*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl. Appeal No. 807/2008

Judgment reserved on: 12.05.2009

% Judgment delivered on: ,2009

Sanjeev Nanda ..... Appellant

Through: Mr. Ram Jethmalani, Sr. Advocate and Mr. Siddharth Luthra, Sr. Advocate with Mr. R.N. Karanjawala, Mr. Sandeep Kapur, Mr. Saurab Ajay Gupta, Ms. Lataa Krishnamurti, Mr. Rajat Wadhwa , Mr. Mehul Milind Gupta, Mr. Shivel Trehan, Madhav Khurana , Mr. Arndam Mukherjee, Ms. P.R. Mala, Mr. Saurabh Gupta, Ms. Joyeeta Banerjee and Mr. Rajdeep Banerjee for the appellant.

versus

The State ..... Respondent

Through: Mr. Pawan Sharma, Addl. P.P. for State

And

Crl. Appeal No. 767/2008

Rajiv Gupta ..... Appellant.

Through: Mr. D.C. Mathur, Senior Advocate with Mr. Mohit Mathur

versus

State(Govt. of NCT of Delhi) ..... Respondent

Through: Mr. Pawan Sharma, Addl. P.P. for State

And

Crl. Appeal No. 871/2008

Bhola Nath & Anr. ..... Appellant.

Through: Mr. S.S.Gandhi, Senior Advocate
with Mr. Abhilash Mathur

versus

State(Govt. of NCT of Delhi) ..... Respondent
Through: Mr. Pawan Sharma, Addl. P.P. for State

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

KAILASH GAMBHIR, J.
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"The miracle is not to fly in air or to travel to the moon, but to walk on the earth", says a Chinese proverb.

1. The increase in vehicular traffic alongwith the population of Delhi has grown much faster since the time Maruti Company has flooded the market with their brand of cars for the middle class of the society. Although the capital of the country is dominated by the middle and lower class, but the presence of rich and affluent is no less visible when one looks at the roads of Delhi to find large number of high class luxurious cars, including the Mercedes and BMWs. The traditional mode of travelling by tangas, bicycles, rickshaws, two wheelers is coming to gradual extinct except in the interiors of some localities.

2. Except for a few hours between midnight to dawn, one cannot see even a patch of earth but vehicles and vehicles either running or stranded in traffic jams on Delhi roads. This ever increasing vehicular explosion in traffic is due to the rapid increase of human population primarily due to continuous migration of people in search of their livelihood from adjoining states and from far flung areas. In this unmanageable crowd, what we have lost is humanity, morals, our age old rich culture, tradition, ethos and path of truthfulness and righteousness as shown to us by saints and scriptures. Of all the maladies afflicting India, the malady of inner decay reigns supreme. There is a weakening of our moral fibre and ethical values. Corruption, red tapism, callousness, casualness and crumbling moralities dominate our public life instead of much needed culture of care, compassion, empathy, and catholicity.

3. Drunken driving, insensitivity and apathy of the Government for public safety on roads; poor, faulty and ill equipped police investigation; growing interference of media in criminal trials; media hype; hostile and dishonest witnesses; falling standards of legal profession, filthy use of money power by rich and mighty; unholy nexus between defence counsel and State appointed Special Public Prosecutors are some of the issues that cropped up in this infamous case known as the BMW case.

Brief Facts

4. In this background, it would be relevant to briefly put forth the facts of the case before delving upon the contentions of counsel for the parties, which are as under:

5. At about 4:00 am on the cold wintry morning of 10/1/1999, the accused Sanjeev Nanda in an inebriated state, without an Indian driving licence while driving a brand new BMW car bearing registration no. M 312 LYP caused an accident at the Lodhi Road in which 6 persons, including three police officers were trampled to death and one person was injured. After causing the accident, the accused Sanjeev Nanda fled away from the accident spot and parked the accidental car at 50 Golf Links at the residence of his friend Siddharth Gupta. The accused has been convicted u/S. 304 (II) IPC and sentenced to 5 years imprisonment by the trial court for culpable homicide not amounting to murder. Accused Siddharth Gupta was discharged by this Court and accused Manik Kapoor was acquitted by the trial court. Accused Rajiv Gupta, Bhola Nath and Shyam Singh Rana have been convicted by the trial court u/S. 201 (II) IPC for causing disappearance of evidence of offence committed by accused. Aggrieved with the said orders of conviction & sentence dated 2/9/2008 passed by the learned trial judge, the appellant Sanjeev Nanda preferred appeal bearing Crl. A. No. 807/2008; Rajiv Gupta preferred appeal bearing Crl. A. No. 767/2008; and Bhola Nath and Shyam Singh Rana preferred appeal bearing Crl. A. No. 871/2008.

6. First, I will deal with the Crl. A. No. 807/2008 and then I will deal with Crl. A. Nos. 767/2008 and 871/2008.

Crl. A. No. 807/2008

Arguments of the appellant

7. At the outset of his arguments, Mr. Ram Jethmalani, learned Senior Advocate with a view to narrow down the controversy very fairly admitted to the factum of accident and the fact that the accused No.1 Sanjeev Nanda was at the driving seat of the offending BMW car bearing registration no. M-312 LYP. The submission of Mr. Jethmalani was that the accused is an absolutely honest person and in his very first encounter with the police, he truthfully and honestly disclosed in his statement recorded under Section 161 of Code of Criminal Procedure that the said unfortunate accident in which six persons had died and one was injured had occurred when he was driving the said vehicle on the said fateful morning. The contention of the senior counsel for the appellant was that except for the said disclosure statement of the appellant, the prosecution had no evidence to implicate the appellant for the offences charged against him. He fiercely attacked the judgment of the trial Court on all fronts. As per him, it is a case where prosecution totally failed to prove its case, the trial judge failed to appreciate facts in the right perspective, misapplied law, indulged in self research to give strength to the prosecution theory, assumed the role of an expert though not being an expert after viewing the

videography of the site, attached undue weightage to the testimony of one of the most discredited witnesses and displayed his prejudice against the rich and mighty, blaming the accused for the ills and misdeeds of greedy lawyers and so on and so forth.

8. The first and foremost attack of the Senior counsel for the appellant was denial of fair and speedy trial to the accused. As per counsel, fair trial has been held to include speedy trial. Commenting on the speedy trial, learned counsel argued that it is a right granted to every accused under Article 21 of the Constitution of India and also can be traced to Section 309 of the Cr.P.C. Section 309 is a partial embodiment of the requirement of speedy trial and any delay in the trial would be a negation of the fundamental right of the accused to have speedy trial, the counsel contended. In every enquiry and trial, the proceedings have to be held as expeditiously as possible and if the law enforcing agency fails to abide by the said mandate of law, then it is incongruous for the State to expect the citizens to abide by the law. Giving a detailed account as to how and in what manner the proceedings before the trial Court were held, the counsel submitted that based on the narration of day to day account of the said case the entire delay is attributable to the prosecution. The trial was sometimes adjourned for weeks and months together. The trial which easily could have been concluded within a period of 4-5 years at the most, took more than 9 years, ruining the entire career of the accused, both educationally and professionally. Not only the career, the accused also lost his

precious adolescent life. He could have been a free man long ago and could have rehabilitated himself in the society, had the trial proceeded in a speedy and expeditious manner.

9. In support of his arguments, counsel for the appellant laid much stress on the authoritative pronouncements by the Constitutional Bench of the Apex Court in **Abdul Rehman Antulay Vs. R.S. Nayak and Anr., AIR 1992 SC 1701** and **Pankaj Kumar Vs. State of Maharashtra & Ors., Manu S.C. 7818/2008**

10. Counsel for the appellant also referred to the Privy Council judgment reported in **Herbert Bell Vs. Director of Public Prosecutions & Anr. (1985) A.C. 937.** Relevant paras of the said judgment are reproduced as under:

> "Thus, their Lordships accept the submission of the respondents that in general the courts of Jamaica are best equipped to decide whether in any particular case delay from whatever cause contravenes the fundamental right granted by the Constitution of Jamaica. The respondents explained and their Lordships accept, that a particular current problem arises from the difficulty in securing the attendance of witnesses. Witnesses absent themselves through ignorance or fear, sometimes influenced by intimidation, crude or subtle. The courts of Jamaica must constantly balance the claim of the accused to be tried, *954 notwithstanding the absence of witnesses, against the possibility, unproved and unprovable in many cases, that the absence of a necessary witness has been procured or encouraged by someone acting in the interests of the accused. The courts seek to prevent exploitation of the rights conferred by the Constitution and to weigh the rights of the accused to be tried against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can fairly be established by all the relevant evidence. The Board will therefore be reluctant to disagree with the considered view of the Court of Appeal of Jamaica that the right of an accused to a fair hearing within a reasonable time has not been infringed. But since no court is infallible, there remain the power and the duty of the Board to correct any error of principle and to reverse a decision which, in the opinion of the Board, could only have been reached by the reliance on some irrelevant consideration or by ignoring some decisive consideration.
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> …….But their Lordships consider that in the present case the courts fell into error when they compared the delay which occurred after the order for a retrial with the average delay which occurs between arrest and trial. The applicant was arrested in May 1977. His trial was defective. The court of Appeal which heard his

appeal against conviction at the first trial could have upheld the conviction if they had been satisfied, notwithstanding the defective conduct of the trial, there had been no miscarriage of justice involved in the conviction. The Court of Appeal quashed the conviction in March 1979 and ordered a retrial. The members of the Court of a Appeal must therefore have considered that the applicant might be acquitted. The applicant having been arrested, detained and submitted to a defective trial and conviction had, through no fault of his own, endured two wasted years and must for the second time prepare to undergo a trial. In these circumstances there was an urgency about the retrial which did not apply to the first trial. A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself. Far from recognizing any urgency, the Full Court excused delay which occurred after March 1979 on the ground that it was partly due in their words to "bureaucratic bungling.

Moreover in the present proceedings the Full Court and the Court of Appeal not only over looked the significance of the fact that the applicant *955 was complaining of delay in the context of a retrial, but also over looked the significance of the fact that on 10 November 1981 the applicant had been discharged. When Chambers J. discharged the applicant on 10 November 1981 the judge must have been satisfied and the prosecution does not appeal to have disputed that, whatever the reasons for the unavailibity of the witnesses at that time, any further delay would be unfair to the applicant and that he was entitled to be discharged in the light of all that had happened to him since his arrest in 1977. If that had not been the position, the prosecution would have sought and the judge might have granted a further adjournment. If fairness required the applicant to be discharge don 10 November 1981 fairness required that he should not be rearrested in February 1982. Although the provisions of the Constitution may not have been present to the mind of the judge, his discharge of the applicant can only be construed in the circumstances of the present case as recognition of the fact that the applicant had not been afforded a fair hearing within a reasonable time.

Provided that the courts of Jamaica recognized that a retrial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a retrial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognize the significance of the discharge by the judge. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the applicant is entitled to a declaration that Section 20(1) of the Jamaica (Constitution) order in Council 1962 which afforded the applicant and right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.

Their Lordships were reminded by counsel, the Director of Public Prosecutions and the Solicitor General, of the traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advise tendered by the Board. In these circumstances, it would not be appropriate to accede to the request by the applicant that the Board should order that the applicant be discharged and not tried again on the original or any….."

11. Delving upon his arguments on the second limb of the fair trial, the counsel submitted that besides being denied speedy justice, the appellant has also been denied a fair trial. Learned counsel contended that the trial judge may be most honest and upright, but still may not be fair because of his own philosophy, ideas and prejudices. Counsel submitted that fairness is not only possessing physical integrity or honesty , not submitting to pressures of any kind including extra judicial pressure but, it is much more.

12. Counsel for the appellant invited attention to Section 20 of the Jamaica (Constitutional) Order, to buttress his submission that the said section provides that whenever any person is charged with a criminal offence then such a person is entitled to fair hearing within a reasonable time by an independent and impartial Court established by law. Section 20 of said Jamaica Constitution as referred in **Herbert Bell Vs. Director of Public Prosecutions & Anr.- (1985) A.C. 937** is referred as under:

> "Section 20 sets out the provisions which by Section 13 are afforded to secure the protection of law and provides, inter alia:
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> Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

13. Giving detail of series of instances of judicial unfairness on the part of the trial judge and the prosecution, which as per the counsel totally vitiated the entire trial and the final judgment, the

counsel submitted that various observations made by the trial judge would show that the judgment given by him in the present case is more clouded by his personal prejudices than backed by his judicious approach. The entire conduct of the prosecution was utterly dishonest and the investigation was conducted in a most unfair and corrupt manner, the counsel submitted. The attention of the Court was particularly invited to the observations made by the trial court at pages 122 and 104 of the impugned judgment. The trial court, it was argued has blamed the appellant for the alleged unethical acts and nexus between the defence counsel and the State prosecutor. Counsel for the appellant took strong exception to the observations made by the trial judge on pages 45, 72,116, 117, 122, 123, 124 of the judgment.

14. Citing further instances of unfair approach of the trial Court, the counsel submitted that the audience given by the learned judge to the most dishonest witness Mr. Sunil Kulkarni in his chamber on 11.7.99 when copies of certain letters already addressed by Mr. Kulkarni to the said judge had been given to the Judge. It is the grossest contempt of Court when a judge conducting the criminal trial speaks in private to the prosecution witness and what privately he would have said was neither known to the prosecution nor to the accused, the counsel contended. The judge should have denied such audience to the said witness or in all fairness should have disclosed the entire conversation having taken place in the chamber to the prosecution as well as to the defence. It was quite

surprising that the learned judge not only gave him a hearing in the chamber and then at his instance addressed a letter to the Police Commissioner. Obviously the learned judge felt convinced by the interview of the witness and perhaps believed him to be an honest man who deserved to be protected. The learned judge did not appreciate that the examination of the witness had commenced on 14.5.2007 and continued till 17 and 29th May, 2007, whereafter, it was resumed on 11.7.2007. The said audience was given by the learned judge on 11.7.2007 after the case was adjourned. No revelation was made by the Judge even on the next date i.e. 29.7.2009 and only a passing reference was made by the judge about the said meeting of the witness with him, during final arguments. The learned Judge also called for the judgment of the High Court in the matter of alleged misconduct of prosecution counsel Mr. I.U. Khan and defence counsel Mr. R.K. Anand and allowed his judicial mind to be influenced and moulded by the said judgment, without affording any opportunity to the accused. The learned judge has made reference to the said judgment of the High Court to draw unwarranted inferences. The contention of the counsel for the appellant was that the accused and his family members were victims of the said incident of alleged extortion between the defence counsel and prosecution counsel but they never bribed any one. Continuing his attack on the unfair trial, counsel further submitted that the learned Judge could have also exercised his power under Section 311 Cr.P.C. to call other witness i.e. Gauri

Shankar Tiwari who on electronic media accused Kulkarni of being a cheat and not being in Delhi on the date of the accident, when after a gap of about eight years the learned Judge could decide to recall Mr. Sunil Kulkarni who was a dropped witness, so far prosecution was concerned. The Court could have easily confronted Mr. Kulkarni with the version of said Mr. Gauri Shankar Tiwari , who disputed his presence in Delhi and called him a cheat.

15. On the unfair trial and on the alleged injudicious approach of the learned judge and his unwarranted observations in the judgment affecting the fair trial, counsel placed reliance on the following judgments.

(1) Datar Singh Vs. State of Punjab-(1975) 4 SCC 272
(2) Sharad Birdhichand Sarda Vs. State of Maharashtra-(1984) 4 SCC 116 and
(3) Chandran @Surendran & Anr. Vs. State of Kerala-(1991) Suppl. 1 SCC 39.

16. Counsel for the appellant was no less vociferous on the conduct of the prosecution who according to him was equally guilty for not ensuring fair trial to the accused. The prosecution in a most surreptitious manner did not produce the PCR messages with regard to the incident in question depriving the accused to his unbridled right of fair trial. The case of the prosecution is that PW-1 Hari Shankar who was working as an attendant in the petrol pump was the first one to inform the police about the said incident. One of the injured person Mr. Manoj PW-2 was taken in the PCR vehicle

referred as Eagle-11 where three police officers PW-24, PW-34 and PW-36 were present and were sending the messages through wireless. These police officials also flashed the oral statement of one victim PW-2 Mr. Manoj who in his statement stated that he was not able to tell about the said incident and about the accused who was driving the offending vehicle. These police control room messages as per the counsel for the appellant were deliberately not filed by the prosecution along with the charge sheet and not made part of the FIR, with the sole objective to misdirect the investigation so as to implicate the appellant for a higher degree of crime which he never committed. These documents ought to have been disclosed by the prosecution to the defence and they should have been formed part of the challan and that suppression of such vital documents on the part of the prosecution is in itself a circumstance sufficient enough to vitiate the entire trial. It is a matter of record that these PCR messages were placed on record by the prosecution after an application to this fact was moved by the appellant and they were proved on record, almost at the stage of conclusion of trial. The trial court also dealt with the PCR messages selectively as it ignored the material evidence based on these messages, which were of more significance between 5.23 A.M and 5.27 A.M.

17. Placing reliance on Rule 16 of the Bar Council of India Rules, the counsel for the appellant contended that said rule has brazenly been violated by the prosecutor and the State in this case

before the trial Court. For proper appreciation of the argument of the counsel for the appellant, Rule 16 is reproduced as under:

> "16. An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accuse shall be scrupulously avoided."

18. Counsel further submitted that although Britain has no written Constitution but they have signed European Convention & Human Rights which clearly mentions that every accused person is entitled to a fair trial.

19. Counsel for the appellant also placed reliance on Rule A-252 of the Attorney General Guidelines in support of his arguments. The same is referred as under:

> "A-252-Generally, material can be considered to potentially undermine the prosecution case if it has an adverse effect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with he elements of the case that must be provided by the prosecution. Material can have an adverse effect on the strength of the prosecution case:
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> by the use made of it in cross-examination; and
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> by its capacity to suggest any potential submissions that could lead to ;
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> the exclusion of evidence;
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> a stay of proceedings;
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> a court on tribunal finding that any public authority had acted incompatibly with the defendant's right under the ECHR.
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> 37. In deciding what material might undermine the prosecution case, the prosecution should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Examples are:
>
> i. any material casting doubt upon the accuracy of any prosecution evidence;
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> ii. any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence;
>
> iii. any material which may cast doubt upon the reliability of a confession.

iv. any material that might go to the credibility of a prosecution witness;

v. any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. If the material might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor:

vi. any material which may have a bearing on the admissibility of any prosecution evidence.

It should also be borne in mind that while items of material viewed in isolation may not be considered to potentially undermine the prosecution case, several items together can have that effect.

38. Experience suggests that any item which relates to the defendant's mental or physical health, his intellectual capacity, or to any ill treatment which the defendant may have suffered when in the investigator's custody is likely t have the potential for casting doubt on the reliability of an accused's purported confession, and prosecutors should pay particular attention to any such item in the possession of the prosecution."

20. Counsel thus submitted that fair trial is a trial which includes fair disclosure of any material which may be relevant for investigation so as to give a fair chance to the defence to establish his innocence in the criminal trial. Counsel thus urged that fair trial in this case has been denied not only by the trial judge but equally by the prosecution, and therefore, the findings given by the learned Judge in such an unfair trial cannot be sustained in the eyes of law. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Apex Court in **Datar Singh Vs. The State of Punjab, 1975 (4) SCC 272.** Relevant para of the same is reproduced as under:

"3. It is often difficult for courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances, cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide. They

> cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure build on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case."

21. The next submission made by Mr. Ram Jethmalani Senior Advocate for the appellant was with regard to the prosecution evidence and contended that except the disclosure statement of the appellant , which in any case is not admissible, the prosecution miserably failed to prove their case against the appellant by any other reliable evidence. The focus of attack of the counsel for the appellant was primarily on the three witnesses who as per the prosecution were key witnesses, the same being PW-1 Mr. Hari Shankar, PW-2 Mr. Manoj and court witness Mr. Sunil Kulkarni.

22. PW-1 Mr. Hari Shankar was declared a hostile witness. He was an employee of petrol pump known as Car Care Centre, Lodi Road. He testified that one vehicle was coming from the side of Nizamuddin. He also testified that in the accident some person fell down on the road and died after receiving injuries. He also testified that he was so frightened after seeing the accident that he immediately went back to petrol pump. As per the counsel for the appellant, false story was put into the mouth of this witness by the prosecution as clearly he was not a witness to the actual incident. Admittedly, he came on the road after hearing the sound of 'thud' which would mean that the accident had already taken place and

sound of 'thud' was heard by him after the accident. The deposition of this witness before the court clearly goes to show that false story was put into his mouth by the prosecution whereas the fact of accident was clearly not known to him. His deposition is that he was not a witness of the actual impact or anything prior thereto. Certainly, the man was not standing out on the road but was at the petrol pump and it must have taken him at least one minute time to come out on the road after hearing the said sound. The use of expression 'perhaps' by this witness stating that 'perhaps it has caused the accident' could not have been given by a person who was a witness to the accident. Use of expression 'perhaps' thus itself puts the credibility of the witness to question. However, in desperate need of finding a witness the said PW-1Mr. Hari Shankar was made an eye witness by the prosecution. Little did the prosecution realise that what made the said witness to come to the site of the accident was a noise which was created because of the impact of the accident, therefore, such a witness could not have been a witness to the accident, prior to the collision or at the time of the impact. The FIR in the present case was lodged at 7.10 A.M. in the morning of 10.1.99 and as per the Rukka, sent by S.I. Kailash Chand no witness was available which fact would show that even Hari Shankar was not present there at the site. Counsel thus submitted that this witness who completely retracted from his statement recorded under Section 161 of the Cr.P.C. would clearly show that his statement was falsely recorded by the police under

Section 161 Cr.P.C., in desperate need to create an eye witness of the accident.

23. Second important witness as per the prosecution was PW-2 Mr. Manoj Malik who in his deposition stated that in the month of January 1999 he was staying at CGO Complex, Lodi Road and was working there at the Dhaba of one Kailash. He testified that he was going towards the railway station along with his two friends when they were stopped by the police at the site of the incident. He further testified that he was standing in the middle of the road when one truck had hit them due to which three police officials and two of his friends were killed while he himself got injured. As per the counsel for the appellant, the conduct of the prosecution in the case of PW-2 Manoj Malik is much more objectionable than their dubious conduct in the case of PW-1 Hari Shankar. This was the witness who was injured but was conscious when taken in PCR Van and upon inquiry about the accident at 5.27 A.M. by PW-36 he clearly stated that he did not know anything about the accident. This revelation by PW-2 Manoj Malik at 5.27 A.M. was deliberately suppressed by the prosecution and he was made an eye-witness by the police not realizing that already he had given the said statement to the Police Control Room officials. In his deposition this witness mentioned about the existence of fog and to that extent, the evidence of the hostile witness would be admissible as per the settled legal position, counsel for the appellant contended.

24. This part of the evidence of PW-2 stating presence of the fog is also corroborated from the evidence of meteorological department adduced through PW-2 deposing about the presence of mist in the early morning of 10.1.1999, senior counsel contended. Counsel for the appellant further stated that due to the presence of the fog as referred to by PW-2 in his deposition and also by the meteorological department the said witness PW-2 could not have noticed the offending car approaching at a fast speed towards the place of accident due to the poor visibility. Counsel submitted that this witness PW-2 who could be the only eye witness to the exact circumstances leading to the accident, once having said to the police officials of PCR van that he was not aware of anything about the accident, inevitably leads to the only conclusion, that he could not see the accident either due to the presence of the fog or on account of the impact of high powered lights of the BMW car. Counsel thus submitted that statements of said two witnesses under Section 161 Cr.P.C. were nothing but bundle of lies recorded at the instance of the police and the said statements were also in complete contradiction to the messages recorded by the PCR officials. Counsel for the appellant thus submitted that the entire evidence was fabricated by the police with a view to falsely implicate the appellant for a crime punishable for non-bailable offence which he had never committed. Counsel for the appellant drew attention of this Court to the depositions of PW-34 and PW-36 who in their depositions committed an act of perjury by falsely stating that the

said witness PW-2 Manoj Malik had told them while being carried in the PCR van that he saw one big black car coming from the side of Lodi Hotel at a very fast speed being driven in a zig-zag manner and on seeing such car, he had shouted 'Bachaao-Bachaao' but the car ran over the persons standing at that place. The relevant portions of statement of PW-34 Constable Shadi Ram is reproduced below:

> "……..……Then we took that injured whose name was disclosed by that injured himself on way ot hospital as Manoj who was conscious at that time. On the way incharge Davinder Singh had asked that injured Manoj as to what had happened and then Manoj told him that he was going to Nizamuddin Railway Station to leave his companion Gulab at the station. Manoj also told that two other persons were also going with them and when they reached in front of car care centre some police men were present there. He further told that in charge that at that time one black coloured car of big size came and had stuck against them and that car had come at a very fast speed. (objected to by the defence council as being here say as Manoj himself has been examined already and he has not claimed so). Manoj was then taken to the AIIMS hospital. After getting Manoj admitted in AIIMS we came back to the spot that is place of the incident. At the spot Inspector Jagdish Pandey and SHO had also reached when we came back from AIIMS."

25. The relevant portions of statement of PW-36 ASI Devender Singh is reproduced below:

> "……On the way I asked Manoj as to with what he had met with the accident. He told me that one big black coloured car had come from the side of Lodhi Hotel at a very fast speed and which was being driven in a gick zack manner and on seeing that car being driven in that manner he had shouted 'Bachao-Bachao' but that car was driven over them who were standing at that place and he informed me that one Gulab Singh of his Village and one other person from his Village were with him at the time of accident besides four other persons…."

26. The third important witness as per the prosecution to nail the appellant is the Court witness Mr. Sunil Kulkarni. With all the vehemence at his command Mr. Jethmalani, raised a challenge to

the credibility and creditworthiness of the said witness. Mr. Sunil Kumar was introduced as one of the key prosecution witnesses who as per the prosecution witnessed the accident himself. He in fact was the only witness who could give detailed account of the exact sequence of events which led to causing the said accident. His statement under Section 161 Cr.P.C. was recorded by the police on 15.1.99 and by the Metropolitan Magistrate under Section 164 Cr.P.C. on 21.1.99. However, this witness was dropped by the prosecution itself on the ground that he was showing undue anxiety for his early examination as a witness and also because of the fact that the said witness leveled serious allegations against the police in his application before the trial Court on 13.9.99. For better appreciation of the facts, relevant portion of the said order dated 30.9.99 is reproduced as under:

> "PW Sunil Kulkarni who was bound down on the last date is present along with Shri B.R. Handa Senior Advocate Shri I.U. Khan, Spl. P.P. however has today submitted that on instructions from the State he gives up PW Sunil Kulkarni considering the manner in which he has been appearing in court and has been showing his anxiety for his early examination as a witness which is quite unusual and also in view of the averments made by this witness in his application which was filed by him on 13.9.99 leveling allegations against police. Mr. Khan has submitted that there is full justification in the circumstances, in which the witness has been conducting himself for the decision taken by the prosecution to drop him and no adverse inference should be drawn against the prosecution for this decision. In view of the submission of Mr. Khan the witness Sunil Kulkarni stands discharged."

27. So far the act of the prosecution in dropping the said witness was concerned, no fault can be found with the same, counsel for the appellant submitted but to recall such a witness that too by the Court itself after a gap of about eight years was no doubt an

astounding fact on the earth, the counsel contended. Vide order dated 19.3.2007, the trial Court recalled its earlier order to summon Sunil Kulkarni as a Court witness, and pursuant thereto his examination started on 17.5.2007 and continued till 11.7.2007. The objectionable meeting of the witness with the Court took place on 11.7.2007 and none of the parties were apprised about the deliberations of the meeting having taken place between the Court and the star witness of the prosecution who was earlier dropped due to unusual circumstances. The proceedings of such meeting remained under wrap and came to be known to the appellant only during the final hearing. One of the serious objections taken by the counsel for the appellant was about the said closed door meeting between the Court and the prosecution witness. As per the counsel for the appellant, this itself vitiates the trial, besides being an act of contempt of Court. The essence of fair trial lies in open public trial, on which our adversarial judicial system rests and no trial can take place at the back of the parties, the counsel contended. It might be possible that many observations made by the trial Court may be on account of the prejudice caused in the mind of the Court in view of the unknown conversation between the said witness and the presiding judge of the Court. It is only under certain circumstances, a hearing in camera is permissible, but not otherwise, counsel contended. Instead of initiating contempt proceedings against the said witness the meeting had struck a very sympathetic chord in as much as the learned judge felt inclined to

direct police protection to him. Public trial and an open hearing to the public at large as well as to the parties are the essential features of our jurisprudence and any deviation from such established procedure will certainly vitiate a trial, counsel for the appellant contended.

28. Mounting further attack on the deposition of the said Court witness, counsel submitted that his entire deposition is full of falsehood and self concoctions. He checked out from his hotel on 9.1.99 at about 12.30 P.M., disclosing the place of destination as 'Solan'; after landing in Delhi on 7.1.99 by Goa Express to meet some Minister of State in connection with a vigilance case of his friend. He initially stayed in a hotel namely 'Ajanta' in Phaharganj and thereafter shifted to one Shiva Hotel. Instead of going to 'Solan' he met one of his friends, Mr. Sushil Kataria at New Delhi railway station and had diner with him, and was free from the dinner by 3.45 A.M. in the morning of 10.1.99. After the said dinner both of them sat near Shiv Mandir, near Maharishi Raman Marg and kept sitting around a bonefire lit by three wheeler drivers. Since Mr. Kulkarni could not get any three wheeler he started walking on foot towards Nizamuddin railway station so as to hire some auto rickshaw to reach his hotel. As he was trying to find out some three wheeler, he was going by the side of the divider, when he saw a group of people who were standing in the middle of the road talking to each other. At that very point of time he saw very heavy lights of some vehicle coming from the opposite direction, but could not see

much because of the powerful lights. As per the witness the said vehicle, which was a black car hit those people who were standing on the road and as a result of the same, few persons were flung in the air and the remaining fell by the side of the car. He heard the sound of application of brakes and thereafter, heard one more sound, which appeared to him to have been caused after being hit by the same car. At that time, he was 62-70 feet away from the spot. He further saw 3-4 persons coming out of the said car to see the damage caused to the car. All the three persons sat in the car again reversed the car a bit and then sped away from the right side of the witness. This witness tried to wake up the persons sleeping in the petrol pump, but nobody woke up from their sleep. He could not see PCO or telephone in the vicinity. After walking some distance he got an auto rickshaw, hired the same and went to the Nizamuddin railway station. He also tried to dial 100 number from the railway station but could not succeed because all the five public telephones lying installed at the railway station were not in a working condition. He boarded Chattisgarh express and went to Bhopal to meet another person with the name of Kataria. He came back after 2-3 days to Delhi and made a telephonic call to Mr. Amod Kanth, Joint Commissioner of Police or perhaps to DCP Mr. Srivastava. The said Joint Commissioner Mr. Amod Kanth immediately called him to Police Headquarter where he narrated everything to Mr. Kanth. Mr. Amod Kanth directed the witness Mr. Kulkarni to meet DCP Srivastava. The witness was given accommodation to stay in the

police station Lodi Colony itself. The next day, in the morning he was shown the BMW car stationed in the Lodi Colony police station. His statement under Section 161 Cr.P.C. was recorded by the police. He was produced by the police in the Court and his statement under Section 164 Cr.P.C. was recorded by the Metropolitan Magistrate. The police had arranged the TIP but the same did not take place.

29. Following objections were raised by the counsel for the appellant to discredit the deposition of the said Court witness Mr. Kulkarni as borne out from his written submission:

> **"1. If he was an eye witness he would wait for the police and not leave for Bhopal he had no urgent business of any kind.**
>
> **2. Is it conceivable that all alone he tried to move the injured and did not shout for held. He would at least talk to Manoj and another who were alive. He would wait for a passing car and summon help.**
>
> **3. Came to meet a minister in connection with a vigilance case but then meets a friend to start a mushroom business. But on the 9th he has gone to New Delhi Station. Obviously he wanted to leave Delhi. But he met Sushil Kataria and abandoned the idea of travelling. From 1 P.M. what did he do till dinner time? No interrogation, no evidence.**
>
> **4. How dinner till 3.45 A.M. Both sat on a public road warming themselves with a free bon fire lit up by other poor rickshaw drivers.**
>
> **5. Then he is alone, does not go with his bosom friend, nor did that fellow invite him.**
>
> **6. Suddenly he wants rickshaw to reach his Hotel. Which hotel he had checked out.**
>
> **7. Went to the Petrol Pump and tried to wake up persons sleeping there but did not succeed.**
>
> **He did not meet or see Hari Shankar PW-1**
>
> **8. The light of the car prevented him from seeing clearly.**
>
> **9. Ultimately gets a rickshaw but does not go to the hotel. Why did he go to station-to leave for Bhopal to meet whom-Again Kataria.**

10. Stayed in Bhopal for two-three days. No explanation of what he did there with or without Kataria.

11. Returned to Delhi called police officers Amod Kanth DCP Srivastava. Called yet no statement recorded. Instead police sent him to the spot. There he met DCP Vivek Gogia, Vimlesh Yadav and IO Kailash chand. They confirmed his story from the scene and their record. No statement recorded.

12. Slept at the police station. No statement next morning. They showed him the car BMW.

13. Police were concocting a false case. Exclude Sidharth Gupta.

He never knew any names. (619 & 621)

Name of Sanjeev brought in under pressure.

14. 164 statement of PW 56/3. Some parts are under pressure. He had seen three come out of the car but mentioned only 2 in the statement.

15. Admits pressure of police upto 164 statement being recorded.

16. Persons were standing in the middle of the road.

17. Denied his statement of 31.3.99 Ex. CW1/PB.

18. 11.7.2007-shown site plan.

19. High speed but not excessive.

20. Luggage of the 6 victims was scattered on the road.

Concocted story. Whose luggage? Why six? Where is it mentioned.

30. Based on the above objections, the counsel for the appellant submitted that Mr. Sunil Kulkarni had dinner with one Mr. Kataria which went on till 3.45 A.M., without knowing where the dinner had taken place, he sat around the bonfire along with three wheeler drivers but could not get a three wheeler so as to reach back to the hotel. He is the only witness who talks of reversal of the car, which is not even the case set up by the prosecution in their substantive or non-substantive evidence. If the evidence of this witness is believed who deposed that none of the employee of the petrol pump had

woken up, then the evidence of PW-1 Mr. Hari Shankar goes, whose presence being an employee of the petrol pump located near the site of the accident, cannot be of any doubt. The evidence of Mr. Hari Shanker PW-1 appeared to be more natural as he was on duty at the petrol pump and he heard the sound of impact and thereafter rang up his employer who in turn contacted the police the senior counsel contended. The prosecution failed to prove that no public telephone was available in the said vicinity or five telephones installed at the railway station were out of order or that he could not come across even a single constable at the railway station. The prosecution also failed to give any reason as to why the evidence of the said witness was not immediately recorded when he had approached the Joint Commissioner of Police on his return from Bhopal and enough time was consumed by the police to record his statement on the lines suggested by the police, the senior counsel argued. The delay on the part of the police in recording his statement clearly shows that the fabrication was in progress to record the statement of the said Court witness in a manner which suited the prosecution. The witness also failed to explain as to why he had gone to Bhopal although he was destined to go to Solan and why from Bhopal also necessary information was not given by him about the said incident.

