevant time, calibration of apparatus and equipments used in the present case was done or not. It was also asked to the witness that there are marking on glass pipette, burette and measuring cylinder. Further PW-18 cannot say during passage of time, markings gradually become faint. It is never suggested to the witness during cross-examination that there were faint markings on the apparatus.

366. Further PW-18 Bhalshankar also unable to tell about sublimation of the process. According to him, iodine solution is kept in dark colour bottle and he also cannot tell why iodine solution is not kept in normal glass bottle. He also cannot tell whether strong light, nitrite and copper irons, catalyzes in the process of reaction. According to him, titration using Sodium Thiosulphate is known as idometric titration. He also admitted that colour of the indicator near the end point depends upon the perception of individual. Further PW-18 unable to tell whether the perception of colour is misjudged, then in that event, there would be error in the result. He also admitted that different

persons have different sensitivity to the colours. He admitted that if volume is misread, the end result would be incorrect. He also admitted that by seeing the volume either in pipette or burette the angle in which the analyst sees, it is important. He also admitted that if the angle is faulty, then the reading of the volume would be faulty. He also admitted that while reading the volume in burette scale, the upper reading and the lower reading in the burette , the condition of light would differ in the process. and because of the lighting condition there may be error found in the result of analysis. He also admitted that if two different solutions are transferred by one pipette, then two different solutions may be contemplated and if wrong concentration solution is used, the end result would be incorrect. Nothing is put during cross-examination of the witness that there were errors made by him during analysis.

367. PW-18 Bhalshankar also admitted that if glass apparatus is not properly wetted by the solution, they can form the droplet on the glass surface and in that exact volume measuring would be impossible. No suggestion is given to the witness in cross-examination that no proper procedure was followed by him during the analysis. Nothing brought on record to show that the apparatus used for analysis was contaminated. No suggestion was given to the witness that he did not read the reading properly at the time of analysis.

368. Further PW-18 Bhalshankar also stated in cross examination that during test he had separately measured the blood quantity of phials by pipette. He cannot say whether he firstly

measured the blood sample from the bottle containing preservative or from the plain bottle. He also admitted that there was a rubber stopper existing in the phial not containing the preservative. He denied that he does not know about chemical analysis and the report was prepared as per the direction of the police. He denied that the blood sample was contaminated and not in a position of testing. He denied that the blood samples were sent back on the first day of receiving the same by his office and thereafter the bottles were changed and tampered blood was sent to the Laboratory for analysis. PW-18 denied that on the strength of tampered blood, false report was prepared by him. If the evidence of PW-18 Bhalshankar is looked into, it is full of "ifs and buts". Nowhere it was suggested to C.A. whether he has committed any lapse in taking precaution in actual analysis of the blood. For the sake of repetition it is again said that if a particular thing is required to be done in a particular manner, presumption is that it is done and performed in that particular manner. Merely because the advanced techniques are not used, opinion cannot be faulted, unless the technique used is faulty.

369. Ld. SPP argued that the deposition is confined to propositions only not furthering the defence, but only testing the knowledge of the Doctor as an expert. According to ld. SPP, so far as the confrontation of the Doctor with the extracts from the books and research papers, the same documents have not been produced in evidence on record and no effort is made first to prove that the person whose opinion is shown to the witness is an expert and his opinion is acclaimed opinion in the field accepted by the expert. According to ld. SPP, in absence of such evidence, there is no proof that authority

referred to is really the authority. The ld. SPP relied on **1997 SC 1307 Pratap Mishra v/s. State of Orissa and Bhagwandas v/s State of Rajasthan AIR 1957 Supreme Court 589**. It is held in the said judgments that, it cannot be said that opinions of these authors were given in regard to the circumstances exactly similar to those which arose in the case or before us or is this a satisfactory way of the disposing of evidence of an expert unless the passages which are sought to discredit his opinion, are put to him establishing that the authors are standard and their opinions are sustained in the field. According to ld. SPP, knowledge of the C.A. has been tested during cross-examination, as if knowledge of a research scholar, the same is not sufficient to discard the evidence unless the actual fault is found in his evidence.

370. Considering the entire evidence of PW-18 Dr. Bhalshankar and though he cannot be in a position to state process of modified diffusion oxidation method and also about formulas, it cannot be said that the evidence of C.A. is doubtful. Since long he is doing the analysis. In our case, PW-18 has a long experience while working in the Laboratory and under grueling cross-examination he is unable to tell about formulas, modified diffusion oxidation method, but in my opinion, that would not render his evidence doubtful. There is no reason for PW-18 to speak otherwise against the accused. The suggestions given by defence to PW-18 during cross-examination that the blood samples were sent back along with the letter on the first day of receiving the same in the office and the bottles were changed and tampered blood was sent to Laboratory for analysis is devoid of any substance and cannot be accepted. There is no reason for the Forensic Science Laboratory to do such alleged act against the accused.

371. According to ld. Advocate Mr. Shivade, Sodium Fluoride preservative was not added in the blood. However, the blood which was transferred after extracting from accused by PW-20 Dr. Pawar in the phial containing oxalate which is a preservative preventing coagulation. The samples were also sealed properly. PW-18 Bhalshankar also found seal intact. Ld. Advocate Mr. Shivade also contended that proper custody of the bottles is not established. According to him, the manner in which the sample was kept in the police station is also suspicious. It is argued that according to PW-21 Borade, Carrier, PSI Kadam gave him the sample bottle which was kept near almera in the common hall where other samples like viscera were kept. PW-21 Borade also admitted that there was no refrigerator or air conditioner in the police station.

372. According to ld. Advocate Mr. Shivade, Investigating Officer PW-27 Shengal made material improvement that there is fridge in his anti chamber and bottle of blood was kept in the fridge. According to the ld. SPP, the evidence of the Doctor finds corroboration from the evidence of PW-21 Borade who carried the blood samples to C.A. According to ld. SPP Mr. Gharat, since the fridge was in the anti chamber of PW-27, ignorance of PW-21 Borade cannot be disbelieved.

373. PW-18 Bhalshankar has stated that the blood if extracted and without adding preservative, the blood lasts for two days if properly sealed by the Doctor who extracted the blood. There is no cross-examination on this particular evidence. As per the Civil Medical Code,

blood sample is to be sent within 7 days from police station for analysis. In our case, on 28.09.2002 blood sample was taken and it was deposited in the police station. On 30.09.2002 blood sample of accused was sent to C.A. in Laboratory. On 30.09.2002 the blood sample was kept in fridge. On 01.10.2002 PW-18 analyzed the blood. So it can be said that there was no delay for analyzing the sample. It is pertinent to note that on 28.09.2002 blood sample was taken, the blood sample was transferred to the labelled phial having oxalate which prevents coagulation. The blood remained whole in tact. According to Mr. Shivade, by not adding Sodium Fluoride as preservative in blood sample, the possibility of blood fermentation and producing the alcohol cannot be ruled out. It is pertinent to note that the blood sample is having oxalate as a preservative which prevents coagulation and also sealed properly. For a period of two days, the blood sample remained in police station. There appears to be contradictory evidence regarding keeping the sample in the fridge. According to PW-18 Bhalshankar, Chemical Analyser, .30 mg is the ethyl alcohol level might be found in the blood of human being. The percentage of the ethyl alcohol may be increased upto 40 to 42 mg if the medical treatment is taken by the person. The defence never suggested to PW-18 that the accused was on medication. The blood was extracted on 28.09.2002 and sent to Kalina on 30.09.2002. In laboratory, it was kept in fridge till its analysis. So in between the period, even if the process of fermentation is started, it will not be doubled than normal. It is pertinent to note that the accused had consumed the alcohol at about 01.00 to 01.30 a.m. and at about 03.00 p.m. his blood was extracted. After the incident the accused was not arrested till 10.30 a.m. and therefore, his breath analysis test was

not done, nor his blood was taken immediately after the accident. However, some traces of the alcohol noticed in his blood. If the accused would have arrested immediately after the incident and if his blood was extracted, then the percentage of the alcohol in his blood would be more. As per the Civil Medical Code, abnormal delay in collecting the blood renders the blood sample useless, if collected after undue delay, such as 8 to 12 hours. However, in the landmark reported case of **State Through PS Lodhi Colony Versus Sanjeev Nanda [(2012) 3 Supreme Court Cases (Cri) 899, (2012) 8 Supreme Court Cases 450].** In this case also, the accused drove the vehicle BMW in a rash and negligent manner under intoxication and 6 persons died and one person was injured in the incident. The incident had occurred at about 4.00 a.m. and his blood was taken at about 12.29 p.m. However, certain amount of alcoholic contents were still found in his blood to the extent of 0.115 which was equivalent to 115 mg per 100 ml of blood. In our case in hand, the charge is under Section 85 of the Motor Vehicles Act. If the alcohol percentage is more than .30, then Section 85 of the Motor Vehicle Act would be attracted. So even if for the sake of argument some fermentation would have started, it will not be doubled that the normal percentage. The bottle was having oxalate preservative and was sealed properly, within two days it was despatched to the Laboratory. In Laboratory, bottle was kept in fridge till blood analysis.