31. Continuing with his fierce attack on the credibility of the said witness Mr. Jethmalani, learned Senior Advocate submitted that if the entire conduct of the said witness is taken into account, then one

cannot but conclude that he was not an eye witness to the said incident. As per his deposition he had tried to shift the injured to the divider, and if it is accepted as correct then why there was no trace of blood on his clothes and in fact why his clothes were not seized by the police; why the Joint Commissioner of Police Mr. Amod Kanth did not record the statement of Mr. Kulkarni immediately when he met him at the police headquarter. Every police official owes a legal duty to record the statement of any witness without any loss of time. Counsel for the appellant placed reliance on the judgment of **Maruti Rama Naik Vs. State of Maharashtra,2003(10) SCC 670** in support of his argument. Counsel thus submitted that the statement of said witness recorded under Section 161 was in violation of principles envisaged under Section 162 itself as his statement was recorded after a delay of 2-3 days when he was under complete control of the police. The police wrongly directed him to give an application in writing under his signatures. Counsel further submitted that it is a settled legal position that if witness's signatures are taken on Section 161 statement then the same is certainly a breach of Section 162 Cr.P.C. The signing of the statement by the said witness and the same having been accepted by the prosecution itself vitiates the testimony of the said witness. In any event two admissions were made by the said witness also on which the defence has placed reliance. Firstly, in his deposition he had stated that the light of the car prevented him to see clearly. He had admitted that the police pressurized him to

exclude certain names and such conduct of the police would clearly show that there was a clear attempt on their part to set up a false case against the accused. He had also admitted that at the time of recording his statement under Section 164 Cr.P.C. he was under pressure. Counsel also submitted that the testimony of the witness was totally untruthful when he says that group of persons were standing in the middle of the road and their luggage was also scattered on the road. Counsel thus urged that to rely on the testimony of such a witness would be the most hazardous thing to do. In support of his argument counsel for the appellant placed reliance on **State of U.P. Vs. Babul Nath (1994) 6 SCC 29** and **Baij Nath Prasad Vs. Madan Mohan Das AIR 1952, Allahabad 108.**

32. Even when he arranged the sting operation he was trying to find out how much money he would be able to extract. It is a fact on record that so far the appellant accused is concerned, the statements of PW-1 and PW-2 were recorded when he was in jail. Even the conversation in sting operation is with regard to the attempts being made to extract money but in fact nothing was paid by the appellant or on his behalf by anybody else.

33. The next ground of challenge made by the counsel for the appellant pertains to wrongly connecting the appellant with the commission of offence punishable under Section 304 Part-II Indian Penal Code on the premise that the appellant was driving the

offending vehicle in a highly drunken state of intoxication beyond reasonable limits. As per the medical report produced on record, the appellant was found to have 0.115% w/v, the quantity of alcohol in his blood. No evidence was produced on record to prove that the accused was intoxicated in the sense in which intoxication is understood under Section 85 of the Indian Penal Code, nor in the sense of having his ability to control the motor vehicle getting substantially impaired as a result of intake of alcohol in terms of requirement of Section 185 (1) (a) of the M.V. Act. Section 185(1) (a) of the Motor Vehicles Act prescribes artificial limit beyond which one must not go, submitted learned Senior counsel. Section 185 (1) (a) was introduced after 1994 amendment and prior to the said amendment even the consumption of one sip of alcohol was made punishable for driving the vehicle. This small consumption was found by the legislature totally reasonable and it was thought that the people must be allowed to drive after consuming a little quantity of alcohol which in the said amendment they put it at 30 mg in 100 ml of blood. The said Section 185 (1) (a) also introduced a test for analyzing the alcohol content in one's blood through the mechanism of breath analyzer. No charges against the appellant were framed either under Sections 183, 184 and 185 of the Motor Vehicles Act, but to determine as to whether the appellant had consumed the alcohol in excess of the quantity prescribed, the recourse has to be taken to Section 185 (1) (a) of the M.V. Act, the counsel for the appellant contended. Once the Statute itself provides a particular

method or mechanism to be used to ascertain the intake of alcohol, then no other method or mechanism could be deployed by the prosecution to find out the quantity of intake of alcohol in the body of the appellant at the time of the accident. Counsel for the appellant placed reliance on the decision of the House of Lords in **Rowlands Vs. Hamilton (1971) 1 AER 1089** and **Gumbley Vs. Cunningham 1989 (1) AER 5** in support of his arguments. The said decision of the House of Lords is in conformity with the principle laid down by the Privy Council in **Nazir Ahmed Vs. King Emperor AIR 1936 PC 253**, which was followed by our Supreme Court in **State of U.P. Vs. Singhara Singh, AIR 1964 SC 358.** Counsel submitted that the mechanism of test provided under the Statute was only to be adhered to by the prosecution and not to any other test disregarding the mandate of the Statute. Counsel for the appellant further submitted that even if the presence of alcohol determined through inadmissible evidence of blood test is taken as correct, then, admittedly the same was found at 0.115%. The presence of quantity of the alcohol as per the medical test again cannot be accurate because out of the same 0.020 has to be deducted on account of the presence of non-alcoholic substances like aldehydes and Ketones in every human body. This has been proved on record in defence evidence through examination of an expert as well as with the help of text books on medical jurisprudence. Even no reliance can be placed on the report of the blood samples as admittedly out of two samples, taken on 10.1.99,

one sample was sent for blood grouping but the Government laboratory reported that the analysis was not possible because the blood was found to be putrefied. In any event of the matter it was for the prosecution to have established in evidence to remove the said doubts and prove the fact that the appellant had consumed the liquor in excess than the laid down limit of presence of 30 mg in 100 ml of blood under Section 185 (1) (a) of the M.V. Act. In criminal case by adopting the principle of back tracking, one can find that how successfully the prosecution has been able to establish its case. In a criminal trial, any incriminating circumstance has to be established with the help of evidence and evidence means such evidence which can be contradicted by the defence. Reference is made to the decision of the Apex Court in **Pritam Singh Vs. State of Punjab, AIR 1956 SC 415.** The accused in the present case was examined in the hospital at 12.29 P.M. on 10.1.99 and the symptoms described by PW-10, Dr. T. Milo did not establish any kind of intoxication and rather absence of intoxication could be easily made out from his symptoms. The appellant was found coherent in his speech, absolutely oriented and cooperative and these findings of Dr. T. Milo were enough to show that the appellant was not intoxicated at least above the level of presence of alcohol provided under Section 185 (1) (a) of the M.V. Act. In this regard counsel for the appellant invited attention of this Court to the medical certificate Ex. PW-10/G. The appellant accused was in his proper senses is also borne out from the fact that

at 7.00 A.M. in the morning of 10.1.99, the police had recorded his long confessional statement and trouble free statement given by him clearly proved sobriety on the part of the appellant and absence of any intoxication in his body. Even in the examination of the appellant under Section 313, no question was put to him to suggest that he was excessively drunk on that date, which further proves the fact that intake of the alcohol by the appellant was much below the prescribed limit. Another strong factor to show that the appellant was quite sober and was in his full senses is the fact that he could drive the car for more than 16 k.m. without any hassle or causing any kind of mishap on its way prior to reaching at the place of accident. The appellant also applied the brakes immediately and stopped the car within a few meters and this again shows complete orientation of the mind of the appellant. In support of his argument, counsel for the appellant placed reliance on **Narayanan Nair Vs. State, AIR 1952 Tranvancore (Cochin) 239, Bachubhai Hassanalli Karyani Vs. State of Maharashtra 1971 (3) SCC 930** and **Rajavalse M. Vs. State 1999 Crl.LJ. 58(Kant)**. Counsel for the appellant further submitted that the presence of quantity of alcohol of 0.115% is absolutely near the safety point and that the trial Court committed an error by holding that the same was beyond the prescribed limit. Counsel thus submitted that with the presence of the said quantity of alcohol, the appellant could not have been considered a person excessively drunk for which much more vital symptoms were required to be proved by the prosecution.

34. Finding fault with the judgment of the learned trial Court, Mr. Jethmalani, counsel for the appellant pointed out that many judgments of the Apex Court and other courts were cited before the learned trial Court, but the learned judge misconstrued the rationale and import of those judgments. The learned trial Court distinguished them on the ground that none of those cases pertained to drunken driving. Counsel further submitted that there is no breach of law if a person drives a vehicle after consuming liquor because the law permits to drive with intake of liquor up to certain amount of limit. It is only when one takes something more than the required limit then one can be held guilty of committing breach of legal duty punishable under Section 185 M.V. Act, but even taking the liquor in excess, above the prescribed limit under Section 185 M.V. Act in itself would not render the act as intentional, deliberate or willful, as illegally held by the learned trial Court and even otherwise drunkenness has not been established by the prosecution in the present case, the counsel contended.

35. The next submission of the counsel for the appellant was against the alleged perverse finding of the trial court to hold that the vehicle was being driven by the appellant recklessly and at an excessive speed. As per the counsel for the appellant, it is well recognized fact that the oral evidence of witnesses on the issue of 'speed' whether given by the bystanders or passengers travelling in the vehicle is notoriously unreliable. Speed of the vehicle involved in the accident essentially has to be determined from circumstantial

evidence especially scientific evidence and not on the basis of oral evidence. The learned trial judge failed to apply the principles laid down by the Apex Court in this regard in **Jagdish Chander Vs. State of Delhi 1973 (2) SCC 203** and **State of Karnataka Vs. Satish (1998) 8 SCC 493.** The Apex Court in the said case held that to substantiate the charge of rash driving, investigation should be conducted on scientific lines. For instance, there should be examination of the skid marks of the vehicle on the road and secondly, the position of victims. The Apex Court also observed that the witnesses who deposed that they saw the accident in question need to be carefully scrutinized because such witnesses only observed the incident after their attention was drawn to the impact resulting from the collision. The statements of such witnesses to a large extent are influenced by what they imagined must have happened and not from what they have practically seen happening. Counsel thus submitted that most important piece of circumstantial evidence are skid marks. Counsel for the appellant referred to page 998 of the Forensic Science in Criminal Investigation and trials by Dr. B.R. Sharma, 4th Edition paragraph 16.6.3. The author in the said book has also dealt with the concept of reaction time. The reaction time is the time which the driver takes to apply the brakes fully after he perceives the necessity to apply brakes. This reaction time as per the author varies with different individuals but 0.5 to 0.8 seconds is a normal reaction time. Giving example, the counsel submitted that if the vehicle is moving at a speed of 60

K.M. per hour, the distance travelled in reaction time would be 8 to 15 meters. The FIR in the present case shows the skid marks of the car to a distance of 38 to 40 ft. which means approximately 12 meters. According to the graph of skid marks describing length in meters for the said reaction time corresponding to speed in kilometer, the speed in the facts of the present case would come to around 42 k.m. per hour. Such a speed on a lonely road at 4.30 A.M. on the wintry morning by no means can be considered either excessive or dangerous or reckless. Even if the conclusion regarding the skid marks is corroborated by the evidence of sole eye witness Mr. Sunil Kulkarni whom the trial court had believed, is taken into account, he also nowhere stated that the speed was excessive, rather he stated the same was high only. The evidence of two other witnesses PW-1 and PW-2 also does not support the theory of excessive speed to carry the prosecution case any further. In the impugned judgment the learned Judge concluded that the car was at an extremely high speed when it hit the unfortunate persons. He comes to this conclusion by his own inference from the facts mentioned in FIR that dead bodies were strewn over a large area. No expert had said this and the learned judge had converted himself into an expert which is against all judicial norms. The forensic laboratory report dated 21.7.99 placed on record before the trial court clearly states that no facility is available with the said laboratory to determine the speed of the vehicle with the help of mechanical devices or instruments. Counsel

for the appellant drew attention of this court to the observations made in the said report, which are reproduced as under.

> **"(b) Facilities do not exist to determine the co-efficient of friction of the road hence speed of the vehicle could not be determined."**

36. This admission on the part of the prosecution is a clear pointer to the fact that no scientific evidence was available to prove the speed.

37. Counsel for the appellant also contended that the learned Judge assigned to himself the role of expert by examining the video tape as after viewing the said video, the learned trial Court could notice the marks demonstrating reversal of the car. As per the counsel for the appellant marks of reversal are never disclosed by the skid marks. The skid marks are caused due to the sudden application of brakes and therefore, they appear because of the friction, however, when you reverse the car you do not produce such marks as are caused while moving forward after application of brakes. Counsel thus submitted that the learned Judge became an expert to draw a conclusion after viewing the video that the vehicle had reversed after hitting the victims to support the theory which was not even propounded by the prosecution. The learned Judge could see even what the prosecution did not see and for which even the defence got no opportunity to contradict or destroy. It is a disclosure by the judge himself which came to the notice of the defence only after reading the judgment. The counsel also pointed

out that FIR mentions that the skid marks are 38 to 40 feet, this clearly shows carelessness on the part of the investigating agency as they did not even measure the said marks rather estimated the same. He urged that where allegations of high speed are made, the least that was expected of investigating agency was to give accurate length of skid marks.

38. Counsel for the appellant further found fault with the observations of the learned trial judge in finding the speed of the vehicle excessive, based on the report of the meteorological office wherein they have disclosed the visibility of one thousand meters at 5.30 A.M. on the morning of 10.1.99. The contention of the counsel for the appellant is that this is a misreading of the certificate of the meteorological office by the Court, as the said certificate clearly speaks of the presence of 'mist'. Counsel further submitted that presence of 'mist also gets corroborated from the statement of Mr. Kulkarni who also deposed about the presence of fog on the said morning of 10.1.99. Counsel placed reliance on page 45 of Observer's Handbook (Meteorological Office, London) 4th edition in support of his argument that thousand meters visibility is considered as poor visibility. This distance of one thousand meters can be covered in a few seconds i.e. around 90 seconds if the car is moving with a velocity of 40 k.m. per hour.

39. The learned judge committed another grave error by holding that at the time of the offence it cannot be said that the accused

could not have seen the few persons standing on the road, the counsel contended. The Court also wrongly observed that after being hit by BMW car, three persons got entangled in it but still the accused kept on driving the vehicle for quite a long distance. The trial court failed to appreciate that the accused was not reasonably expected to know that at that hour of the morning that a group of persons would be present in the middle of the road and amongst those would be three policemen examining the luggage of the others. The court also failed to note that the accused had immediately applied brakes and stopped the car. Counsel further submitted that it was the duty of the learned judge to ask himself as to why neither the policemen nor the other private persons saw the car with lights on, coming towards them from Nizammudin side so that they could take some steps to avoid the accident. Even after the driver had noticed the presence of the persons standing on the road, it is quite obvious and natural that the brakes did not operate immediately and the vehicle must have covered some distance before finally coming to a halt. To support his argument, counsel for the appellant derived support from the decision of the Apex Court in **Mahadeo Hari Lokre Vs. State of Maharashtra, 1972 (4) SCC 758**, wherein the Apex Court set aside the conviction order under Section 304-A after a bus driver ran over the pedestrian, causing death because the pedestrian suddenly crossed the road, without taking note of the approaching vehicle. The Apex Court in the facts

of that case observed that the driver, however, slowly he may be driving may not be in a position to avert the accident.

40. Elaborating his argument on the failure of the prosecution to prove excessive speed, the counsel further submitted that even if a vehicle is driven at a high speed, the same itself would not lead to an inference that the driver was negligent and rash. In support of his argument counsel for the appellant placed reliance on the judgment of the Apex Court in **State of Karnataka Vs. Satish, 1998 (8) SCC 493** where the Apex Court has held that mere driving of truck at a high speed does not lead to an inference that negligent and rash driving has caused the incident resulting in death and injuries to a number of persons. The Apex Court in the said case upheld the order of acquittal passed by the High Court while two courts below held the accused guilty under Section 304-A IPC and other cognate offences. On the same legal principle, this Court in **Abdul Subhan Vs. State (NCT of Delhi), 2007 Crl.L.J 1089** also took the similar view. Even no such question of suggesting excessive speed was put to the accused during his examination under Section 313 of the Crl. P.C. contended counsel for the appellant.

41. Based on the above submissions, counsel for the appellant submitted that prosecution miserably failed to prove that the petitioner was driving the offending vehicle at a highly excessive speed.

42. Counsel for the appellant also took serious exception to the conduct of the judge who had examined the police file and police diary to reach his conclusions in the face of the admitted legal position that police diary cannot be used as evidence.

43. The next limb of argument of the counsel for the appellant relates to the presence of fog/mist on the wintry morning of 10.1.99, which as per the counsel for the appellant was ignored by the trial court. Counsel for the appellant invited attention of this court to the certificate given by the office of the meteorological department proved on record as Ex. PW15/B, wherein they have clearly stated the presence of 'mist' on the said day with visibility of one thousand meters. PW-2 Mr. Manoj Malik in his cross examination also disclosed the presence of fog on the said day. Counsel for the appellant also found fault with the report of the meteorological department wherein they have disclosed the visibility at the distance of one thousand meters on the ground that the said visibility was not present at the place near the accident but the same was at Safdarjung Airport. The portion of the said examination in chief of PW-15 Mr.S.C. Gupta, Director Meteorological office Safdarjung Airport is reproduced as under:

> "As per the report given by me the visibility on that day at 5.30 A.M. was thousand meters at Safdarjung Airport."

44. In his cross-examination also the said witness stated that the visibility was thousand meters on account of the presence of the

‘mist’ which remains at the height of up to five hundred meters from the ground level. The said witness also stated that the concentration of the mist at lower height from the ground level is more and there is only a little changed_concentration of the mist up to the next five hundred meters. The contention of the counsel for the appellant was that because of the presence of the mist at the lower level, one may not be able to see the human beings on the road, but although may be able to see the stars in the sky. Counsel for the appellant further submitted that the learned APP in his cross examination to PW-2 himself suggested that there was no light on the street and there was fog. Taking a contrary stand to the said stand of the prosecution, the court observed that it was nobody’s case that lights were not on at the site of the accident. Counsel thus submitted that the trial court has ignored the presence of fog and mist which was a vital factor to be taken into consideration, before giving finding on the exact circumstances leading to the occurrence of the said accident. The court’s findings that it was clear with no mist and there was lot of visibility at the spot at the time of the occurrence of the offence are contrary to the certificate given by the meteorological department and also to the suggestion given by the prosecutor in the cross-examination of PW2. Counsel for the appellant although admitted that the appellant should have taken a precaution of dipping the lights of his car due to the presence of the fog and because of not dipping the said lights certainly the presence of fog

must have affected the visibility of the appellant in not finding the presence of victims, in the middle of the road from a distance.

45. Coming to the last leg of his submission, counsel for the appellant in his scathing attack on the judgment, disputed the finding of the learned trial court in holding the appellant guilty for committing an offence under Section 304 (II) of the Indian Penal Code. Differing with the reasoning given by the trial court, counsel submitted that the culpable homicide referred under Section 299 of the Indian Penal Code would become murder if it satisfies the requirements of four clauses of Section 300 IPC and even if it satisfies four clauses, then again it may be reduced to culpable homicide not amounting to murder if the facts attract any of the exceptions of Section 300 Indian Penal Code. Clearly Section 304-A deals with those cases where death of a person takes place by committing rash and negligent act and not such acts as would constitute the offence of culpable homicide not amounting to murder. Whether a particular act amounts to culpable homicide or not such an act must necessarily fall either in Section 299 or in Section 300 of the Indian Penal Code. Counsel for the appellant submitted that the learned trial judge got much carried away with the judgment of the Bombay High Court in the case of **State of Maharashtra Vs. Alister Anthony Pareira – MANU/MH/0655/2007** where the Division Bench of Bombay High Court in the facts of the said case, where the accused while driving his car ran over people sleeping on the footpath resulting into the death of seven persons and causing

injuries to eight persons, reversed the conviction and sentence awarded by the trial Court under Section 304-A and convicted the accused under Section 304-II of Indian Penal Code. Distinguishing the facts of the said **Pareira's case (supra)** with the present case, the counsel submitted that knowledge of people sleeping on the footpath during the night could be attributed to the accused in that case but no such knowledge can be attributed to the appellant in the present case who could never visualize the presence of policemen and private persons in the middle of the road on the chilly morning of 10.1.99. The Judgment of the Bombay High Court is also under challenge before the Apex Court, where already the Apex Court had granted special leave to appeal, the counsel contended. The learned trial judge also misconstrued the observations of the apex Court in the matter of **State of Gujarat Vs. Haidarali Kalubhai 1976 (1) SCC 889**, wherein the Apex Court held that if a person drives a motor vehicle into the midst of the group and thereby causes death to some persons then such a case will not be a case of mere rash and negligent driving and the said act will amount to culpable homicide. Learned trial judge also by drawing a wrong analogy of Section 300(4) of IPC and Illustration of the same reached to the conclusion that the case in hand is covered not under Section 304-A but under Section 304-II Indian Penal code. Infact, in the ultimate analysis, the trial Court although held the said act on the part of the appellant as an act of gross recklessness but still held him guilty under Section 304-II IPC. The

contention of the counsel for the appellant was that with the said finding of the learned trial Court the only section which could be applied is Section 304-A and not Section 304-II of IPC. Counsel for the appellant also contended that the Legislature imputes particular kind of degree of knowledge in Section 299 and Section 300 of Indian Penal Code. Although the knowledge imputed in sub-section (4) of Section 300 is of the highest degree than the knowledge imputed under Section 299 of the Indian Penal Code, yet one thing is certain, to attract these provisions the person must possess some actual knowledge that commission of his act would likely result in causing death or the commission of the act is so imminently dangerous that it must, in all probability cause death or such bodily injury as is likely to cause death but such kind of knowledge cannot be attributed to the appellant that too for the death of the persons standing in the middle of the road, whose presence the appellant could never perceive. In other words, the act of the offender must be a willful act and the reference to 'such act' under Section 299 of the IPC refers to an 'act' which is either intentional or which is known to the accused. The counsel urged that S. 304 (II) does not talk of Knowledge but talks of actual good knowledge. For attracting Section 304-II, IPC the act of the offender must be willful and the offender must have the complete knowledge that if a particular act is done by him then the same is likely to cause death or to cause bodily injury as is likely to cause death. Knowledge is the motivating factor to attract Section 304-II IPC. In support of his

submissions, counsel for the appellant placed reliance on the following English Authorities as well as judgments of the Apex Court:-

1. **R. Vs. Eoars-(1962) 3 All ER 1086**
2. **R.Vs. Thorpe- (1972) 1 ALL ER 926**
3. **R. Vs. Murphy-(1980) 2 ALL ER 325**
4. **R. Vs. Lawrence-(1981) 1 ALL ER 974**
5. **R. Vs. Boswell-(1984)3 ALL ER 353**
6. **State of Gujarat Vs. Haiderali Kalubhai-(1976) 1 SCC 889**
7. **State of Karnataka Vs. Satish-(1998) 8 SCC 493**
8. **Mahadeo Hari Lokre Vs.State of Maharashtra (1972) 4 SCC 758.**
9. **R. Vs. M.C. Bride-(1961) 3 ALL ER 6**
10. **R. Vs. Guiltoyle-(1973) 2 ALL ER 844**

46. Counsel for the appellant also submitted that offence of causing death by reckless driving was created for the first time in England in 1977. In 1977, the Britishers amended the Road Traffic Act, to substitute the word 'danger' with that of 'recklessness', while Section 304-A of Indian Penal Code which is the only substantive provision to deal with the accident cases, uses the expression 'rash or negligent'.

47. Lastly, on award of sentence, counsel for the appellant submitted that the appellant has suffered immensely and in all earnestness he felt remorseful over what had happened to the

poor persons and their families on account of the said tragic accident. The appellant in fact is a victim at the hands of the prosecution who created false evidence against the appellant and the prosecution itself is a sinner who did their best to blame the appellant even for the offence which he never committed. The appellant has a very good character and during the period of his incarceration, there was no complaint against him and rather he got excellent reports from the jail authorities. He has already suitably compensated the families of the victims by granting compensation to the extent of Rs. 65 lacs. The said act of the appellant is the first offence and according to the well established principles of jurisprudence of law, the highest punishment should not be inflicted on the first offender. The counsel also averred that the American driving licence was taken as a circumstance by the trial court to give five years sentence. He submitted that same is completely beyond the settled principles of criminal jurisprudence.

Arguments of the Respondent

48. Stoutly refuting the submissions of Mr. Ram Jethmalani, Mr. Pawan Sharma, Additional Public Prosecutor representing the State fully supported the order of conviction and the sentence passed by the trial Court. Commencing his arguments, counsel pointed out that the future of the family of those killed has been plunged into complete darkness consequent upon the accident on the fateful morning of 10th January, 1999. As per the public prosecutor, the

police came into action after the information about the said accident was received and registered vide DD No. 27-A immediately whereafter SI Kailash Chand posted at P.S. Lodhi Colony on emergency duty rushed to the spot along with one Constable Jagan Lal. On reaching the spot he found three deadbodies lying scattered on the road. One leg of the deceased constable was lying at one place while abdomen of the other deceased was lying scattered at another place. Rough site plan of the spot of accident was prepared by the said sub inspector which was duly proved on record as Ex. PW 58/B. As per the prosecutor, this site plan was never challenged by the defence during the trial. After arrival of the said Sub Inspector Kailash Chand, Jagdish Pandey from Police Control Room also reached there who saw the trails of the oil reaching from the site of the accident to 50, Golf Links, where ultimately the said car was found parked inside the Kothi in a badly damaged condition. Some human flesh and blood was also found on the vehicle. Forensic team was summoned and videography of the site of the accident as well as of the damaged car and of the Bungalow where the said car was parked was taken. Rajiv Gupta, one of the other co-accused in the connected appeal, disclosed that the said offending car was parked there by none else but the appellant Sanjeev Nanda. All the accused persons were taken for medical examination at 12.20 a.m. on 10.1.1999, in AIIMS where blood samples of appellant Sanjeev Nanda were taken and in the said report it was found that the appellant was heavily drunk. Rukka was prepared by SI Kailash

Chand which was proved on record as Ex. PW 58/A after the registration of DD. Explaining the purpose of DD, the Public Prosecutor submitted that the only purpose of the DD is to inform the police so that the police officer may proceed to rush to the spot to probe the matter. As per the Prosecutor, the only purpose of the DD is to put the police into motion. The recovery memo of articles seized by SI Kailash Chand from the spot was also proved on record which remained unchallenged by the defence. The contention of the public prosecutor is that if the testimony of SI Kailash Chand and that of SI Jagannath supported by the said site plan and recovery memo is taken into consideration then the same would clearly show how the said barbaric accident had occurred and after causing the said accident how the appellant had fled from the spot.

49. The State prosecutor, Mr. Pawan Sharma further submitted that the three eye witnesses cited by the prosecution were later on examined as PW 1 Hari Shankar and PW 2 Mr. Manoj Malik while Mr. Sunil Kulkarni appeared as a court witness. Counsel further submitted that although the said two witnesses; PW 1 Hari Shankar and PW-2 Manoj Malik turned hostile but still as per the settled legal position, the testimony of the hostile witnesses cannot be rejected in entirety.

50. Counsel for the State then categorized his submissions in reply to certain specific contentions raised by the petitioner. Dealing with the issue of speedy and fair trial the state counsel

submitted that during the entire period of trial no lapse or delay can be attributed on the part of the prosecution. The proceedings for consideration of charge were held between 14.5.1999 to 17.7.1999 and on 2.8.1999 charges were framed against the appellant and other accused persons. During the aforesaid period on 14 dates the accused persons argued their case while on three dates the prosecution made their submissions on framing of charges. Three times there was no electricity in the court, two times the ld. Presiding officer was on leave and on one date the ld. Judge adjourned the proceedings because of "no time left". During the said period also one application was moved by the appellant under Section 311 Cr.P.C. and on one of the dates defence counsel took time. The prosecution evidence was completed between 2nd August, 1999 to 22nd August, 2003 and during this period request for adjournment was made by the accused nine times. On 38 hearings prosecution witnesses were examined. Request for adjournment by the State was made four times and at least on eight occasions the case was adjourned due to "no time left". Only on two occasions no witnesses were present and at least on three dates there was a joint request for adjournment. The case was also adjourned 7 times because the trial court records were summoned by the High Court. The matter was once adjourned because of the Republic Day arrangements. Adjournments were also taken for various other multiple reasons for which prosecution cannot be blamed. Application for exemption was moved by Mr. Rajiv Gupta at least ten

times and the appellant moved similar application at least 12 times. Ld. Presiding Officer was on leave at least for five times. The defence evidence was completed between 24.10.2005 to 5.5.2008 and during this period the matter was adjourned 12 times at the request of the defence. During this period the ld. Judge exercised his power under Section 311 Cr.p.c. to summon Sunil Kulkarni as a court witness. Supplementary chargesheet was also filed during the said period. Final arguments were heard between 5.5.2008 to 2.9.2008. The final arguments were addressed by the State counsel at least on eight hearings while the defence counsel made their submissions on 15 dates. The order of conviction and sentence was passed on 2.9.2008 and 5.9.2008, respectively. After giving a detailed account of the court proceedings, counsel submitted that there has not been any delay on the part of the prosecution and the appellant cannot complain that he was either denied the speedy trial or fair trial. In support of his argument counsel for the State placed reliance on the judgment of the Apex Court reported in **2002 III AD (S.C.) 634 P. Ramachandra Rao Vs. State of Karnataka**. The contention of the counsel for the State was that the guidelines laid down by the Apex Court in **A.R. Antulay's case** are not exhaustive but only illustrative and the Apex Court has clearly observed in the above decision that the guidelines in the **Antulay's case** are not intended to operate like hard and fast rules or be applied like a strait-jacket formula. Special emphasis was laid by the State counsel on para 32 of the said judgment referred as under:

"32. For all the foregoing reasons, we are of the opinion that in Common Cause case (I)3 [as modified in Common Cause (II)4] and Raj Deo Sharma (I)1 and (II)2 the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:

(1) The dictum in A.R. Antulay case5 is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case5 adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A.R. Antulay case5 are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I)3, Raj Deo Sharma (I)1 and Raj Deo Sharma (II)2 could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I)3, Raj Deo Sharma case (I)1 and (II)2. At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case5 and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary — quantitatively and qualitatively — by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act.

We answer the questions posed in the orders of reference dated 19-9-2000 and 26-4-2001 in the abovesaid terms."

51. The State counsel also placed reliance on the judgment of the Apex Court reported in **State Vs. Dr. Narayan Waman 2002 (3) AD Crl. SC 770** with specific reference to para 9 of the same which is referred as under:-

> "9. While considering the question of delay the court has a duty to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay. Number of witnesses examined, volume of documents likely to be exhibited, nature and complexity of the offence which is under investigation or adjudication are some of the relevant factors. There can be no empirical formula of universal application in such matters. Each case has to be judged in its own background and special features, if any. No generalization is possible and should be done. It has also to be borne in mind that the criminal courts exercise available powers such as those under Sections 309, 311 and 258 CrPC to effectuate right to speedy trial."

52. And also the judgment of the Apex Court in **S.P. Vs. B. Sriniwas 2008 (3) JCC 2115 and Himanshu Singh Sabharwal Vs. State of M.P. AIR 2008 SC1943**.

53. Based on the above judgments and on the legal proposition laid in the above judgments, the counsel for the State submitted that the appellant cannot complain that he was denied fair and speedy trial by the court. Counsel also submitted that it is not only the appellant/accused who is entitled to the fair trial but the victims as well.

54. Counsel for the State also submitted that all human beings are prone to commit some errors and therefore, minor discrepancies in the depositions of prosecution witnesses cannot be given undue weightage. Counsel for the State further submitted that the

presence of PW 2 Manoj Malik cannot be disputed on the said fateful morning as he himself was the victim of the accident. The contention of the counsel for the State is that the testimony of injured person cannot be equated with Mr. Sunil Kulkarni who happened to have seen the accident.

55. The witness PW1 in his deposition clearly stated that he was sitting in the petrol pump when on hearing the noise he came out and saw one vehicle coming from Nizamuddin side, causing the said accident. He also clearly deposed that as a result of the accident some people received injuries and some died also. He also categorically stated that the vehicle was coming at a fast speed. Counsel further submitted that this witness PW 1 Hari Shankar was the first person who had informed the happening of the said occurrence and his entire testimony cannot be brushed aside because of some minor variations in his stand. In fact, as per the Prosecutor, he was wrongly declared as a hostile witness.

56. Even the testimony of PW 2 Manoj Malik cannot be discarded in entirety as he has supported the prosecution case fully except the fact that he took somersault when he deposed that infact the offending vehicle was not a car but a truck. This minor contradiction in the testimony of PW 2 would not render his entire testimony uncreditworthy, more particularly, when the defence is no more disputing the involvement of appellant causing the said accident.

57. Commenting upon the creditability of court witness Mr. Sunil Kulkarni, Mr. Pawan Sharma, Addl. Public Prosecutor, contended that the said witness may be a crook or may have criminal antecedents but so far the present case is concerned he is a truthful witness.

58. On the conduct of the court witness Sunil Kulkarni counsel for the State submitted that the prosecution has been able to prove that the said witness was present at the spot and once having proved so, the other antecedents of the said witness even if they are shoddy are of no consequence. Simply because of the fact that he immediately did not inform the police about the said incident or went to Bhopal without any information to the police cannot lead to infer that he was a planted witness. Counsel for the State placed reliance on the judgment of the Apex Court in **2005 SC Crl. 51 State of U.P. Vs. F. Khan & Ors** .

59. Counsel further submitted that no doubt that the court has to see the statement of such a witness with great caution and care but solely based on the shady character of the witness, his testimony cannot be ignored, more particularly, when deposition of such a witness is corroborated by other circumstances. The presence of the said court witness Mr. Kulkarni in Delhi cannot be denied as PW 42 Ms. Alka, receptionist of Hotel Shiva Continental duly proved this fact in her deposition by proving the hotel records.

60. Dwelling on his arguments further on the realiability of witness Mr. Sunil Kulkarni counsel for the State submitted that the said witness was discharged by the prosecution on account of the fact that he was showing undue anxiety for getting his statement recorded but such stand of the prosecution could not have come in the way of unfettered powers of the court under Section 313 of the Code of Criminal procedure to examine any witness or to call and examine any witness so as to find out the truth to impart justice. As per the counsel even a witness whose statement under Section 161 of the Code of Criminal Procedure is not recorded can also be called as a witness by the court in exercise of powers conferred under Section 311 of the Code of Criminal Procedure. Counsel further submitted that the trial court called this witness on 29.5.2007 when this witness was cross-examined at length not only by the defence but by the prosecution as well and he stood the test of being a truthful witness in his entire deposition before the trial court. Counsel further submitted that this witness has no enmity with any of the accused persons and has no relations with any of the police officials. Counsel strongly placed reliance on the judgment of the Apex Court reported in **AIR 2004 SC 3114 Zahira Habibullah Vs. State** where also the witness turned hostile and the prosecutor also colluded with the defence and the Hon'ble Apex Court directed fresh trial of the case. Special reference was made to paras 2, 13, 36 & 38 of the said judgment which are reproduced as under:-

"2. The present appeals have several unusual features and some of them pose very serious questions of far-reaching consequences. The case is commonly to be known as "Best Bakery Case". One of the appeals is by Zahira who claims to be an eyewitness to macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgment by the trial court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the Public Prosecutor. Last, but not the least, that the role of the investigating agency itself was perfunctory and not impartial. Though its role is perceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

13. Statement of one eyewitness was recorded on 4-3-2002 by PI Baria at S.S.G. Hospital, Vadodara disclosing names of five accused persons and when he was sought to be examined before the Court, summons were issued to this person on 27-4-2003 for examination on 9-5-2003. It could not be served on the ground that he had left for his native place in Uttar Pradesh. Therefore, fresh summons were issued on 9-6-2003 for recording his evidence on the next day i.e. on 10-6-2003, giving only one day's time. When it could not be served, then summons were issued on 13-6-2003 for remaining present before the court on 16-6-2003. It could not be also served for the same reasons. Ultimately, the Public Prosecutor gave purshis for dropping him as witness and surprisingly the same was granted by the trial court. This goes to show that both the Public Prosecutor as well as the court were not only oblivious but also failed to discharge their duties. An important witness was not examined by the prosecutor on the ground that he, Sahejadkhan Hasankhan (PW 48) was of unsound mind. Though the witness was present, the Public Prosecutor dropped him on the ground that he was not mentally fit to depose. When such an application was made by the prosecution for dropping on the ground of mental deficiency, it was the duty of the learned trial Judge to at least make some minimum efforts to find out as to whether he was actually of unsound mind or not, by getting him examined by the Civil Surgeon or a doctor from the Psychiatric Department. This witness (PW 48) has received serious injuries and the doctor Meena (PW 9) examined him. She has not stated in her evidence that he was mentally deficient. The police has also not reported that this witness was of unsound mind. During investigation also it was never stated that he was of unsound mind. His statement was recorded on 6-3-2002.

36. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

38. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have

always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

61. Drawing strength from the said decision counsel submitted that in similar circumstances, the trial court had exercised the power to summon the said witness although dropped by the prosecution.

62. For antecedent of witnesses, relevance of testimony of expert witnesses etc., counsel for the State referred following judgments:-

AIR 2005 SC 44 State of M.P. Vs. Dharkole (Para 15-B)
2006 CrLJ 413 SC Saidu Mohd. Vs. State (Para 29)
1987 CAR 335 (SC) Dalbir Singh Vs. State (para 17)
AIR 2003 SC 785 Sanjay Bhan Vs. State
(1995) 57 DLT 399 Naresh Kumar Vs. State (paras 12,20, & 21)
AIR 2001 SC 3955 State of Punjab Vs. Nyaydeep (para12)
2005 SCC (Crl) State of U.P. Vs. Farid Khan page 51

63. Taking strong exception to the stand taken by the counsel for the appellant during the course of his arguments that he will proceed with the admission that Sanjeev Nanda was driving the BMW car on the said fateful day, Mr. Pawan Sharma, lamented that no such plea

can be introduced by the defence in the appeal when such a defence was never set up before the trial court. Throughout the trial, the case of the defence was that the said BMW car was not involved in the accident as would be evident from the suggestions given by the defence in the cross-examination of various witnesses examined by the prosecution. Therefore, in the appeal the defence cannot introduce a new plea completely contrary to the stand of the defence taken before the trial court. In the appeal the defence has tried to build a case to bring the same within the four corners of Section 304-A of the Indian Penal Code while before the trial court the accident in question itself was denied by the defence. The precious time of the trial court would not have been wasted, had the appellant taken this defence before the trial court.

64. Counsel for the State further contended that conduct of the appellant in his refusal to participate in the TIP proceedings further goes to show that he was never truthful in his defence. The contention of the State counsel is that refusal on his part to join the TIP proceedings merely on the ground that his photographs had appeared in electronic and print media was not a valid ground as per the settled legal position and this refusal on the part of the appellant itself clearly proves that he was not only driving the vehicle but was driving in a heavily drunken state and at excessive speed.

65. Another plea taken by the defence in the appeal that there was presence of heavy fog in the early morning of 10.1.1999 also does

not find support from their case set up in the trial court as no such suggestion was given by the defence to PW 15 Dr. S.C. Gupta. Only PW 2 in his cross-examination had disclosed the presence of fog but not on account of any suggestion given by the defence in his cross-examination. Counsel thus contended that the theory of fog being propounded by the defence in the appeal cannot be accepted at this stage. No such suggestion was given by the defence with regard to the alleged presence of fog on the fateful day to any of the witnesses examined by the prosecution and therefore, new plea taken by the defence at an appellate stage cannot be appreciated, counsel contended. Counsel for the respondent State placed reliance on the judgment of the Apex Court reported in **1988 CAR SC page 63 (para 10) Darshan Singh Vs. State of Punjab , 2005 (2) LRD (Delhi) DB.**

66. The counsel also urged that the videography proved on record totally belies the story of the defence. Report of Dr. Rajinder Singh remained unrebutted by the defence in the trial, contended Ld. Addl. P.P. The counsel also averred that the brakes were not applied by the appellant before the impact.

67. Refuting the submission of Mr. Ram Jethmalani, attributing mysterious presence of the police on the intervening night of 9-10th of January, 1999, counsel for the State submitted that the testimony of Mr. Bannu Singh (PW 53) clearly proves that the constable who

died on that day was on duty. PW 2 Manoj Kumar also corroborated the testimony of PW 53.

In this regard counsel relied on following judgments.

1. **AIR 1974 SC 639 Sri Chand Batra Vs. State,**
2. **1967 Crl.L.J. Page 785 Para 13 Thimmiah Vs. State**

68. Counsel for the respondent further submitted that the prosecution has successfully proved that the appellant was heavily drunk. Counsel for the State placed reliance on the judgment reported in **Longpokalakpam Vs. State,1975 Crl.L.J. 1088**.

69. To establish the fact that the appellant was driving the offending vehicle in a drunken condition counsel invited attention of this court to the replies given by the accused to the question Nos. 11,38, 45,90 & 92 putforth by the court at the time of recording statement of the accused under Section 313 Cr.P.C. and the same are as under:-

> Q. 11 It is also in evidence against you that there is evidence that BMW car being No. M-312 LYP was involved in this accident on 10.1.1999, Because of the accident, the injured and the deceased were found scattered at different places between the radius of 100/150 feet. What have you to say?
>
> Ans. It is incorrect.
>
> Q.38 It is in evidence against you that SI Kailash Chand PW 58 directed SI Hullas Giri PW to go to Defence Colony for bringing you to Golf Links who returned along with three persons including you, Manik Kapur and Siddharth Gupta who immediately on their arrival asked Rajiv Gupta accused 'KYA GARI DHUL GAI HAI'. All the three, including you, were interrogated. It was also noticed that you were in intoxication state and smelling alcohol and having injuries on your lips/face. Your disclosure statement was recorded which is Exht. PW 58/A. What have you to say?
>
> Ans. It is incorrect. From my house at Defence Colony I was straightaway taken to P.S. While Police came to my house to take me away. I was assaulted by the police and therefore I have injuries on my face. At that time my friend Manik Kapoor and

Siddarth Gupta were not with me. My grand father, mother and domestic servants were present in the house.

Q. 45 It is in evidence against you that on 10.1.99 after getting the Medical examination of all the six accused persons including you were brought back to 50 Golf Links and after interrogations and being satisfied, sufficient incriminating evidence has come, you and your other co-accused were arrested and were personally searched and memo were prepared. The personal search memos are Exht. PW 37/B to Ext. PW 37/G. SI Kailash Chand explained the grounds of arrest to you and other co-accused. The BMW Car bearing No. M 312 LYP was taken into possession vide memo Ex. PW 37/H Seizure Memo of Tirpal is Exhibit PW 37/J and that of flesh pieces exihibit PW 37/K. Some blood was lifted from the Car and was kept in a sealed pulanda with the seal of K.C. Details of lifting the blood were recorded in the memo Ex. PW 37/L. All the accused persons were brought to the Police Station and were kept in the lock up and the case property was deposited in the Mal Khana of the Police Station. What have you to say?

Ans. I was not brought to 50 Golf Links however I was arrested and I am not aware of what documents at what time were prepared by the police. After medical examination I was brought by the Police to P.S.

Q.90 Why this case against you?

Ans. It is a false case.

Q.92 Anything else you want to say?

Ans. I was falsely implicated in this case. I am innocent. Since the car belongs to my sister I was made accused in this case. I was not involved in this accident nor I had driven the said car. I was assaulted while I was arrested by the police.

70. Contrary to the said stand, the appellant in cross-examination of PW 37 Const. Jagan Lal gave a suggestion that he was first taken to 50 Golf Links and in answer to question 45 the appellant said that he was not brought to 50 Golf Links. The contention of the counsel for the State was that the appellant is not a truthful witness and if the accused gave false answers under Section 313 of the Code of Criminal Procedure then for that the advantage goes to the prosecution and not to the defence. Another false stand taken by the accused was that they were straightway brought to the police station and were never taken to 50, Golf Links where the offending

vehicle was parked. In fact the said false stand of the defence bridges the missing Links in the prosecution case. Even in answer to question 92 he has stated that he was falsely implicated in this case and he was innocent since the car belonged to his sister & this again goes to show that the appellant was dishonest and only now he has taken the plea that he alone had caused the said accident.

71. Counsel for the State further submitted that only at the stage of appeal before this court admission of accident is made and during the course of entire trial before the trial court, the accident was being denied by the appellant. Counsel for the State further submitted that this admission on the part of the defence has merely been made to claim leniency from this court, therefore, such an admission on the part of the appellant at the stage of appeal will be of no help to him when the prosecution has already proved its case under Section 304 Part-II of the IPC. He also urged that in a similar case, the Division Bench of this court has in **Nehru Jain Vs. State of NCT of Delhi-2005(1) JCC 261** turned down such an argument and convicted the appellant under Section 304 Part-II.

72. Counsel for the State further took an exception to the approach of the ld. Counsel for the appellant attacking the conduct of the Ld. Trial judge instead of confining his attack only on the impugned judgment of conviction and sentence.

73. Counsel further submitted that the defence has tried to base his arguments primarily on foreign judgments, literature and certain

authors' and books without taking care of putting the relevant questions to the witnesses examined by the prosecution. Counsel thus submitted that defence cannot build his case based on such material which material was not placed before the trial court and even no such case was built up by the defence before the trial court. Counsel reiterated his submission so far the authenticity of the blood samples and the report submitted by Dr. Madhulika Sharma PW 16 and the testimony of doctor PW 10 Dr. T. Milo are concerned which remained unchallenged and unrebutted. No suggestion was given to the said witnesses that they had not properly seized the blood samples of the appellant or their report was wrong. The contention of the counsel for the State was that the finding of the Expert witness cannot be ignored or overlooked by the court on the basis of certain opinions and views expressed in some books and commentaries. In support of his argument counsel for the State placed reliance on the following judgments reported in State Vs. Santosh Kumar **2007 Cr.LJ 964 , Ram Bali Vs. State AIR 2004 SC 2329, Nehru Jain Vs. State 2005 (1) JCC 261 and State of U.P. Vs. Man Singh 2003 Volume I AD (Crl.) SC 61.**

74. On the submission of the counsel for the appellant that since the appellant had safely travelled about 16 kilometres without causing any accident from Sainik Farm to Lodi Road, counsel for the State placed reliance on the judgment of the Apex court in AIR **1965 SC 1616 Kurban Hussain Vs. State : 1965 (2) Cr.L.J. 555**. The contention of the counsel for the State is that simply because of

the fact that no untoward incident had taken place prior to the occurrence of the accident cannot lead to this conclusion that the appellant was sober and not in a drunken state.

75. On the next submission of the counsel for the appellant that material questions were not put to the accused under Section 313 Cr.P.C. , the counsel for the State submitted that if no prejudice is caused by not putting certain questions under Section 313 Cr.p.C. then the conviction cannot be set aside on this sole ground. Even in the absence of such questions being not asked by the trial court, the appellate court has ample powers to examine such accused again by way of additional evidence. Reliance was placed by the counsel for the State on the judgments of the Apex Court reported in Rambha Vs. State **2001 (2) AD Crl. SC page 68, Baba Vs. State 2002 (9) SCC 567, State of Punjab Vs. Naib Din 2001 SC page 3955.**

76. Counsel for the State further submitted that all incriminating questions were put to the accused persons and the appellant cannot raise a grievance that some of the related questions or in the form as being suggested by the appellant were not put to the accused by the Trial court.

77. On the submission of the counsel for the appellant that the blood group of the appellant was not ascertained by the prosecution, counsel for the State submitted that the report of the forensic expert reported that blood on the jersy and steering wheel was of group 'B'. The contention of the counsel for the State was that once the

presence of blood of the appellant was ascertained then proof of a Rh factor of the blood i.e. B+ or B– was not required to be mentioned. Counsel for the State placed reliance on the judgments in **2001 SCC (Crl.) 323 (para 20) Gura Singh Vs. State of Rajasthan and 42 (1990) DLT 211 (para 22B) Balwan Vs. State**.

78. On the submission of the counsel for the appellant on the failure of the prosecution to place on record the PCR messages and the contradiction in the PCR messages and the statements of material witnesses, counsel for the State submitted that evidentiary value of PCR messages cannot be equated either with the statements made by the witnesses under Section 161 of the Code of Criminal Procedure or their depositions made before the Court. Counsel for the State further submitted that such PCR messages are precise and cryptic and are sent just for information purposes to pick victims of accident to take them to hospital or for other desired actions. Counsel for the State further submitted that persons who had recorded the messages were not examined to prove the said PCR messages. Counsel thus submitted that evidentiary value of these messages is absolutely 'nil'. In support of his argument counsel for the State placed reliance on the judgments reported in **AIR 2003 SC 4414 (para 11) Damodar Vs. State of Rajasthan & State Vs. Laxman etc. 28 (1985) DLT (page 500**).

79. As regards case diary, counsel for the respondent submitted that the trial court before passing the order of conviction and

sentence had already gone through the case diaries and therefore every conceivable material was available with the trial court before passing the final order. Reliance was placed on the judgment of the Supreme Court in **AIR 1989 SC 144 Mukund Lal Vs. UOI**.

80. On the crucial submission of counsel for the appellant that at best the offence committed by the appellant would attract Section 304-A IPC and not section 304 part –II IPC, counsel for the State submitted that the accident caused is not a case of rash and negligent act on the part of the appellant. Counsel submitted that the sequence of events as disclosed in the FIR and more aptly shown in the site plan, proved on record, clearly goes to show that the appellant was driving the said vehicle in a heavily drunken state and at an excessive speed beyond the prescribed limits and thus he had sufficient knowledge that such an act would endanger lives of people on road. As per CFSL report proved on record he first struck against the persons who were standing on one side of the road and then moved 40-45 steps and then again struck on central verge and after striking on central verge again went ahead and as per the videography proved on record, the court also took into consideration the reversal of car resulting into crushing the bodies already entangled with the car. Counsel for the State also placed reliance on the deposition of Mr. Manohar Lal (PW 24) wherein he deposed that when he had asked Manoj Kumar (PW 2) as to how he had received injuries he was told that one big car of black colour had come at a very fast speed from the side of Lodhi Road in a zigzag

manner and despite their shouting BACHAO BACHAO, the driver of the car did not care and struck against him. The contention of the counsel for the State is that the said statement given by Mr. Manoj Kumar (PW 2) to PW 24 is a relevant fact and is admissible in evidence, under Section 6 of the Evidence Act. In support of his argument counsel for State placed reliance on the following judgments:-

Radha Krishan Vs. State 1987 CAR 349 (SC) ; Rathnashalvan Vs. State 2007 Crl.J. 1451; State Vs. Bhagaben 1987 CAR 209 SC; Nehru Jain Vs. State 2005 (1) JCC 611; 2005 (1) JCC 261.

81. Based on the above submissions counsel for the State submitted that the appellant was rightly convicted under Section 304 Part-II of IPC and sentenced accordingly.

82. With regard to the submission of the counsel for the appellant that the learned Judge unnecessarily got carried away with the feeling that the investigation took place under pressure, counsel for the State submitted that in the given facts and circumstances of the case, the trial court rightly commented upon the various aspects of the case as were noticed by the court and no fault can be found with the same. Counsel for the State placed reliance on the judgment reported in **State (through CBI) Vs. Santosh Kumar Singh 2007 Crl. L.J. 964**.

Rejoinder by the appellant

83. In his rejoinder to the submissions made by the State counsel, Mr. Ram Jethmalani, Senior Advocate sought to distinguish the **Zahira's case** also known as **Gujarat Best Bakery's case** with the case in hand by contending that **Zahira's case** was confronted with an extraordinary situation where the Apex court found the trial to be absolutely farce and mock while in the present case, the situation is totally incomparable. Elaborating his argument further, the counsel contended that in the instant case the prosecution started with fabrication by concealing facts not only from the accused but from the court as well. Manoj Malik(PW 2) who is the star witness of the prosecution was in fact the first person questioned by PW 24 Manohar Lal and PW 34 Sadhi Ram when he was being taken in the PCR Van, called Eagle 11. It was quite natural for the said police officials of PCR Van to have questioned PW 2 Manoj Malik once he was found present at the site of the accident in an injured state. Counsel thus urged that the statement of PW2 Manoj Malik made in the PCR to PW 36 Davinder Singh and PW34 Sadhi Ram unfolds the prosecution case and it was the duty of the prosecution to have supplied the said statement to the accused after making the same as a part of police report under Section 173 Cr.P.C. Counsel further submitted that since the defence was not aware of the said statement of Manoj, therefore, all the material witnesses i.e. PW 24 Manohar Lal, PW 34 and PW 36 were examined in the absence of the said statement and moreover the said three police officers in fact

committed perjury by giving false statements in complete contradiction to what Mr. Manoj had disclosed in his statement in the PCR Van. Counsel thus submitted that the case of the prosecution started with dishonest investigation. It is only when a written application was made by the defence, copy of the said PCR messages were made available to the defence. The trial judge also acted in a most unfair manner by not dealing with the said part of PCR messages dealing with the statement of Manoj and also by not making any observation on the conduct of the prosecution in suppressing the said PCR messages. Counsel for the appellant also referred to a subsequent decision of the Apex Court reported in **2005 (1) SCC 115, Satyajit Banerjee Vs. State of Bengal,** wherein after referring to Zahira's case the Apex Court held that Zahira's case had an extraordinary situation wherein extraordinary remedy was suggested by the court by holding a fresh trial. The unfair trial as per the counsel for the appellant in the present case is peculiar on its own facts and it cannot be assumed that the investigation in the present case was conducted in a clean and honest manner.

84. Reiterating his submission with regard to the denial of speedy trial to the appellant accused, the counsel pointed that seven Judges Bench in **Zahira Habibulla's case** was not constituted to examine the correctness of the Constitution Bench's Decision in **Antulay's case** and in fact validity and correctness of the findings given in Antulay' case were upheld by the Seven Judges bench. Counsel thus

submitted that it is the solemn duty of every court to effectuate & ensure expeditious and speedy trial as envisaged under Sections 309 and 258 of the Code of Criminal Procedure and long delay of nine years certainly has jeopardized the said invaluable right of speedy trial of the appellant who remained in custody for more than 20 months. The best part of the life of the appellant who was just a young man of 20 years of age (D.O.B. 17.1.1978) has gone waste. Besides ruining his love life, this was the only period when he was to undergo proper education to look for better employment avenues. Counsel for the appellant contended that Section 258 of the Code of Criminal Procedure is a salutary provision which applies to summons case, in which the punishment is not more than two years, and for an offence which is punishable for a period of two years the trial for the same cannot go on for a period of ten years. What more can be a reflection on the prosecution when in such a case of accident they have filed three charge sheets. In such a case the trial court ought to have taken recourse to Section 258 of the Code of Criminal Procedure to put an end to such protracted and unfair trial. Another example of unfair trial on the part of the trial court is that it had referred the judgment of the High Court probing the conduct of the defence counsel and the prosecutor without calling for any explanation from the accused. The said judgment of the High Court was absolutely extraneous and could not have influenced the mind of the court to draw a hostile inference against the appellant.

85. Countering the argument of the State counsel on videography, counsel for the appellant submitted that Video is a secondary evidence of the scene of occurrence. By viewing the video the court in fact examined the scene of the offence as was shown by the prosecution. The law in this regard is well settled that such an inspection by the court can only take place under Section 310 of the Code of Criminal Procedure. The right to such an inspection or for local investigation is given to the court to better and properly appreciate the evidence placed before the court that too after due notice to both the parties. The legislature was conscious of such extraordinary right being given to the Magistrate for local inspection which could influence the judge to form a particular perception and therefore such a local inspection was envisaged only after due notice to both the parties so that the judge's perception could be formed with the proper assistance of both the parties. He urged that in the present case the trial judge viewed the videography and formed his own opinion without the defence knowing in what context and on what basis such an opinion was formed by the judge. The judge in fact has made himself as a witness and such a course adopted by the trial judge vitiates the trial proceedings. In support of his argument counsel for the appellant placed reliance on the following judgments:-

Lalu Vs. State AIR 1960 Calcutta 776 , Manik Chand Vs. Bhubneshwar Prasad AIR 1961 Patna 278, Keisam Kumar

Singh Vs. State of Manipur 1985 (3) SCC 676 , Satyajit Banerjee Vs. State of W.B. 2005 (1) SCC 115.

86. Counsel for the appellant further submitted that the skid marks arise only when the brakes are applied that too by a speeding car. If the car is stationary and if the same is reversed it would produce reversal marks. If such reversal marks can be discovered, then may be some scientifically expert person based on some scientific investigation could trace out the same but not the judge who has no such expertise in the field. Counsel thus submitted that this whole discovery by the Ld. Trial court of the reversal marks is an act of his poor imagination and therefore, the findings of the trial court after viewing the said video by correlating the same with the evidence of the said court witness Mr. Kulkarni are absolutely perverse and illegal vitiating the entire proceedings.

87. Not disputing the legal proposition that even the evidence of a sole witness can lead to the conviction of accused, the counsel contended that an evidence of a sole witness has to be above board, totally honest and fully supported by other circumstances. But as far as the facts of the present case are concerned, the presence of Kulkarni at the scene of the offence is not only doubtful but is totally incapable of being believed even after taking into consideration the other circumstances of the case as set up by the prosecution. If the presence of Kulkarni is accepted then the presence of PW1 Hari Shankar would become doubtful. The evidence of Hari Shankar

who was on duty at petrol pump cannot be doubted at least on one point that he was present at the petrol pump on the cold wintery morning and his attention was drawn only when he had heard the noise. This witness alone had informed his employer about the accident who in turn had contacted the police. Contrary to his deposition, Mr. Kulkarni said that he went to the petrol pump where he found everybody was sleeping. He even could not make any telephone call from the petrol pump and evidence of such a witness whose presence gets destroyed with the evidence of Hari Shankar was believed by the court to accept the theory of reversal of the offending vehicle. This witness was dropped by the prosecution in the year 1999 but was examined as a court witness in the year 2007. Counsel thus submitted that the evidence of Mr. Kulkarni was absolutely untrustworthy and unreliable.

88. Dealing with the argument of the State prosecutor that why the experts were not cross-examined so as to challenge their findings on the presence of particular quantity of alcohol in the blood of the appellant, counsel for the appellant submitted that the appellant in fact does not assail the said findings so far the presence of 0.115% of alcohol shown in the blood sample of the appellant is concerned. The contention of the counsel for the appellant was that the said presence of Alcohol in the blood of the appellant does not impair one's ability to drive the vehicle, rather the presence of such a quantity of Alcohol is consistent to maintain sobriety. In a criminal case, it was for the prosecution to have proved that the appellant

was not sober but was heavily drunk but the prosecution miserably failed to discharge such an onus.

89. Negativing the contention of the State prosecutor that one cannot place reliance on the medical jurisprudence or other text books to prove any point, counsel for the appellant took great exception to such an argument as the help of text books can always be resorted to for better appreciation of the points in issue. In support of his argument counsel for the appellant placed reliance on the judgment of the Apex Court in **Sharad Birdichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116** (paras 40, 42, 44 and page 140) and **Tumahole Bereng Vs. The King, AIR 1949 Privy Counsel page 172**.

90. Even the court witness Kulkarni in his deposition clearly stated that the speed was fast but not excessive and based on no material the ld. Trial judge presumed the speed of the offending vehicle excessive.

91. Countering the argument of the counsel for the State with regard to the counsel submission that the accused can always use his disclosure statement or the confession made therein to draw support in his favour but the same cannot be used by the prosecution to use the same against the accused as per the mandate of Section 25 of the Indian Evidence Act.

92. Drawing further distinction between Section 302, 304-Part-1 and Part-II and Section 304-A of Indian Penal Code, the counsel contended that even behind any intentional act, the determining factor would be the desire of the accused behind such an intentional act to ascertain whether his particular act falls under Section 302 IPC , 304 or 304-A of Indian Penal Code. While distinguishing the facts of the case in **Shankar Narayan Bhadolkar (Supra),** judgment relied upon by counsel for the State, Mr. Jethmalani, Senior Advocate urged that if one intentionally shoots a person who refuses to stay at night in his home and as a result of the injury the person dies, the question would arise whether the accused in such a case had the necessary desire to kill the visitor so as to book him under Section 302 IPC or whether the accused never intended to kill him but his purpose was to force his stay at night, then the offence applicable would be Section 304-A and not Section 302 or 304 IPC. Counsel thus submitted that in the case in hand the appellant did not drive his vehicle intentionally into a group of persons to whom he had seen and therefore the element of accompanying desire to cause death is absolutely missing in the facts of the present case and the offence necessarily would be Section 304-A instead of Section 304 Part-II of IPC.

Discussion

93. I have heard learned Senior counsel Mr. Ram Jethmalani, led by battery of lawyers representing the appellant Mr. Sanjeev Nanda

in criminal appeal No. 807/2008; and Mr. Pawan Sharma, Additional Public Prosecutor for the State.

94. Very extensive arguments were addressed by Mr. Ram Jethmalani, Senior counsel appearing for the appellant so as to assail and shatter the reasoning and conclusions arrived at by the learned Trial Court in passing the order of conviction and sentence against the appellants, and equally by Mr. Pawan Sharma, APP for the State.

95. As already noticed, to narrow down the controversy Mr. Ram Jethmalani very fairly conceded at the threshold of the arguments that he would proceed in the matter by admitting the factum of the accident and the appellant being on the driver seat on the fateful morning of 10th January, 1999, when the horrifying incident had taken place. This admission on the part of the counsel for the appellant would mean that the appellant gives up his right to challenge the findings of the Lower Court so far as the factum of accident by the appellant while driving BMW car bearing registration No. M 312LYP resulting in death of six persons and injury to one person on the morning of 10th January, 1999 near Car Care Centre petrol pump at Lodhi Road is concerned, despite the fact that several contentions have been raised by the appellant denying his involvement in the accident in the grounds of appeal. Counsel for the State raised a dispute that this admission amounts to raising a new plea before the Appellate Court. In this regard this court is of the view that since from the material on record the trial court correctly

found the involvement of appellant in causing the said ghastly accident while driving BMW Car bearing registration No. M 312 LYP on the tragic morning of 10.1.99, thus the said admission is immaterial. Be that as it may, this admission on the part of the accused cannot be construed as taking or introducing a new plea as the appellant after the trial of the case can always admit his guilt and the prosecution at least cannot raise a plea to challenge such an admission on the part of the accused. This may not be true in a case where the accused at the appellate stage introduces a new plea to evade conviction. The judgment of **Nehru Jain (Supra)** is not of any support to the counsel as it relates to some other issues.

1. Unfair trial

(a)Speedy trial

96. This brings me to deal with the first submission of the counsel for the appellant claiming denial of speedy and fair trial to the appellant as enshrined under Article 21 of the Constitution of India. In the entire grounds of appeal nowhere the appellant has raised any grievance either with regard to the alleged denial of fair trial or the speedy trial. However, the issue being purely legal deserves proper consideration.

97. First, I would like to deal with the contentions raised by the counsel for the appellant with regard to the denial of speedy trial. Contention of the counsel for the appellant was that the right to speedy trial is granted to every accused under Article 21 of the

Constitution of India and Section 309 of the Code of Criminal Procedure is partial embodiment of the same. As per the counsel for the appellant the prosecution has taken more than 8 years time in completing the trial without their being any lapse on the part of the appellant accused. The initial chargesheet in the case was filed on 25th March, 1999 while second and third chargesheets were filed on 3rd September, 2006 and 18th September, 2007. The first prosecution witness was examined on 18th August, 1999 and last prosecution witness was examined on 28.8.2003. It took nearly 19 months for examination of the appellant starting on 2.1.2004 and ending on 5th October, 2005. The case for the defence evidence was listed on 24th October, 2005, but later a supplementary chargesheet was filed on 3rd September, 2006. The first defence witness then came to be examined on 7th October, 2007. After conducting fresh examination of the appellant under Section 313 Code of Criminal Procedure on 19.11.2007 and after the start of defence evidence again, the appellant was again examined to record his statement under Section 313 of the Code of Criminal Procedure. Final arguments in the case started on 1.7.2008 and the judgment was delivered on 2nd September, 2008. Contention of the counsel for the appellant was that the entire career of the appellant got ruined educationally, professionally as well as on his matrimonial front. The appellant lost his precious adolescent life either by remaining behind bar or facing the ordeal of trial. Strong reliance was placed by the counsel for the appellant on the Constitutional Bench decision of the Apex Court in

A.R. Antuley's case (Supra) and **Pankaj Kumar's case (supra)** On the other hand Mr. Pawan Sharma, APP for the State gave detailed account of day to day hearing before the Trial Court and submitted that no delay has been caused by the prosecution and the adjournments, if any, had taken place before the Trial Court were for multiple reasons beyond the control of the prosecution for which the appellant cannot claim denial of the speedy trial.

98. In support of his arguments Public Prosecutor of the State placed reliance on the judgments of the Apex Court reported in **2002 III AD (S.C.) 634 P. Ramachandra Rao Vs. State of Karnataka**. The contention of the State Prosecutor was that the guidelines laid down by the Apex Court in **A.R. Antulay's case (supra)** are not exhaustive but only illustrative and are not to be applied like a strait jacket formula. Counsel for the State also placed reliance on the other judgments of the Apex Court reported in **2002 (3) AD Crl. SC 770 State Vs. Dr. Narayan Waman; 2008 (3) JCC 2115 S.P. Vs. B. Sriniwas and AIR 2008 SC 1943 Himanshu Singh Sabharwal Vs. State of M.P.** Counsel also submitted that it is not the accused alone who is entitled to speedy and fair trial but equally the victims also expect the trial to be fair and expeditious.

99. The framers of our Constitution made no provision to recognize the right to speedy trial as one of the fundamental rights under the Constitution of India unlike the VI amendment to the U.S. Constitution which expressly recognizes this right. The VI

amendment to the U.S. Constitution declares inter alia that "in all criminal prosecutions the accused shall enjoy the right to speedy trial". Article 21 of the Constitution of India received a wider interpretation in **Mrs. Maneka Gandhi** v. **Union of India and Anr. AIR 1978 SC 597** and its horizons were broadened further in **Hussainara Khatoon and Ors.** v. **Home Secretary, State of Bihar 1978 SC 1360**. Delivering the judgment in the said case Hon'ble Mr. Justice Bhagwati observed as under:-

> "We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi v. Union of India9. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be 'reasonable, fair and just'. If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right of life and liberty enshrined in Article 21."

100. Without there being any dissent on the fundamentals laid down in **Hussainara Khatoon's case (supra)** the scope of Article 21 again came up for consideration before the Constitutional Bench in **Abdul Rehman Antulay Vs. R.S. Nayak and Anr., AIR 1992 SC 1701** where the question was raised that no such right of speedy trial flows from Article 21 of the Constitution of India and the right if at all there, is an amorphous one, while on the other hand

supporters of the said right went a step forward to claim laying down of upper time limit beyond which criminal trial should be not allowed to proceed. Needless to state that Mr. Ram Jethmalani, Senior Advocate also represented one of the appellants in the criminal appeals argued before the Constitutional Bench, representing the view of those who did not recognize the right to speedy trial flowing from Article 21 of the Constitution of India once the same having not been specifically recognized unlike in the U.S. Constitution. After referring to the number of decisions of the Apex Court and the American Law on the subject, the Apex Court laid down the following 11 guidelines but with a word of caution that guidelines are not exhaustive as it was difficult to foresee all situations nor was it possible to lay down any hard and fast rules. The guidelines framed by the Apex Court in the said case are reproduced as under:-

> "86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:
>
> (1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.
>
> (2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.
>
> (3) The concerns underlying the right to speedy trial from the point of view of the accused are:
>
> (a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on — what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker22 "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in U.S. v. Ewell39 in the following words:

'... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the

relevance of demand rule has been substantially watered down in Barker22 and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors — 'balancing test' or 'balancing process' — and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

101. Mr. Ram Jethmalani, Senior Advocate for the appellant placed strong reliance on the aforesaid guidelines to claim acquittal of the accused, who has been denied speedy trial by the Trial Court on account of unexplained and unreasonable delay of about 9 years in concluding the trial ruining the bright career of the appellant on educational, professional and matrimonial front. On the other hand Mr. Pawan Sharma, APP for the State placed reliance on the judgment of the Apex Court in **P. Ramachandra Rao's case (supra)** to buttress his argument that the guidelines laid down in **A.R. Antulay's** case are not exhaustive but only illustrative and they

cannot be applied like a strait jacket formula. Specific reference was made to para 32 of the said judgment, which is referred as under:-

> "For all the foregoing reasons, we are of the opinion that in Common Cause case (I)3 [as modified in Common Cause (II)4] and Raj Deo Sharma (I)1 and (II)2 the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:
>
> (1) The dictum in A.R. Antulay case5 is correct and still holds the field.
>
> (2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case5 adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.
>
> (3) The guidelines laid down in A.R. Antulay case5 are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.
>
> (4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I)3, Raj Deo Sharma (I)1 and Raj Deo Sharma (II)2 could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I)3, Raj Deo Sharma case (I)1 and (II)2. At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case5 and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.
>
> (5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.
>
> (6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary — quantitatively and qualitatively — by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act.
>
> We answer the questions posed in the orders of reference dated 19-9-2000 and 26-4-2001 in the abovesaid terms."

102. On the same lines the Apex Court in **Dr. Narayan Waman's case (supra)** observed as under:-

> "9. While considering the question of delay the court has a duty to see whether the prolongation was on account of any delaying tactics adopted by the accused and other relevant aspects which contributed to the delay. Number of witnesses examined, volume of documents likely to be exhibited, nature and complexity of the offence which is under investigation or adjudication are some of the relevant factors. There can be no empirical formula of universal application in such matters. Each case has to be judged in its own background and special features, if any. No generalization is possible and should be done. It has also to be borne in mind that the criminal courts exercise available powers such as those under Sections 309, 311 and 258 CrPC to effectuate right to speedy trial."

103. Reference is also made to paras 7 and 8 of **B. Sriniwas's case (supra)**, which are reproduced as under:-

> "7. There is no general and wide proposition of law formulated that whenever there is delay on the part of the investigating agency in completing the investigation, such a delay can be a ground for quashing the FIR. It would be difficult to formulate inflexible guidelines or rigid principles in determining as to whether the accused has been deprived of fair trial on account of delay or protracted investigation; it would depend on various factors including whether such a delay was reasonably long or caused deliberately or intentionally to hamper the defence of the accused or whether the delay was inevitable in the nature of things or whether it was due to dilatory tactics adopted by the accused. It would depend upon certain peculiar facts and circumstances of each case i.e. the volume of evidence collected by the investigating agency, the nature and gravity of the offence for which the accused has been charge-sheeted in a given case. The nexus between whole and some of the above factors is of considerable relevance. Therefore, whether the accused has been deprived of fair trial on account of protracted investigation has to come on facts. He has also to establish that he had no role in the delay. Every delay does not necessarily occur because of the accused.
>
> 8. A seven-Judge Bench of this Court in P. Ramachandra Rao v. State of Karnataka2 affirmed the view taken in Abdul Rehman Antulay v. R.S. Nayak3 and clarified confusion created by certain observations in Common Cause, A Registered Society v. Union of India4, Common Cause, A Registered Society v. Union of India5, Raj Deo Sharma v. State of Bihar6 and Raj Deo Sharma (II) v. State of Bihar7. It was observed that the decision in A.R. Antulay case3 still holds the field and the guidelines laid down in the said case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the factual situations of each case. It is difficult to foresee all situations and no generalisation can be made. It has also been held that it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. Whenever there is any allegation of violation of right to speedy trial the court has to perform by balancing the act by taking into consideration all attending circumstances and to decide whether the right to speedy trial

> has been denied in a given case. As noted above, one month after the order relating to investigation and lodging of FIR, a petition under Section 482 of the Code was filed before the High Court."

104. In another recent case reported in **Manu/SC/7818/2008 Pankaj Kumar Vs State of Maharashtra and Ors.** the Apex Court has referred to all the aforesaid judgments and came to the following conclusion:-

> "17. It is, therefore, well settled that the right to speedy trial in all criminal persecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal persecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for conclusion of trial."

105. Truth is the cherished principle and is the guiding star of the Indian criminal justice system. For justice to be done truth must prevail. Truth is the soul of justice. The sole idea of criminal justice system is to see that justice is done. Justice will be said to be done when no innocent person is punished and the guilty person is not allowed to go scot free.

106. For dispensation of criminal justice, India follows the accusatorial or adversarial system of common law. In the accusatorial or adversarial system the accused is presumed to be

innocent; prosecution and defence each put their case; judge acts as an impartial umpire and while acting as a neutral umpire sees whether the prosecution has been able to prove its case beyond reasonable doubt or not.

107. In India, the entire burden to prove the accused guilty so that he does not go unpunished is upon the prosecution. While seeing that the rights of the accused are not infringed it is equally essential to see that the victims and the family of the victims of the crime are not ignored as the very purpose behind the concept of duties of the State and its organs are that the law and order is maintained in the state and the grievance of the victims should not go without redress.

108. In this regard, it would be worthwhile to refer to para 13 of the judgment of the Hon'ble Apex Court entitled State of **Maharashtra Vs. Dr. Praful B. Desai -- (2003) 4 SCC 601** :-

> 13. One needs to set out the approach which a court must adopt in deciding such questions. It must be remembered that the first duty of the court is to do justice. As has been held by this Court in the case of Nageshwar Shri Krishna Ghobe v. State of Maharashtra 5 courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course the rights of the accused have to be kept in mind and safeguarded, but they should not be overemphasized to the extent of forgetting that the victims also have rights.