374. The ld. Advocate Mr. Shivade contended that if really Salman Khan consumed the alcohol, then the complainant Patil would have noticed the said fact. According to Mr. Shivade, in FIR, there is no mention that Salman Khan was under influence of liquor. According to

Mr. Shivade, Patil in his evidence deposed that Salman Khan was drunk. It is pertinent to note that supplementary statement of complainant Patil was recorded by PW-27 Shengal on 01.10.2002. This statement was recorded by Shengal when he took charge of the case. His statement recorded on 01.10.2002 where in there is mentioned that body language of Salman Khan looks like that he might have consumed the alcohol. Further it is not necessary that all the details of the offence must be stated in FIR. In this regard, reliance is placed on the case of **Animireddy Venkata Ramana and others V/s. Public Prosecutor, High Court of Andhra Pradesh [2008(4) Mh. L.J. (Cri.)1 (Supreme Court)]**. So in view of the above discussion, even if complainant Patil did not mention in FIR that the accused was under the influence of liquor while driving the vehicle, evidence of Patil cannot be discarded to that effect or doubted. Complainant Patil is impartial, natural witness happened to be present at the time of incident.

375. Further it is also submitted by the ld. Advocate Mr. Shivade that PW-9 Rizwan who was the Manager of Rain Bar, also escorted Sohel and Salman Khan while leaving the Restaurant. In cross-examination, PW-9 Rizwan Rakhangi stated that Salman Khan was found walking normally and also he did not notice any smell of alcohol from Salman. According to ld. Advocate Mr. Shivade, even PW-12 Kalpesh Verma, Parking Assistant, who happened to be received the tip of Rs.500/- from Salman also never stated that Salman was smelling alcohol. PW-15 Alok @ Chikky Panday also stated in the cross examination that after hearing the news of accident he went to the Salman's house. He hugged him. According to him Salman was not

smelling alcohol. It appears that PW-15 Alok Panday knew Salman since 35 years and therefore possibly he is deposing in favour of the accused.

376. According to Mr. Shivade, all these above facts would demonstrate that Salman was not under influence of liquor. Further ld. Advocate Mr. Shivade, blood sample of the accused was extracted after 12 hours and it is highly improbable that the accused was smelling alcohol after 12 hours. It is vehemently submitted by Mr. Shivade, if in fact the accused has consumed the quantity of alcohol, that would result in test result produced by the accused. (Blood sample collected more than 12 hours after the alleged consumption). It is impossible to believe that he could have driven the vehicle all the way upto the accident spot without hitting anything and the route is about 8 kms., the cars parked on his side of the road, having over 10 significant turns and people and cars crossing the road. I am afraid to accept the argument of Mr. Shivade on the ground that finding the alcohol in the blood is a conclusive proof to demonstrate that the the person had consumed the alcohol. Even if PW-9 Rakhangi and PW-12 Kalpesh did not notice any smell, that would not establish that the accused had not consumed the alcohol. Further according to Mr. Shivade, if really the accused was under intoxication, the accused could have dashed prior to reaching of the spot. I am afraid to accept the argument on the ground that it is extremely difficult to assess when the liquor would show its effect. In this regard, reliance is also placed on the reported judgment of the Hon'ble Apex Court in case of **State v/s. Sanjeev Nanda [(2012) 3 Supreme Court Cases (Cri) 899]**.

"26. After having critically gone through the evidence available on record, we have no doubt in our mind that the accident had occurred solely and wholly on account of rash and negligent driving of BMW car by the respondent, at a high speed, who was also intoxicated at that point of time. This fact has been admitted by the respondent-accused at the appellate stage in the High Court that at the relevant point of time, the respondent was driving the vehicle and had caused the accident but even then, it would be only his rash and negligent act, attracting Section 304-A IPC only. Even though it is difficult to come to the aforesaid conclusion, since he was in an inebriated condition. For the simple reason that he had already driven almost 16 km from the place where he had started, to the point where he actually met with the accident without encountering any untoward incident would not go absolutely in favour of the respondent. There is no evidence on record that they had consumed more liquor on their way also. No such material objects were recovered from the vehicle, to suggest that even while driving they were consuming liquor. One may fail to understand if one could drive safely for a distance of 16 km, then whether the effect of intoxication would rise all of a sudden so as to find the respondent totally out of control. There is nothing of that sort but it cannot be denied that he must have been a little tipsy because of the drinks he had consumed some time back. It is, indeed, extremely difficult to assess or judge when liquor would

show its effect or would be at its peak. It varies from person to person."

377. Considering the evidence of accused visiting Rain Bar, thereafter J. W. Mariot and considering the evidence of Medical officer and Asst. Chemical Analyser, I am of the opinion that it can safely be inferred that at a time of driving the vehicle accused was under intoxication.

F) Fingerprint evidence:-

378. It is also argued by ld. Advocate Mr. Shivade that the prosecution has suppressed to bring on record the evidence of finger print of the accused. According to Mr. Shivade, PW-27 Shengal admitted in his cross-examination that the finger prints of the accused were taken and Forensic team inspected the vehicle. PW-27 in his cross-examination stated that he had called Forensic team for examination of vehicle. PW-27 further stated that he does not know whether finger prints were obtained from the car. PW-27 had sent the fingerprints to the fingerprint expert. He had not given direction to ascertain the fingerprint of the accused on the steering. He also does not know whether Forensic Expert had taken the fingerprint from the steering. So there is no evidence whether the fingerprint expert had collected the fingerprints from the steering or not. On perusal of panchanama of spot (Exh.28), panchanama was drawn on the spot and also after opening the door, inner inspection of the car was taken and also RC Book, New India Insurance were taken in possession. In that process, the possibility of coming in contact with the steering cannot be

ruled out. In such situation, the evidence of fingerprint would be of no use. Moreover, it is also not known whether fingerprints were collected or not from the steering. So in my opinion non production of evidence relating to fingerprint is not fatal to the case of prosecution, when there is a direct evidence on record to show that accused was driving the vehicle.

G) Death of Nurulla Mehboob Sharif:-

379. During the course of argument, the ld. Advocate Mr. Shivade contended that the death of Nurulla is not because of dash of Toyota Land Cruiser, but due to falling of the car at the time of lifting car by crane. According to Mr. Shivade, PW-11 Mohd. Shaikh was sleeping near deceased Nurulla. PW-11 Mohd. Abdulla Shaikh admitted that Nurulla was sleeping along with him. According to PW-11, Mannu, Kalim, Muslim were also injured. All cried for help. Bakery men, taxi driver rescued from beneath the car. In cross-examination PW-11 stated that Nurulla was sleeping near his side. PW-11 and Nurulla were entangled in the car. After accident, because of the dragging, PW-11 found himself and Nurulla at the short distance from the place where they were sleeping. After accident sleeping position of the injured were shifted. He was lying beneath the car for the period of 10 to 15 minutes. He does not know how car was lifted. When the car was lifted, PW-11 and Nurulla were crying for help. The ld. Advocate Mr. Shivade much harp on this particular piece of evidence stating that till the car was lifted, Nurulla was alive. The ld. Advocate Mr. Shivade contended that PW-8 Ram Asare Pandey stated in the cross-examination that the car was taken away with the aid of crane from the spot in order

to clear the spot. The injured were asked to sit near the bakery. He also stated that when car tried to lift by crane, bumper of the car came out, thereby car again fell down. So according to ld. Advocate Mr. Shivade, the possibility cannot be ruled out that Nurulla died because of fall of car. PW-26 Kadam who drawn the panchanama and who was present on the spot stated in the cross-examination that the vehicle was lifted with the help of crane. The hook of the crane was applied to the bumper of the car in order to lift the car. He cannot say whether while lifting the car by crane, the bumper was broken and car fell down on the ground. He denied the suggestion that the bumper of the car was not fallen in the accident, but it was fallen when the car was lifted. PW-26 further stated that the car was lifted to the extent of 2 – 3 ft. with the aid of crane. He cannot say from which part of the bumper the hook of the crane slipped away. Bumper was broken. He denied that the car was lifted again with the aid of crane by applying the hook of the crane to the grill behind the bumper.