109. The golden right of speedy trial enshrined in Article 21 of the Constitution of India stands duly recognized in Section 309 of the Code of Criminal Procedure and as per counsel for the appellant the said provision is in fact a partial embodiment of the mandate of

Article 21 of the Constitution of India. Section 309 of the Code of Criminal Procedure is reproduced as under:-

> **"Section 309 CrPC**
>
> "309. Power to postpone or adjourn proceedings.— (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.
>
> (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:
>
> Provided that no magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:
>
> Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:
>
> Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

110. With the aforesaid legal position there does not remain even an iota of doubt that the right to speedy trial in all criminal proceedings is an inalienable right not only flowing from Article 21 of the Constitution of India, but is a well recognized right under Section 309 of the Code of Criminal Procedure. It is both in the interest of accused as well of the society that a criminal case is concluded as expeditiously as feasible. Societal interest lies in punishing the guilty and exoneration of the innocent, but one cannot shut his eyes from the cumbersome procedure involved before the final culmination of the trial proceedings. 'Justice delayed is justice denied' is a popular adage. But not in every case delay in trial results in denial of justice

and it is only when there is an inordinate delay which is proved to be oppressive and unwarranted. It is the right of both, the accused and the victims that the trial should culminate as expeditiously as possible. But there are certain factors which we cannot ignore while considering whether the delay in trial was oppressive and unjustifiable.

111. The principal reasons which can contribute delay in trial have been dealt by the Supreme Court in **P. Ramachandra Rao' case (supra)** in paras 22 and 23 of the judgment which are referred as under:-

> "22. A perception of the cause for delay at the trial and in conclusion of criminal proceedings is necessary so as to appreciate whether setting up bars of limitation entailing termination of trial or proceedings can be justified. The root cause for delay in dispensation of justice in our country is poor judge-population ratio. The Law Commission of India in its 120th Report on Manpower Planning in Judiciary (July 1987), based on its survey, regretted that in spite of Article 39-A being added as a major directive principle in the Constitution by the Forty-second Amendment (1976), obliging the State to secure such operation of legal system as promotes justice and to ensure that opportunities for securing justice are not denied to any citizen, several reorganisation proposals in the field of administration of justice in India have been basically patchwork, ad hoc and unsystematic solutions to the problem. The judge-population ratio in India (based on the 1971 census) was only 10.5 Judges per million population while such ratio was 41.6 in Australia, 50.9 in England, 75.2 in Canada and 107 in United States. The Law Commission suggested that India required 107 judges per million of the Indian population; however, to begin with, the judge strength needed to be raised to fivefold i.e. 50 judges per million population in a period of five years but in any case, not going beyond ten years. Touch of sad sarcasm is difficult to hide when the Law Commission observed (in its 120th Report, ibid.) that adequate reorganisation of the Indian judiciary is at the one and at the same time everybody's concern and, therefore, nobody's concern. There are other factors contributing to the delay at the trial. In A.R. Antulay case5 vide para 83, the Constitution Bench has noted that in spite of having proposed to go on with the trial of a case, five days a week and week after week, it may not be possible to conclude the trial for reasons viz. (1) non-availability of the counsel, (2) non-availability of the accused, (3) interlocutory proceedings, and (4) other systemic delays. In addition, the Court noted that in certain cases there may be a large number of witnesses and in some offences, by their very nature, the evidence may be lengthy. In Kartar Singh v. State of Punjab8 another Constitution Bench opined that the delay is dependent on the circumstances of each case because reasons for delay will vary, such as (i) delay in investigation on account of the widespread ramifications of the crime and its designed network either nationally or internationally,

(ii) the deliberate absence of witness or witnesses, (iii) crowded dockets on the file of the court etc. In Raj Deo Sharma (II)2 in the dissenting opinion of M.B. Shah, J., the reasons for delay have been summarized as, (1) dilatory proceedings; (2) absence of effective steps towards radical simplification and streamlining of criminal procedure; (3) multitier appeals/revision applications and diversion to disposal of interlocutory matters; (4) heavy dockets, mounting arrears, delayed service of process; and (5) judiciary, starved by executive by neglect of basic necessities and amenities, enabling smooth functioning.

23. Several cases coming to our notice while hearing appeals, petitions and miscellaneous petitions (such as for bail and quashing of proceedings) reveal, apart from inadequate judge strength, other factors contributing to the delay at the trial. Generally speaking, these are: (i) absence of, or delay in appointment of, Public Prosecutors proportionate with the number of courts/cases; (ii) absence of or belated service of summons and warrants on the accused/witnesses; (iii) non-production of undertrial prisoners in the court; (iv) presiding Judges proceeding on leave, though the cases are fixed for trial; (v) strikes by members of the Bar; and (vi) counsel engaged by the accused suddenly declining to appear or seeking an adjournment for personal reasons or personal inconvenience. It is common knowledge that appointments of Public Prosecutors are politicized. By convention, Government Advocates and Public Prosecutors were appointed by the executive on the recommendation of or in consultation with the head of the judicial administration at the relevant level but gradually the executive has started bypassing the merit-based recommendations of, or process of consultation with, District and Sessions Judges. For non-service of summons/orders and non-production of undertrial prisoners, the usual reasons assigned are shortage of police personnel and police people being busy in VIP duties or law and order duties. These can hardly be valid reasons for not making the requisite police personnel available for assisting the courts in expediting the trial. The members of the Bar shall also have to realize and remind themselves of their professional obligation — legal and ethical, that having accepted a brief for an accused, they have no justification to decline or avoid appearing at the trial when the case is taken up for hearing by the court. All these factors demonstrate that the goal of speedy justice can be achieved by a combined and result-oriented collective thinking and action on the part of the legislature, the judiciary, the executive and representative bodies of members of the Bar."

112. Based on the above legal principles, let me examine the facts of the present case to see whether the prolongation in the trial was on account of dilatory tactics adopted by the prosecution for any extraneous reasons or the delay took place due to multiple factors involved in the gradual progress of the trial. Mr. Ram Jethmalani has put the blame on the prosecution on account of the fact that supplementary chargesheets were filed by the prosecution after

about a lapse of 7 years i.e. 3rd September, 2006 and 18th September, 2007, which led to the examination of the accused under Section 313 Cr.P.C. on three different occasions. Counsel for the appellant also raised grievance that various adjournments were taken by the prosecution, which led to causing unnecessary delay firstly in completing the prosecution evidence and then the defence evidence which could not take place for a period of 2 ½ years due to the filing of supplementary chargesheet by the prosecution. No doubt, under Section 173 of the Code of Criminal Procedure the police is expected to complete the investigation with all promptness and without any unnecessary delay and in the present case there has been unreasonable delay so far the filing of the chargesheets on 3rd September, 2006 and 18th September, 2007 are concerned. However, at the same time both the chargesheets were filed because of the necessity of carrying out further scientific investigation first for the collection of the blood samples of the appellant/accused and then for carrying out the comparison of finger prints of the accused persons with the result of the comparison of the chance prints of the accused persons, who were occupants of the offending vehicle. Necessary applications were moved by the prosecution before the Trial Court so as to take blood sample of the appellant and for taking finger prints of the accused persons facing the trial and needless to mention that necessary directions were given by the Trial Court keeping in view the mandate of Section 173 (8) of the Code of Criminal Procedure, which permits the police to carry out further investigation even after

filing a report under Section 173 (2) of the Code of Criminal Procedure. The learned Trial Court in its order dated 19th July, 2006 clearly observed that carrying out any scientific investigation does not cause prejudice to any party. The Court also observed that the investigating agency does not require any direction from the Court for taking blood sample of the accused as the investigating agency was fully empowered to do the same under Section 173(8) of the Code of Criminal Procedure even during the pendency of the trial. The filing of the chargesheet was opposed by the counsel representing the appellant and then also the Court observed that there is no substance in the arguments advanced by the learned counsel for the accused as already the Court observed that Investigating Officer is at liberty to carry out further investigation of the case under Section 173(8) of the Code of Criminal Procedure. It is thus evident that the two supplementary chargesheets were filed by the police under Section 173(8) of the Code of Criminal Procedure and the senior counsel for the appellant failed to satisfy this Court as to how the filing of the said two supplementary chargesheets has prejudiced the case of the appellant by just recording subsequent statements of the appellant under Section 313 of the Code of Criminal Procedure. When the documents were filed along with the supplementary chargesheet dated 3.9.2006 the defence counsel sought time to move an application to examine more witnesses and also sought time to examine the summoned witnesses as was borne out of the order dated 4.9.2006, which is reproduced as under:-

> "In view of admission of the documents, the prosecution does not want to examine any witness concerning above stated documents. Now this court wants to put a few questions U/S 313 Cr.P.C. in view of the further evidence. However, Ld defence counsel submits that since some new material has come on record, he wants to move an application U/S 311 Cr.P.C. to further summon a few witnesses and submits that further questions U/S 313 Cr.P.C. be recorded after decision of the application or examination of the witnesses, if any, summoned by this court U/S 311 CrPC.
>
> It is submitted by Ld defence counsel that defence witness namely Sumitra Nanda and Karan Singh are present, however, he would like to examine him after further recording of statement U/S 313 CrPC. To come up for further proceedings on 16.10.06."

113. In the intervening proceedings the Court had summoned Sunil Kulkarni in exercise of its powers under Section 311 Cr.P.C. and statement of the appellant under Section 313 was recorded by the Court on 19.11.2007. The aforesaid delay in filing the supplementary chargesheet and the consequent examination of the appellant/accused under Section 313 Cr.P.C. in my view has not caused any prejudice to the appellant and has not caused such delay so as to make him entitled to claim acquittal on this ground. In **Antulay's case (supra)** as well as the other judgments cited above, the Apex Court has clearly held that every case has to be examined on its own facts and the Court has to perform balancing act after taking into consideration all the attendant circumstances. The Apex Court has also held that each and every delay does not necessarily prejudice the accused and many delays can be attributed to the delays in the system, which occur due to the multiple factors, due to filing of various applications by the parties, challenge made to the various orders before the Court, heavy dockets of the Court, Presiding Officer on leave, advocates of either side not available due

to their pre-occupation in other Courts or for their own personal reasons and many other unforeseen situations. The detailed account placed on record by the State counsel of day to day hearing before the Trial Court does exemplify that on many dates the Court file was not received by the Trial Court due to pendency of the proceedings before the High Court, on many dates one or the other application of the prosecution or the accused was pending consideration, on many dates even the Presiding Officer was on leave. However, the perusal of the Court proceedings clearly reveal that on most of the dates effective proceeding took place and, therefore, the instant case cannot be considered to be a case of denial of speedy trial to the appellant accused. This contention of the counsel for the appellant is thus not sustainable and is rejected.

114. In any event of the matter, the appellant himself must share the burden of causing delay in the matter as with a view to hoodwink the prosecution and to escape from the clutches of law, he denied the factum of accident. It is only at the stage of final arguments before the trial court and in appeal, the appellant turned honest to accept occurrence of the said horrifying accident while driving BMW Car bearing registration No. M-312-LYP. Certainly, a lot of time could have been saved had the accused been honest from day one and admitted his guilt.

(b) Judicial Unfairness

115. Let me now examine the second limb of argument of the counsel for the appellant claiming denial of fair trial to the accused/appellant. Counsel for the appellant very strenuously urged that due to the judicial unfairness on the part of the trial judge and the prosecution, the entire trial held before the trial court stood vitiated. The arguments raised by the counsel for the appellant in this regard can be categorized in the following terms:-

(a) Unwarranted observations made by the court in the final judgment which reflects personal prejudice and bias of the judge over-influenced by the conduct of the investigation, conduct of the defence counsel and of the public prosecutor, demeanor of witnesses and for all these ills placed blame on the appellant on account of his belonging to a rich and influential family.

(b) The audience given by the Learned Judge to Mr. Sunil Kulkarni, the court witness in his chamber on 11.7.1999 without making disclosure to either of the parties till during the course of final arguments when passing reference of the said meeting was made by the judge during the course of final arguments.

(c) Reference made to the High Court Judgment in 'Sting Operation case' without affording any opportunity to the accused.

(d) Non-production and non-disclosure of the PCR messages , more particularly in reference to the statement of PW 2 Manoj Malik

victim of the accident recorded by the police officials of the PCR Van and flashed to the police control room.

116. In support of his arguments with regard to the unfair trial, counsel for the appellant placed reliance on Section 20 of the Jamaica (Constitutional) Order as referred in **Herbert Bell Vs. Director of Public Prosecutions & Anrs. (1985) A.C. 937** and decision in **Datar Singh Vs. State of Punjab (Supra), Sharad Birdhichand Sarda Vs. State of Maharashtra (Supra) and Chandran @ Surendran and Anr. Vs. State of Kerala (Supra)**. Counsel for the appellant also placed reliance on Rule 16 of Bar Council of India Rules & Guideline A- 252 of the Attorney General Guidelines.

117. Mr. Pawan Sharma, Addl. P.P. for the State, on the other hand, vehemently opposed the said contention raised by the counsel for the appellant and submitted that the approach of the trial court was absolutely fair and judicious. Fully supporting the trial judge for the observations made by him in the final judgment, counsel for the State submitted that presiding officer cannot remain a mute spectator to various happenings taking place surrounding the case in hand and is required to take active interest to elicit all relevant material to find out the truth and to administer justice with all fairness and impartiality. Counsel for the State placed reliance on the judgment of the Apex Court reported in **AIR 2004 SC 3114 Zahira Habibullah H. Shaikh Vs. State of Gujarat.**

118. Free and fair trial is sine-qua-non of Article 21 of the Constitution of India. If the criminal trial is not free and fair and not free from the bias, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest and fair defence counsel and equally honest and fair public prosecutor. Fair trial necessarily includes fair and proper opportunity to the prosecutor to prove guilt of the accused and opportunity to the accused to prove his innocence.

119. Before dealing with the rational of the said court observations, it would be appropriate to reproduce the observations of the trial court as objected to by the counsel for the appellant which are as under:-

> "(Page 45) "This trial poses greater questions as to what is the meaning of fair trial and how should the court proceed when the witnesses are being won over and the trial is being hijacked by the high and mighty. The trial saw many dramatic twists and turns and it is an eloquent witnesses to a common state of affairs in the criminal trials. Of course all the trials do not get the publicity as the present one. This is case where it is needed that the entire criminal justice system should sit up to find effective ways and means to tackle a situation whether wealthy and highly paced persons are able to thwart the entire course of justice and thereafter at the end, claim benefit of doubt as a matter of right. This is a trial in which entire criminal justice system crumbled, though a hope for justice still remained because of the watchful eyes of vigilant fourth estate."
>
> (ii) Page72- "I make it clear that entire evidence in this case has to be appreciated in the backdrop of the circumstances that accused persons have indulged in winning over the witnesses to such an extent that even the victim of this offence is testifying that offending vehicle was a truck.
>
> (iii) Page 116-117- I have already stated that this particular case is one of those cases which highlights the degradation which has crept into the criminal justice system. Conduct of the investigating agency is also under shadow of doubt. A

careful perusal of the entire Investigation and the case diaries as well as the judicial record, it would become abundantly clear that although initially the police acted with a great responsiveness which is expected from a law enforcing agency. But very soon a great deal of reluctance on the part of the investigating officer starts appearing in the case. Though from outward, it was a show of strength and determination but the silent termites had started eating the wood from inside.

"(iv) Page 122-123- But after perusal of the entire judicial file and police file, I am of the considered opinion that this is simply not a case of hobnobbing between defence counsel and prosecution but also at some stage in the back ground, the Investigating Officer has been influenced who being, deliberately indulged in such perfunctory investigation that it causes serious prejudice to the prosecution. In background of these circumstances, the evidence on record has to be assessed. The principle of weighing the evidence on golden scales cannot be applied here because this trial is an example where the entire criminal justice and entire trial has been hijacked by the rich and influential accused persons. Once this scenario is emerging, taking technical view of the facts and circumstances is bound to lead to miscarriage of justice ."

"(v) Page 123-124. However this was high profile case and the record shows that the same was being monitored by the top police officers. Therefore, such level of inefficiency is not incidental, rather to my mind, the same appears to be deliberate. In such state of affair, the court has only one option i.e. to abandon the narrow and winding lane of technicalities and travel on the royal road of justice."

120. The role of a judge in dispensation of justice after ascertaining the true facts no doubt is very difficult one. In the pious process of unraveling the truth so as to achieve the ultimate goal of dispensing justice between the parties the judge cannot keep himself unconcerned and oblivious to various happenings taking place during the progress of trial of any case. No doubt he has to remain very vigilant, cautious, fair and impartial, and not to give even slightest of impression that he is biased or prejudiced either due to his own personal convictions or views in favour of one or the other party. This, however, would not mean that judge will simply shut his own eyes and be a mute spectator, acting like a robot or a recording machine to just deliver what stands feeded by the parties. Although, the courts are required to remain totally unstirred, unaffected and

unmoved amidst storms and tribulations of various corrupt and flagitious activities happening around them involving of the police, prosecutor or the defence counsel or even the whirlwind publicity of a high profile case which affects public opinion and motivates media trial but it cannot be expected of them not to deprecate or condemn such misdeeds of those culprits hell bent to pollute the stream of judicial process. A man after becoming a Judge, in any case, does not become a passionless thinking machine not to react to certain situations. The recent judgment of the Apex Court in **Zahira's case (Supra**) although was given in its own peculiar facts but is an answer to the aforesaid objections raised by the counsel for the appellant. It would be worthwhile to reproduce para No.38 of the same as under:-

> 38. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

121. The first and the primary duty of a Judge is to do justice. For a common man truth and justice are synonymous. So when truth fails justice also fails. Criminal Justice System in India accords highest importance to truth and for this reason, alone our National Emblem, "Ashoka Sthambha" has the inscribed motto, "Satyameva Jayate" (Truth alone succeeds).

122. The Hon'ble Apex Court has condemned the passive role played by Judges and emphasized the importance and legal duty of a Judge to take an active role in proceedings in order to find the truth to administer justice and to prevent the truth from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the lis. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors.

123. If the courts are to impart justice in a free, fair and effective manner then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material

necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.

124. In the facts of the present case, where two material witnesses took a somersault and circumstances under which the prosecution had dropped star witness, Mr. Sunil Kulkarni who was later summoned as a court witness, the trial court also could not have remained oblivious to the sting operation carried out by NDTV exposing the unholy nexus between the defence and the prosecution and no doubt the media publicity due to the involvement of an accused not only because of being a protege of a rich businessman but also being the grand-son of one of the national hero Admiral S.M. Nanda and so on and so forth and therefore, no fault can be found with the aforesaid comments made by the court not at interim stage but in the final judgment. Merely because a Judge actively participates in the proceedings would not mean that he is not neutral and has deviated from the path of truth. Throughout the ages and in all societies, impartiality has been regarded as the essence of the administration of justice. A departure from appropriate standards of civility and judicial detachment may result in criticism of a Judge. The courts are not expected to suppress their convictions, feelings and views if they are relevant to the controversy and based on materials on record not merely for suggesting corrective measures but also to expose all those who failed to perform their duties diligently, truthfully or for ulterior and exterior

reasons. Indisputably, the courts have to be careful, cautious and must exercise restraint in making any observations which are not germane to the controversy in hand or reflect the bias, prejudice and predilections of a judge and if such a course is allowed to happen then it will put the entire justice delivery system into danger by such personalized views of a judge. Further, it would lead to loss of public's faith in judicial system if the courts overreach or transgress the unwritten rules of self regulation and self restraint in the judicial behavior. In **Abani Kanta Ray v. State of Orissa-1995 Supp (4) SCC 169**, the norms of judicial propriety and restraint needed in discharge of judicial functions were indicated as under:

> "What we have said above is nothing new and is only a reiteration of the established norms of judicial propriety and restraint expected from everyone discharging judicial functions. Use of intemperate language or making disparaging remarks against anyone unless that be the requirement for deciding the case, is inconsistent with judicial behaviour. Written words in judicial orders form permanent record which make it even more necessary to practise self-restraint in exercise of judicial power while making written orders. It is helpful to recall this facet to remind ourselves and avoid pitfalls arising even from provocation at times."
>
> Justice H.R. Khanna in an article on "Judicial Activism" (The Hindu dated 28-9-1995) has indicated the duty of a Judge and the source of strength of the law courts. He said:
>
> "A Judge like Epictetus, it has been aptly put, must recognise the impropriety of being emotionally affected by what is not under one's control. The courts, it is also pointed out, have to be much more circumspect in seeing that they do not overstep the limits of their powers because to them is assigned the function of being the guardian of the Constitution. It is a faith and trust reposed by the framers of the Constitution in the courts and their position in this respect is akin to that of a trustee. When the other agencies or wings of the State overstep their limits, the aggrieved parties can always approach the courts and seek redress against such transgression.
>
> When, however, the courts themselves are guilty of such transgression, to which forum would the aggrieved parties appeal?
>
> * * *
>
> The courts have, I submit, to earn reverence through the test of truth...."

125. Section 165 of the Indian Evidence Act confers vast and wide powers on presiding officers of the court to elicit all necessary materials by playing an active role to achieve the ultimate objective of searching the truth.

126. In view of the above discussion, I do not find that the learned trial court exceeded or over-reached the aforesaid parameters in making certain observations in the order under challenge.

127. The next submission of the counsel for the appellant claiming unfair trial is on account of the audience given by the trial judge to the court witness Mr. Sunil Kulkarni in his chamber on 11.7.1999. The grievance of the appellant was that how the court could grant such a private audience to a witness whose credibility was already under great suspicion. Such a witness in his private audience could have influenced the mind of a judge to make him believe the otherwise unbelievable version or to create a bias or prejudice in his mind against the accused, the senior counsel argued. Counsel for the appellant also urged that in fact such private audience has led the court to pass the aforesaid observations in the final judgment. Before dealing with this aspect, it would be necessary to give the brief background as to under what circumstances such an audience was given by the court to the said witness Mr. Kulkarni.

128. Mr. Sunil Kulkarni claimed himself to be an eyewitness of the accident which took place on the morning of 10.1.1999. This witness without contacting the police after the incident alleged to

have boarded a train to Bhopal and returned back to Delhi on 15.01.1999. After coming back to Delhi, he contacted the then Joint Commissioner of Police in his office to disclose that he had witnessed the said incident on the said fateful morning. The Joint Commissioner of Police directed him to report before the concerned DCP who in turn sent him to the SHO P.S. Lodhi Colony where his statement under Section 161 Cr.P.C. was recorded after 5 days of the accident. This witness also made a voluntary statement before the Magistrate under Section 164 Cr.P.C. after 11 days of the accident. For the prosecution this was an important witness being an eyewitness of the accident. This prosecution witness was dropped by the prosecution. The prosecutor representing the State represented before the court that the said witness has been showing his anxiety for his early examination which conduct of the witness as per the prosecution was taken to be quite unusual and also the fact that he had leveled serious allegations against the police in his application dated 13.9.1999. This witness was already enjoying police protection as he had complained of some danger to his life at the hands of the police. It is also pertinent to mention here that another incident had occurred in the precincts of Patiala House Courts itself involving members of NDBA , on the one hand, and the police, on the other hand, which led to the registration of an FIR No.450/1999 u/S 186/353/450/332/147/149/225 IPC on 23.9.2009. This incident had taken place when Mumbai Police with the assistance of local police came to arrest the said witness being

accused in crime No. 207/99 under Section 420 IPC and the said arrest was resisted by the bar members who apprehended illegal arrest of the said prosecution witness. After a gap of about 8 years, this witness was summoned by the court in exercise of powers under Section 311 Cr.p.c. vide orders dated 19.3.2007. He was partly examined on 14.5.2007 and was bound down to appear for 17.5.2007. Vide orders dated 14.5.2007 court also gave directions to the SHO of P.S. Lodhi Colony to provide security to the said witness. His examination-in-chief was recorded on 17.5.2007 but his cross-examination was deferred in terms of some order of the High Court. The said witness again stated that he required police protection till the next date and accordingly directions were given by the court to the police to provide security to the said witness till the completion of his evidence. The said witness was partly cross-examined on 29.5.2007 and the matter was adjourned for further cross-examination on 31.5.2007. In the meanwhile on 30.5.2007 NDTV had conducted a sting operation. In the said sting operation, the electronic media had shown certain pictures as to highlight that the defence counsel and the public prosecutor were trying to win over the said court witness to testify in such a manner to help accused Sanjeev Nanda. In view of the said sting operation, the main prosecutor and the additional public prosecutor withdrew from the said case and vide orders dated 31.5.2007 the court observed as under:-

> "If the newspaper report mentioned above regarding the NDTV telecast and the accusations made in the said telecast are false, it would in deed be a very serious matter. However, I accusations are correct and truthful, the implications would be more serious because any effort to win over a witness prejudices and interferes with the true course of judicial proceedings and also tends to obstruct the administration of justice."

129. One Mr. Rajiv Mohan , Additional P.P. was replaced in place of the earlier prosecutors and the said court witness was cross-examined by the newly appointed special public prosecutor on 11.7.2007. His further cross-examination was deferred for 13.7.2007. It is on 11.7.2007 the said witness sought audience from the court which was given by the presiding Judge in his chamber. Mr. Ram Jethmalani counsel for the appellant raised serious objections to such a private audience given by the judge to the court witness. The police and the public prosecutor showed their complete ignorance about the letters lying under sealed cover in the trial court record. The letter purported to have been sent by the Court to the Commissioner of Police and the letters handed over by the court witness to the presiding judge are lying in a sealed envelope. The said sealed envelope was directed to be opened by this court and access to the letters was granted to counsel for both the parties. The said envelope contained one letter dated 11.7.2007 addressed by the presiding judge to the Commissioner of Police. In the said letter, the court brought to the notice of the Commissioner of Police the grievance of the court witness against the public prosecutor and the defence counsel who as per him were threatening and blackmailing him so as to support them in the matter concerning

sting operation. Along with the said letter copies of letters dated 22.6.2007 and 2.7.2007 written by Mr. Sunil Kulkarni were found and one letter written by the Stenographer to the court was in the sealed envelope.

130. This audience given by the court to the court witness has been castigated as the secretive method adopted by the court totally in negation to the Constitutional guarantee granted under Article 21 of the Constitution of India to every citizen for free, fair and open trial. The contention of the counsel for the appellant was that close trials breed suspicion, prejudice and arbitrariness. Counsel for the appellant placed reliance on an authoritative pronouncement of **American Supreme Court in (1980) 448 US 555 – Richmond Newspapers INC, et al Vs. Commonwealth of Virginia**; and the judgment of our Apex Court and High Court in **J. Vasudevan Vs. T.R. Dhananjaya 1995 (6) SCC 249, AIR (39) 1952 All 108 – Baij Nath Prasad Vs. Madan Mohan Das and AIR 1936 P.C. 246, Lillian Mc Pharson Vs. Oran Leo Mc Pharson.**

131. Openness is inherent in the very nature of the criminal trial under our system of justice. Without disputing the principles of open public trial being an integral part of American legal system and our own legal system and also considering the observation of the Apex Court in **J. Vasudevan (Supra**) coming heavily on a government officer's meeting a judge of the Supreme Court at his residence and disapproval of the action of a judge in **Lillian Mc**

Pharson's case (Supra) where the judge instead of sitting in a regular court room preferred to sit in a library to conduct the court proceedings, I am of the view that the audience granted by the court to the witness so far the facts of the present case are concerned stands on a completely different footing.

132. Here is a case where as per the sting operation by NDTV, the defence counsel and the State prosecutor were allegedly shown to be in unholy nexus so as to enter into a deal to win over the witness for toying the line of defence in his evidence. This witness was already summoned as a court witness and was to be examined on 11.7.2007 when by that time the said sting operation had taken place. Without commenting upon the credibility of this witness at this point of time which will be discussed later it is an undeniable fact that witnesses are an important part and parcel of the administration of justice. The witness performs an important public duty of assisting the court in discovering the truth and deciding on the guilt or otherwise of the accused in the case. Such a witness sacrifices his time and takes the trouble to travel all the way to the court to give evidence. Eventually, such a witness incurrs the displeasure of persons against whom he gives evidence. He takes all these troubles and puts himself to risk not for any personal benefit but to advance the cause of justice. They are often threatened and face danger not only to their life but also to their family members. But instead of being showered with due courtesy they are not treated pleasantly.

133. Section 165 of the Indian Evidence Act fully empowers the court to call any witness or any party for production of any document at any stage of the proceedings for a just decision of the case. Section 311 Cr.P.C. and Section 165 of the Evidence Act, therefore, confer very vast and wide powers on the court to elicit all necessary information by playing an active role in the evidence collecting process. Section 311 Cr.P.C. also gives discretion to the court to summon any person as a witness.

134. Now the said witness whose evidence was considered material by the Court felt threatened not only at the hands of the defence counsel but also at the hands of the public prosecutor as well. It cannot be lost sight of the fact that prior to the said audience, sting operation involving the trio i.e. Court witness, defence counsel and the prosecutor had already taken place and in this background the Court witness Mr. Kulkarni might not have mustered enough courage to apprise the Judge in open Court about the threats received by him from the side of the public prosecutor and the defence counsel coercing him to support them in the matter concerning sting operation. It appears that the counsel for the appellant has tried to read too much into the said audience between the Court and the witness, but when the sealed envelop was opened in Court nothing substantial was found to attribute or cast any aspersions on the conduct of the Judge. One must be very restraint and careful before commenting on any Judge unless the conduct of a Judge is so reprehensible warranting condemnation. Faith of the public can be

badly shaken in judiciary, if in a very casual or cavalier fashion aspersions are cast on the conduct of the Judges, who at times are constrained to take unpleasant decisions in due discharge of their judicial functions.

135. As already stated above, witness is a most important person who comes forward to depose in the societal interest and he deserves all protection of the State as well as of the Court. A witness is an indispensable aid in the justice dispensation system in any civilized society. A witness happens to be the eyes and ears of the Court. Hon'ble Supreme Court in **Swaransingh Vs. State of Punjab AIR 2000 SC 2017** expressed deep concern about the predicament of a witness in the following words: -

> "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all."

136. The witness in our Courts does not receive deserving and desired place and the respect and this is one of the major reasons

that many of the witnesses do not come forward to give their statements as they feel threatened firstly, at the hands of the police and then the humiliating treatment they get in Courts. Witness are not supposed to stand in the Courts like criminals or to face the punishment of standing in the Courts for hours together or to take round of the Courts on more than one day. Recently, Hon'ble Supreme Court in **"Best Bakery's Case", (Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others(2004) 4 SCC 158)** came down heavily on the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The categorical finding is that the whole machinery of a State failed in maintaining the confidence of public in the justice delivery system. While disscussing the reality about the witness hostility, one of the predominant points taken note of by the Hon'ble Supreme Court is the lack of witness protection and the relating laws in our country. It has been observed that if the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed. Following excerpt from the said decision will be appropriate in this context:

> " The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by

> their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery."

137. Few days back in **Javed Alam vs. State of Chattisgarh & Anr.** in Crl. A. No. 1240/2006 decided on 8/5/2009, the Hon'ble Apex Court sounded the alarm on the growing trend of witnesses turning hostile in criminal cases involving the rich and influential, stressing that justice would remain a far cry unless a witness protection mechanism was put in place and observed as under:

> 8. It is a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by accused. As appears from the record, the witnesses are the classmates of the deceased who were there with her. As appeared from the evidence of witnesses they backed out from what was stated during investigation. The statement made before the Police during investigation is no evidence. Unfortunately, in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure. ……The plight of the girls who were under pressure depicts the tremendous need for witness protection in our country if criminal justice administration has to be a reality……."

138. It is no time for slumber. It is high time that we wake up and act for the protection of the citizens who appear before the courts to testify so as to render a helping hand in the dispensation of justice. Best Bakery Case, Jessica Lal murder case and many other like cases, if repeated, would shatter the strength and credibility of our criminal justice system. Every country is expected to make laws to meet the situations prevalent in that country. However, there is

nothing wrong, rather it is wise, in imbibing the spirit shown by other countries in the matter of witness protection. No nation can afford to expose its righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a court of law. If the State continues to turn a blind eye to the ground realties, the plight of an honest witness will be pathetic and calamitous. Not only the honest witnesses need full protection of the State, but at the same time dishonest witnesses need to be dealt with an iron hand. No leniency and indulgence should be shown to such a witness who with impunity has the audacity to utter falsehood after taking oath. Such a witness derails the trial which can result in miscarriage of justice and consequently bring miseries to victim of crime. Present is not the only case where witness has adduced false evidence in misleading the Court and thus causing interference in the due discharge of justice. This evil of perjury has assumed alarming proportions in cases depending on oral evidence and in order to deal with this menace effectively in a given case the Courts must take re-course to Section 340 Cr.P.C. (summary procedure for trial for giving false evidence) more frequently. Therefore, the State must give serious thought to protect the interest of witnesses and to introduce suitable legislation in this regard at the earliest so that the witnesses are not discouraged to come forward to give evidence for fear of harassment, humiliation and danger to their lives.

139. In view of the above discussion, I do not find that any prejudice was caused to the appellant because of the audience granted by the Court to the said witness on 11th July, 2007 so as to take up this matter with the Commissioner of Police for granting him due protection. To draw inference that something more than that must have transpired between the witness and Court so as to prejudice and influence the mind of the Court is not only wholly illogical but is based on mere imagination. Judges who are entrusted with the pious and noble task of dispensing justice are presumed to be fair, judicious and honest whether sitting in the open Court or inside their chambers and it cannot be expected of them that in the chambers they will indulge into any act which will disrepute or sully their image. It often happens that the parties to the litigation in certain situations do approach the Court even in chambers and there is nothing wrong in entertaining any genuine request in exceptional circumstances in a chamber if situation so warrants. Nonetheless, I find myself in agreement with the counsel for the appellant that it was bounden legal duty of the Court to have recorded necessary proceedings with regard to the said audience granted to the Court witness and also to have apprised the newly appointed public prosecutor as well as the counsel representing the accused persons. A judge administers justice. The holder of office of the judge should, therefore, be above the conduct of ordinary mortals in the society. The first and foremost expectation from him is that his actions have to be just. This expectation itself is the fountain source of all that can

be put in the realm of canons of judicial ethics. The legal maxim **'Actus Curiae Neminem Gravabit'** which means an act of the court shall prejudice no man depicts the duty of a judge to be just. The notions of fairness and impartiality give rise to certain special norms for judges. These norms are designed so that he remains independent and uninfluenced. The standards of judicial behavior, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions, norms and principles which govern the conduct of a judicial officer. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behavior. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming his devotion to higher responsibilities.

140. There has to be a proper record of every proceedings, which takes place in Court as in Court proceedings nothing can be held back from the parties or their counsels representing them and nothing can be withheld on the premise of being private between the Court or any of the parties or even the witnesses. To this limited extent I am of the view, the trial court went wrong. However, since in the said audience granted by the Court only a letter was addressed to the Commissioner of Police seeking protection of the said Court witness, therefore, non-recording of the proceedings

cannot be said to have caused prejudice to the rights of the appellant and thus the plea of unfair trial on this count deserves to be rejected.

141. Grievance was also raised by the counsel for the appellant that the Court allowed its judicious mind to be influenced and moulded by the judgment of the Division Bench of the High Court in the sting operation case, bearing W.P. (Crl.) No. 796/2007, without affording any opportunity to the accused. Indisputably, the sting operation carried out by the NDTV revolved around the said Court witness, who was allegedly being influenced through the alleged nexus of the defence and Special Public Prosecutor appearing before the Court. The Division Bench of the High Court took suo muto notice of the said reporting of sting operation in the electronic media in W.P. (Crl.) No. 796/2007. Even the Trial Judge had set up an enquiry and the Managing Director NDTV had produced before the Court three chips and five CDs containing the said material and the unedited version of the sting operation was seen in the chamber of the trial court as indicated in the order dated 1st June 2007. Without commenting on the role of the defence and State Public Prosecutor who have already been held guilty of committing criminal contempt of Court, by the Division Bench of this court, matter being sub-judice before the Hon'ble Supreme Court, I can only say that no fault can be found with the Trial Judge if a passing reference to the judgment of this High Court was made in the impugned judgment. The copy of the said judgment was produced before the Trial Court

by none else but by Mr. Ramesh Gupta, Senior Advocate who was representing counsel for the appellant before the Trial Court and it cannot be said that the appellant was taken by surprise to find certain observations made in the impugned judgment about the decision of the said High Court case in the sting operation. I also do not subscribe to the view of the counsel for the appellant that the said judgment of the High Court had influenced its judicial mind to reach the final conclusions, which are in fact based on various other factors independent of the said High Court judgment.

(c) Conduct of prosecution

142. The last contention of the counsel for the appellant so far the allegation of unfair trial is concerned relates to suppression of PCR messages by the prosecution and as per the counsel for the appellant it deprived the accused of his unbridled right to fair trial. The PCR messages as per the counsel for the appellant were of great significance for the accused to prove his defence as one of the victims of the said accident himself denied knowing anything with regard to the exact facts leading to the accident in question in his first encounter with the police when he was being taken in PCR van. Counsel for the appellant further attributed dishonesty of the police officials of the PCR van, who entered in the witness box as PW 24 Const. Manohar Lal; PW 34 Const. Sadhu Ram and PW 36 ASI Davinder Singh and deposed that Manoj Kumar when being taken in the PCR van had told them that one big black colour car had come

from the side of the Lodhi Road at a very fast speed in a zig zag manner and struck against them. Counsel for the appellant placed reliance on Rule 16 of the Bar Council of India Rules and Rule A-252 of the Attorney General Guidelines in support of his arguments. Counsel for the State on the other hand did not attach much importance to these PCR messages which as per him are of no evidentiary value as such PCR messages are primarily given just to inform the police to bring them into action to reach at the place of occurrence.

143. It is not in dispute that these messages were never placed by the prosecution before the directions in this regard were given by the trial judge on the application moved by the defence. It is further not in dispute that at about 5.27 a.m. on the morning of 10th January, 1999 message from police officials of police control room van known as E-11 was sent to the main control room informing that one Manoj Kumar s/o Mr. M.C. Malik C/o Kailash Gupta came to roam around and was fully conscious and knew nothing about the accident. This very Manoj Kumar in his statement under Section 161 Cr.P.C. gave a detailed account as to how the accident on the morning of 10th January, 1999 had occurred. In his statement he averred that on the morning of 10th January, 1999 around 4.15 a.m. he along with Nasir, Mehndi Hassan and Gulam left his place for Nizamuddin Railway Station when at about 4.30 a.m. they reached near petrol pump, Lodhi Road, they were stopped by three police officials who started enquiring from them and at that point of time, from the side of

Nizamuddin, a dark black car came like a lightning and hit them, as a result he (Manoj) fell down from the bonnet of the car. This witness when he appeared in the court as PW2 turned hostile. In his testimony before the court, he took a contrary stand and attributed the accident to one truck instead of BMW car. The Trial Court has believed the testimony of this PW2 Manoj Malik in so far the same corroborates to the scene of crime and other facts set up by the prosecution except with regard to the nature of the offending vehicle. Before embarking upon the question as to whether the suppression of PCR messages by the prosecution can be termed as dishonest leading to unfair trial it would be appropriate to first decide as to what is the evidentiary value of such PCR messages. The Apex Court in **Ramasinh Bavaji Jadeja vs State of Gujarat (1994) 2 SCC 685 while** dealing with the similar issue, where the appellant accused claimed that his name was not disclosed by the Head Constable when he informed about the incident on telephone to the police official at control room, the Court held as follows:-

> 6. Now the question which has to be examined is as to whether the cryptic information given on telephone by Head Constable can be held to be the first information report of the occurrence. Section 154 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') requires an officer in charge of a police station to reduce to writing every information relating to the commission of a cognizable offence, if given orally to such officer. It further requires that such information, which has been reduced to writing shall be read over to the informant and the information reduced to writing or given in writing by the person concerned shall be signed by the person giving it. Section 2(h) defines investigation to include all the proceedings under the Code for the collection of evidence conducted by a police officer or by any other person (other than a Magistrate), who is authorised by a Magistrate in this behalf.
>
> 7. From time to time, controversy has been raised, as to at what stage the investigation commences. That has to be considered and examined on the facts of each case, especially, when the information of a cognizable offence has been given on telephone. If the telephonic message is cryptic in nature and the officer in charge, proceeds to the

place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be first information report. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer in charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said offence including about the participants, shall be deemed to be a statement made by a person to the police officer "in the course of investigation", covered by Section 162 of the Code. That statement cannot be treated as first information report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report. This can be illustrated. In a busy market place, a murder is committed. Any person in the market, including one of the shop-owners, telephones to the nearest police station, informing the officer in charge, about the murder, without knowing the details of the murder, the accused or the victim. On basis of that information, the officer in charge, reaches the place where the offence is alleged to have been committed. Can it be said that before leaving the police station, he has recorded the first information report? In some cases the information given may be that a person has been shot at or stabbed. It cannot be said that in such a situation, the moment the officer in charge leaves the police station, the investigation has commenced. In normal course, he has first to find out the person who can give the details of the offence, before such officer is expected to collect the evidence in respect of the said offence.

144. Yet another case reported in **(1994) 2 SCC 220 Dhananjoy Chatterjee alias Dhana vs. State of West Bengal** the Apex Court held that the cryptic telephone messages received in the police station from the father of the deceased had only made police agency run to the place of the occurrence and the investigation commenced thereafter, observed as under:-

9. We are unable to agree with the opinion of the High Court. The cryptic telephonic message received at the police station from Nagardas PW 4 had only made the police agency to rush to the place of occurrence and record the statement of Yashmoti PW 3 and thereafter commence the investigation as was admitted by the investigating officer in his testimony which testimony was not challenged during the cross-examination of the investigating officer. The High Court failed to notice that the vague and indefinite information given on the telephone which made the investigating agency only to rush to the scene of occurrence could not be treated as a first information report under Section 154 of the CrPC. The unchallenged statement of the investigating officer that he

> commenced the investigation only after recording the statement of PW 3 Yashmoti unmistakably shows that it was that statement which alone could be treated as the first information report. The High Court fell in error in observing that the statement of PW 3 Yashmoti was recorded "after the investigation had already commenced". There is no material on the record for the above opinion of the High Court. The cryptic telephonic message given to the police by Nagardas PW 4 was only with the object of informing the police so that it could reach the spot. The investigation in the case only started after the statement of PW 3 Yashmoti was recorded. Though initially Mr Ganguli did try to support the finding of the High Court but in the face of the evidence on the record and more particularly in the absence of any challenge to the testimony of the investigating officer, in fairness to Mr Ganguli, we must record that he rightly did not pursue that argument any further. We, therefore, find ourselves unable to agree with the opinion of the High Court and hold that the statement of Yashmoti PW 3, recorded by the investigating officer PW 28, was rightly treated as FIR in this case by the prosecution and the trial court.

145. In the light of the aforesaid legal position, no significance can be attached to the fact that these PCR messages were not placed by the prosecution along with the police report filed under Section 173 of the Code of Criminal Procedure or thereafter as these PCR messages just set the police machinery into motion so as to make them reach the place of occurrence or to take the victims to the hospital or to bring them into action for taking measures as the circumstances of the case may warrant.

146. I, therefore, find myself in agreement with the counsel for the State that no evidentiary value can be attached to such cryptic statements. In any case, such statements cannot be considered at a higher pedestal than statements made under Section 161 Cr.P.C. It is also worthwhile to mention here that at no stage defence sought reexamination of PW -2, PW-24, PW -34 and PW-36 after PCR messages were placed on record. In the absence of the aforesaid omission on the part of the defence, the plea that non-disclosure and

non-production of PCR messages by the prosecution has vitiated the trial or it amounts to unfair trial cannot be accepted.

147. Moreover, the PCR messages, so far the facts of this case are concerned, fall in the category of hearsay evidence in relation to the police officer who flashed the said message to the Central control room. Since the PCR messages flashed by the police officer were nothing more than what they learnt from PW2 and as they had no personal knowledge of the same, they were clearly hearsay evidence.

148. It is well established that hearsay evidence is no evidence and thus inadmissible. Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The rule of res gestae is an exception to the principle of hearsay evidence. The test for applying the rule of res gestae is that the statement should be spontaneous and should form part of the same transaction ruling out any possibility of concoction.

149. As discussed above, it is clear that PCR messages are not res gestae and form part of hearsay evidence and thus are inadmissible in evidence. Therefore, statement given by PW 24 Mr. Manohar Lal regarding statement of PW2 while being taken in Eagle 11 PCR Van is not admissible.

150. Furthermore, so far Rule 16 of Bar Council of India Rules and Rule A-252 of the Attorney General Guidelines are concerned there cannot be any dispute that it is the bounden duty of the prosecution and the counsel representing the State to place every

material on record even if such a material weakens the prosecution case and it is for the State counsel to conduct the prosecution in a manner that no innocent suffers any punishment. If the said initial cryptic PCR messages are accorded any significance, then any lapse or negligence on the part of the initial informer making any irresponsible statement can prove fatal to the prosecution or even to the defence. In any event of the matter, since the defence itself failed to seek re-examination of the concerned witnesses so as to test the credibility of the said statement of PW2 made to the police officials of the PCR van, therefore, the objection raised by the counsel for the appellant at this stage is totally misplaced.

Witnesses

151. The next contention raised by the counsel for the appellant relates to the alleged failure of the prosecution to prove the case as set up by them in the chargesheet. The prosecution case has mainly rested its case on the shoulders of three important witnesses i.e. PW1 Hari Shankar, an employee of petrol pump known as Car Care centre, Lodhi Road, PW2 Manoj Malik, an employee of a hotel owned by one Kailash Chand and Court witness Mr. Sunil Kulkarni, resident of Mumbai. For better appreciation, I feel it appropriate to discuss their role separately.

PW1: Hari Shankar

152. This witness in his statement recorded under Section 161 Cr.P.C. stated that he was an employee with Car Care Centre, Lodhi

Road for the past about 12 years and he was on night duty from 2.00 p.m. to 6.00 a.m. on 9th -10th January, 1999 and while he was present at the petrol pump at about 4.30- a.m. he saw that one black coloured imported car came from the side of the Nizamuddin like lightening in the clouds and hit 6-7 persons out of which three were police men. He also stated that because of the impact 2-3 persons fell on the bonnet of the car while others came underneath the car. As per him, while those on the bonnet fell down and those underneath the car got dragged for some distance as the car did not stop till after it had struck against the divider whereafter one person came out of the car and then again entered the car to flee away from the spot. This witness in his deposition before the Court took a stand that while he was sitting inside the petrol pump on the morning of 10th January, 1999 he heard some noise and on hearing the same he came and saw one vehicle coming from the side of Nizamuddin having met with an accident in front of the petrol pump. He also deposed that he came inside the petrol pump and rang up his owner who in turn informed the police whereafter the police reached the site of accident in about 20 minutes. He also deposed that he got so much frightened and went inside the petrol pump and then did not come out till the time of his interrogation by the police.

153. This witness was declared as hostile witness as he took an inconsistent stand in the evidence contrary to his statement recorded under Section 161 of the Code of Criminal Procedure. As per the counsel for the appellant this witness was not the witness to the

accident as admittedly he came on the road after hearing some noise. That must be sound created by the impact. Counsel also claimed that the prosecution had put a false story in his mouth to make him an eye witness of the accident and his deposition made in the Court is more near to the truth than his statement given under Section 161 Cr.P.C. On the other hand counsel for the State submitted that although PW1 was declared as hostile witness but still to a large extent he supported the case of the prosecution and to that extent his testimony cannot be disbelieved. Now, since the factum of the accident is not in dispute, therefore, the deposition of PW 1 so far the same shows his presence at the petrol pump on the morning of 10th January, 1999 and his being a witness to the site of accident cannot be doubted. I agree with the submission of the senior counsel for the appellant that he must have rushed to the road after hearing the noise of "thud", which must have been caused the car had hit the victims on the road. The deposition of this witness stating that vehicle had come at a fast speed also does not inspire any confidence and appears to be imaginative as witness was not present on the road to testify the speed of the vehicle. It is evident that after having witnessed the ghastly scene of crime, any prudent person would assume the speed of the vehicle as "fast" and not "normal".

154. Based on the above discussion, in my view the testimony of PW1 can be believed only to the extent that he had seen the

involvement of BMW car in causing the said horrifying accident after he had entered the road after having heard the noise of impact.

PW 2: Manoj Malik

155. PW 2 Manoj Malik was also declared a hostile witness because of his retraction from a very important fact of substituting the offending vehicle from "BMW" car to a "truck". The learned Trial Court has taken a considerable support from the testimony of Manoj Malik PW2 in believing the prosecution theory as well as the theory of reversal of car propounded by the Court witness Sunil Kulkarni in his deposition before the Court. As per the counsel for the appellant the prosecution acted in a most mala fide and high handed manner in putting the prosecution case in his mouth by suppressing the fact that he at the very first available opportunity completely denied to have witnessed the accident when he was being taken by the PCR officials in their van at about 5.47 a.m. on 10th January, 1999. Counsel for the State on the other hand placed reliance on his entire deposition which proves the prosecution story except that of his retraction made with regard to the nature of the vehicle involved in the accident.

156. I have already discussed above that the cryptic messages which were sent primarily for the police to come into action have no evidentiary value. Nevertheless, the depositions of PW 24, 34 and 36, who were present in the PCR van at the time of taking PW 2 Manoj to the hospital, have falsely deposed that on the way to the hospital

Manoj told them that one big car of black colour came at a very fast speed from the side of the Lodhi Hotel in a zig zag manner and had struck against him and other victims of the accident. This may be the version of Manoj Kumar PW 2 when his statement under Section 161 Cr.P.C. was recorded but to say that he made such a statement on his way while being taken to the hospital is nothing but an utter falsehood on the part of these police officials who as per even on the basis of their own PCR messages. In any event of the matter, the testimony of PW2 so far it proves the occurrence of the accident can be safely relied upon. So far the incriminating statement of this witness stating that the vehicle was coming at a very fast speed from Nizamuddin side and his deposition as to the presence of the fog on the said morning are concerned, the same will be discussed in the later part of this judgment. The testimony of PW 2 thus can be believed to the extent that he, being a victim of the crime, was a witness to the accident and of the scene of the crime. His testimony that he was hit by the truck gets itself falsified because of the admission of the appellant admitting the factum of the accident by him while driving the BMW car.

Court witness: Mr. Sunil Kulkarni

157. Credibility of this witness was seriously challenged by the Senior counsel for the appellant. Even the Trial Court described his character direct from the novel of Charles Dicken's and has very strange aspect to his personality, but still he gave undue weightage

and credit to his testimony believing him to be an eye witness of the said accident. The testimony of this witness was believed by the Court as his statement recorded under Section 164 of the Cr.P.C. and the evidence given by him as a court witness to a very large extent corroborated by statement given by PW2 Manoj Malik and the scene of crime as proved in the site plan Exhibit PW 58/B and the videography of the scene of the crime as placed on record by the prosecution. Learned Trial Court even went to the extent of giving much credence to the new theory propounded by this Court witness that the said BMW car had taken a reverse after finding such fact corroborated from the evidence of Manoj Malik PW 2 and on the basis of reversal tyre marks found visible by the Presiding Judge himself, after viewing the video. It needs to be mentioned here that this theory of the reversal of car was introduced by this court witness alone for the first time in his deposition before the Court and prior to this it was neither the case of prosecution nor of this Court witness when he had given his statement under Section 161 of the Code of Criminal Procedure and Section 164 of the Code of Criminal Procedure. The Trial Court although in the impugned judgment has stated that the testimony of the witness was read by him time and again very carefully and the same duly tallied with the site plan Exhibit PW 58/B and the scene of crime as appearing in videography, but I feel otherwise. The more I read the statement of this Court witness, the more dishonesty, falsehood and crookedness of this man flows out. This witness has been introduced as a chance

witness to the scene of crime and how his presence in the wee hours of morning of 10th January, 1999 has been shown is itself flabbergasting and mind boggling. Counsel for the appellant highlighted many instances to expose the conduct and character of this witness clearly reflected in his unsavory and unpalatable statements and depositions with no plausible explanation to the same coming forth from the side of the State Prosecutor.

158. This witness checked out from his hotel on 9.1.2009 at about 12.30 p.m. disclosing his place of destination at Solan but he did not go to Solan at all. He came to Delhi on 7.1.1999 to meet some Minister of State in connection with some vigilance case of his unnamed friend, but nowhere he disclosed when he met the Minsiter or which Minister and on what date and at what time. On 9th January, 1999 after checking out from the hotel he went to see a movie at Sheela theatre but did not disclose whether in fact he had seen any movie or not. Thereafter, he spent one hour time at Delhi station, which must be New Delhi Railway Station being near to Sheela theatre, wherefrom he made some STD calls. At about 11.30 p.m. he went to Lodhi Colony so as to meet his friend Mr. Sushil whose address he could not remember. Here also it looks highly improbable that the person who had checked out from his hotel at 12.30 p.m. and even had seen some movie at Sheela theatre, would kill his time upto 11.30 p.m., after spending just one hour at New Delhi Railway station. Nowhere this witness gave any particulars of Mr. Sushil Kataria nor the police made any efforts in this regard so as to test

the credibility of this Court witness. In his statement under Section 164 Cr.P.C. he stated that he went to the residence of Mr. Sushil at about 12.00 A. M. in the night where he stayed from 12.00 A.M. to 3.45 A.M., while in his statement before the Court he deposed that he met one of his friends namely Sushil Kataria at New Delhi Railway station and he had dinner with him and was free by 3.45 a.m. on the night of 10.1.1999. In his statement under Section 164 Cr.P.C. he stated that he left for Nizamuddin Railway Station from the residence of his friend at Lodhi Road around 4.00 a.m. or 4.15 a.m. so as to board Chattisgarh Express for going to Bhopal and since he could not get any auto on his way, therefore, he went on foot to Nizamuddin Railway Station. In his deposition before the Court he deposed that after having dinner with Sushil both of them sat near Shiv Mandir at Maharishi Raman Marg around a bonfire lit by three wheeler drivers. He was sitting with the three wheeler drivers but still he was not able to get an auto rikshaw so as to move towards Nizamuddin Railway Station. In his statement under Section 164 Cr.P.C. he stated that when he reached in front of HUDCO building at Lodhi Road and was walking on the central verge then from the opposite direction a vehicle at a very fast speed was seen by him coming towards the petrol pump and had hit 5-6 persons who were standing near petrol pump. He also stated that the vehicle was being driven in a zig zag manner and the impact was so forceful that 2-3 persons were flown by the impact of the said car and later fell down. While in his deposition before the Court he deposed that he saw a

group of people who were standing in the middle of the said road and they were talking to each other when from the opposite direction very heavy lights of some vehicle were seen by him and then the said vehicle which was of black colour had hit those people standing on the road. In his statement under Section 161 he stated that after moving a distance of 200 -300 ft the car stopped near the central verge when the driver came out from his seat and saw the vehicle from front and back side so as to assess the damage to the car. He also saw some persons underneath the car when the person from the co-driver seat also got down and screamed "Sanjeev let us rush" and thereafter, after crushing the men under the vehicle fled from the spot. It would be relevant to mention here that this witness in his cross-examination in the Court deposed that he was forced to take the name of Sanjeev under pressure of the police in his statement recorded under Section 164 Cr.P.C. This is also surprising as at the time of recording of his statement under Section 164 Cr.P.C. he stated that the concerned Magistrate was quite courteous to him and he was even offered a cup of tea by the Magistrate, but still could not tell the Magistrate that he was under pressure from the police. In his statement before the Court, he deposed that three or so persons came out of the said car and were seen moving in front and back of the car to assess the damage, they then sat in the car and after taking a bit reverse, drove away the car with a speed from his right side.

159. In his statement recorded under Section 164 Cr.P.C., he stated that he was at a distance of 300 ft. from the first impact while in his statement before the Court the distance disclosed by him is 60 to 70 ft. away from the spot of the accident. According to him, he also tried to wake up the persons sleeping in the petrol pump but they did not wake up from their sleep. This version of court witness goes contrary to the deposition of PW-1 Hari Shankar who in his deposition stated that after hearing the impact, he came on the road and witnessed the scene of crime. Essentially, Hari Shankar is not a chance witness who was on a night duty at the petrol pump and his presence at the petrol pump looks more natural and therefore, the above statement of court witness deposing that everybody were asleep at the petrol pump and they did not wake up although due efforts were made by the court witness appears to be absolutely illogical and inappropriate. It is highly improbable that a person on a night duty at a petrol pump would sleep and other persons did not wake up despite alleged efforts made by the court witness. It is also highly unbelievable that the court witness when reached Nizamuddin railway station found all the five public telephones lying installed there not in the working condition. He boarded Chattisgarh Express so as to meet one person named Kataria but again he was never in possession of any railway ticket nor he had disclosed any particulars of his friend named Kataria. It is again amazing to note that when he came back after 2-3 days he directly made a telephone call to an officer not less than a Joint

Commissioner, Delhi Police. It is also fascinating to note that the said witness was treated as a guest by the police for 2-3 days. No explanation has come forth from the State as to why the statement of this court witness was recorded on 15.1.99 after a gap of 2-3 days although the witness remained throughout available with the police. He also resiled from his earlier statement given under Section 164 of the Cr. P.C., stating that the vehicle was coming in a zigzag manner. He also took a different stand in his deposition before the Court, when he stated that he heard the voice 'Sanch'/'Sanz' while in his statement recorded under Section 164 Cr.P.C., he clearly stated that the voice heard by him was 'Sanjiv let us go'. Later on in his cross examination before the Court he disclosed that the name of 'Sanjiv' was mentioned by him because of some pressure from the Police Headquarter. He, in his cross-examination before the Court, also disputed the fact of the appellant coming out from the driving seat after the incident. He also admitted in his deposition before the court that the police kept on deliberating with him before finally recording his statement under Section 164 Cr.P.C. It was also strange on his part when he deposed that he had identified the appellant being one of the occupants of the car because of his cognitive faculties_although he had only seen the physique of the occupants and not their faces.

160. The said court witness was earlier dropped by the prosecution as the prosecution was under the apprehension that he already stood won over by the defence. He was examined as a court

witness after a gap of 7-8 years when all of a sudden the court felt the necessity of summoning him as a court witness in exercise of powers under Section 311 Cr.P.C. This is the witness who was accused in Crime No. 271/99, at Bombay under Section 420 IPC. This is a witness against whom one Gaurishankar had given an interview on electronic media saying that Mr. Kulkarni was present in Mumbai on the date of the said accident (acquaintance with Mr. Gaurishankar has not been denied by the court witness in his deposition before the court). This is the witness who was sought to be arrested by the Bombay Police when some altercation between the police and advocates took place in the precincts of Patiala House Court. This is the witness who kept on changing his stand and was shown in sting operation carried out by the NDTV, negotiating a deal for helping out the defence. The defence treats such a witness totally unreliable and untrustworthy, while the prosecution on the other hand considers this witness as a totally reliable one even if his other antecedents may not be of any creditworthiness.

161. The APP for the State placed reliance on the judgment of the Apex Court in **Balbir Singh & Ors. Vs. State of Punjab 335** in support of his proposition that the testimony of a witness even if his character is not above suspicion, cannot be rejected. Counsel for the State also placed reliance on the judgment of the Supreme Court in **State of U.P. Vs. Farid Khan, 2005 SCC (Cr) 51,** in support of his proposition that merely because the witness has got a criminal background, his testimony cannot be thrown out if otherwise his

testimony gets sufficient corroboration from the circumstantial evidence and from the evidence of other witnesses. The APP for the State relied upon the judgment of this court in **Naresh Kumar Vs. State, 57(1995) DLT 399,** to support his argument that once the court felt satisfied that there was no lapse on the part of the investigating agency in recording the FIR even though no eye witness was then available but put up later to support the prosecution case, then statement of such a witness cannot be treated as unreliable.

162. Counsel for the appellant placed reliance on the judgment of the Apex court in **Maruti Ramnaik Vs. State of Maharashtra, 2003 (10) SCC 670** in support of his argument that the testimony of a witness who fails to explain delay on his part in recording his statement cannot be relied upon after such a witness claims to have seen the incident of crime.

163. At this juncture I deem it appropriate to analyse the legal position as to the relevancy to the evidence of a chance witness.

164. Many a times, the witness does not live near the place of the crime or there is no reason for him to be present at that particular time and place and in fact if he is an outsider, such a person is called a "chance witness" in legal parlance.

165. On the basis of the aforesaid discussion, it is manifest that Sunil Kulkarni is a shady character who, in order to hog the limelight, made his entry on the scene on 15.1.1999 and was

produced by the prosecution as its star witness. He utterly failed to prove his presence at the wee hours of wintry morning of 10/1/1999. The story as given by him was wholly unconvincing, illogical and irrational so as to inspire any confidence. Thus his testimony cannot be relied upon. In this regard in **Baldev Singh Vs. State of MP (2003)9 SCC 45**, the Apex Court, where chance witness failed to assign any convincing reason for being at the place of incident at that abnormal hour of the day in full summer, held that testimony of such witnesses could not be relied upon.

166. The expression `chance witness' is borrowed from the countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. In **Thangaiya Vs.State of Tamil Nadu (2005 Cri.L.J. 684)** the Apex Court indicated as under:-

> "In a murder trial by describing the independent witnesses as `chance witnesses' it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere `chance witnesses'. The expression `chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. In instant case, the plea of the accused that PW-3 was `chance witness' who has not explained how he happened to be at the alleged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards the accused. Therefore, there is no substance in the plea that evidence of independent witness which is clear and cogent is to be discarded."

167. Although, some caution is required to be exercised in case of chance witnesses, but merely because a witness is a chance witness does not entail that his testimony should be discarded forthwith. The evidence of a chance witness is not necessarily incredible or unbelievable but it only requires cautious and close scrutiny. It requires a close scrutiny of the evidence of a chance witness before relying upon it. In this regard the Apex Court observed as under in **State of Punjab v. Gurdip Singh, (1996) 7 SCC 163:**

> "8. So far as PW 6 Madhuban is concerned, it appears to us that he is a chance witness and although he has stated that when the accused had been loudly giving suggestion to the deceased to commit suicide by burning or by drowning he could hear the same from his friend's house, his evidence should not be accepted. None of the neighbours has been examined in this case. **The evidence of the said chance witness without being corroborated by any other independent witness does not inspire confidence.** For the aforesaid facts, we do not find any reason to take a contrary view and the appeal, therefore, fails and is dismissed."

168. As mentioned above and in view of the foregoing discussion, the presence of Kulkarni as a chance witness at the site of accident on the wintry morning of 10.1.99 at about 4.30 A.M. with his filmy style story from hotel to station and then to Lodhi Road and then to the site of crime is utterly unbelievable to be relied upon.

169. Without disputing the legal propositions settled in the aforesaid judgments, the first and foremost duty of the court was to critically examine the credibility and the reliability of the said witness so far his claim of personal presence at the time of the accident was concerned, and then the question of his corroboration with the scene of the crime as disclosed in the site plan or his

corroboration with the other witnesses could have been analyzed to give credence to his testimony. The manner in which this witness has tried to demonstrate his presence exactly at the time when the BMW car had entered the Lodhi Road from Nizamuddin side would show that he masterminded the sequence of unreliable evidence starting from the time when he checked out from his hotel to visit Sheila Theatre, then spending time from 12.00 A.M. to 3.45 A.M. with his friend at Lodhi Road and then spending time warming himself in the company of auto drivers around the bonfire, then walking on foot in search of auto so as to exactly enter the scene co-inciding with the timings of the said accident. He was destined to go to Solan but then ultimately boarded a train for Bhopal. He was not in a position to contact the police, could not wake up the employees of petrol pump, could not find PCO on his way from Lodhi Road to Nizamuddin railway station as all the PCO's at that point of time went out of order. He could not come across even a single police constable on his way to Nizamuddin railway station or even at the railway station itself where even in night hours normally the police officials remain on duty. He even did not contact the police after boarding the train to Bhopal, then after coming from Bhopal he straightway came in the contact with the officer of the rank of Joint Commissioner of Police who directed him to meet the DCP, then the local police officials. He still did not prefer to give his statement or to write a complaint till 15.1.99, although remained as a guest of police for 2-3 days. If witness of such a character can be relied upon

as a truthful witness then one will have to give a different meaning to falsehood or to dishonesty. Before believing any part of his testimony and before looking for corroboration to his testimony with the testimony of other witnesses or the scene of the crime, the Trial Court should have at the first instance satisfied itself without any element of doubt about his presence at the scene of the crime. If his very presence as has been held by this Court was utterly doubtful then his entire testimony falls to the ground. By no stretch of imagination, after going through his statements under Sections 161, 164 and before the Court, the presence of said witness at the scene of crime can be believed.

170. In my considered view, Mr. Sunil Kulkarni is the most dishonest, unreliable, untrustworthy and untruthful witness. His entry in the case is as dramatic as could happen only in our Bollywood movies. It appears that he introduced himself as a witness of the scene of the crime not without any extraneous reasons. Finding involvement of an accused from a rich and affluent family, he jumped into the fray may be to make a fortune. As noted above, the manner in which the police had been hob-nobbing with this witness even the motive of police appears to me to be a suspect. The defence for their apparent motive also tried to fiddle with this witness. In any event of the matter, his presence at the scene of the crime is as false as the existence of a $3 bill.

171. In view of the above discussion, the deposition of court witness Sunil Kulkarni is thrown out lock, stock and barrel.

3. Intoxication

172. Challenging the findings of the learned trial court, on the intoxication, counsel for the appellant submitted that there is no evidence on record to prove that the appellant was intoxicated in the sense in which intoxication is understood under Section 85 IPC nor in the sense of his ability to control the motor vehicle substantially impaired as a result of taking of alcohol as laid down by Section 185(1) of the M.V. Act. Number of other objections were taken by the counsel for the appellant which have already been referred above in the submissions raised by the counsel.

(a) Blood reports and validity of test conducted

173. Counsel for the State, on the other hand, placed reliance on the evidence of PW-16 and of the FSL report duly proved on record as Ex.16/A by the said PW-16, Dr. Madhulika Sharma, Sr. Scientific Officer. Since the counsel for the appellant has proceeded with his arguments after accepting the presence of 0.115% alcohol in the blood sample of the appellant as opined by PW-16, Dr. Madhulika Sharma, Sr. Scientific Officer, therefore, various contentions raised by the parties with regard to the procedure adopted by the prosecution for the collection of the blood samples or on the final report of the blood sample has become inconsequential. The counsel for the appellant has also made a strong challenge to the methodology of test of blood samples adopted by the prosecution in preference to the method prescribed under Section 185 of the

M.V.Act, which prescribes such tests only with the help of breath analyzer. Counsel for the appellant also placed reliance on the judgments reported as **Rowlands Vs. Hamilton, 1971 (1) AER 1089** and **Gumbley Vs. Cunningham, 1989 (1) ALL ER 5** in support of his arguments.

174. No doubt under Section 185 of M.V.Act, the test prescribed is through a breath analyzer and in the present case the test through the mechanism of breath analyzer was not carried out. Under Section 185 of M.V. Act if in the blood of an offender alcohol exceeding 30 mg per 100 ml of blood is detected then, such an offence has been made punishable for the first offence with imprisonment for a term which may extend to 1-6 months or with fine which may extend to Rs.1000 to 2000. It would be appropriate to reproduce Section 185 of the M.V. Act as under.

> "**185. Driving by a drunken person or by a person under the influence of drugs.**
>
> Whoever, while driving, or attempting to drive, a motor vehicle,-
>
> 1[(a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or]
>
> (b) is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle,
>
> shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.
>
> Explanation.-For the purposes of this section, the drug or drugs specified by the Central Government in this behalf, by notification in the Official Gazette, shall be deemed to render a person incapable of exercising proper control over a motor vehicle."

175. The language of said Section would show that the 'breath analyzer' test is required to be carried out only when the person is attempting to drive the vehicle or while he is driving the offending vehicle, therefore, it is apparent that the breath analyzer test is a kind of instant test to be conducted on the spot, through which the presence of alcohol in the blood of the offender can be determined instantly so that the offender may be prosecuted for drunken driving but not after a gap. But in the instant case, the appellant had fled from the site of the accident and was taken to AIIMS hospital at 12.29 P.M., on 10.1.99 when his blood sample was taken by the doctor attending on him. According to Section 45 of the Indian Evidence Act, opinion of witnesses possessing specialized knowledge and skills is admissible and therefore, the courts can form their opinion based on the evidence given by the medical experts and in the present case the evidence given by Senior Scientific Officer Dr. Madhulika Sharma which was not effectively rebutted by the appellant, remained conclusive between the parties. I, therefore, do not find any merit in the submission of the counsel for the appellant that the prosecution could not have resorted to the method of taking blood sample to find out the presence of alcohol in the blood of the appellant ignoring the method of breath analyzer test as statutorily prescribed under Section 185 of the M.V. Act.

(b) Blood test allowed under MV Act

176. Furthermore, a bare perusal of Sections 203 and 204 of M.V. Act would show that for the purpose of offence committed under Section 185 of M.V. Act, blood sample for laboratory test under Section 204 of M.V. Act may be collected where the breath test provided for under Section 203 M.V. Act could not be done as soon as reasonably practicable after the commission of the crime, due to the omission, refusal or failure of the offender. Breath analyzer test is more like a screening test used by police to determine if a person was driving a vehicle under the influence of alcohol. Sections 203 and 204 M.V. Act are reproduced as under:

> "203. Breath tests.- [110] [(1) A police officer in uniform or an officer of the Motor Vehicles Department, as may be authorised in this behalf by that Department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such police officer or officer has any reasonable cause to suspect him of having committed an offence under Section 185:
>
> Provided that requirement for breath test shall be made (unless, it is made) as soon as reasonably practicable after the commission of such offence.]
>
> (2) If a motor vehicle is involved in an accident in a public place and a police officer in uniform has any reasonable cause to suspect that the person who was driving the motor vehicle at the time of the accident had alcohol in his blood or that he was driving under the influence of a drug referred to in Section 185 he may require the person so driving the motor vehicle, to provide a specimen of his breath for a breath test-
>
> (a) in the case of a person who is at a hospital as an indoor patient, at the hospital,
>
> (b) in the case of any other person, either at or near the place where the requirement is made, or, if the police officer thinks fit, at a police station specified by the police officer:
>
> Provided that a person shall not be required to provide such a specimen while at a hospital as an indoor patient if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.
>
> (3) If it appears to a police officer in uniform, in consequence of a breath test carried out

by him on any person under sub-section (1) or sub-section (2) that the device by means of which the test has been carried out indicates the presence of alcohol in the person's blood, the police officer may arrest that person without warrant except while that person is at a hospital as an indoor patient.

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

(5) A person arrested under this section shall while at a police station, be given an opportunity to provide a specimen of breath for a breath test there.

(6) The results of a breath test made in pursuance of the provisions of this section shall be admissible in evidence.

Explanation.- For the purposes of this section "breath test", means a test for the purpose of obtaining an indication of the presence of alcohol in a person's blood carried out on one or more specimens of breath provided by that person, by means a device of a type approved by the Central Government by notification in the Official Gazette, for the purpose of such a test.

204. Laboratory test.- (1) A person who has been arrested under Section 203 may, while at a police station be required by a police officer to provide to such registered medical practitioner as may be produced by such police officer, a specimen of his blood for a laboratory test, if,-

(a) it appears to the police officer that the device, by means of which breath test was taken in relation to such person, indicates the presence of alcohol in the blood of such person, or

(b) such person when given the opportunity to submit to a breath test, has refused, omitted or failed to do so:

Provided that where the person required to provide such specimen is a female and the registered medical practitioner produced by such police officer is a male medical practitioner, the specimen shall be taken only in the presence of a female, whether a medical practitioner or not.

(2) A person while at a hospital as an indoor patient may be required by a police officer to provide at the hospital a specimen of his blood for a laboratory test-

(a) it it appears to the police officer that the device by means of which test is carried out in relation to the breath of such person indicates the presence of alcohol in the blood of such person, or

(b) if the person having been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, has refused, omitted or failed to do so and a police officer has reasonable cause to suspect him of having alcohol in his blood:

Provided that a person shall not be required to provide a specimen of his blood for a laboratory test under this sub-section if the registered medical practitioner in immediate

charge of his case is not first notified of the proposal to make the requirement or objects to the provision of such specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.

(3) The results of a laboratory test made in pursuance of this section shall be admissible in evidence.

Explanation.- For the purposes of this section, "laboratory test" means the analysis of a specimen of blood made at a laboratory established, maintained or recognised by the Central Government or a State Government."