380. It is pertinent to note that Mr. Shivade developed the argument of causing the death of Nurulla by falling of car on the cross-examination of PW-11. In cross-examination as stated above, PW-11 stated that, "**till the car was lifted, myself and Nurulla were crying for help**." According to Mr. Shivade, while lifting the car by crane, the car slipped and had fallen and in that, possibility of death of Nurulla cannot be ruled out. It is important to note here that in examination-in-chief PW-11 also deposed that Nurulla was with him in Bhabha Hospital and he was crying in pain. How it is possible that Nurulla was alive in the hospital and he was crying in pain. Further no suggestion was given

to the Investigating Officer PW-27 Shengal and PW-26 Kadam who was very present at the time when car was lifted or any other injured witness including PW-11 that the car was slipped at the time of lifting by crane and had fallen and due to that, Nurulla was expired. So in my opinion, it was an imaginary submission which is without any valid and legal evidence. Further which part of the vehicle had fallen on the which part of the Nurulla is also not established by defence. On perusal of the postmortem report the Nurulla sustained multiple crash injuries over head, neck, chest, abdomen. Both arms crushed, skull head crushed completely, thorax, heart, lung crushed completely. In my opinion all these can be possible when a severe dash was given by the car. The car ran over the sleeping Nurulla over his head and chest portion. If Nurulla sustained these crush injuries the evidence of PW-11 that Nurulla was crying in pain in the hospital cannot be accepted. Evidence of PW-11 (in cross examination) that till the car was lifted Nurulla was also crying for help is also cannot be accepted. Moreover PW-11 was already rescued by bakery men, taxi driver from beneath the car. Only dead body of Nurulla was on the spot. Suppose as per the argument of Shri Shivade car was lifted at a distance of 1 to 2 ft. and it slipped and again fallen then there is no evidence to show that by which portion of the car Nurulla sustained injuries.

381. PW-1 Sambha Gauda was a witness on panchanama. As per his version motor car had climbed three stairs. The rare side wheel of the car also sustained with blood. The car was found in the same position prior to panchanama and after the panchanama when he left the spot. Further he also saw crane standing nearby. He had not seen

whether the car was removed with the help of crane in order to remove the injured. Further PW-1 also admitted that police had removed the car with the aid of crane in his presence and he had not seen whether the bumper of the car was removed when the crane was touched to that portion at a time of removing the car. No specific suggestion was given to the said witness that the car had fallen when it was trying to lift by the crane and in that Nurulla was injured. On the perusal of panchanama (Exh. 28) there is mentioned in the panchanama (Exh. 28) that near the back left tyre of the vehicle a dead body was found. One Lungi and bloodstained Baniyan was also noticed on the body. Further left tyre was also found punctured sustaining blood. So it appears that front left tyre and back tyre ran over the Nurulla in the incident, crushing the upper portion of the body and in my opinion the death of Nurulla was on the spot. The submission of Shri Shivade cannot be accepted that Nurulla might have died when the car slipped at a time of lifting by the crane. The said suggestion was never given to any of the witnesses. Hence in my opinion Nurulla was expired because of the dash and running over his body by car when he was sleeping.

382. The Ld. Adv. Shri Shivade further contended that there was no footpath and the tar road extended till the stairs of the American Express Cleaners. PW-3 Munna and PW-4 Kalim were sleeping on the otala (platform). Mohd. Abdulla Shaikh, Nurulla were sleeping near in front of the American Laundry. In Mumbai generally the space before the shop is used by the pedestrians for walking. The injured witnesses including deceased were sleeping near the American Laundry. According to Shri Shivade there was no bloodstain whatsoever on the

bed sheet or the pillow was found of the deceased. That does not mean that Nurulla did not sustain any injuries from the car. It appears that the pillow, bed sheets did not seize by the police. Even police did not seize the Baniyan, Underwear and the Lungi worn by the deceased after inquest panchanama. Further during panchanama, the blood sample also collected from the blood accumulated on the spot. So all these goes to establish that the death of the Nurulla took place on the spot after dash to him by the car and after running over him and also the other labours were injured in the same incident. Non seizure of bed sheet and pillow will not at all hamper the case of prosecution. So the arguments advanced by Shri Shivade that the death of Nurulla was not because of the dash of the car involved in the accident cannot be accepted.

H) Accused was not possessing driving licence:-

383. There is also a charge against the accused that accused was driving the vehicle without driving licence at the time of the accident. The Investigating Officer PW-27 Shengal in his evidence deposed that he demanded licence from the accused, but the accused did not produce the licence. The prosecution in order to prove the charge, has examined PW-23 Raghuvir Singh Bilawar. As per the version of PW-23 Bilawar, he is working in RTO Department and was qualified for the said post through Maharashtra Public Service Commission Examination. He has narrated in his evidence that RTO office used to issue learning licence, permanent licence, issuance of fitness certificate, permit to the transport vehicles, etc. PW-23 also deposed that the learning licence is to be issued for a period of 6 months thereafter permanent licence required to

be obtained from R.T.O. 20 years period is the validity of the licence for the light vehicle or age upto 50 years of the person. After attending the age of 50 years, the licence holder also get further 5 years validity of licence by renewing the same. Further PW-23 also deposed that at the time of taking permanent licence, the person has to submit learning licence and is also required to fill application in Form 4. Address and age proof is required to be submitted. The person who wants to get permanent licence has to submit test fee. According to PW-23, then RTO Inspector takes driving test of the person applying for permanent licence. PW-23 further deposed that, if a person is having permanent licence, then he cannot apply for new licence for the same category of vehicle. The person has to declare the information while submitting the application for learning licence that he is not holding the licence of particular category of vehicle for which he applies.

384. The evidence of PW-23 Bilawar further reveals that Andheri RTO received a letter from Bandra Police Station for inquiry of the licence of Salman Khan. PW-23 has examined the record in RTO office pertaining to the driving licence of accused. He also checked the registers maintained in RTO office, Andheri. According to PW-23, as per the record maintained in RTO office, on 17.08.2004 permanent licence was issued to the accused. The number of the licence is MH-02-2004/B/786. As per the record, the validity of the licence is till 26.12.2015. The address is 111/A, Galaxy Apartment, Band Stand, Bandra. PW-23 also brought register pertaining to the record of the licence of the accused. Certified copy of the extract of the driving licence is also produced on record which is at Exh.121.

385. PW-23 Bilawar further stated in his evidence that new licence is given to the accused bearing No.MH-02-2004/B/786. Prior to issuance of the said licence, no licence was issued to the accused. Further according to him, the validity of the application Form No.4 is for the period of 5 years and thereafter the application Form No.4 is liable to be destroyed. Exh.120 is the letter issued by Transfer Officer Prabhakar Bhalerao authorizing PW-23 Bilawar to give the evidence.

386. PW-23 Bilawar is also cross-examined at length by ld. Advocate Mr. Shivade. He admitted that some of the pages were missing from the register. During the course of cross-examination, the entry in the name of accused was shown to the witness. The portion on which photo is affixed is torn. PW-23 also admitted that the portion on the page is having signature of Salman is also found torn. He is unable to tell in whose handwriting the entries are. PW-23 denied that the entry in the name of accused in the register is fabricated and false record is created. The question is why RTO office will create false record in the name of accused ?

387. If the cross-examination of PW-23 Bilawar is looked into, nothing is brought on record by the defence to discard the evidence of PW-23. It is pertinent to note that there is a charge against the accused that at the time of incident, the accused was not holding the licence. The prosecution also examined PW-23 Bilawar. According to him, as per record, licence was issued to the accused on 17.08.2004 and the validity till 26.12.2015. Prior to 17.08.2004 no licence was issued to

Salman Khan. The alleged incident occurred in the intervening night between 27.09.2002 to 28.09.2002. The burden shifts on the accused to demonstrate that he was having licence on the day of the incident. However, nothing is produced by the accused to show that he was possessing the licence. If the accused was having the licence on the day of the incident, then he could have produced it. Non production of licence itself demonstrates that the accused was not possessing the licence. In my opinion, the prosecution has proved beyond reasonable doubt that on the day of incident, the accused was not having valid driving licence. Ld. Advocate Mr. Shivade contended that as Ashok was driving the vehicle, question of producing driving licence was not arise. I am afraid to accept such argument. I am of the opinion that the prosecution has proved the charge against the accused that he was not possessing the driving licence at the time of driving the vehicle at the time of incident.