177. A bare look at the aforesaid two provisions of the M.V. Act would show that in a case where due to failure, refusal or omission of a person, breath analyzer has not taken place, the presence of alcohol in the blood of such person can be ascertained through Laboratory test of blood sample of such person. It also needs to be mentioned that with the growth and advancement of science, the methodology adopted for such investigations cannot be restricted to the test as prescribed and new methods can always be adopted to give more authenticity and conclusiveness to such tests. If a restrictive interpretation is given in this regard, then the same would be a hindrance to avail the benefits of new technological developments. Be that as it may, creative interpretation of the provisions of the statute demands that with the advancement in science and technology, the court should read the provisions of a statute in such a manner so as to give complete effect to the same.

178. The two judgments cited by the counsel for the appellant cannot be of much help in view of the legal position discussed above. In **Rowlands Vs. Hamilton (Supra)**, the House of Lords

was confronted with a strange situation where the offender had consumed alcohol after he ceased to drive the vehicle and the question arose whether the alcohol content at the time of the test can be ascertained without adjustment of the consumption of whisky consumed by the offender after having ceased to drive the vehicle. Dealing with the pre-amended Section 1(1) of the Road Safety Act 1967, the House of Lords held as under:

> "Section 1(1) prescribes the manner in which the proportion of alcohol in the blood is to be determined. It is the proportion 'as ascertained from a laboratory test'. In my opinion, the Act does not permit of it being ascertained in any other way. The result of the test in this case showed the proportion of alcohol in the respondent's blood at the time the specimen was provided.
>
> ……The language does not, in my view, permit of any other exceeded, is not a test of the alcohol in the blood resulting solely from the consumption of alcohol before driving ceased then there must be an acquittal….."

179. It is in the aforesaid background, the House of Lords held that to determine whether the proportion of the alcohol in the blood exceeded the prescribed limit, the same could be ascertained only from a laboratory test as statutorily prescribed in Section 1(1) of the Road Safety Act 1967. It is also worth noticing that in the said case the offender was facing prosecution under the Road Safety Act unlike in the instant case where the appellant was facing charge under Section 304-I IPC and was convicted under Section 304 (II) IPC and not under Section 185 of the M.V. Act. Similarly, in **Gumbley Vs. Cunningham (Supra)**, the House of Lords was dealing with the amended provision of the Road Safety Act to answer the following question:

> "Whether on a true construction of Section 6(1) and Section 10(2) of the Road Traffic Act 1972, as amended, the prosecutor is entitled to adduce evidence other than by way of the specimen of breath or blood provided by the accused in order to prove the proportion of alcohol in the accused's breath or blood at the material time."

180. It would be worthwhile to refer the facts of the said case for better appreciation of the controversy involved therein. The offender in the said case at about 10.45 P.M. on 7.5.85 left along with his brother and drove his car at Erdington turn. He drove erratically for about six miles and about 11.15 P.M. he collided at high speed with the wall of an underpass in the city centre thereby killing his brother. He refused specimen of his breath and between 11.50 and 12.20 P.M. he started vomiting and thereafter was taken to a nearby general hospital. At 3.35 A.M. at the general hospital his blood sample was taken for analysis and the analysis revealed a concentration of not less than 59 mg of alcohol per 100 ml of blood. Since the presence of the alcohol was found less than the prescribed limit of 80 mg the prosecution sought to establish that the blood-alcohol concentration in the blood of the offender must have been in excess of the prescribed limit at the time of the collision. Relying on some medical evidence, the prosecution sought to establish that such a person would eliminate alcohol from his blood stream at between 10 and 25 mg per 100 ml per hour and if such an elimination of alcohol is taken into consideration then the presence of alcohol would have been in excess of the prescribed

limit at the time of the collision. It is in this background the House of Lords held as under:

> "I therefore agree with the conclusion reached by the Divisional Court that those who drive whilst above the prescribed limits cannot necessarily escape punishment because of the lapse of time. Because back-calculations involve a number of factors, eg. the individual's personal physiology, the amount, if any, which he has eaten and the nature of the alcohol which he has drunk, I would indorse the advice given by the Divisional Court that the prosecution should not seen to rely on evidence of back-calculations save where the evidence is both easily understood and clearly establishes the presence of excess alcohol at the time when the accused was driving. The Divisional Court was clearly right to emphasize that justices must be very careful, especially where there is conflicting evidence, not to convict unless on the scientific and other evidence, which they find it safe to rely on, they are sure that an excess of alcohol was in the defendant's body when he was actually driving as charged."

181. It would be thus apparent that decisions of both the judgments were based in their own peculiar facts and are no authority to determine the controversy involved in the present case. The other two judgments in the case of **Nazir Ahmad Vs. King Emperor, AIR 1936 Privy Council 253 (2)** and **State of U.P. Vs. Singhara Singh & Ors., AIR 1964, SC 358** are equally not applicable.

182. It is no more res integra that a decision of a court cannot be treated as Euclid's formula to be read and understood mechanically. A decision must be considered on the facts of that particular case. In this regard, the Hon'ble Apex Court observed as under in **Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University,(2008) 9 SCC 284**:

> 40. As held in Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani24 a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed: (SCC pp. 584-85, paras 9-12)

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton25 (AC at p. 761), Lord MacDermot observed: (All ER p. 14 C-D)

'The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.'

10. In Home Office v. Dorset Yacht Co. Ltd.26 (All ER p. 297g-h) Lord Reid said, 'Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.' Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2)27, (All ER p. 1274d-e) observed: 'One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament;' and, in British Railways Board v. Herrington28 Lord Morris said: (All ER p. 761c)

'There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.'

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

'Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it.' " (emphasis supplied)

41. In view of the above, we are of the opinion that the decision of this Court in Bhanu Prasad Panda (Dr.) case1 cannot be read as a Euclid's formula or treated as a precedent, since it has not given any reason for holding that Political Science and Public Administration are distinct and separate subjects, and since the aforesaid decision was given on a concession."

183. Based on the above discussion, the contention of the counsel for the appellant as regards breath analyzer also falls face down being devoid of any merit.

(c) PW 16 Dr. Madhulika Sharma, Senior Scientific Officer not rebutted

184. The next important question is whether the appellant had consumed the liquor beyond the permissible limit and was in a state of intoxication or drunkenness, impairing his driving ability at the time of causing the said accident. In the test report submitted by Dr. Madhulika Sharma, Senior Scientific Officer, FSL she found the presence of 0.115% weight/volume ethyl alcohol in his blood. The said test report was duly exhibited as Ex.PW-16/A in the evidence of PW-16, Dr. Madhulika Sharma. In her cross-examination, PW-16 clearly explained that 0.115 % would be equivalent to 115 mg per 100 ml of blood. In answer to the court question the said witness also clearly deposed that as per traffic rules if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed an offence. Whereas, in the present case it was much above i.e., 115 mg. The evidence of the said medical expert was not rebutted as no contrary suggestion was put to the said witness by the defence disputing the correctness of the said test report and therefore, the said unrebutted testimony of the said witness has to be given due credence. Even the plea of deduction of 0.020% from the said intake

of alcohol on account of aldehyde and ketones is not available to the appellant as no suggestion in this regard was given by the appellant to PW 16 during her cross-examination. In this regard, I find support from two judgments reported as **Shri Chand Batra Vs. State of U.P., AIR 1974 SC 639** and **State of Gujarat Vs. Ibrahim Mohmad, 1975 Crl. L.J. 1089.**

(d) Citing books

185. Furthermore, while challenging the authenticity of the blood samples and the report submitted by Dr. Madhulika Sharma, the learned senior counsel for the appellant referred to the case of **Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116**, where the Hon'ble Apex Court itself preferred to cite some passages of an eminent psychiatrist, Robert J. Kastenbaum from his book Death, Society and Human Experience, to analyse the causes, the circumstances, the moods and emotions that may drive a person to commit suicide. He has also relied on the judgment delivered by the Privy Council in **Tumahole Bereng and ors. v. The King AIR 1949 PC 172**.

186. To substantiate his point on irrelevancy of citing books, the learned counsel for the State relied upon **State (through CBI) v Santosh Kumar Singh 2007 Cri LJ 964 (Del) (DB)**, wherein the Division Bench of this Court referred to the judgments of the Hon'ble Supreme Court in **Sunder Lal v. State of Madhya Pradesh AIR 1954 SC 28: 1954 Cri LJ 257 and Bhagwan Dass v. State of**

Madhya Pradesh AIR 1957 SC 598: 1957 Cri LJ 889 where it was held that findings of an expert cannot be set aside by a Court by making a reference to some literature/book without confronting the expert with them and directing his opinion on it. The division bench also referred to the case of **Gambhir v. State of Maharashtra AIR 1982 SC 1157: 1982 Cri LJ 1243,** wherein it was held that the court should not usurp the function of an expert by arriving at its own conclusions contrary to the one given by the expert witness.

187. In this context, I find it relevant to refer to the case of **State of Madhya Pradesh v. Sanjay Rai 2004 Cri. L. J. 2006 (SC),** where the Hon'ble Supreme Court observed the following at para 17 of the judgment, also referring to its earlier decisions in **Sunderlal v. The State of Madhya Pradesh (supra) and Bhagwan Das and another v. State of Rajasthan (supra)**:

> "17. It cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of dealing with or disposing of the evidence of an expert examined in this case unless the passages which are sought to be relied to discredit his opinion are put to him. This Court in Sunderlal v. The State of Madhya Pradesh (AIR 1954 SC 28), disapproved of Judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. Similar view was expressed in Bhagwan Das and another v. State of Rajasthan (AIR 1957 SC 589). Though opinions expressed in text books by specialist authors may be of considerable assistance and importance for the Court in arriving at the truth, cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a Court of law to come to an appropriate conclusion of its own on the peculiar facts proved in a given case. In substance, though such views may have persuasive value cannot always be considered to be authoritatively binding, even to dispense with the actual proof otherwise reasonably required of the guilt of the accused in a given case. Such opinions cannot be elevated to or placed on higher pedestal than the opinion of an expert examined in Court and the weight ordinarily to which it may be entitled to or deserves to be given."

188. Considering the decisions of Hon'ble Supreme Court in **State of Madhya Pradesh v. Sanjay Rai (supra), Sunderlal v. The State of Madhya Pradesh (supra), Bhagwan Das and another v. State of Rajasthan (supra) and Gambhir v. State of Maharashtra (supra)** and also of the Division Bench of this Court in **State (through CBI) v Santosh Kumar Singh (supra),** it should always be kept in mind that the opinions given in books are not circumstance-specific and they will have only persuasive value and they cannot be made binding unless the experts are confronted to give answer to such opinions of Authors expressed by them in their textbooks. It cannot be forgotten that the experts of certain specialized field are expected to be well conversant with the opinions of authors expressed in various textbooks, to suitably answer the questions, if asked to them in their cross-examination. Hence, the counsel for appellant cannot rely upon the theories given in various books when they were not put to the said expert witness during her cross-examination.

(e) Whether accused was Sober or intoxicated at the time of accident

189. Now proceeding with the fact of the presence of 115 mg of alcohol per 100 ml of blood, the next question would arise as to whether with the presence of the said quantity of alcohol the offender could be considered sober or in the state of drunkenness or

intoxication to the level which could result in inpairing his capability to drive the vehicle at the time of occurrence of the accident.

190. Counsel for the appellant placed reliance on the medical jurisprudence by Modi's Medical Jurisprudence & Toxicology and Field's Expert Evidence to contend that these medical authorities are unanimous in their view that even if the presence of the said quantity of alcohol is taken as correct, the same would be consistent with sobriety and undiminished driving ability. Relevant para from the Modi's Medical Jurisprudence & Toxicology taken from page 315 is reproduced as under:

> "It is generally believed that a person with a concentration of 0.1 per cent alcohol in the blood appears to be gay and vivacious, and those with a concentration of 0.15 per cent alcohol in the blood are regarded as fit to drive a motor vehicle. This concentration of alcohol in the blood is regarded as a presumptive limit of safety, and may result from the rapid consumption of 8 ounces of whisky or 4 to 5 pints of beer. Persons with a concentration of 0.2 per cent alcohol in the blood, show symptoms of moderate intoxication where as those with 0.2 to 0.4 per cent are progressively dizzy, delirious, stuporous and quite drunk, and those with more than 0.5 per cent are dead drunk or deeply comatose. When the amount of alcohol approaches 0.6 to 0.7 per cent or more in the blood, death usually ensures from asphyxia. It is a legal offence for a person to with a blood alcohol level above 0.05 per cent drive a motor vehicle in Norway, above 0.08 per cent in Sweden and in England (Road Safety Act 1967) and above 0.10 per cent in Denmark, while in many states of USA, 0.15 per cent level results in a conviction.

Table of Equivalents Methods of Expressing the Concentration of Alcohol of the Tissues

Milligrams per 100 ml (w/v)	Milliliter per 100 ml (v/v)	Grams per liter	Percentage
50	63.13	0	0.05
100	126.26	1.0	0.10
150	189.89	1.5	0.15
200	252.52	2.0	0.20

Average specific gravity of alcohol at 20/20 may be taken as 0.7919

Specific gravity=Weight=W i.e 0.7919=50mg.V=50=60.13

Volume V V 0.7919

Concentration of 50 mg/100 mg(w/v) of alcohol will therefore be equivalent to a concentration of 68.13 ml/100 ml(vv).

Alcohol acts differently on different individuals and also on the same individual at different times. The action depends mostly on the environment and temperature of the individuals and upon the degree of dilution of the alcohol consumed. The habitual drinker usually shows fewer effects from the same dose of alcohol. Barbiturates, benzodiazepines, antihistamines, tranquilizers, chlorpromazine and insulin, potentiate the action of alcohol, while epileptics or persons who have suffered from a head injury may show an increased effect to a small quantity of alcohol."

191. Under Section 185 of the Motor Vehicles Act, presence of alcohol exceeding 30 mg per 100 ml of blood in a person driving the vehicle and attempting to drive a vehicle has been made punishable and in the present case the said quantity of blood is much in excess i.e., 115 mg per 100 ml of blood, therefore, so far the offence under Section 185 of the M.V. Act is concerned, the appellant could have been clearly held liable for the said offence but in the present case the appellant was not charged under Section 185 of M.V. Act and the presence of alcohol exceeding 30 mg necessarily would not lead to a conclusion that the offender was in drunken or intoxicated state to such an extent rendering him incapable to drive the vehicle. The different countries have laid down different parameters and different punishments so far the intake of alcohol by the person driving any vehicle is concerned. In India, prior to the amendment in the year

1994 in Motor Vehicles Act,1988, the drunken driving was totally prohibited and was punishable under Section 117 of the Motor Vehicles Act, 1939 and the said rigor was relaxed by putting the limit if presence of alcohol exceeding 30 mg per 100 ml of blood. In Sweden, if you drive with alcohol content of 0.02 % you can be imprisoned up to six months and if the said quantity increases to 0.10 % then you can go to jail for a period of two long years. In middle east countries like Kuwait, Iran, Saudi Arabia, they do not like their citizens to drink at all. In Canada if you drive with 0.08% then you may not be able to drive for one whole year after that and plus there is a fine. In the U.S.A too, the limit is 0.08%, although it varies in some of their states. You can also get one year imprisonment and licene can be suspended on the spot. In Pakistan also there is total ban of the alcohol and there is no question of any limit. In China, it is 0.05% and in Hong Kong also it is 0.05%. The maximum percentage in most of the countries in any case does not exceed 0.08%. Going by the views of the medical experts given in Modi's Medical Jurisprudence & Toxicology, this issue that under what circumstances a person can be considered in a state of intoxication was extensively dealt with in a case reported as **Narayanan Nair Vs. State, AIR 1952 Travancore Cochin 239**, where the accused Superintendent of Fisheries was on his way to conduct an inquiry into the official irregularities of some inspectors of Fisheries but was taken into custody on his way as he was found in the state of intoxication at a public place. Referring to the

Taylor's Medical Jurisprudence, Volume II pages 535 and 536, the court dealt with the subject in detail. It would be relevant to reproduce the following paras from the said judgment:

> "The absorption of alcohol from the stomach and small intestine begins soon after ingestion. The rate of absorption is dependent upon a number of factors, the most important being the presence or absence of food in the stomach. Food delays absorption and the delay is most marked in the presence of fat and protein (haggard and Greenberg, 1934; Mellanby, 1919). The concentration of alcohol is important, and generally the stronger the drink the more rapid is its effect. Absorption is usually complete within the first hour, so that after a single dose the maximum concentration in the blood is reached within the same period. After absorption, the alcohol is distributed, more or less evenly throughout the tissues, with the exception of the bones and fat. Thus by estimating the amount of alcohol in the blood it is possible to calculate the approximate total quantity in the body at that time and the minimum, quantity which must have been ingested.
>
> About 90 per cent of the alcohol absorbed is oxidized and the remaining 10 per cent is excreted, mainly by the kidneys and the lungs. At no stage in its oxidation is alcohol stored in the tissues and its disappearance from the blood takes place at a fairly uniform rate, which the rough calculation may be placed at, 10 c. cm. per hour (o.185 c. cm. per kg. of body weight (Mellanby, 1919). It to be cleared of alcohol after the ingestion of a single large whisky. The excretion by the kidney is of importance in that at the time of secretion the urine has a similar concentration as that in the plasma at the same time, though higher than that in the blood as a whole, the ratio being approximately 1.3:1.
>
> The concentration in the blood varies, however, increasing during absorption and then decreasing with oxidation. It follows, then that the concentration of alcohol in a given sample of urine will correspond with the average concentration in the blood during the time the urine has been collecting in the bladder (Smith and Stewart, 1932). If the concentrations in the urine and blood are estimated some time after ingestion when the alcohol in the blood has fallen through oxidation, it may be found that the urine alcohol is at a higher level. Urine examination may, therefore, be used instead of blood examination and gives a reasonably accurate idea of the total alcohol in the body.
>
> A considerable number of investigations have been made in an endeavor to correlate the alcoholic concentration in the blood with the behavior of the individual.
>
> It is generally agreed that with concentrations below 0.05 per cent, there is little change to be observed on clinical examination; at 0.10 per cent, a number shows mild symptoms and quite possibly some more decided symptoms. Between this level and 0.2 per cent the number showing decided symptoms of intoxication increases, and at the latter figure it is to be expected that practically all will be diagnosed clinically. The critical concentration seems to lie at or about the 0.15 level and any person with this amount in his blood can be considered to have imbibed a dangerous amount of alcohol. With increasing concentrations the symptoms become more intense and at concentrations beyond 0.2 per cent up to 0.5 per cent there is likely to be marked inco-ordination, come and possibl

'Effects of alcohol'. The only acute effect of alcohol which is of any interest is its effect on the central nervous system. Its first effect appears to be a depression of the highest evolutionary centres, the centres regulating the conduct, judgment, and self criticism. It passes progressively downwards through the centres of earlier evolutionary origin until the motor centres are reached, and finally it depresses and paralyses the vital centres in the medulla.

There is first a feeling of well being and a certain slight excitation. The actions, speech and emotions are less restrained, due to a lowering of the inhibition normally exercised by the higher centres of the brain. With this there is increased confidence and a certain carelessness of consequences. This implies a lack of self-control, which is one of the first things observed after alcohol, and which is a constant feature of alcoholic poisoning.

When the narcosis has penetrated more deeply the sense perceptions and skilled movements are effected. The increased loss of the inhibitory action of the higher centres causes an alternation in the conduct of the individual according to the dictates of his inherent desires and emotions.

This accounts for the fact that an individual may become morose, gay, irritable, excitable, pugnacious, sleepy and so on, according the dominant impulses which have been unleashed by the drug. The reaction times are somewhat lengthened, and there is a certain clumsiness and inco-ordination in the finer and more skilled movements shown by slight alteration in speech and in the finer finger movements.

This passes into a third stage, where the motor and sensory cells are deeply affected, speed becomes thick and slurring, co-ordination is markedly affected, causing the patient to stagger and possibly to fall. Finally a stage is reached where the narcosis affects the whole nervous system, and the patient passes into a state of coma with stertorous breathing, indicating a commencing paralysis of the respiratory centre.

The coma gradually lightens into a deep sleep, and the patient, if left alone, usually recovers in eight to ten hours and wakes up with gastro-intestinal irritation, and usually nausea, vomiting and severe headache. If the coma continues for more than ten hours, the prognosis is bad."

(3) The accused was not in any condition of coma when P.W.8 saw him. According to the prosecution, it was also more than five h ours since he had taken the liquor. He could not, therefore, have been in a stage of intoxication at 12.50 a.m. P.W.7 himself stated that the accused pleaded before him to let him free. That would not be the condition of a person who was in a stage of intoxication. The tests to find out whether a person is intoxicated or not, are given at pages 613 and 614 of Modi's Medical Jurisprudence and Toxicology. They are given below:

"In order to ascertain whether a particular individual is drunk or not a medical practitioner should bear the following points in mind:

1. The quantity taken is no guide.

2. An aggressive odour of alcohol in the breath, unsteady gait, vacant look, dry and sticky lips, congested eyes, sluggish and dilated pupils, unsteady and thick voice, talks at random and want a perception of the passage of time are the usual signs of drunkenness.

3. Drunkenness does not come within the cognizance of the police, unless the man is dangerous to himself or to his property or that he is annoying or dangerous to others.

A special committee of the British Medical Association was appointed to consider the question of the definition and diagnosis of drunkenness. This committee arrived at the following conclusions and recommendations in regard to persons accused of being "drunk":

I. That the word "drunk" should always be taken to mean that the person concerned was so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safety the occupation on which he was engaged at the material time.

II. That it is desirable that a medical practitioner should base his opinion on the following considerations:

(a) Whether the person concerned has recently consumed alcohol.

(b) Whether the person concerned is so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time.

(c) Whether his stage is due, wholly or partially, to a pathological condition which causes symptoms similar to those of alcoholic intoxication, irrespective of the amount of alcohol consumed.

III. That in the absence of any pathological conditions a person is definitely under the influence of alcohol if there is a smell of alcoholic liquor in the breath and/or in the vomited manner (if any) provided there is a combination of all or most of the following groups of signs or symptoms:

(i) A dry and furred tongue, or conversely, excessive salivation.

(ii) Irregularities in behavior, such as insolence, abusive language, loquacity, excitement or sullenness, and disorder of dress.

(iii) Suffusion of the conjunctivae & reaction of the pupils. The pupils may vary from a stage of extreme dilatation to extreme contraction and may be equal or unequal.

In the opinion of many police surgeons when alcohol in toxic quantity has been consumed, the pupil reflex to 'ordinary light' is absent, whereas the pupil will contract in 'bright light' and remain contracted for an abnormally long time, indicating the delayed reaction of the pupil.

(iv) Loss of confusion of memory, particularly as regards recent events and appreciation of time.

(v) Hesitancy and thickness in speech and impaired articulation.

(vi) Tremors and errors of co-ordination and orientation.

IV. That there is no single test by itself which would justify a medical practitioner in deciding that the amount of alcohol consumed had caused a person to lose control of his faculties to such an extent as to render him unable to execute safely the occupation on which he was engaged at the material time. A correct conclusion can only be arrived at by the result of the consideration of a combination of several tests or observations such as

General demeanor;

State of the clothing;

Appearance of the conjunctivae;

State of the tongue;

Smell of the breath;

Character of the speech;

Manner of walking, turning sharply, sitting down and arising picking up a pencil or coin from the floor;

Memory of incidents within the previous few hours and estimation of their time intervals;

Reaction of the pupils;

Character of the breathing, especially in regard to hiccup.

V. That the following are the tests, upon which taken by themselves, little stress should be laid in deciding whether or not a person is under the influence of alcohol:

Presence of tachycardia (rapid pulse);

Repetition of set words or phrases;

Character of handwriting;

Walking along a straight line;

Failure of convergence of the eyes."

192. A survey suggests that drunken drivers have been responsible for the maximum number of road rages and accidents. Although in India the numbers of cases detected are few, there are too many who consume alcohol while or before driving. Though the laws to check the drunken driving do exist in India but they are totally inadequate to deal with this growing menace to effectively deal with the alcohol-impaired drivers. The punishment for drunken driving is a meager 950 rupees, which is sufficient to get an offender out on bail even if he has fatally knocked down or crippled someone. The Parliamentary Standing Committee on transport, tourism and culture in its 139th report on motor vehicles (amendment) bill, 2007 recently proposed making drunken driving a criminal offence of culpable homicide not amounting to murder under IPC and there is an urgent need for the State to bring suitable legislation so as to make drunken driving a

more stringent offence. The said recommendation is reproduced as under:

> **"The Committee, therefore, recommends that the Government may amend the necessary legislations to include the deaths due to drunken driving as culpable homicide not amounting to murder.**
>
> **The Committee also recommends that if the drunken driver commits an accident his action should not be construed as mere 'negligence' rather it should be treated as a premeditated commitment of a crime and the drunken driver should be punishable under relevant provisions of IPC depending on the consequences of the accident."**

193. Be that as it may, the appellant in the present case was taken to the AIIMS Hospital for his medical examination on 10.1.99 at 12.29 P.M. and he was found to be oriented, alert, cooperative, speech coherent, but eyes congested, gait unsteady with the presence of alcohol. The statement of the appellant was recorded by the police on the same morning at about 7 A.M. and there was no complaint of the police that the appellant was not sober or was not able to give statement due to intoxication.

194. As would be seen from the above, the word "drunk" shall be taken to mean that the person concerned was so much under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation on which he is engaged at the material time. It can also be seen from the above discussion that alcohol acts differently on different individuals and also on the same individual at different times. Counsel for the appellant has admitted the presence 0.115% alcohol, which is equivalent to 115 mg in 100 ml of blood and it has to be

seen whether the said quantity of alcohol in the blood of the appellant was considered as sober or not. In Modi's Medical Jurisprudence and Toxicology, 22nd Edition, at page 315, 0.15% alcohol, which is equivalent to 150 mg of alcohol in the blood has been regarded as fit to drive the motor vehicle, but in **Narayan Nair's** case (supra), the Cochin High Court while referring to Taylor's Medical Jurisprudence Volume II observed that the presence of 0.15 mg of alcohol in the blood can be considered a dangerous amount of alcohol in the blood. It was further observed that with the increasing concentration, the clinical symptoms in a person becomes more intense and at the concentration between 0.2 to 0.5% there is likely to be marked incardination, coma and possible death. In Taylor's Principles and Practice of Medical Jurisprudence, Eleventh Edition at page 426, while discussing the effect of the different quantities of alcohol in blood with varying symptoms, it has been observed as follows:-

> "Broadly speaking, it is agreed that with concentrations in the blood below 0.05 per cent, there is little change to be observed on clinical examination; at 0.10 per cent a number show mild symptoms and a few more decided symptoms. Between this level and 0.2 per cent the number showing decided symptoms of intoxication increases, and at the latter figure it is to be expected that practically all will be diagnosed clinically as being under the influence of alcohol. The critical concentration seems to lie at or about the 0.15 level and any person with this amount in his blood can be considered to have imbibed a significant amount of alcohol. With increasing concentrations the symptoms become more intense and at concentrations beyond 0.2 per cent up to 0.5 per cent there is likely to be marked incoordination, coma and a danger of death."

195. There are thus different medical views but one thing is clear that the case of the appellant was somewhere in between the level of

sobriety and drunkenness. Now since as per the medical jurisprudence, consumption of alcohol acts differently on different individuals and also on the same individual at different times and the presence of some of the clinical symptoms even at 12.29 p.m. on 10.1.1999 i.e. unsteady gait, eyes congested as opined by PW10 Doctor T. Milo in his MLC report, it cannot be said that the accused was fit to drive the said BMW car safely on the fateful morning of 10.1.99 at 4.30 a.m. The manner in which the said ghastly accident has taken place and the scene of accident go to show that the appellant was under the influence of liquor and was driving the vehicle most recklessly. Merely because the appellant had driven his vehicle upto a distance of 16 Kms without any untoward incident is no ground to believe in itself that he was not in an inebriated state. More so when it is not known whether he alone continued to drive the vehicle till the place of accident and no one else drove the same.

196. Based on the above discussion, I am of the view that presence of 0.115% of alcohol, which in any case is much above the limit of 30 mg prescribed under the Motor Vehicles Act certainly must have affected his ability to drive the vehicle in a safe manner otherwise mishap of such a magnitude could not have taken place. Even otherwise no suggestion was given by the defence to the expert witness PW16 Dr. Madhulika Sharma, Senior Scientific Officer that as per Modi's Medical Jurisprudence and Toxicology the consumption of alcohol of 0.115% w/v by the appellant was near sobriety.

4. Conviction under Section 304 (II), IPC – whether sustainable or should it be altered to that under Section 304 – A?

197. Coming to the most crucial aspect of the case as to whether the appellant had been rightly convicted and sentenced for the offence punishable under Section 304 (II) of the Indian Penal Code or whether Section 304-A IPC would attract in the facts of the present case.

(a) Reasoning given by trial court

198. Before I venture to discuss the rival arguments of the parties on the said contentious issue, let me briefly discuss the reasoning given by the learned trial court in arriving at the said finding by holding the appellant guilty of committing an offence under Section 304 (II) IPC. The learned trial court has examined the case from two different angles i.e., one by keeping the evidence of Sunil Kulkarni out of purview and secondly by taking into consideration his evidence. The trial court placed reliance on the judgment of the Apex Court in **State of Gujarat Vs. Haidarali Kalubhai -1976 (1) SCC 889** to dispel the impression that every case of accident, if resulting into death would attract criminal liability only under Section 304-A IPC. The observations of the Apex Court in the said judgment, as referred to by the trial court are reproduced as under:

> "Section 304A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 IPC or murder under Section 300 IPC. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some persons, it will not

be a cause of mere rash and negligent driving and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused."

199. Based on the said ratio of the judgment, the trial court held that if situation so warrants reckless driving may also be covered under Section 300(4) IPC or it may fall under part (3) of Section 299 IPC and if a particular case does not fall in either of the two situations then the court will consider the question as to whether the offence under Section 304-A IPC is made out or not. The trial court also placed reliance on one article with the title 'RECKLESSNESS UNDER THE INDIAN PENAL CODE' by Stanley Meng Heong Yeo, an Australian author, published in Volume 30 of Journal of the Indian Law Institute, so as to examine the scheme of the Indian Penal Code dealing with different situations envisaged under part (3) of Section 299 IPC, Section 300(4) IPC and Section 304-A IPC. Serious objections were raised by the counsel for the appellant to such reference made by the trial court on such an article without affording any opportunity to the defence to go through the said article and to address arguments on the same. I will deal with this aspect in the later part of my judgment.

200. Referring to three different situations envisaged under the above provisions, the trial court held that Section 300 (4) comprehends a situation, where the knowledge required is of first degree whereby the person committing the act knows that the act is imminently dangerous that the same would result into death, in all

probability. Such type of act would be punishable under Section 302 IPC as the same involves highest degree of gross recklessness on the part of the offender. Knowledge of second degree can be comprehended from part (3) of Section 299 IPC, where the death is caused by the offender by an act which the offender knows is likely to cause death. In such type of offence, the court termed the same as that of substantial gross recklessness and would be punishable under Section 304 Part (II) of IPC. As far as Section 304-A IPC is concerned, the knowledge of third degree involves death of a person but the offender hopes that the same would not occur and such type of offence would be the lowest degree of gross recklessness and may be called a rash act. After drawing a distinction of three various situations contemplated in the above three sections, the trial court examined as to what type of knowledge the appellant possessed at the time of commission of the offence. The trial court gave a detailed account of the scene of the crime as narrated by S.I. Kailash Chand in the rukka as well as in the site plan proved on record as Ex.PW58/A and after comparing the same with the scene of crime, viewed by the presiding judge from the C.D., the court found that from the scene of crime itself it stands proved beyond doubt that the appellant had knowledge that the car being driven by him was dragging 3-4 persons who got entangled under the bonnet of his car. The trial court also took into consideration the testimony of PW-2 Manoj Malik to come to the conclusion that it is a case of causing

death of human beings by an act of gross recklessness on the part of the accused Sanjiv Nanda.

201. The trial court also gave a gist of ratio of various Supreme Court decisions cited by the defence in support of their argument that the case in hand can only attract Section 304-A IPC, but the trial court had shot down the said argument of the defence counsel by holding that all these cases were the cases of simple rash driving and in none of those cases the drivers were found drunk. The court also found that in the present case the accused was so heavily drunk that the knowledge can be validly imputed upon him that if he drives the vehicle he was likely to cause death of human beings passing on the road. In fact the court found that the gravity of the knowledge of the offender was almost touching boundaries of Section 300 (4) of IPC, but the court held that it would be unjustified to treat the present case under Section 304-A IPC, and therefore, would fall within the purview of Section 299 (3) IPC.

202. From the other angle the court examined the issue by taking into consideration the testimony of the said court witness Mr. Sunil Kulkarn. Totally ignoring the creditability of said witness, the court found that his testimony fully supported the scene of crime as well as the fact of reversal of the car. The theory of reversal of car was introduced by the court witness for the first time when he gave his statement before the court and the same was found corroborated by the court after having viewed the oblique tyre marks from the videography of the scene of crime. The court thus found that after

taking into account the testimony of Sunil Kulkarni it could be clearly found out as to in what manner the offence took place and how the entangled bodies were dragged and then fell one by one on the road and therefore, based on the testimony of the said court witness, the court found that the offence committed by the appellant would fall under part (3) of Section 299 IPC and in no manner the same could fall under Section 304-A IPC.

203. Therefore, as discussed above, the learned trial court, after having taken into consideration the circumstantial evidence as well as the ocular evidence found the appellant having committed the offence punishable under Section 304 (II) IPC and not under Section 304-A IPC.

(b) Sections 299, 300, 304-A of the Penal Code

204. At this juncture, it would be worthwhile to reproduce Sections 299, 300 and 304-A IPC which are as under:

> "**299. Culpable homicide –**
>
> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> Explanation 1.-A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
>
> Explanation 2.-Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
>
> Explanation 3.-The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child

may not have breathed or been completely born.

300. **Murder** –

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or –

2ndly – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. or

3rdly – If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly – If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.-When culpable homicide is not murder.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos –

Firstly –That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly – That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.-Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence or person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law,

and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

304A. Causing death by negligence –

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

205. The provision of Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. This provision is thus directed at offences outside the range of Sections 299 and 300 IPC and obviously contemplates those cases where neither intention nor knowledge enters. On the other hand, Section 299 of IPC deals with those cases in which death of the victim is caused by the accused with the intention to cause death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the act is likely to cause death. In the scheme of Indian Penal Code culpable homicide is the genus and murder is its species. All murders are culpable homicide but not vice-versa. The Indian Penal Code practically recognizes three degrees of culpable homicide; the first may be termed as culpable homicide of the first

degree; this is the gravest form of culpable homicide which is defined under Section 300 as 'murder'. The second may be termed as culpable homicide of the second degree, which is punishable under Ist Part of Section 304 and then there is culpable homicide of third degree which can be termed as lowest type of 'culpable homicide' and punishment for this is provided under the IInd Part of Section 304. It needs to be noticed that there is a firm distinction between the classes of cases contemplated by two parts of Section 304 IPC. The Ist Part of Section 304 postulates a more serious class of offences where the court can infer that there is clear intention to cause death, whereas, the IInd Part of Section 304 contemplates a slightly lesser class of offence where there is a 'knowledge' that the act is likely to cause death, but the 'intention' is completely missing. Thus, in Part-I of Section 304 the mental element or mens rea is 'intention' whereas, in Part-II of Section 304 the mens rea is 'knowledge'. In a case where the accused could have known that the death was likely to be caused but he did not intend to cause death, it was held that the accused could only be convicted under the third clause of Section 299, i.e., for 'culpable homicide' punishable in Part-II of Section 304 but neither under Section 302 nor Part-I of Section 304 IPC. 'Knowledge' thus cannot be equated with an 'intention' and as compared to 'knowledge', 'intention' requires something more than mere foresight of the consequences, mainly the purposeful doing of a thing to achieve a particular end. In a case where there is no evidence to show any

'knowledge' of the likelihood of causing death on the part of the accused, the IInd part of Section 304 IPC will not apply.