388. The Investigating Officer PW-27 Shengal also produced on record reply written by RTO, Andheri, dated 03.10.2002 and RTO, Wadala, dated 14.10.2002 (Exh.161 colly.). Respective RTO informed Bandra Police Station that no driving licence was issued to Salman Khan. The ld. Advocate Mr. Shivade objected to give exhibit to the said reply. It is pertinent to note that PW-27 on 03.10.2002 sent letter to RTO and called information regarding the licence. So in pursuance of the letter, replies were given. Though the prosecution has not examined the RTO, Andheri, and RTO, Wadala, who wrote the letters, however, the prosecution has examined PW-23 Bilawar to show that the licence was not issued to the accused prior to 2004. As discussed above, the accused also not produced the licence on record.

I) Conduct of the accused

389. The conduct of the accused after the incident by not taking reasonable steps to provide medical aid to the victims and also failed to give information about accident to the police is the circumstance against him. There is also a charge against the accused that after the mishap, the accused did not render medical help to the victims, nor report to the police about the incident. The ld. SPP Mr. Gharat vehemently submitted that the accused fled away from the spot after the incident, neglecting the injured from providing any medical help and also failed to report the police. According to the ld. SPP Mr. Gharat, the accused is a renowned actor and famous in the society. Had he been not guilty, what prevented him from staying back to calm down the people and tell them that the action would being taken against the driver, if really Ashok was driving. Further according to the ld. SPP, when accused was not driving the vehicle, according to him then why he left the place. Ld. Advocate Mr. Shivade vehemently contended that after the accident, the people gathered on the spot. People became furious as the bakery men became injured and were beneath the car. According to Mr. Shivade, there is every apprehension that if the accused remained on the spot, the possibility of occurring untoward incident with him cannot be ruled out. Ld. Advocate Mr. Shivade drawn my attention to the cross-examination of PW-7 Francis. As per his version, the accused was surrounded by mob. One bhaiya was possessing rod. Salman recognized PW-7 and told him, “Commander save me.” Thereafter Salman and PW-7 walked towards the house and wife of PW-7 then succeeded in stopping the taxi by which Salman went away. According

to the ld. SPP, when it is the case of the accused that he was not driving the vehicle and Ashok was driving the vehicle, then he could have persuaded the people gathered on the spot. PW-8 Pandey also nowhere stated that there was apprehension from the people to Salman.

390. PW-4 Mohd. Kalim also stated that the accused got down from the car and ran away from the spot after seeing the crowd. He also stated in cross-examination that Salman Khan remained on the spot for about 5 to 10 minutes. Many people gathered near Salman. PW-8 also stated in cross-examination that as people were in angry mood, Salman was sent by another car so that people would not cause hurt to him.

391. It is pertinent to note that the accused also submitted his further written statement u/s.313 of the Cr. P.C. (Exh.171-A). The accused mentioned in the statement that large crowd was gathered who were hostile as started attacking and throwing stones. Francis and his wife asked Salman to leave the place as crowd became violent and they beaten Ravindra and Ashok. However, it is pertinent to note that PW-7 Francis nowhere stated in his evidence about the said fact. He never stated that the driver Ashok and Patil were beaten by the crowd. As argued by ld. SPP, the accused is well known actor and everybody knows him. If according to the accused he did not commit accident, then he could have convinced people that action will be taken against the driver. The accused did not wait for police on the spot, but left the spot. Instead of visiting police station, the accused went to his house and till 10.30 a.m. he hided himself. This shows one of the

circumstances against the accused about his involvement in the offence. If really the accused did not commit any wrong, he could have visited the police station immediately and lodged the information about the incident. It is pertinent to note that the accused did not take any positive steps by visiting hospital to see the injured and provide medical aid to them and to come on the spot again with police.

392. The accused is a renowned Film Actor and he could do anything to provide help to the injured. If a ghastly accident takes place, wherein one person was crushed and four were injured and in spite of that, the person whose vehicle was involved in the accident hided himself till he is arrested, this itself shows the conduct of the accused.

393. In **State (through PS Lodhi Colony, New Delhi) v/s Sanjeev Nanda , [(2012) 3 Supreme Court Cases (Cri) 899, (2012) 8 Supreme Court Cases 450**, reliance is place by Hon'ble Apex Court on the judgment in a case **Parmanand Katara V. Union of India [(1989) 4 SCC 286].**

> "95. This Court in Parmanand Katara V. Union of India pointed out that it is the duty of every citizen to help a motor accident victim, more so when one is the cause of the accident, or is involved in that particular accident. Situations may be there, in a highly charged atmosphere or due to mob fury, the driver may flee from the place, if there is real danger to his life, but he cannot shirk his responsibility of informing the police or other authorised

persons or good Samaritans forthwith, so that human lives could be saved. Failure to do so may lead to serious consequences, as we see in the instance case. Passengers who are in the vehicle which met with an accident, have equal responsibility to inform the police about the factum of the accident, in case of failure to do so, they are aiding the crime and screening the offender from legal punishment".

394. This is another circumstance against the accused in our case by not informing police and also not providing any help to the injured persons. Even he did not visit the hospital to see what happened to the injured.

J) Section 304(II), its essential ingredients and effect, knowledge etc.:-

395. The Ld. Adv. Shri Shivade relied on many case laws which are as follows. The ld. Advocate Mr. Shivade relied on the case of **Basappa V/s. State of Karnataka [(2014) 5 Supreme Court Cases 154]**. In this case, the Hon'ble Apex Court held that "High Court itself has acquitted appellant u/s.187 of the M.V. Act on the ground of no evidence, held conviction u/s.279 and 304(A) of IPC cannot be sustained."

396. Ld. Advocate Mr. Shivade relied on the case of **Ravi Kapur v. State of Rajasthan (2012) 9 Supreme Court Cases 284**. In the said case, it is held that rash and negligent driving has to be established in

the light of facts and circumstances of a given case. Speed of vehicle is not always determinative. Reckless and negligent driving at slow speed is also possible.

397. The ld. Advocate Mr. Shivade relied on the case of **Guru Basavraj v/s. State of Karnataka [(2012) 8 Supreme Court Cases 734**. In the said case, it is held that the accident occurred due to that detachment of the tailor from tractor and distance to which tractor moved after detachment vividly reveals that vehicle in question was driven recklessly and high speed.

398. The ld. Advocate Mr. Shivade relied on the case of **Kuldeep Singh V/s. State of Himachal Pradesh [(2008) 14 Supreme Court Cases 795)**. In the said case, it is held that the appellant driver drove the vehicle carrying more than 50 persons at high speed on the public road as a result he lost the control and vehicle went off the road and rolled down the field leaving four persons dead and several other injured. The Hon'ble Apex Court held that the appellant was rightly convicted u/s.304-A, 279, 337 of IPC and 185 of M.V. Act. No leniency and interference in the sentence called for.

399. The ld. Advocate Mr. Shivade relied on the case of **Naresh Giri V/s. State of M.P. [(2008) 1 Supreme Court Cases 791**. In this case, the bus driven by the appellant was hit by a train as a result, two persons died and several passengers got injured. Charges were framed u/s.302 and alternatively, u/s.304, 325 and 323 of the IPC. It is held that 302 prima facie has no application. Criminal Revision filed by the

appellant. Charges stand altered to Sec.304-A along with Section 279 of the IPC.

400. The ld. Advocate Mr. Shivade relied on the case of **Prabhakaran V/s. State of Kerala [(2007) 14 Supreme Court Cases 269**. In this case, appellant was the driver running over a boy aged 10 years crossing the road along with other school children in a queue. Appellant ignoring passengers and pedestrians cries cautioning him to stop, but appellant drove the bus at speed and caused the death of the boy. Trial Court and High Court convicted the appellant u/s.304-II of the IPC on the basis that the accused acted with the knowledge that it was likely to cause death. Hence, it is held that Section 304-A speaks of causing death by negligence. It applies to rash and negligent act and does not apply to the cases where death has been voluntarily caused. It only applies to the case in which without any such intention or knowledge the death is caused by what is described in rash and negligent act. Hence appropriate action would be u/s.304-A of the IPC.

401. Ld. Advocate Mr. Shivade relied on the case of **Benny Francis and others v/s. State of Kerala (Criminal Appeal No.79 of 1990 decided on 07.02.1991 by the Hon'ble High Court of Kerala)**. It is held that conviction u/s.304-A of the IPC without charge was not possible. Section 304-A of the IPC was not minor offence constituting only some of the several particulars of major offence punishable under Second Part of Section 304 of the IPC.

402. Ld. Advocate Mr. Shivade relied on the case of **State of Gujarat v/s. Haidarali Kalubhai [1976 Supreme Court Cases (Cri) 211]**. In this case, deceased along with Head Constable and two constables were resting on the cot in the hotel by the side of the highway. The appellant came to the spot on his truck. The appellant alleged to have driven the truck in a full speed against the deceased cot overthrowing him and caused his death. Sessions Court convicted the appellant u/s.304-II which was altered to Sec.304-A by the High Court. The appeal was prepared to the Hon'ble Apex Court. It is held that the facts disclosed in the prosecution evidence do not make out the case of any willful or deliberate act on the part of the accused and Sec.304-A by its own definition totally excludes the ingredients Section 299 or 300 of IPC. It is held by the Hon'ble Apex Court that no error was committed by the High Court in holding that the case falls under Section 304-A of the IPC and not under Section 304-II of the IPC. I have gone through the cited case laws and I am of the opinion that the case laws are not applicable to our case at hand.

403. There are two landmark judgments of the Hon'ble Apex Court on the aspect of rash and negligent driving, driving under consumption of the alcohol, about the knowledge of the act, failing to give information to police after accident and also neglected the injured and did not provide any medical help. The landmark judgments are **(1) The State of Maharashtra V/s. Alister Anthony Pareira in Criminal Appeal No. 430/07 with The State of Maharashtra V/s Alister Anthony Pareira in criminal appeal no. 566/07 with Criminal Appeal No. 475/2007 decided on 6.9.2007 and (2) State**

through PS Lodhi Colony, New Delhi V/s. Sanjeev Nanda [(2012) 3 Supreme Court Cases (Cri) 899, (2012) 8 Supreme Court Cases 450)] in Criminal Appeal No. 1168 of 2012. The judgment of the Hon'ble Bombay High Court in case of Alister Pareira is also confirmed by Hon'ble Apex Court in **Criminal Appeal Nos. 1318-1320 of 2007, decided on 12.1.2012.**

404. In both these cases the accused drove the vehicle in rash and negligent manner under influence of the liquor and caused death of the persons. In the case of Alister Anthony Pareira, the Alister Pareira drove the vehicle in rash and negligent manner and caused death of 6 persons and injured others. These persons were sleeping on the footpath. The accused Alister Pareira was having knowledge that the people in Mumbai used to sleep on the footpath. The ratio laid down in the case of Alister Pareira is also applicable to our case. In Sanjeev Nanda's case also it is held that the accused drove the vehicle in the rash and negligent manner under intoxication and caused death of 7 persons. The accused was also having knowledge about the consequence of his act. He fled from the spot and did not render any help to the injured. In both the cases the accused was convicted u/s 304 (II) of the IPC. In Alister Pareira case the accused was also convicted u/s 337, 338 of the IPC.

405. In our case also the charges against the accused is that the accused drove the Land Cruiser vehicle in rash and negligent manner in speed, under intoxication, at about 2.45 a.m. while taking right turn on the Hill Road from St. Andrews Road, he could not control the vehicle

and went straight and ran over the poor bakery persons sleeping in front of the American Express Laundry. The car ran over them and also climbed the three stairs of the American Express Laundry. Nurulla was crushed and died on the spot and two bakery persons sustained simple injuries and two bakery persons sustained grievous injuries. Accused was not holding license. He also left the place within 5 to 10 minutes and did not visit police station for informing the incident nor to the hospital to see the injured. Even he did not provide any medical facility to the poor injured persons. Accused is a well known Cinema actor of Bollywood.

406. In our case also the accused is charged u/s 304 (II), 337, 338 of IPC and 181, 185 & 187 of Motor Vehicle Act.

407. In the Landmark judgment of **Alister Pareira**, Their Lordships of the Hon'ble High Court discussed the provisions of Section 304 (II) of IPC, about the knowledge which is the important constituent of Section 304 (II) IPC. As the principle laid down in the judgment of Alister Pareira which is also applicable to our case, it is necessary to reproduced some of the paras of the said judgment.

> "31. Under Section 304(II), whoever commits culpable homicide not amounting to murder can be punished with imprisonment of either description for a term which may extend to 10 years or with fine or with both, if the act is done with 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. A bare reading of this provision shows that there are three essential ingredients of the offence punishable under section 304(II); (a) accused must commit a culpable homicide not amounting to murder, (b) the act is done with knowledge that it is likely to cause death and (c) but without any intention to cause death.

32. Section 299 of IPC defines culpable homicide as whoever causes death by doing an act with the intention of causing death or with an intention of causing such bodily injury, as is likely to cause death or with the knowledge that it is likely by such act to cause death. Illustration (b) to section 299 indicates the kind of cases, which will fall within the ambit of section 299. A culpable homicide which is not a murder within the contemplation of the provisions of section 300 can alone fall within the scope of section 304(II). 'Knowledge' and 'intention' are the deciphering and distinguishing factors. If an act is done with knowledge but without intention, then it would fall under section 304(II), but if there is intention for committing offence of culpable homicide, it would take it beyond the purview of this provision. The provision of section 304 falls into two different classes; one where offence is committed with intention of

causing death or bodily injury as is likely to cause death providing life imprisonment or imprisonment for a term which may extend to 10 years with fine. The other part is relatable to the act which is done with knowledge that it is likely to cause death but where the element of intention is absent. There it prescribes different punishment of lesser gravity. The act done with knowledge of the end result being of the kind where the doer had reason to believe that the "actus reus" would result into an offence, the knowledge would be attributable to the offender. The court may, in a given set of facts, attribute to the intoxicated man same knowledge as if he was quite sober. This may not be quite true so far as the intention is concerned. 'Knowledge' is an expression of wide connotation and is capable of varied interpretation in the context of the facts and circumstances of a given case. While doing an act, knowledge of consequence would be attributable to the accused, if it falls within the normal behaviour of the person of common prudence. It is difficult to state with certainty any essential constituent of 'knowledge' but this aspect can safely be examined in the light of various judicial pronouncements and settled canons of criminal jurisprudence.

35. In a given circumstance 'knowledge'

may be construed quite differently from the expression 'knowing'. Knowledge is of a lesser degree while 'knowing' is of a definite connotation and it must be established that the offender knew about it. Knowledge has also been explained in the Judicial Dictionary by *K.J. Aiyar's* as under:

"Knowledge – A clear and certain perception of that which exists.

- Knowledge includes either personal knowledge or knowledge derived from documents. No restriction can be read in the word 'knowledge' that it ought to be derived by ocular seeing of the event. Magistrate can take cognizance of the offence of his own knowledge derived from the police papers, FIR, and the final report under section 169."

36. One of the meanings given in the *Oxford Dictionary* of the word 'knowledge' is:

"The fact of knowing a thing, state, etc or (in general sense person, acquaintance, familiarity gained by experience"). Acquaintance with a fact, perception, or certain information of a fact or matter, state of being aware or informed, consciousness (of anything). The object is usually a proposition expressed or implied, e.g., the knowledge that a person is poor, knowledge of his poverty."

39. 'Knowledge' is again distinguishable from 'reason to believe'. The term 'knowledge' contains higher degree while the term 'reason to believe' is a matter of lesser degree. In the first, the person has direct appeal to his sense, while in the latter, there is sufficient cause to believe. While determining knowledge in relation to an event, the conduct of the person prior to and at the time of the event is of relevant consideration. *Actus reus* requires that to constitute a crime there must be a result brought about by human conduct, to physical event, which law prohibits. When an individual pursues or follows a line of conduct, he is expected to produce certain results. Final events or results may be the outcome of different events or it may be the result of a single act. If the end result is prohibited in law and if knowledge would have to be construed in the events of that case in relation to the evidence on record, the onus obviously is on the prosecution to prove the chain of acts even to attribute knowledge to the accused. The concept of 'knowledge' has to be understood and applied to the facts of a given case in complete contra-distinction to the words 'information' or 'reasons to believe'. There may be difference of degree but that difference has to be kept in mind, as that alone is the paramount

consideration even at the stage of framing charge whether under Sections 300, 302 or 304 and for that matter, 304(I) or (II) of the IPC (See Commentary by K.D. Gaur, 3rd edition on IPC and Commentary on IPC by *Ratanlal Dhirajlal,* 31st enlarged edition of 2006).