206. For attracting Section 304-A, the first requirement is to rule out 'culpable homicide'. The Section applies to acts which are not crime in themselves but rather punishable by reason of death having been caused, due to rash or negligent act. Section 304-A thus applies where there is neither 'intention' to cause death, nor 'knowledge' that the act done in all probability would cause death. When the 'intention' or 'knowledge' is the direct motivation of an act complained of, Section 304-A has to make room for the graver and more serious charge of 'culpable homicide'. The words used in Section 304-A 'not amounting to culpable homicide' in the Section are very significant and therefore, it must be understood that the cases of intentional or knowingly inflicted acts of crime, directly and willfully, are excluded. The Apex Court in **Rathnashalvan Vs. State of Karnataka, (2007) 3 SCC 474**, while interpreting Section 304-A IPC held as under:

> "7. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge

that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.

8. As noted above, "rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted.

9. The distinction has been very aptly pointed out by Holloway, J. in these words:

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (luxuria). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." (See Nidamarti Nagabhushanam, In re1, Mad HCR pp. 119-20.)"

207. On the similar lines the Apex Court in **Shankar Narayan Bhadolkar Vs. State of Maharashtra, (2005) 9 SCC 71** held as under:

"18. Coming to the plea of the applicability of Section 304-A, it is to be noted that the said provision relates to death caused by negligence. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision relates to offences outside the range of Sections 299 and 300 IPC. It applies only to such acts which are rash and negligent and are directly the cause of death of another person. Rashness and negligence are essential elements under Section 304-A. It carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder in Section 300 IPC. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304-A IPC has to make room for the graver and more serious charge of culpable homicide.

19. In order to be encompassed by the protection under Section 304-A there should be neither intention nor knowledge to cause death. When any of these two elements is found to be present, Section 304-A has no application. The accused-appellant not only picked up the gun, unlocked it for use but also put the cartridges and fired from very close range, aiming at a very vital part of the body.

> 20. In the background facts as highlighted above, the inevitable conclusion is that Section 304-A has no application.

208. While drawing the distinction even between rash act and negligent act, the Apex Court in **Bhalachandra Waman Pathe Vs. The State of Maharashtra, 1968 ACJ 38**, held as under:

> "An offence under Section 304-A Indian Penal Code may be committed either by doing a rash act or a negligent act. There is a distinction between a rash act and a negligent act. In the case of a rash act as observed by straight, J. in Idu Beg's case the criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Again as explained in Nidamarti Negaghushanam's case, a culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and if he had he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection."

209. Counsel for the appellant placed reliance on English judgments to support his argument that at best the offence committed by the appellant, can attract Section 304-A and not Section 304-II IPC. In **R v. Evans [1962] 3 All ER 1086, [1963] 1 QB 412,** the Court of Criminal Appeal held that if a driver adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt, it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent act.

210. In **R v Thorpe [1972] 1 All ER 929**, the Court of Appeal held that the evidence that a driver charged with causing death by dangerous driving had, prior to the accident, been drinking was admissible provided that it went far enough to show that the quantity of alcohol consumed was such that it **might adversely** affect a person driving; proof that the alcohol content of the blood of a person driving exceeded 80 mg per 100 ml (the prescribed limit) was sufficient to show that the quantity of alcohol consumed was such that it might adversely affect a person driving, and was therefore admissible, whether or not, in the case of a particular person driving, the quantity of alcohol might or might not have affected him.

211. In **R v. Murphy [1980] QB 434, [1980] 2 All ER 325**, the accused was convicted by the trial court for the offence of causing death by driving recklessly. It was observed by the Court of Appeal that a driver is guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent as to whether or not he does so and thereby creates a risk of an accident which a driver driving with due care and attention would not create. It was further observed that whether or not a man is driving in defiance of or with indifference to the proper standard will usually be a matter of inference for the jury on the evidence as to the manner in which the vehicle was actually driven and as to road conditions. However, there may be some other explanations such as a mechanical defect or an inadvertent failure to observe a traffic sign and so on.

212. In **R v. Lawrence [1981] 1 All ER 974**, the House of Lords held that the actus reus of the offence of driving recklessly is not merely driving without due care and attention but driving in a manner that creates an obvious and serious risk of causing physical injury to any other road user or substantial damge to property. Secondly, the mens rea of the offence is driving in such a manner without giving any thought to the risk or, having recognized that it exists, nevertheless taking the risk. It is for the jury to decide whether the risk created by the accused's driving was both obvious and serious, the standard being that of the ordinary prudent motorist as represented by themselves.

213. In **R v. Boswell [1984] 3 All ER 353**, the court of appeal observed that causing death by reckless driving is a serious offence and to be guilty for it, the defendant must have created an obvious and serious risk of injury to the person or damage to property and have either given no thought to the possibility of that risk when it would have been obvious to any ordinary person or having seen the risk nevertheless decided to take it.

214. Counsel for the State, on the other hand, placed reliance on the judgment of the Division Bench of the Delhi High Court reported as **Nehru Jain Vs. State of NCT of Delhi-2005 (1) JCC 261** to buttress his argument that even in a case where the act of offender in its nature is very dangerous and from which 'knowledge' about the likely consequences including the death of a human being can

be attributed to him, the offence committed would be ‘culpable homicide’ punishable under Section 304-II and not under Section 304-A IPC. The facts in the said case before the Division bench were different from the case in hand. The matter before the Division Bench arose in the background of facts inter alia that in a marriage procession the accused fired shot from his licensed revolver to add gaiety to the occasion which led to the death of a member of a band team. The trial court based on the evidence on record convicted him under S. 302 IPC and sentenced him for life imprisonment. Matter when came before the Division Bench, it was confronted with the question whether the appellant's act of causing death of the deceased would tantamount to an offence of murder as held by the trial court or any lesser offence as argued by the counsel for the defence. The court ruled out the possibility of the offence being covered under S. 300 IPC as it was not the case of the prosecution that the accused fired into the crowd of persons constituting the marriage procession or the band party ahead of it. All that was stated was that the appellant was firing from his revolver which act, in the absence of any positive evidence from any quarter to prove that the fire was directed towards the crowd in total disregard for the safety of those comprising the same, could not bring the appellant's case under fourth clause of Section 300 of the IPC. The counsel for the accused contended that the appellant was firing in the air which, according to him, was safe as it could not endanger anybody's life. Knowledge that the appellant's act was likely to cause death could

not, therefore, be attributed to him. That being so, an essential requirement for an offence to fall under Section 299 of the Code was missing in the process bringing the appellant's case under Section 304A, the counsel for the accused argued. But the court rejected the said plea of the counsel for the accused and observed that in the first place, the circumstances in which three gun shots were fired from the appellant's revolver were best known to the accused and ought to have been explained by him. The accused has not, however, done anything of that kind. On the contrary, he totally denied any knowledge about the incident and alleged that he was falsely implicated. The division bench thus held on the basis of the available evidence that the accused had knowledge that by such act, he was likely to cause death and thus convicted him under S. 304 Part II. However, the facts of the instant case where the charge against the accused was driving the motor vehicle in a drunken state and therefore, due to dissimilarity of fact situation the said decision of Division Bench cannot be made applicable to the peculiar facts of the present case.

215. It is no more res integra, as discussed earlier, that Courts should not place reliance mechanically on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.

216. Also, the other cases of **Sarabjeet Singh & Ors. Vs. State of U.P. – 1984 SCC (Cri) 151** relied upon by the counsel pertaining to

the issue of whether the act of lifting and throwing of an infant with force on a cultivated ground causing death after few hours would be covered under Ss. 302 or 304 II or 304-A IPC; the issue in **State of Orissa vs. Bhagban Barik – 1987 CAR 209 (Sc)** in relation to a lathi blow; issue in **Kurban Hassein Mohammedalli Rangawalla vs. State of Maharashtra – Air 1966 SC 1616** in relation to fire breaking out in factory; issue in **Radha Kishan vs. State of Haryana – 1987 CAR 349 (SC)** in relation to gun shot by a drunkard on another drunkard; the issue in **Maragatham @ Lakshmi – (1962) 2 MLJ 286** in relation to the death of an infant when her parents attempted to commit suicide by jumping in a well with the deceased child due to their inability to bear with their perpetual penury are cases which can be of no help to the prosecution as the facts of the those cases are entirely different from the facts of the case at hand.

217. Indisputably, one's heart goes out, the way the accident had occurred resulting into piercing the body parts of some of the innocent victims. At the time of passing interim order, this Court had observed that the site looked like a scene of bomb blast, had it not known that the occurrence was as a result of accident involving a car. Lot many deaths take place in various metropolitan cities in our country due to the accidents caused by the drunken drivers and in most of the cases the spoilt brats of rich families are involved. The necessary amendment in the Indian Penal Code and the Motor Vehicles Act is the only solution as suggested by the Parliamentary

Standing Committee on transport, tourism and culture in its 139th report on the Motor Vehicles (Amendment) Bill, 2007 to effectively deal with this growing menace of drunken driving, and in the absence of any proper legislation in the place, neither the prosecution nor the courts should venture to convert the accident cases resulting into deaths from Section 304-A of IPC to Section 304(I) or (II) of IPC unless the fact situation clearly proves intention or knowledge on the part of the accused as held by the Apex Court in the case of **Shankar Narayan Bhadolkar's case** (supra). So long as the law is not suitably amended, the State should take stringent measures to deter drunken driving, but ultimately this menace can be curbed only by means of legislation.

218. What is generally seen is that a drunken person who may not be totally fit but still drives his vehicle to boost his confidence level to give an impression that he is totally fit to drive the vehicle. Such confidence level is often found more in the young generation. With the growing culture of late night parties, discotheques and pubs our younger generation is tilting towards the vice of consuming liquor at an early age of their lives and as a result on most occasions they not only play havoc with the innocent lives of other human beings but also with their own lives. Attributing knowledge to these people would mean that by driving the vehicle in an inebriated state they are prepared to take their own lives besides taking the lives of others on the road. No person in my view will undertake such a

misadventure of running the risk of his own life and with the lives of others unknown to him.

219. Generally speaking, in motor accident cases involving death of victims, Section 304-A is the only provision in the statute to be taken recourse to by the investigating agencies and the accused is made to face trial under that section alone. In order to depart from this normal practice, there has to be more incriminating material on record like motive of crime, or victim and accused being known to each other and such like circumstances whereby the accused intended to kill the victim due to some prior animosity by using a motor vehicle as a weapon of offence to attract Section 300 of the IPC or the knowledge that his act will in all probability would result in causing death to attract Section 304, Part II of the IPC.

Before proceeding further, I find it relevant to distinguish the terms 'recklessness', 'wishfully' and 'willfully' as the trial court has misconstrued their meanings and held in the impugned judgment that these terms are synonyms of each other while relying upon the term 'willfully' as used by the Hon'ble Supreme Court in **State of Gujarat v. Haidarali Kalubhai (1976) 1 SCC 889**. According to the *Black's Law Dictionary*, 6th edition, *Recklessness* means rashness; heedlessness; wanton conduct. It is the state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge. Recklessness is a

stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended. However, 'willful' as defined in the dictionary is something which proceeds from a conscious motion of the will; voluntary; knowingly, deliberate; intending the result which actually comes to pass; designed; purposeful; not accidental or involuntary. *'Wish'* has been defined as an expression of desire. So, a person would act '*wishfully*' with a desire to do that thing. At a bare perusal of the dictionary meanings of these terms, I am not able to comprehend as to how the trial court came to the conclusion that these three terms are synonym to each other. The term 'willfully' acknowledges the voluntary act on the part of the person committing that act. Wishfully recognizes the desire of the person doing that thing. Therefore, both these terms reflect the intention on the part of the actor. However, recklessness though a stronger term than a mere or ordinary negligence, does not involve either intention or knowledge. It only refers to a man's disregard to a probable or possibly injurious consequence.

220. The facts and circumstances of the present case do not suggest any intention on the part of the appellant to cause death of six persons. It is not even the case of the prosecution that either because of any enmity or other provocation, the appellant could be said to have intentionally caused the death of these persons or inflicted an injury which was likely or sufficient in the ordinary

course of nature to cause death. What is argued by the prosecution which found favor with the trial court was that the appellant must be presumed to have had the knowledge that his act of driving the vehicle at a high speed while he was drunk beyond the permissible limit prescribed under S. 185 MV Act and based on other circumstantial evidence, was likely to cause death.

(c) Determination of Knowledge of the accused

221. This brings me back to determine the question as to whether the accused had knowledge at the time of commission of the offence that his act was likely to cause death of 6 persons and injury to one person. The prosecution, in this regard, urged that the appellant had the knowledge that his act of driving the vehicle at a high speed while he was drunk beyond the permissible limit prescribed under S. 185 MV Act coupled with other circumstantial evidence, placed on record, without taking adequate safeguards and without proper care and caution was likely to cause death. Counsel for the appellant, on the other hand, contended that the appellant was driving the vehicle on a cold wintry morning of January and it was not expected of him to know or visualize that a crowd of seven people would be standing in the middle of the road and according to him, accused will have to be presumed to have driven the vehicle safely till he reached Lodhi Road as he had, by then, covered almost a distance of 16 kilometres without endangering anybody's life. Therefore, knowledge cannot be attributed to him.

222. Before any discussion is made in this regard, I find support from the following observations made by the Hon'ble Supreme Court in **Sadhu Singh Harnam Singh v. State of Pepsu AIR 1954 SC 271**:

> "10. On a careful reading of the evidence of the eye-witnesses and the different statements that have been made by them it is quite clear that the incident happened in a very short time and suddenly. There was no previous enmity between the deceased and the accused. On the other hand, the accused was very respectful to the Mahant and was over-anxious to show all hospitality to him. It seems that he was anxious that the Mahant should not go away from his house without taking meals and spending the night with him, and seeing that the Mahant was going away, in all probability he let go his gun without aiming it at the Mahant in order to prevent him from leaving his place by terrifying him to some extent. It is not possible to believe the embellished version of the witnesses that Sadhu Singh was present at the altercation between his father and the Mahant or that he loaded the gun after he himself had intervened in the altercation, or that there was the conversation alleged by the witness between him and the Mahant. It also appears that the story that the accused took aim before firing at the Mahant or that he said that he had never allowed in the past anybody to go like that from his house is a subsequent introduction in the case to add gravity to the offence committed by the accused.
>
> *********
>
> 12. It seems to us that the High Court was in error in thinking that there was not a single difference between the statements made by the witnesses in the first information report and the statements made at the trial, which went to the root of the case. As above pointed out, the whole version as to the nature and character of the act of the accused had been completely changed. An act which on the facts stated in the first information report and on the statements made to the police may well be regarded either accidental or rash and negligent, has been deliberately made to look like an act of deliberate murder. If such a difference does not go to the root of the case it is difficult to conceive what else can fall within that class of cases. We are therefore of the opinion that the High Court was clearly in error in holding that the accused was guilty of the offence of murder under Section 302, I. P. C. On the materials placed on the record it could not be held proved that he had any intention of firing at the Mahant. He seems to have pulled the trigger without aiming at the Mahant in a state of intoxication in order to see that by the gun fire the Mahant was prevented from leaving his place. It was a wholly rash and negligent act on his part or at the worst was an act which would amount to manslaughter. It could not be held to constitute an offence of murder. No intention of causing death or an intention of causing such bodily injury as being sufficient in the ordinary course of nature to cause death could be ascribed to the accused or readily inferred in the circumstances of this case.
>
> 13. The result therefore is that we allow this appeal, set aside the decision of the courts below and hold the appellant guilty of the offence under Section 304A, I. P. C. In our opinion, the sentence already undergone by him is sufficient to meet the ends of justice and we therefore direct that he be released forthwith. Even if the offence were to be

regarded as falling under Section 304, I. P. C., we would not have awarded him a severer punishment than the imprisonment that he has already undergone."

223. In the light of the aforesaid, it follows that if an act is done with knowledge but without intention, then it would fall under Section 304 Part (II). The act done with knowledge of the end result being of the kind where the doer had reason to believe that the act would result into an offence, the knowledge would be attributable to the offender. `Knowledge' is an expression of wide implication and is proficient 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.

224. The Concise Oxford English Dictionary; 10th Edition published by Oxford University Press gives meaning of 'knowledge' as information and skills acquired through experience or education; the sum of what is known; true justified belief as opposed to opinion; awareness or familiarity gained by experience.

225. The Chambers Dictionary; 1st Edition published by Chambers Harrap Publishers Ltd. defines `knowledge' as:

226. That which is known; information; instruction; enlightenment; learning; practical skill; assured belief; acquaintance; cognizance.

227. The Black's Law Dictionary, 6th Edition explains the word `knowledge' in different contexts and it would be helpful to have a

glance at them with an object to find most appropriate meaning which can be given to satisfy the requirements of Section 304 Part(II) of IPC.:

> Knowledge. Acquaintance with fact or truth People v. Henry 23 Cal App 2d 155, 72, p 2d 915,921.
>
> It has also been defined as act or state of knowing or understanding, Writers v. U S 70 App DC 316, 108, F 2d 837, 840 actual knowledge, notice or information, New York Underwriters Ins Co. v. Central Union Bank of South Carolina, C.C.A.S.C.65 F 2d 738, 739 assurance of fact or proposition founded on perception by senses, or intuition, clear perception of that which exists, or of truth, fact or duty, firm belief; Writers v. U S 70 App DC 316, 106, F 2d 837, 840, guilty knowledge, Gold worthy v. Anderson 92 Colony 446, 21, P 24 718. information of fact, Green v. Stewart 106 Cal App 518, 289 P 940 944, means of mental impression, Howard v. Whittaker 250 Ky 836, 64, S W 2d 173 miscellaneous information and circumstances which engender belief to moral certainty or induce state of mind that one considers that he knows, Wise v. Curdes 219 Ind 606, 40, NE 2d 122, 128, notice or knowledge sufficient to exercise attention and put person on guard and call for inquiry, Iberville Land Co v. Amerada Petroleum Corporation, C.C.A.La 141 F 2d 384, 389, personal cognisance or knowledge or means of knowledge, The Chickle DC Pa 54 F Supp 19,20, state of being or having become aware of fact or truth. Howard v. Whittaker 250 Ky 836 64 SW 2d 173.
>
> When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
>
> Knowledge consists in the perception of the truth of affirmative or negative propositions, while `belief' admits of all degrees, from the slightest suspicion to the fullest assurance. The difference between them is ordinarily merely in the degree, to be judged of by the court, when addressed to the court, by the jury, when addressed to the jury".

228. The Supreme Court, in the case of **Jayprakash v. State (Delhi Administration) 1991 (2) SCC 32,** clearly stated that the knowledge of the accused is subject of invisible state of mind and their existence has to be gathered from the circumstances, such as weapon, force of the attack and other surrounding circumstances. `Knowledge' being of lesser degree has to depend considerably on attendant circumstances and awareness of a common man in relation

to the acts and deeds immediately preceding or at the time of occurrence of the offence.

229. Indisputably, rashness and negligence behind any act or omission to act can also be discovered on the basis of circumstantial evidence and then to test the same that in such a given situation what an ordinary prudent man would have done.

230. Merely because an automotive car or scooter is involved would not by itself take the offence outside the scope of Section 304 Part (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 the attendant proven circumstances of the case.

231. Before I give my final conclusion as to whether offence under Section 304 Part (II) is made out or Section 304-A would attract, let me deal with the other contentions raised by the counsel for the appellant to examine as to whether the appellant can be attributed sufficient knowledge, i.e., the act of his driving the vehicle would result in causing death of six persons.

Circumstantial evidence to determine knowledge: fog, videography, speed.

232. Before coming to any conclusion as to negligence or rashness or knowledge on the part of the accused under Section 304 Part

(II), I would discuss three important aspects relating to speed of the vehicle, fog and videography.

(i) Speed

233. This brings me to deal with the contention of the counsel for the appellant assailing the finding of the learned trial court holding that the vehicle was being driven by the appellant at excessively high speed. Before this court critically analyse the contentions raised by the counsel for the parties, let me see as on what basis, the learned trial court has arrived at the said finding. The learned trial court took into consideration the scene of crime as narrated by S.I. Kailash Chand in the rukka and in his rough site plan proved on record as Ex. PW58/B and the testimony of PW-2 Manoj Malik, who in his deposition stated that the vehicle came at a very fast speed from Nizamuddin and hit them. The trial court further took into consideration the deposition of court witness Sunil Kulkarni who in his testimony testified that the vehicle was at a very-very high speed and due to the impact of the accident 2 or 3 persons fell on the bonnet and wind screen of the car.

234. Assailing the said finding of the learned trial court, counsel for the appellant argued that speed of the vehicle involved in an accident essentially has to be determined from circumstantial evidence and especially the scientific evidence and not from oral evidence. The examination of the skid marks could be the best evidence to determine the speed of the vehicle, counsel urged.

Referring to the forensic laboratory report dated 21.7.99, the counsel submitted that in the said report, there is a clear admission on the part of the State that no facility is available with them to determine the speed of the vehicle with the help of mechanical devices or instruments. Counsel also took objection to the conduct of the learned trial judge who assigned himself the role of an expert to give his findings about the reversal of the car and existence of three parallel long blood dragged marks of blood on the road after having viewed the C.D. of scene of crime.

235. Before carrying any further discussion on the said contention, it would be appropriate to reproduce the scene of crime as narrated by S.I. Kailash Chand in rukka as under:

> "After the receipt the DD, I along with Ct. Jagan Lal reached the spot i.e. Car Care Center, Petrol Pump, Lodhi Road, where three persons namely Ct. Ram Raj-DHG, Ct. Rajan Kumar (CRPF) and unknown age about 35 years were found and four persons were reported to be shifted to hospital by PCR Van. A broken No. of plate was found lying. After assembling broken pieces the particulars were revealed as M-312-LYP and Park Lane and BMW. At the spot the black colour piece of bumper and rear wind screen and black colour broken piece of the car were found scattered in the radius of 100/125 ft. Skid marks of a vehicle were seen on the road. The head of unknown body was found crushed, brain matter was found out side the skull. The body of Ct. Ram Raj was found crushed due to passing of the vehicle, his right leg was found detached and was lying at distance of 10'-15'. The abdomen of Rajan Kumar was found burst and the blood is spread on the road for considerable distance…… On the spot pieces of flesh was found scattered in a large area. These facts were indicating that death of these three persons occurred due to forceful impact of vehicle no. M-312, LYP, there were skid marks upto 30'-40'……."

236. The said scene of crime has been further described in the rough site plan proved on record as Ex. PW58/B and the learned trial court made the following observations based on the description of crime as described in the said rough site plan:

"Investigation officer SI Kailash Chand prepared a rough site plan Ex. PW58/B. As per observation of the IO at point A of site plan was the place where first impact occurred. Blood is lying at point A. At point B which is at 38 steps away from point A, blood is lying and there are blood stains and skid marks. At point C on the middle divider there are friction marks of the tyre. Point C is eight steps away from point B. At point D one dead body is lying having its right leg amputated. There are blood and friction/drag marks from point C to D. At point E one dead body is lying near electric pole no. 12 and blood as well as drag marks are seen. At point F another dead body is lying and point F is 26 steps away from the point E. From the point E to F the drag marks and blood are visible. At point G which five steps away from point F, one amputated leg is lying in front of electric pole no. 13. Pieces of bumper and broken pieces of glass were lying scattered. Bumper was black colour.

One oil trail was also observed by the Investigating Officer going towards Madarsa Safdarjang. In this site plan point B is seen at electric pole no.11.

The description of scene of crime as observed in the rukka is corroborated by the site plan prepared by the Investigating Officer and the videography done by the police of the scene of crime. Since the site plan is made by Investigating Officer on his own observations, the same is admissible in evidence. The points where blood and dead bodies are lying, skid marks and the oil trail prove it clearly that the offending vehicle was coming from the side of Nizamuddin and after the offence went towards side of Madarsa Safdarjang. This scene of crime makes it clear that the offending vehicle first hit the persons standing on the left side (i.e. at point A) of the road near footpath where some blood is seen lying. Thereafter the vehicle took a right turn and hit the central verge. The videography scene of crime (now converted into a CD) would show that there are three parallel dragged marks of blood on the road up to a certain distance. As per the rukka and the site plan, thereafter one body is lying and second body is lying after that and third body is lying at a distance. This leads to only one conclusion that these persons had been entangled with the car and thereafter they were dragged by the offending vehicle and they fell one by one and were also got crushed and amputated. I have already discussed that the offending vehicle was BMW car driven by accused Sanjeev Nanda…"

237. There cannot be any two opinions that the said accident resulting into six deaths and one injured was one of the most ghastly and gruesome incident especially after noticing the horrifying death of six persons whose bodies were ripped into pieces with the spread of blood all around. The Apex Court in **Jagdish Chander's case (Supra)** dealing with the similar controversy, held in para 7 as under:

"7. After going through the record to which our attention was drawn, we cannot help observing that the investigation into the offence in question was not

conducted on scientific lines and it leaves much to be desired. Our attention was not drawn to any material on the record showing if the tyre marks of the two vehicles on the road were carefully examined with the object of finding out the approximate speed and the manner of application of brakes at the time of the collision. Nor were photographs taken of the position of the site soon after the unfortunate occurrence which is usually done in the course of efficient investigations. Our attention was no doubt drawn to the site-plan, Ext. PW 9-A which purports to show that the two vehicles in question which were coming from opposite directions, started swerving to their right presumably on seeing each other and that the collision took place at point 'A' from where the truck drove straight on the road, while the auto-rickshaw was driven towards its right to the point 'B' where Smt Vidya Sharma was standing with her baby in her arms and her brother by her side. This plan, however, seems to be a rough plan. Our attention was not invited to any statement of the witnesses explaining at whose instance various notings were made on this plan. So far as the witnesses deposing as having seen the occurrence in question are concerned, their evidence has always to be carefully scrutinised because such witnesses only observe accidents after their attention is drawn to the impact resulting from the collision. Their statement about the events immediately preceding the occurrence are generally and to a very large extent influenced by what they imagine must have happened. After looking at the plan and going through the evidence to which our attention was drawn, one forms an impression that both the truck driver and the appellant were equally guilty of rash and negligent driving. But since the driver of the truck has been acquitted by the learned Additional Sessions Judge and no appeal was preferred against his acquittal, we have to take his acquittal to be final. According to the findings of the three courts below the appellant suddenly turned to the right without paying proper heed to the truck coming from the opposite direction and in doing so he was both rash and negligent. Under Article 136 of the Constitution we should not like to appraise the evidence for ourselves to flee how far the concurrent conclusion of the three courts below upholding the appellant's act as rash and negligent is justified. The argument raised before us on behalf of the appellant on this point relates only to the appreciation of evidence and no serious legal infirmity was brought to our notice."

238. On the similar lines, this court in **Abdul Subhan's case (Supra)** clearly held that it is for the prosecution to bring on record sufficient material to establish what is meant by 'high speed'. This court, in the said case, further observed that merely because the vehicle was being driven by the offender at a high speed, the same in itself would not mean that the offender was driving the vehicle rashly or negligently. Relevant para 7 of the said judgment is reproduced as under :

"7. At the outset I would like to observe that I am appalled by the investigation, or shall I say the lack of it, that was carried out in this particular case. I may also note that I am of the view that the testimony of PW 3 head constable Munim Dutt, even if

taken to be entirely true only leads to the conclusion that the vehicle driven by the present petitioner was being driven at a high-speed. This in itself does not mean that the petitioner was driving the vehicle rashly or negligently. Furthermore, the testimony of PW 3 leads to ambiguities and doubts and, I am afraid, my conscience does not permit me to convict a person under Section 279/304A IPC on the nature and degree of evidence that is on record in this case. There are so many questions which remain unanswered. What is meant by high-speed? Were the traffic lights working or not? Why was the investigating officer not examined? Why were photographs not taken? Why is there no evidence with regard to tyre skid marks? Why was the site plan not exhibited? There are questions which remain unanswered pertaining to the motorcyclist who unfortunately lost his life in this incident. Was the motorcyclist on Mathura Road? What was his direction of movement? Was he coming from Sher Shah Road and turning towards Mathura road? Or, was he on Mathura Road turning towards Sher Shah road? What was the speed of the motorcyclist? Did the motorcyclist suddenly curve into the path of the petitioner's truck? A host of other questions remain unanswered purely because the degree of investigation carried out and the quality of investigation carried out is quite unsatisfactory. It is well known in criminal cases that it is for the prosecution to establish its case beyond reasonable doubt. Unfortunately, in the present case I find that the prosecution has failed to achieve this standard. On the other hand there are grave doubts that the petitioner is at all guilty of the offences for which he has been convicted and sentenced."

239. Counsel for the appellant also placed reliance on the judgment of the Apex Court in **State of Karnataka Vs. Satish (Supra)**. Para 4 of the said judgment is reproduced as under:

"4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case."

240. The concept of skid marks has been explained in Forensic Science in Criminal Investigation & Trial by Dr. B.R.Sharma. The relevant para of same is reproduced as under:

> "**16.6.3. Skid Marks**
>
> "When brakes are applied to a vehicle, they lock the wheels and stop them from revolving. When a vehicle traverses a certain distance with locked wheels, the vehicle is sad to skid. The marks created by the tyres without revolving are called skid marks. The friction between the tyres and the surface abrades the tyres and black tyre material is deposited at the surface, which makes the skid marks easily discernible and conspicuous. When the vehicle is moving on soft earth, the sudden application of brakes ploughs through the earth. The skid marks in such cases are identified from the displacement of earth from the track. When a vehicle is moving in dust or dirt, the skidding tyres removes the dirt from its path and creates the marks. If the tyre is moving on a tarry road, it creates the marks in the tar, by pushing away the tar from its path".

241. The said concept of skid marks has also been explained in the book titled as "An Introduction to Criminalistics" by Charles E.O'Hara & James W. Osterburg, published by the Macmillan Company, New York in the following manner:

> "SKID MARKS
>
> When the brakes of a moving car are forcefully applied, the friction between tire and roadway heats the rubber, depositing a thin layer in the path of the tires. Sometimes a black mark is formed by displaced surface materials-dust, tar, etc. Some synthetic tires of high heat resistance exert a cleaning action on the road surface. These lines are called skidmarks. In a motor vehicle accident the problem which confronts the investigator is the determination of deficiencies in the brakes or of negligence on the part of the driver due to excessive speed. Usually the only evidence present is a set of skidmarks. These marks may be shown to be a measure of the probable stopping distance."

242. Another important aspect to be considered in such cases is the 'reaction time' which one takes to actually apply the brakes. The

author B.L. Sharma in his book has also dealt with the concept of 'reaction time' in the following words:

> "**Reaction time**: It is the time, which the driver takes to apply the brakes fully after he has perceived the necessity for braking. The reaction time varies with different individuals. Reaction time 0.5 to 0.8 second is normal. If a vehicle is moving at a speed of 60 km/h the distance travelled in reaction time is 8 to 15 meters."

243. The author Mr. Sharma in the said book has also dealt with different reaction times depending upon the condition of surface of a road. This reaction time as per the author of the book varies from individual to individual, but 0.5 to 0.8 seconds is the normal reaction time taken by an individual before he stops the vehicle after having perceived the necessity to stop the vehicle. The said reaction time would further depend upon the speed of the vehicle. As per the counsel for the appellant, if the vehicle is moving at a speed of 60 k.m./hour, the distance travelled in the reaction time would be 8 to 15 meters. Counsel also submitted that the skid marks in the present case as shown in the scene of crime are 38 to 40 feet which would mean approximately 12 meters and based on the graph shown in the said book of Forensic Science in Criminal Investigation & Trials, the speed of the vehicle would come to about 42 k.m., which, as per the counsel, by no means can be considered as excessive or dangerous especially on an empty road on the wintry morning of 10.1.99 around 4.30 A.M.

244. It is a matter of serious concern that our scientific laboratories are still not fully equipped to undertake proper scientific

investigations with the help of modern devices. It is true that one can hardly get any witness to disclose exactly about the speed of the vehicle and even if anybody comes forward to state about the speed of the vehicle, the same would be highly skeptical and of suspicious character. In most of the cases, the witness to such an incident forms his own presumptive opinion about the speed of a vehicle depending upon the resultant havoc a particular accident causes. The scientific investigation in all such like cases thus assumes greater importance which necessarily involves the evidence of skid marks to scientifically determine the speed of the vehicle. No such scientific investigation was undertaken by the Forensic Science Laboratory in the present case and rather in the report submitted by the FSL it was candidly admitted that no such facility is available with them.

245. In such a helpless situation, the trial court relied upon the deposition of PW-2 Manoj Malik and took into consideration the scene of crime as described by S.I.Kailash Chand in his rukka as well as the rough site plan. Undoubtedly, the speed of the vehicle on the empty road in the wintry morning with a clear visibility of 1000 meters as opined in the deposition of PW-15 Dr. S.C. Gupta, Director, Meteorological Department, would have been on the higher side only. Had the vehicle been not driven at a high speed it would not have created such an impact resulting into bodies of the victims being flown in the air or getting entangled under the bonnet and then thrown at various distances, fragmenting their

body parts with the spread of blood all over the area. Although it is difficult to assess as to what exactly the speed of the vehicle would have been, but looking into the scene of the crime and the way the six victims met their tragic end, certainly the speed of the car must have been very high. Therefore, I do not find any infirmity or perversity in such finding of the learned Trial Court so far speed of the vehicle has been held to be fast and high.

246. Another important question as to whether the appellant was driving the said offending vehicle so recklessly as to attract part-II Section 304 IPC will be discussed later under the relevant subject.

(ii) Visibility at the site of accident/Fog

247. One of the arguments advanced by the counsel for the appellant was that there was presence of 'fog/mist' on the wintry morning of 10.1.99 which fact as per the counsel was ignored by the trial court. The fact of presence of 'mist' found duly mentioned by the meteorological department in their report exhibited as Ex.PW15/B. The meteorological department has mentioned the factum of 'mist' on the said morning with visibility of 1000 meters. The presence of 'fog' was also disclosed by PW-2 Manoj Malik in his cross-examination and as per the counsel for the appellant, the said deposition duly corroborates that part of the said report submitted by the meteorological department. Counsel for the appellant also took a stand that the learned APP in cross-examination of PW-2 himself suggested that there was no light in the

street, and there was 'fog', but the learned trial court took a contrary stand by holding that it was nobody's case that lights were not illuminating at the site of the accident. As per the counsel for the appellant the only fault of the appellant was that he did not dip the lights of his car which he should have, due to the presence of fog, and therefore, the presence of 'fog' must have blurred his visibility in not finding the presence of the victims in the middle of the road from some distance.

248. Mr. Pawan Sharma, APP for the State, on the other hand took a plea that the appellant has introduced this new plea which is not even taken in the grounds of appeal but is now taken just with a view to wriggle out from the rigor of law. He contended that this was never the case of the defence before the trial court that there was presence of 'fog' or 'mist' on the said wintry morning of 10.1.99 and this would be evident from the fact that no such suggestion was given by the appellant to any of the prosecution witnesses and not even to PW-15 Dr. S.C. Gupta, Director, Meteorological Department. PW-15 Dr. Gupta, in his cross-examination, had vaguely mentioned about the presence of 'fog' but the said fact was neither mentioned by him in examination-in-chief nor any suggestion to this effect was given by the prosecution during his cross-examination.

249. The presence of 'fog', no doubt would be a very important circumstance as far as the cases of accidents are concerned. The presence of 'fog' near the surface of earth certainly obscures and restricts visibility of the person driving any vehicle. 'Mist' on the

other hand, limits the visibility of a person to a lesser extent. The definitions of 'fog' and 'mist' as given in the Concise Oxford English Dictionary; 10th Edition published by Oxford University press and The Chambers Dictionary; 1st Edition published by Chambers Harrap Publishers Ltd. are as under:

> "FOG is a thick cloud of tiny water droplets suspended in the atmosphere at or near the earth's surface which obscures or restricts visibility.
>
> MIST is a cloud of tiny water droplets in the atmosphere at or near the earth's surface, limiting visibility to a lesser extent than fog.
>
> The Chambers Dictionary; 1st Edition published by Chambers Harrap Publishers Ltd.
>
> FOG is thick cloudlike mist near the ground.
>
> MIST is a thin fog."