40. The Supreme Court and various High Courts have also explained the word 'knowledge'. To establish knowledge as an ingredient of criminal offence, there has to be an affirmative or circumstantial evidence to bring home to the accused that he had knowledge of his acts. What a person of normal and ordinary prudence foresee by utilization of his sense directly, would be knowledge. In the case of ***Jairaj vs. State of Tamil Nadu,* AIR 1976 SC 1519**, the Supreme Court observed that knowledge of the likelihood of the death of the person is contemplated in law. Under section 304(II), if the result of the criminal act is death of the victim and if each of the assailants possesses the knowledge that death is the likely consequence of criminal act, then there is no reason why section 34 should not be read with second part of section 304 to make each of such persons individually liable. [**Afrahim Sheikh and ors. Vs. State of West Bengal (1964) 6 SCR 172***]*.

41. It will be useful to refer to the facts of a case titled State of Gujarat vs. Haidarali Kalubhai, 1976(1) SCC 889, which had not been argued during the course of the hearing of this case. In that case the accused was charged for an offence under section 304 II on the allegation that he had caused death of a police officer lying on a cot from where he was thrown out. According to the accused and as per his statement under section 313 of the Code, when he was reversing the vehicle, other truck was standing and while making his way to the narrow passage, the accelerator got stuck and the truck then went in high speed resulting in the accident. When the driver heard the noise, the cleaner of the truck told him that he had stuck the truck against a cot and people were injured. That obviously was a case of negligent driving simpliciter, as is clear from the attendant circumstances and no knowledge could be attributable to the accused in the facts and circumstances of the case that his reversing the vehicle could cause fatal accident, unlike the facts of the present case where direct evidence as well as attendant circumstances clearly demonstrate that safely an inference of knowledge could be drawn.

42. Another important aspect which has to

be examined is that all persons are deemed to be in the knowledge of law. What is prohibited in law and what is an offence in law, are matters of public knowledge. Ignorance of law is not a valid defence when the person is committing an act or omission, which would result in an act prohibited in law. Therefore, the offender cannot take the plea of ignorance in that regard. It will be useful also to notice the judgment of the Supreme Court in the case of **Joti Prasad vs. State of Haryana (AIR 1993 SC 1167)**, where counterfeit court fee stamps were recovered from the possession of the accused, a licenced stamp vendor. The accused alleged that he had purchased the stamps from the treasury, but did not produce register of such purchase. The accused also did not make any effort to summon the record of the treasury. The court held that it would be proper to infer that the accused has knowledge or reason to believe that the stamps were counterfeit.

43. The concept of rash and negligent driving simpliciter can be attributable where there are no other attendant circumstances of culpable factors indicating additional conduct, act, omission or commission on the part of the offender, pre and post accident. 'Knowledge' is a concept which would get attracted in the above circumstances as the case

> would fall beyond the known canons of rash and negligent driving simpliciter. Getting drunk and under the influence of liquor using a big stick or other weapon for giving blow on the head of a person resulting in death, would obviously be an act done with knowledge that the act would or is likely to cause death. Merely because an automotive car or scooter is involved in the same process would not by itself take the offence outside the scope of section 304(II) of IPC. The court would have to examine this in the light of the evidence led by the prosecution, defence, if any, the links provided by the accused himself in his statement under section 313 and attendant proven circumstances of the case.

408. In our case, the accused admitted the incident but denied that he was driving the vehicle. According to him his driver DW-1 Ashok was driving the vehicle on Hill Road. According to him it was a pure accident as left front tyre of the vehicle was burst thereby the steering became hard and vehicle went on the bakery labours sleeping in front of the American Express Laundry and vehicle climbed two-three stairs. The defence of the accused is rejected by me from taking into consideration. The prosecution beyond reasonable doubt proved that the accused was driving the vehicle. In the incident Nurulla was expired and four persons were injured. The accused is a resident of Banrda. The spot of incident is also located at a 200 meters from his house. PW-6 Balu Muthe, a bodyguard of Sohel Khan, the brother of

accused also stated at about 3.00 am, one person came running near Galaxy Apartment and informed that Salman Khan's car met with an accident near the junction of St. Andrews Road and Hill Road. He also stated in the cross examination that within 2-3 minutes one can reach at the spot of the incident from the Galaxy Apartment. The said evidence remained unchallenged. So spot of incident is very close near the house of the accused. The accused is brought up in the Mumbai and residing in Bandra since many years. He is also acquainted with the topography of the Bandra area. As the spot of incident is located near the house, the accused was knowing that the poor bakery labours used to sleep in front of American Express Laundry. Further PW-5 Malay Bag, waiter in the Rain Bar restaurant also deposed that Salman Khan is the regular visitor of the Bar which is located in Juhu. On the day of incident also the accused visited the Rain Bar, thereafter J. W. Mariot and while returning at about 2.45 a.m. the accident took place. So accused is knowing very well the route from his house upto to Rain Bar and J. W. Marriot. It appears that when the accused is visiting Rain Bar and J. W. Marriot, as he is the regular visitor of the Rain Bar, it can be said that accused also used to travel in the night. In such situation and also the spot of incident is very near to the place of residence of accused, it can be said that the accused is having knowledge that the people are sleeping in front of the American Express Laundry.

409. The accused is well known Cine Actor and also accused was having knowledge that one should not drive the vehicle without license. The accused was also having knowledge that one should not drive the vehicle under consumption of the liquor that too in the late night.

These are the basic rules. As the accused is the regular customer of the Rain Bar, accused might have gone number of times from near American Express Laundry. Even PW-17 Mark Marshal D'souza who is working in the American Express Laundry also stated that the said laundry is located on Hill Road and also St. Andrews Road is running opposite to the Laundry. He also used to see Salman Khan sometimes from Hill Road. Salman Khan used to pass near from his laundry. The said evidence also remained unchallenged. In short the accused was having knowledge that the poor labours were sleeping in front of the American Express Laundry. The accused was also having knowledge that he was not possessing license to drive the car at a time of incident. The accused was also possessing knowledge that he should not drive the car under alcohol consumption. There was 0.062 mg. alcohol was noticed in the blood of the accused. When the person was consumed alcohol and was driving the car in late night, it was difficult for the person to concentrate in the night and that he had a knowledge that there is every likelihood of his meeting with an accident resulting in death or injuries to others particularly those sleeping on the footpath. The knowledge of such fact can neither be far away from the reality, in any case, would squarely fall within the term of “knowledge” appearing in section 304 (II) of IPC. Keeping in mind the facts and circumstances of the present case the event resulting from such acts, omission and offences would be within the knowledge of the offender. I find that our case squarely fall within a term of “knowledge” appearing in section 304 (II) IPC.

K) Latches, lapses, errors in the investigation:-

410. Ld. Advocate Mr. Shivade vehemently submitted that there are many latches, lapses, errors in the investigation. According to ld. Advocate Mr. Shivade, the parking tag, which is important piece of evidence, is not on record. Further the photographs of the vehicle and its position in the incident were also not taken. No photographs of stairs of American Express on which the vehicle was resting were taken. The statements of Yogesh Verma, working in J.W. Mariot, Security Guard of J.W. Mariot were not recorded when the car of the accused parked in the premises of J.W. Mariot. The bedsheets, pillow, clothes of the deceased were also not seized. Further it is contended by Mr. Shivade that the left front tyre was also not sent to the Laboratory for examination. Hence, on all these grounds, it is submitted that the prosecution story is not free from any doubt.

411. As against this, it is contended by the ld. SPP Mr. Gharat that non examination of the Yogesh Kadam is not fatal to the case of prosecution. The prosecution has examined PW-12 Kalpesh who was also Parking Assistant. Further it is submitted by the ld. SPP that non examination of witnesses from J.W. Mariot Hotel is also not fatal to the case of prosecution. The Investigating Officer has recorded statements of the injured witnesses within 3 to 4 days of the incident. These witnesses are impartial witnesses and also sufferer in the incident and they were under mental shock and also were in confuse state of mind in the manner in which the incident taken place. Even though some delay is caused to record the statement, that would not be fatal to the case of prosecution. So far as parking tag is concerned, according to ld. SPP, PW-12 Kalpesh is examined. There is no dispute that the car was

parking in the premises of J.W. Mariot. PW-12 Kalpesh had given the car in possession of the accused. There is direct evidence of PW-12 Kalpesh who saw accused sitting on the driver's seat and the accused had given the tip of Rs.500/- to him. According to ld. SPP Mr. Gharat, tip is to be given when one leaves from the place. In such situation, non production of the parking tag and non examination of Yogesh Kadam will not fatal to the case of prosecution. Further according to ld. SPP Mr. Gharat, the defence put forth by the accused about bursting of the tyre is also ruled out. The accident was occurred due to rash and negligent driving while turning the vehicle without taking proper care and attention, having knowledge that the people were sleeping in front of American Express cleaners. Hence, even if front left tyre not sent to the laboratory for examination, it will not fatal to the case of prosecution.

412. The ld. Advocate Shri Shivade further submitted that the prosecution has not examined API Yadav, Senior Police Officer, who recorded FIR along with PW-26 PSI Kadam. Shri Shivade drawn my attention to the cross-examination of complainant Patil wherein Patil has stated that he lodged the complaint with API Yadav and PSI Kadam. According to ld. Advocate as the prosecution did not examine API Yadav, the accused has been deprived of the opportunity of cross-examine API Yadav on the point of FIR. In my opinion, though prosecution has not examined API Yadav, I find that no prejudice would be caused to the accused as prosecution has examined PSI Kadam. PSI Kadam has recorded FIR of complainant Patil. Further PSI Kadam also drawn spot panchanama and on that ground also, he was cross

examined. Further non examination of the witnesses from J. W. Marriot will not invalid the case of the prosecution. Reliance is placed on the reported judgment in **Karnel Singh V/s State of M.P. [1995 (5) SCC 518],** the court, despite the fact that there was improper investigation held as under :

> "5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating office if the investigation is designedly defective. Any investigating officer, in fairness to the prosecutrix as well the accused, would have recorded the statements of the two witnesses and would have drawn up proper seizure memo in regard to the "chaddi". That is the reason why we have said that the investigation was slipshod and defective.
>
> 6. We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer.

To acquit solely on the ground would be adding insult to injury".

413. It is pertinent to note that Kamal Khan was also travelling in the car at the time of the incident. He is originally British Citizen. He is a Singer and used to visit India for singing. He is not examined by the prosecution. During the course of arguments, neither prosecution nor defence advanced argument regarding the examination of Kamal Khan.

414. While concluding, I find that it is established beyond reasonable doubt by prosecution that, accused was driving the vehicle at the time of the accident. The defence of the accused that DW-1 was driving is discarded from consideration. DW-1 Ashok Singh is a got up witness who has come to help the accused on the instruction of Salim Khan, the father of the accused. After 13 years for the first time u/s 313 of Cr. PC accused has stated that initially Altaf and thereafter Ashok Singh was driving the vehicle. The accused never suggested his case in cross examination to complainant Patil. Near about 27 witnesses are examined before me. Accused never suggested to any of these witnesses during cross examination that initially Altaf was driving the vehicle from his house in the night of 27.9.2002 upto Rain Bar and thereafter to J. W. Mariot. It was also never suggested to any of the witnesses that at J. W. Mariot, Altaf was having giddiness therefore, he contacted Ashok Singh to come to J. W. Mariot to reach accused at his house. It was also never suggested to any of the witnesses that Ashok Singh was driving the vehicle and the tyre was burst resulting in the

incident. The accused never suggested to the PW-26 Kadam who recorded FIR of the complainant as well as PW-27 Investigating Officer Shengal that tyre was burst and at that time Ashok was driving the vehicle. Even defence never suggested to any of the witness examined before me that accused was not driving the vehicle at the time of incident and he was not under the intoxication. Only it was suggested to complainant Patil whose evidence was recorded before Metropolitan Magistrate, Bandra. The said evidence is relevant and admitted u/s 33 of the Evidence Act. So defence fails to put his case to the prosecution witnesses. The said aspect is also dealt in the Landmark case of the **Alister Pereira V/s State of Maharashtra.**

415. The accused was also having knowledge being the resident of same locality that poor labourers used to sleep in front of American Express Cleaners. It is also brought on record that accused is regular visitor to the Rain Bar. The accused was also having knowledge that one should not drive the vehicle after consuming the alcohol. The accused was also having knowledge that one should not drive the vehicle without license. The accused after the accident did not wait on the spot and instead of going to police station for lodging information, went to his house. Till 10.30 am the accused did not make himself available in police station or went to see the injured in the hospital. The accused is a well known artist, it was possible for him to provide medical help to the poor people, but he didn't. For not visiting the police station is that accused was under the consumption of the alcohol.

416. The Ld. Advocate Shri Shivade submitted that evidence of

Patil is recorded in the absence of accused. It appears that Hon'ble High Court exempted accused as per the roznama recorded in the Court of Metropolitan Magistrate. Accused was exempted so accused cannot raise the ground that in his absence evidence was recorded. Further his advocate was present at the time of recording the evidence of Patil. Much argued by Ld. Adv Shri Shivade that for a distance of 7-8 Km. at a speed of 90-100 very little time would be required, but according to him 30 minutes time was required to reach the spot of the incident. So according to him the vehicle was not in speed. If really the vehicle was not in speed the bursting of the tyre would not arise and vehicle could have been stopped on the spot by applying the brakes as the car was having ABS system. It means that the vehicle was in speed and while taking right turn on the Hill Road from St. Andrews Road, the accused lost his control and went straight on the people sleeping in front of the American Express Laundry, amount to rash and negligent driving . Even the accused was not in the position to think in order to apply the brakes and the vehicle climbed the stairs after crushing one Nurulla and injuring four persons. So it goes to establish that the accused must have been a little tipsy because of the drinks he had consumed some time back. It is, indeed, extremely difficult to assess or judge when liquor would show its effect or would be at its peak. It varies from person to person.

417. So considering all angles of the case, going through the ocular, documentary and expert evidence minutely and after hearing the arguments of Ld. SPP and Ld. defence councils at length, I conclude that the offence u/s 304 (II) of IPC is made out against the accused as

Nurulla was died because of the dash of the vehicle. Accused drove the vehicle in a rash and negligent manner and under influence of the liquor, caused death of Nurulla and also caused grievous hurt to Mohd. Abdulla Shaikh and Muslim Shaikh and caused simple injuries to Mannu Khan and Mohd. Kalim Pathan. Accused being resident of the same area was having the knowledge that injured used to sleep in front of American Express Laundry. Hence in view of the documentary, ocular and expert evidence as referred above, clearly show that accused committed offence of culpable homicide not amounting to murder with the knowledge that the acts/injuries caused by him, seen in the light of manner in which he drove the car in rash and negligent manner, while taking right turn on the Hill Road from St. Andrews Road under the influence of the liquor would cause death or likely to cause death. In fact accused caused the death of Nurulla and also caused grievous injuries and simple injuries to the other labours. Hence I hold him guilty punishable under Section 304 (II), 338 and 337 of the IPC. Accused was not holding the valid license and therefore he also committed an offence punishable under Section 181 of the Motor Vehicles Act, 1988. Accused also failed to provide medical help to the injured and also failed to give information or report to the police about the incident thereby accused committed an offence punishable u/s 187 of Motor Vehicles Act, 1988. There was alcohol noticed to the extent of 0.062 % m.g., which is exceeding 30 m.g. per 100 m.l., therefore, accused also committed an offence punishable under Section 185 of Motor Vehicles, Act, 1988.

418. I take pause to hear the accused on the point of sentence.

(D.W. Deshpande)
Additional Sessions Judge
Date : 06.05.2015 Gr. Bombay

419. Heard the accused Salman Khan on the point of sentence. He left discretion on the Court to pass order of sentence.

420. I have also heard Mr. Shivade, ld. Advocate for the accused, at length. Ld. Advocate Mr. Shivade relied on the case of **State Through PS Lodhi Colony Versus Sanjeev Nanda [(2012) 8 Supreme Court Cases 450]** and also on the case of **Alister Anthony Pareira V/s. State of Maharashtra (2012) 2 SCC 648**. Relying on these authorities, it is submitted that in Alister Pareira case, Alister Pareira was convicted for the offence punishable u/s.304-II of the IPC and sentenced to suffer R.I. for three years. So also in the case of **Sanjeev Nanda**, the Trial Court awarded the sentence of two years. The matter reached upto the Hon'ble Supreme Court. The Hon'ble Apex Court did not incline to enhance the sentence of two years already served, but respondent (**Sanjeev Nanda**) was directed to deposit Rs.50 Lacs with Central Government for providing compensation to the victims in motor accident cases where drivers/owners of the vehicles are not traceable. (Deposit of this amount was in addition to civil settlement already arrived at by respondent with victims), (ii) to render community service

of two years to be arranged by Minister of Social Justice.

"The Supreme Court while ordering respondent driver to do community service and to contribute to welfare fund for hit-and-run cases, has not referred to any particular provision of law under which such course of action has been adopted. This has perhaps been done by exercising the Supreme Court's omnibus power under Article 142 of the Constitution to do complete justice in a case before it. It therefore remains to be seen whether lower courts, particularly, trial courts exercising original jurisdiction in criminal matters, can pass such kind of orders. The position may be clarified in some future case."

421. Further it is contended by the ld. Advocate Mr. Shivade that in the case of **Alister Pareira**, 7 persons were died in the accident and 8 persons were injured. Mr.Shivade also submitted that in the case of **Sanjeev Nanda**, 6 persons lost their lives in the accident. The punishment imposed in Alister Pareira is of 3 years and Rs.8.5 lacs compensation was awarded. The punishment awarded against Sanjeev Nanda is already stated by me. According to ld. Advocate Mr. Shivade, in our case, only one person is died and two persons sustained grievous injuries and two persons sustained simple injuries. According to Mr. Shivade, if the trend of cases is looked into, the driver/accused was not convicted more than 3 years period. Mr. Shivade further vehemently submitted that the accused also deposited Rs.19 lacs amount in the Hon'ble High Court in one public service litigation in the year 2002. Mr. Shivade further submitted that the accused did not challenge the order of depositing the amount in the Hon'ble Supreme Court. It is contended by ld. Advocate Mr. Shivade that the accused is ready to

deposit the compensation, if awarded by this Court, but the accused should not be punished for more than 3 years. The reason given by ld. Advocate Mr. Shivade is that the accused formed a foundation termed as "Being Human", a Charitable Trust. The object of the said foundation is religious, educational, medical, relief and other objects. Many needed people receive the money for recovery of their ailments, surgery, etc. According to ld. Advocate Mr. Shivade, if accused is sent in jail for more than 3 years, then the work of "Human Being" foundation would be affected at a great length.

422. Further according to ld. Advocate Mr. Shivade, the accused is also attending the Court since the year 2003 and no delay is caused by him to prolong the trial. Further the accused made himself available during the trial and the accused never remained absent without permission of the Court.

423. Ld. Advocate Mr. Shivade also cited the judgment of the **State of Punjab V/s. Balwinder Singh and others [(2012) 2 Supreme Court Cases 182]** wherein 5 persons travelling in the bus died in the accident. In this case, the Trial Court convicted the accused and sentenced them for two years each. The sentence upheld by the Sessions Judge. The Hon'ble High Court considering that the accused had suffered a protracted trial for about 17 years and had undergone custody for 15 days, reduced quantum of sentence to period already undergone, but enhancing fine amount to Rs.25,000/- each. The Hon'ble Apex Court observed that sentencing must have correctional policy and has element of deterrence. The Hon'ble Apex Court imposed

6 months R.I. and fine of Rs.5,000/-.

424. The ld. Advocate Mr. Shivade also relied on the case of **State of Karnataka v/s. Sharanappa [(2002) 3 Supreme Court Cases 738]**. In this case also, there was death of 4 occupants of the car. The Hon'ble High Court in revision awarded a lesser sentence. The Hon'ble Supreme Court observed that having regard to the serious nature of the accident, High Court's interference with the sentence was not warranted. It is held by the Hon'ble Apex Court that the sentence should be proportionate to the gravity of the offence and should have deterrent effect. The Court should exercise its discretion in awarding sentence in the larger interest of the society.

425. The ld. Advocate Mr. Shivade also gave a list of the cases u/s.304-II of the IPC in which the punishment upto 3 months, 6 months, etc. In short, according to Mr. Shivade, the punishment imposed in the cases is not more than 2 years. According to Mr. Shivade, in Alister Pareira case also, there was death of 7 persons and 8 persons were injured. The sentence imposed on the accused Alister Pareira is of 3 years. It is pertinent to note that in Alister Pareira case, Trial Court convicted the accused and awarded the punishment u/s.304-II of the IPC for a term of 6 months. The Trial Court held that the offence u/s.304-II of the IPC is not made out. The Division Bench of the Hon'ble High Court after re-appreciating the evidence, concluded that the offence u/s.304-II of the IPC is made out and sentence of 3 years imprisonment was awarded. The Hon'ble Apex Court also confirmed the judgment of the Division Bench of the Hon'ble High

Court, Bombay. However, it is observed by the Hon'ble Supreme Court that no appeal has been preferred by the State for enhancement of the sentence. One letter is also produced on record written to Dr. Reshma Shetty, M.D., Douglas Kondziolka, in respect of Salman Khan. In the said letter, it is mentioned that "he (Salman Khan) has an aneurysm off the basilar artery, and we would recommend consideration of treatment for this."

426. Mr. Shivade, ld. Advocate for the accused, also relied on the case of **Dalbir Singh Versus State of Haryana [(2000) 5 Supreme Court Cases 82]**. It is held that Section 4 of the Probation of Offenders Act cannot be treated as applicable to the offence u/s. 304-II of the IPC. It is observed by the Hon'ble Apex Court while considering the quantum of sentence as under:-

> "13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot

> and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

427. In short, it is prayed that the accused is ready to pay compensation, if directed by this Court, but looking to the sentence awarded in other cases, the accused should not be awarded harsh sentence of imprisonment.

428. As against this, it is vehemently submitted by the ld. SPP that in the present case, one person lost the life and four other persons are injured. It is further contended that fortunately other four persons also escaped from the death. According to ld. SPP, now a days, automobiles are the death traps. Innocent persons without any fault sustained injuries and succumbed and lost the life. According to ld. SPP, looking to the manner in which the incident taken place, no leniency be shown to the accused. The ld. SPP Mr. Gharat also relied

on the reported judgment of the Hon'ble Apex Court in case of **State of Punjab v/s. Saurabh Bakshi** dated 30.03.2015 in Criminal Appeal No.520/15 (arising out of SLP Criminal No.5825/2014) wherein it is held as under:-

> '18. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a non-challant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the lawmakers should scrutinize, re-look and re-visit the sentencing policy in Section 304A, IPC. We say so with immense anguish.'

429. It is observed by the Hon'ble Division Bench of the Hon'ble Bombay High Court in case of **Alister Pareira v/s. State of Maharashtra** as under:-

> "85. Thus, the Court has to consider the question of quantum of punishment guided by the accepted precepts of criminal jurisprudence. The punishment inflicted upon an accused should not be so lenient as to result in rendering the administration of criminal justice a laughing stock. It

should also not be so harsh that it hurts the judicial conscience. Punishment in substance should be punitive so as to act as a deterrent for commission of such crimes and must be founded on the concept of reasonableness relatable to the given facts and circumstances of the case."

430. Having given my anxious thought to the arguments advanced by ld. Advocate Mr. Shivade and ld. SPP Mr. Gharat and also having regard to the nature of the offence and the manner in which the incident had taken place, I find that submission of ld. Advocate Mr. Shivade cannot be accepted. One cannot compare the punishment awarded in the different cases. In some cases, punishment awarded not more than 2 years does not mean that in the present case also the court has to pass similar punishment. Facts of every case are different as laid down by the Division Bench of the Hon'ble High Court in Alister Pareira case in para 85. The Court has to consider the question of quantum of punishment guided by the accepted precepts of criminal jurisprudence. As Shri Shivade made submission at bar that the accused deposited Rs.19 Lacs in the proceeding in the Hon'ble High Court way back in the year 2002, in my opinion, in such situation, it will not be proper to direct the accused again to pay compensation. Hence, in my opinion, the following order would meet the ends of justice. Thus, I answer all the points accordingly and proceed to pass the following order:-

O R D E R

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

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

6. Accused Salman Salim Khan is also convicted u/s.235(2) of the Code of Criminal Procedure for the offence punishable u/s.3(1) r/w. 181 of the Motor Vehicles Act, 1988 and sentenced 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.

Judgment is dictated and pronounced in open Court.

(D.W. Deshpande)
Additional Sessions Judge
Date : 06.05.2015 Gr. Bombay

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