250. Had there been presence of 'fog' on the said fateful morning, then certainly the defence would have taken shelter and based their entire case by taking the said plea of presence of 'fog. This plea of 'fog' which has been taken by the counsel for the appellant during the course of arguments, does not even find mention in the entire appeal and therefore, it is quite apparent that the theory of presence of 'fog' has been introduced to build a new case so as to give an impression as if the accident in question had occurred on account of the poor visibility of the appellant due to the presence of 'fog'. PW-15, Dr. S.C. Gupta, in his report, nowhere mentioned the presence of 'fog'. He, in his report, stated that the 'weather was mainly clear sky' and the visibility was 1000 metres. He mentioned the expression 'mist' against the column of weather in his said

report Ex. PW 15/B as already discussed above. 'Mist' cannot be equated with 'fog' as it does not restrict the visibility to that extent as the 'fog' does. It cannot be lost sight of the fact that PW-15 Dr. Gupta in his report clearly stated that the sky was mainly clear and therefore, mention of 'mist' in the report is of not much relevance. In his cross-examination also the said witness clearly stated that it was due to the presence of 'mist' that the visibility was 1000 meters on that day. No doubt, the defence counsel gave suggestion to the said witness that there was heavy fog at Lodhi Road area at 4.30 A.M. on 10.1.99, but since it was not the defence of the appellant, as would be apparent from his examination under Section 313 Cr. P.C., therefore, no credence can be given to the suggestion given by the defence in the cross-examination of PW-15. No such suggestion was also given to PW-2 by the defence and very casually the said witness mentioned the presence of 'fog' while taking another contrary position to depose that there was no light at the place of the accident. In this regard, it would be useful to refer the relevant para of judgment of the Apex Court in **State of U.P. v. Man Singh,2003 (I) AD (Crl.) SC 61**, where the Apex Court was confronted with such a similar situation. The same is reproduced as under:

> "11. In our view, this factor which seems to have prevailed with the High Court in acquitting the accused persons was totally extraneous, being based on conjectures. It is rather contrary to the evidence on record. Therefore, in our view, the decision of the High Court cannot be sustained. The theory of fog was introduced before the High Court for the first time. It is not based on any evidence. In any case the said theory could not be introduced because the presence of fog leading to the vision of the eyewitnesses being blurred was never put to the eyewitnesses. The eyewitnesses were never asked in the cross-examination as to whether there was fog at the time of

the incident, and if so, did it obstruct the eyewitnesses from watching the occurrence. When this aspect was never put to the witnesses, it cannot be said on the basis of mere imagination that the vision of the witnesses was obstructed by fog and they could not have seen the occurrence. The High Court completely erred in accepting this and doubting the version of the eyewitnesses for this reason alone. The basic fact about the presence of fog leading to blurring of the vision of the eyewitnesses without being put to the witnesses during their cross-examination could not have been taken into consideration. It was the witnesses who were in the best position to say whether there was fog at the relevant time or not and whether the fog, if present, was enough to prevent the eyewitnesses from watching the scene of occurrence. The High Court was not justified in basing its decision on the theory of the presence of fog. On the other hand it is to be seen that both the eyewitnesses gave detailed account of the incident. There is hardly any discrepancy in the version of the incident given by the two witnesses. Without actually witnessing the incident the witnesses could not have given such details of the occurrence. In our view the eyewitness account of the occurrence inspires confidence and there is no reason to cast any doubt on the same. It is a case of brutal murder of a person by a gang of seven persons. The details of the murder available on record in the shape of eyewitness account of the incident, medical evidence, mutilated body of the accused with neck and head severed, leave no doubt about the involvement of the accused-respondents in the crime."

251. It is also pertinent to note that defence did not adduce any evidence to prove presence of 'fog' on the said wintry morning which could blur the vision of the appellant. Moreover, the argument of the senior counsel for the appellant also does not appeal to common sense, as had the fog been present on the said morning restraining or blurring the vision of the appellant then the vehicle could not be driven at such a high speed resulting into killing of six persons.

252. Based on the above discussion, I am of the considered view that the visibility of 1000 meters with clear sky as reported by PW-15 in exhibit PW15/B cannot be doubted and the plea taken by the counsel for the appellant with regard to the presence of 'fog/mist' on the morning of 10.1.99 is repelled.

(iii) Videography for proving reversal marks

253. As regards the issue pertaining to videography that the videography being akin to local inspection cannot take the place of evidence unless properly proved on record, not merely with the help of the person making the video but by the witness who could explain the scene of crime taken in such video. There can be no dispute that a videography is a documentary evidence under Section 3 of Indian Evidence Act and if it is made during investigation then its contents are treated as statements under S. 162 Cr PC. Thus, the purpose of videography is only to contradict or corroborate the statements made by the investigating officer. The trial court took assistance of the videography to corroborate the statement of Sunil Kulkarni before the court that the car stopped at point B in the site plan and then took a reverse before moving ahead. The testimony of kulkarni has already been discarded by this court as discussed above. Merely because videography shows certain marks, would not mean that the same are reversal marks. It is only some expert in the field who could have said so after having scientifically examining such reversal marks if any. Furthermore, when I viewed the videography along with the counsel for the parties, I also possibly could not exactly know which marks could be treated as 'reversal marks'. It was also noticed that the area of site was not completely sealed as it could be seen in the beginning of the video that one Fiat car, rickshaw and a cycle passing through the site of incident. In the absence of any such corroborative piece of evidence to prove

reversal marks, it is difficult to believe just by viewing the C.D. that there existed reversal marks at the site of accident.

254. In a case like the present case, where there was no clinching and substantive evidence to prove that there were reversal marks at the site of accident, help of circumstantial evidence could have been taken to prove the same. In that respect, it is the quality not the quantity of evidence which is required. Once this case was more depended on circumstantial evidence, then the Investigating Agency should have taken the able assistance of specialized persons possessing requisite expertise to give their opinion on the existence, non-existence of reversal marks. The factual scenario emerging from the evidence on record divulge deficiencies during investigation by the prosecution clearly indicating that no such assistance was taken by the prosecuting agency. The present case may not be a solitary case to suffer lapses. There is no perceptible improvement in the system because of lack of proper and penetrating investigating/prosecuting agency. The State being the protector of each individual as well as the whole society, its inaction to combat the perpetrators of crime by providing window exits to culprits through such lapses amounts to *"magna negligent a culpaest"*. The State Government must exercise its authority to avoid 'much ado about nothing'.

Applicability of Section 304-A

255. Negligence is different from rashness. Negligence refers to a breach of duty, an act done without due care and caution and dereliction in taking precaution. Whereas, rashness refers to the consciousness of the person that a mischievous or some illegal consequences may follow due to his act but at the same time he hopes that such consequences will not follow. Thus, the element of consciousness is missing in the case of negligence and consciousness is an important ingredient in rashness.

256. Now taking into consideration the totality of the circumstances as discussed above i.e. evidence of the two hostile witnesses, court witness and the circumstantial evidence, I do not find myself in agreement with the finding of the learned Trial Court that the offence committed by the appellant attracts Section 304 part II and not Section 304 A IPC. Reliance placed by the trial Judge on the judgment of the Apex Court in **State of Gujarat vs Haidarali Kalubhai (supra)** to attract Section 304 part II IPC is clearly distinguishable. In the case before the Apex Court the accused was convicted under Section 304 Part II on the allegation that he had caused death of a police officer lying on cot by hitting him while reversing his truck at a high speed. The Apex Court while reversing the finding held that it was a case of negligent driving simplicitor and no knowledge could be attributed to the accused so as to bring his case within the meaning of Section 304 Part II IPC. However, the Apex Court made a passing reference that where a person willfully

drives motor vehicle amidst the crowd and thereby causes death to some persons then it will not be the case of mere rash and negligent driving and the act will amount to culpable homicide. The Apex Court while making the said observations also proposed a note of caution stating that each case will depend upon the particular facts established against the accused. No doubt in the present case appellant caused the accident in which six persons died and one was injured but it was not a case where the appellant had any knowledge of the presence of those persons on the road and therefore, no parallel can be drawn between the circumstances of this case and the observations of the Apex Court that if a person willfully drives into a crowd then the case cannot be taken to be one under Section 304-A Indian Penal Code, 1860. It is worth mentioning here and as already discussed above, the Hon'ble Supreme Court settled the legal position as far back as in the year 1954 in the judgment of **Sadhu Singh Harnam Singh (supra)** where the accused in a state of intoxication pulled the trigger of his gun to prevent his revered guest, who was a 'mahant' from leaving his place without taking meals and without spending night with him, but unfortunately the shot hit the mahant resulting into his death. The Apex Court held that such an act on the part of the accused was wholly rash and negligent and no intention of causing death or intention of causing such bodily injury sufficient to cause death could be ascribed to the accused and thus held the accused guilty of offence punishable under Section 304A IPC. In the facts of the present case, the learned Trial

Court without critically examining the entire evidence on record appears to have got carried away by the testimony of Court witness Sunil Kulkarni and the video of the scene of crime to give strength to the theory of reversal of car. Undoubtedly, had there been any clinching evidence to prove reversal of car by the appellant after knowing the fact that some of the victims were entangled underneath the car, the knowledge under Section 304 Part II could have been imputed to the appellant but the said theory of reversal is the sole creation of the Court witness which does not find support from the prosecution version, nor from the site plan Ex. PW 58/B or from the video of the site. I have already discussed above in detail that the fact of reversal of the car could have been established by the prosecution through some expert evidence. Courts are not experts to give findings on such vexed issues just by watching a video of the scene of the crime. Indisputably, accidents on roads take place due to the reckless and negligent driving by all those who not only endanger their own lives but also endanger the lives of other persons. Every person who drives a vehicle owes a duty to drive his vehicle in a most responsible and careful manner strictly observing the traffic rules and regulations as any rashness on the part of a driver can prove fatal to many innocent people who more often than not become victims at the hands of drunken and reckless drivers. The expression “rash” and “negligent” as used in Section 304A IPC have been beautifully explained in the recent judgment of the Apex Court in **Prabhakaran vs State of Kerala (2007) 14 SCC 269**

6. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not. Lord Atkin in *Andrews* v. *Director of Public Prosecutions*1 AC at p. 583 observed as under: (All ER p. 556 C-E)

"Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by 'reckless' driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for 'reckless' suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction."

7. "*7.* Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.

8. As noted above, 'rashness' consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted."

257. From the aforesaid principles defining "rash" and "negligence", it is clear that even if any rash act is done precipitately

with the knowledge that the illegal consequences may follow but with a hope that they will not, still the rashness lies because the offender in such a case runs the risk of doing an act with recklessness or indifference as to its consequences. As would be seen from the above discussion, “negligence” or “rashness” are the essential ingredients of an offence under Section 304 A IPC. Culpable negligence lies in the failure to exercise reasonable and proper care and it will depend upon the facts of each case as to what extent there is culpable neglect or failure to exercise reasonable care a proper exercise of which could have averted the evil consequences. But in criminal rashness, the person is conscious of the fact that he is undertaking the risk of committing a dangerous or hazardous act, but at the same time he is hopeful that without causing any harm to any person he will accomplish or undertake such an act. Thus the element of consciousness is missing in the case of negligence while consciousness is an important ingredient of rashness.

258. In the facts of the present case, we cannot attribute knowledge to the accused. On perusal of the site plan it is manifest that circumstance of taking the vehicle suddenly to the extreme left of the road, where all the victims were standing, bespeak negligence or dereliction of duty to exercise due care and control on the part of the accused, especially when the accused has come up with no explanation as to why on a cold wintry morning of January while driving on the Lodhi Road at 4:30 am, when there was no traffic, he swerved the car at point A in the site plan, which is just one step

away from the left side pedestrian footpath. Based on the principle of res ipsa loquitor as enunciated in **Mohd. Aynuddin Vs. State of A.P., (2000) 7 SCC 72**, one would find that the appellant was utterly rash and negligent in driving his vehicle.

259. As discussed above, clearly the speed of the car was high as can be inferred from the rukka, site plan, also and considering the fact that there was clear visibility of 1000 meters with sky mainly clear in the morning of cold winter. A driver who moves the car forward is expected to keep his eyes ahead and possibly on the sides also. The duty of care varies from one situation to the other. Duty of care is evident between drivers of automobiles on the road. Each individual driver owes a duty of care to each of the other surrounding people - motorists, cyclists and pedestrians - to prevent accidents and drive in a reasonable manner. In the case of an automobile accident, drivers not paying attention or driving irresponsibly will breach that duty of care. Every road user has a duty of care to other road users. They must drive responsibly and carefully so as not to endanger the life or well being of others.

260. Therefore, in the present case even if it is assumed that the appellant was in a state of drunkenness but still he had taken the risk of driving the vehicle knowing that his act would endanger the lives of others, but with the hope that it will not and therefore, the said act at the highest would be construed as an act of rashness on his part, which would attract Section 304 A IPC and not Section 304

Part II IPC. Under no circumstances the act of the appellant can attract Section 304 Part II as per the legal principles settled by the Apex Court in catena of judgments referred above and also by the judgments of the English Courts discussed above.

261. At the time of passing an interim order on the bail application of the appellant this Court had observed that it is a stark reality of every metropolitan city where lot of deaths take place due to megalomaniacs on driver's seat driving the vehicle while venturing on the road in an inebriated state. It was also observed that it is high time that legislature undertakes to have a relook at the present laws so as to prevent drunken driving and save precious lives of innocent people and even of those who drive in a drunken state. The legislature has yet to move in this regard and it would be appreciated that the Government gives due priority to the issue of drunken driving in its agenda for taking many public spirited issues in 100 days from the date of assumption of their office.

262. Undeniably, one feel totally aghast and shaken to notice the horrifying scene of crime with as many as six dead bodies and one person lying in an injured condition. Such was the impact of the accident that some persons got entangled beneath the car and later their limbs were ripped apart into pieces with blood spread all around. Seeing such a horrendous scene, one could have easily taken it to be a scene of bomb blast. It was gruesome, macabre and heart rending.

263. At the same time it must be borne in mind however gruesome an accident may be, if it was caused without any knowledge on the part of the accused that it would result into such serious consequences, the Section that would be attracted would only be Section 304-A Indian Penal Code, 1860 and not Section 304 II Indian Penal Code, 1860. It is not the scene of occurrence or the number of deaths that will govern the complicity of the accused but the fact whether it was done with knowledge of such consequences or was mere rashness or negligence on his part. The present case, in my view, despite the unfortunate death of six persons will fall under S. 304-A Indian Penal Code, 1860 and not under S. 304-II Indian Penal Code, 1860.

264. As regards the reliance of the trial court on the decision of Division Bench of the Bombay High Court in the **State of Maharashtra v. Alister Anthony Pareira– MANU/MH/0655/2007** is concerned, I feel that the same is misplaced. The factual scenario of the case before the Bombay High Court was different as therein the court attributed knowledge on the accused after considering that the accused who was driving an overcrowded car and along with occupants of the car were making noise in a drunken state knowing fully well that consumption of liquor and possession of the same is prohibited under Section 66 of the Bombay Prohibition Act, 1949 and ran over poor persons who were sleeping on the footpath of Mumbai. Clearly, the facts of the same are different from the facts of the instant case.

Conclusion

265. In view of the above discussion, the conviction of the appellant is converted from Section 304 II IPC to one under Section 304-A IPC.

266. Certain issues, such as, role of prosecution, need for scientific investigation etc. which cropped up in the present case and deserve due deliberation are discussed as under:

Role of prosecution

267. At this juncture, it is worthwhile to discuss the role of prosecution and the importance and need for scientific investigation.

268. Every man is presumed to be innocent until he is proved guilty. This is the cardinal principal of criminal law. In recognition of this right of the accused the burden of establishing the charge against the accused is placed on the prosecution.

269. Courts have quite often observed that though they are convinced that the accused is guilty but they have to acquit him by giving benefit of doubt due to failure of the investigators in properly conducting the investigation.

270. The investigation of a criminal case, however good and painstaking it may be, will be rendered fruitless, if the prosecution machinery is indifferent or inefficient. One of the well-known causes for the failure of a large number of prosecutions is the poor, faulty and unscientific investigation.

271. Although the Public Prosecutors are appointed by the State, the prosecutor's sole aim is not to seek a conviction. A number of court judgments have emphasised that the Prosecutor is a 'minister of justice' who should place before the court all evidence in the Prosecutor's possession, whether in favour of or against the accused. This is seen as proper prosecution, as opposed to single-minded persecution in seeking a conviction regardless of the evidence.

272. Investigation and prosecution are two different facets in the administration of criminal justice. The role of a Public Prosecutor is inside the court, whereas investigation is outside the court. Normally, the role of a Public Prosecutor commences after the investigating agency presents the case in the court on culmination of investigation. Its exception is that the Public Prosecutor may have to deal with bail applications moved by the parties concerned at any stage. Involving the Public Prosecutor in investigation is injudicious as well as pernicious in law.

273. It is no more res integra that the case of the prosecution must stand or fall on its own legs and the prosecution cannot derive any strength from the weakness of the defence. The decision in **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116** supports this and the relevant para of the same is reproduced as under:

> 151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view.

Role of investigating authorities

274. Since our country follows the adversarial system of criminal justice, it is essential for bringing the culprits to the books that the prosecution is strong and well fed by the investigating agencies.

275. Police and other investigating agencies are at the heart of the criminal justice system of India. The foundation for the Criminal Justice System is the investigation by the police. When an offence committed is brought to the notice of the police, it is their responsibility to investigate into the matter to find out who has committed the offence, ascertain the facts and circumstances relevant to the crime and to collect the evidence, oral or circumstantial, which is necessary to prove the case in the court. The success or failure of the case depends entirely on the work of the investigating officer.

276. In India, the rate of acquittal of criminals as compared to conviction rate is very high. In the report submitted by Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs headed by Dr. Justice V.S. Malimath, formerly, Chief Justice of Karnataka and Kerala High Courts, popularly known as the Malimath Committee Report, the reasons behind such low rate of conviction in India were reported as under:

> 2.19.3 Technical or non-fulfillment of any procedural requirement or inadequacies of evidence or non-examination of material witnesses,mistakes in investigation and similar other factors have quite often contributed to acquittals. This amounts to failure of the courts' to search for truth to do justice.

277. Investigation is basically an art of unearthing the truth for the purpose of successful detection and prosecution. The Apex Court in **State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222** explained various steps involved in investigation, in the following terms:

> 39. Investigation consists of diverse steps — (1) to proceed to the spot, (2) to ascertain the facts and circumstances of the case; (3) discovery and arrest of the suspected offender, (4) collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons including the accused and the reduction of their statements into writing if the officer thinks fit (Section 161 CrPC), (b) the search of places and seizure of things necessary for the investigation to be proceeded with for the trial (Section 165 CrPC etc.) and (c) recovery of the material objects or such of the information from the accused to discover, in consequence thereof, so much of information relating to discovery of facts to be proved. (Section 27 of the Indian Evidence Act).

278. In **Jamuna Chaudhary v. State of Bihar- (1974) 3 SCC 774** the Hon'ble Supreme Court held:

> "The duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth."

279. In **P.P. Sharma's case (supra)** the Hon'ble Apex Court observed as under the duty of the investigating officer:

> 47. The investigating officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore, the foundation stone on which the whole edifice of criminal trial rests — an error in its chain of investigation may result in miscarriage of justice and the prosecution entails (sic) with acquittal. The duty of the investigating officer, therefore, is to ascertain facts, to extract truth from half-truth or garbled version, connecting the chain of events. Investigation is a tardy and tedious process. Enough power, therefore, has been given to the police officer in the area of investigatory process, granting him or her great latitude to exercise his discretionary power to make a successful investigation. It is by his action that law becomes an actual positive force. Often crimes are committed in secrecy with dexterity and at high places. The investigating officer may have to obtain information from sources disclosed or undisclosed and there is no set procedure to conduct investigation to connect every

> step in the chain of prosecution case by collecting the evidence except to the extent expressly prohibited by the Code or the Evidence Act or the Constitution. In view of the arduous task involved in the investigation he has been given free liberty to collect the necessary evidence in any manner he feels expedient, on the facts and in given circumstances. His/her primary focus is on the solution of the crime by intensive investigation. It is his duty to ferret out the truth. Laborious hard work and attention to the details, ability to sort through mountainous information, recognised behaviourial patterns and above all, to co-ordinate the efforts of different people associated with various elements of the crime and the case, are essential. Diverse methods are, therefore, involved in making a successful completion of the investigation.

Need for scientific investigation

280. Scientific inputs help the investigators in solving a number of cases of crime. The latest state-of-the-art equipments are the need of the hour considering the escalating rates of acquittal in India due to faulty and defective investigation. In plethora of cases, the Hon'ble Apex Court has pointed out the need for scientific investigation by the investigating agency and deprecated the practice of failure on the part of the investigating agencies in collecting relevant evidence resulting in the acquittal of the accused due to inefficient and untrained Investigating Officers, who take the investigation in a very casual, careless and traditional manner. With the advancement in science and technology, it is high time that the novel & scientific methods of investigation by a team of well-trained experts and not merely through an ill equipped, overburdened and constrained team of Investigating Officers.

Criminal Appeal Nos.767/2008 and 871/2008

281. Let me now deal with two separate set of appeals, one filed by Rajiv Gupta and the other by Bhola Nath and Shyam Singh Rana, the employees of Rajiv Gupta, challenging the order of conviction

and sentence passed by the learned trial judge for having committed offence punishable under Section 201/34 IPC.

282. Criminal Appeal No.767/2008 has been filed by Rajiv Gupta while Crl. Appeal No.871/2008 has been filed by the other two accused.

283. Mr. Dinesh Mathur, learned Senior Advocate represented Rajiv Gupta in Crl. Appeal No. 767/2008 while Mr. S.S. Gandhi, learned Senior Advocate represented Bhola Nath and Shyam Singh Rana in Crl. Appeal No. 871/2008. This common order shall dispose of both the appeals.

284. Before I proceed to deal with the rival contentions raised by counsels for the parties, it will be appropriate to reproduce the charge framed by the learned trial court under Section 201/34 IPC which is as under:

> "I, P.K. Bhasin, Addl. Sesions Judge, New Delhi hereby charge you (1) Rajiv Gupta s/o Ved Parkash Gupta, age 52 years, business; (2) Shyam Singh Rana s/o Nandan Singh Rana, age 37 years, Service (3) Bhola Nath s/o Moti Lal, age 31 years, Service as follows:-
>
> That you on 10.1.99 knowing or having reason to believe that an offence u/s 304 (I)/308 IPC had been committed by co-accused persons Sanjiv Nanda, Manik Kapur and Sidharth Gupta caused certain evidence of the said offence to disappear by washing BMW Car No. M 312 LYP to remove blood from it in furtherance of your common intention of screening the said three offenders from legal punishment and thereby committed an offence punishable u/s 201/34 IPC and within my cognizance.
>
> And I hereby direct that you all be tried by this court on the aforesaid charge."

285. The first and foremost contention raised by counsel for the appellants in both the appeals is that no offence under Section

201/34 IPC is made out against the appellants as the prosecution miserably failed to bring on record any evidence to prove the said charge.

286. Counsel for the appellants further submitted that the story of washing of car was introduced by the police later on, on the suggestion of the prosecution. The contention of the counsel for the appellants was that the charge sheet in the present case was forwarded by the police on 25th March, 1999 and the same was received by the prosecution agency on 26th March 1999 and in the course of scrutiny by the prosecution agency, certain lacunae were found with regard to the material brought on record vis-à-vis Section 201/34IPC and therefore on the suggestion of the prosecution, the police recorded supplementary statement of PW13 Jagdish Pandey wherein for the first time, the police coined the story of washing of car by the appellants, so as to remove the blood stains etc. Counsel for the appellants thus contended that till 10.1.99, none of the police witnesses in their statements recorded under Section 161 Cr. P.C. raised accusation against any of these appellants attributing allegation of washing of car. In support of their arguments, counsels for the appellants relied upon the judgment of the Apex Court reported as **R. Sarala Vs. T. S. Velu & Ors.-AIR 2000 SC 1731.**

287. Highlighting various contradictions in the testimony of the prosecution witnesses, the counsels pointed out that according to

PW-11, ASI Ram Awadh, he reached 50, Golf Links along with PW-13, S.I. Jagdish Pandey who was accompanying him in the same PCR Van, but neither in his testimony he deposed about having seen the car being washed nor he deposed that S.I. Jagdish Pandey had seen the car being washed, while on the other hand, PW-13 S.I. Jagdish Pandey in his PCR message sent at 6.10 A.M. mentioned the fact of car being washed, besides intimating the fact of presence of the said accidental BMW car with sticker of 'Park Lane' in the said bungalow No. 50, Golf Links. The said S.I. Jagdish Pandey again saw the car as per the PCR message sent by him at 7.35 a.m. but in his said message also nowhere he named any of the appellants being seen washing the said car, although, this time he stated that the said accidental car was seen freshly washed and covered with tarpoline. The contention of the counsels for the appellants was that the car, if at all it washed, the same could be prior to 7.45 a.m. before it was handed over to PW-55, SHO Vimlesh Yadav at 7.45 a.m. Counsels thus contended that it is at a later stage, i.e. at the stage of recording of his supplementary statement, that PW13 introduced the fact of having seen washing of the car and in his deposition before the court he made further improvement by stating that even he had shown the car washing to SHO Vimlesh Yadav also. On the similar lines, PW-55 SHO Vimlesh Yadav never mentioned the fact of washing of the car in her statement under Section 161 Cr.P.C. but later on in her deposition before the court she introduced the story of having seen the washing of the car, after allegedly peeping inside

the gate of the said Bungalow. PW-58, S.I. Kailash Chand also never stated about the said fact of washing of the car in his statement made under Section 161 Cr.P.C. but in his deposition before the court, he deposed about the fact of having seen the car being washed after he reached 50, Golf Links after 7.50 A.M. The contention of counsels for the appellants was that in fact SHO Vimlesh Yadav by that time had already taken possession of the car at 7.45 A.M. and therefore, this witness PW-58 could not have seen washing of the car at 7.50 A.M. Even PW-29 Nagesh Kumar Wadhera, Finger Print Expert and PW-37 Constable Jagan Lal made false statements by deposing before court that they found the car in a wet condition, whereas, in their statements under Section 161 they stated that the same appeared to have been recently washed. Counsels contended that even if it is assumed that the the car was washed between 6.10 A.M. to 7.35 A.M., then also the same could not have stayed wet, for such a long time, i.e., after 10.30 A.M./10.45 A.M. when PW 47 and all these witnesses visited the said Bungalow. Counsels for the appellants further submitted that the trial court ignored the basic tenets of law by taking into consideration those circumstances which were not even put to the appellants during their examination under Section 313 Cr.P.C. The contention of the counsels for the appellants was that the trial court has given undue credence to the contents of video recording showing wet floor without putting the same to the appellants in their statements recorded under Section 313 Cr.P.C. Counsel for the appellants

further submitted that similarly no questions were put to the appellants with regard to the removal of the number plate which is otherwise also beyond the charges framed against the appellant. In support of their arguments counsels for the appellants placed reliance on the judgment of the Apex Court reported as **Ashok Sadashiv Astikar Vs. State of Maharashtra- 3 (1989) (Crimes) 642 (Bom), Ram Kumar Pande Vs. State of Madhya Pradesh AIR 1975 SC 1026; Col Mohan Singh Vs. State of Rajasthan- 1979 (4) SCC 11** and **AIR 1984 SC 1622 Sharad Birdhichand Sarda Vs. State of Maharashtra**.

288. Counsels for the appellants further submitted that the theory of washing of car clearly gets demolished from the fact that 18 chance finger prints were lifted by PW-29 Finger Print Expert and lifting of blood stains by PW-31,Mr. D. S. Chakoutra, Senior Scientific Officer from Forensic Science Laboratory, between 09:30 A.M. to 10.45 A.M. and that had the car been washed by the appellants then, the said witnesses would not have been in a position to collect either the finger prints or blood stains from the said car.

289. Casting serious aspersions on the conduct of PW-13 S.I. Jagdish Pandey, counsels for the appellants contended that if the fact of cleaning of the car by the appellants is taken as correct, then the prosecution owed an explanation as to how the police officers who were present outside the said bungalow allow perpetration of

the crime by the offenders inside the bungalow. The contention of the counsels for the appellants was that the story put forth by the prosecution is absolutely unbelievable and none of the appellants indulged in the act of cleaning the car.

290. Counsels for the appellants further submitted that the small patches of wet surface were not appearing due to the washing of the car but because of the presence of the mist on the cold wintry morning of 10.1.99 and the trial court by viewing such wet patches on the video wrongly believed the theory of washing of the car by the appellants. Counsels also contended that it cannot be lost sight that PW-29 Mr. N.K.Wadhera also saw presence of flesh and blood stains ,on the said car and had the car been washed by the appellants then, there would not have been presence of flesh and blood stains on the car. Counsel for the appellants further contended that the trial court wrongly took into consideration the police record and diaries. The contention of the counsels for the appellants was that such records are used by the prosecution as a back up, to refresh their memory but the same cannot be used by the Court for forming an opinion on the merits of the case.

291. Counsels for the appellants further submitted that PW-13, S.I. Jagdish Pandey who sent the PCR messages at 6.10 A.M. clearly stated that he had seen a sticker under the name 'Park Lane' on the said BMW car, but the said sticker could not have been seen by the police official without gaining entry inside the bungalow. The contention of the counsels for the appellants was that the BMW car

was parked in the said bungalow after the same was dragged inside with the front side of the car facing towards the main gate and the sticker of 'Park Lane' which was affixed on the back wind screen, could not have been visible just from peeping inside the bungalow from the front side gate without practically entering the bungalow. Counsels for the appellants further submitted that no evidence was produced on record to show that the appellants had knowledge of the commission of offence, committed by the other accused persons, and therefore, the appellants had no reason whatsoever to have screened the offenders.

292. Counsel also argued that the trial court fell in grave error by ignoring the fact of discharge of Siddharth Gupta, son of appellant Rajiv Gupta before passing the impugned order. The contention of the counsel for the appellant Rajiv Gupta was that once the complicity of Siddharth Gupta was not found in the commission of any offence, there could be no reason or motive for the appellant Rajiv Gupta to have involved himself to screen anybody else.

293. Counsel for the appellant also submitted that under Section 36 of the Cr.P.C., it is the duty of the senior police officers to deal with the faulty investigation and not for the prosecution to intermeddle. Counsel for the appellant further submitted that Siddharth Gupta was discharged on 6.11.2000, but the trial court did not amend the charges causing serious prejudice to the appellant Rajiv Gupta as charge under Section 201, could not have been sustained against him after the discharge of his son Siddharth Gupta.

294. Counsels for the appellants also argued that the trial court could not have ignored the PCR messages as they are relevant and legally admissible being public documents as per Section 35 and 74 of the Evidence Act. In support of his arguments Mr. Mathur placed reliance on the judgments of Privy Council reported in **Bhaiya Raj Kishore Deo Vs. Bani Mahto-1918 (XLVII) Indian Cases 1** and **AIR 1988 Kerala 1 State of Kerala Vs. Ammini & Ors.**

295. The Trial court is stated to have committed another grave error in not complying with the basic principles of criminal justice that the defence witnesses were to be considered at par with the prosecution witnesses. The contention of counsels for the appellants was that the trial court failed to give any weightage to the deposition of DW-6 and DW-8 while treating the deposition of DW5, DW7 and DW9 as immaterial much to the prejudice of the appellants. In support, counsels for the appellants placed reliance on the judgments of the Apex Court in **AIR 1981 SC 911 Dudh Nath Pandey Vs. State of U.P.** Counsel for the appellants also contended that the police did not seize any incriminating material from the spot to prove that the said car was washed by the offenders.

296. Counsels for the appellants also contended that PW-60 S.I. Hulas Giri in his cross examination falsely stated that he had recorded the supplementary statements of only those witnesses whose statements were not earlier recorded. The contention of the

counsel for the appellant was that the statement of PW-13, Jagdish Pandey was recorded on 10.1.99 as well as on 31.3.99. Reliance in this regard was placed on the judgment of this court reported in **Deepa Bajwa Vs. State & Ors. 2004 (8) AD. 201.**

297. Counsel for the appellant Rajiv Gupta also submitted that it is totally unexpected of a person worth hundred crores to be seen washing the car with his own servants, therefore, the prosecution wrongly implicated the appellant Rajiv Gupta for extraneous reasons. Finding fault with the case of the prosecution, counsel for the appellant contended that initially the case set up by the prosecution was that six persons did the job of cleaning. Counsel also submitted that there was no independent eye witness to the said act of washing of car by the appellant, except the police officials whose evidence due to their inconsistent stand of highly doubtful nature to be relied upon by the court.

298. Counsel for the appellants further submitted that it is for the prosecution to have proved the evidence on record that the appellants had the requisite knowledge or reasons to screen the offenders and the prosecution has utterly failed to prove the same. In support of their arguments, counsels for the appellants placed reliance on the judgment of the Apex Court in **Sarwah Singh Rattan Singh Vs. State of Punjab- AIR 1957 SC 637, Vikramjit Singh Vs. State of Punjab-2007 (1) Crimes 181 (SC)** and **Trimbale Vs. State of M.P.-AIR 1954 SC 39.**

299. Counsel for the appellants further submitted that the court cannot be permitted to give undue weightage to the case of the prosecution and if, after taking the entire material into consideration, if there is possibility of two views then one in favour of the accused has to be accepted and not favoring the prosecution. Counsels for the appellants further submitted that the trial court has given undue weightage to the video film, which being in the nature of a site plan, was required to be proved in accordance with the principles laid down in Section 162 of the Indian Evidence Act. In support of their arguments, counsels for the appellants placed reliance on the judgment of the Apex Court in **Tori Singh & Anr. Vs. State of U.P.- AIR 1962 SC 399** and **Jagdish Narain & Anr. Vs. State of AIR 1996 SC 3136**.

300. Counsel for the appellants laid much stress on their argument that under Section 304 (II) IPC the sentence which can be imposed is disjunctive i.e. either it can be for 10 years or with fine or with both, and therefore, Part III of Section 201 would be applicable in the facts of the present case and not Part-II of Section 201. In the alternative, counsels for the appellants submitted that if this court finds the offence made out against the main accused falls under Section 304-A IPC then in any case Part-III of Section 201 would be attracted and not Part II of Section 201 IPC. In support of their arguments, reliance was placed on the judgment of the Apex Court in **State of Maharashtra Vs. Jugmander- AIR 1966 SC 940.**

301. On the sentence counsel for the appellants contended that the trial court has not taken into consideration the mandatory principles laid down by the legislature under Section 360 Cr. P.C. The contention of the counsel for the appellants was that even if the allegations against the appellants are taken to be correct, yet they being the first offenders, were entitled to be released on probation as per the legislative intent behind Section 360 Cr.P.C. In support, reliance was placed on the judgments of the Apex Court in **Dilbagh Singh Vs. State of Punjab, AIR 1979 SC 680** and **Surendra Kumar Vs. State of Rajasthan-AIR 1979 SC 1048**. Refuting the said arguments of the counsels for the appellants, Mr. Pawan Sharma, APP for the State contended that videography was duly proved by PW-59, Ram Avtar who himself had prepared the video film after visiting the site of the accident and his testimony remained unrebutted and unchallenged and now, at this stage, the defence cannot be allowed to challenge the authenticity or admissibility of the said video.

302. Counsel for the respondent further submitted that the trial court has duly considered the evidence of the defence before holding these appellants guilty of committing the said offence except evidence of DW-6, who was a formal witness.

303. Counsel for the respondent State further submitted that the trial court has duly taken into consideration the parameters laid

down under Section 360 Cr.P.C and had also given reasons before awarding the sentence.

304. Counsel for the respondent also countered the contention of the counsel for the appellants that Section 201 Part III would be attracted and not Section 201 Part-II. The contention of the counsel for the State is that Part-II of Section 201 will be applicable in all sentences punishable for 10 years and above and Part III of Section 201 would be applicable where the offence is punishable for less than 10 years.

305. Counsel for the respondent further submitted that merely because certain questions relevant to the case were not put to the accused during their examination under Section 313 Cr.P.C., such an omission alone will not be fatal to the case of the prosecution and even if it is so, then the appellate or the revisional court has the ample powers to undo the same by re-examination of the accused persons under the said provision. In support of his arguments, counsel for the respondent placed reliance on the judgment of the Apex Court in **Rambhau Vs. State-2001 II A.D. Crl. S.C. 168**, **State of Punjab Vs. Naib Din-AIR 2001 SC 3955,** and **Baba Vs. State-2002 (9) SCC 567.** Counsel for the State further submitted that the learned trial court has already extensively dealt with all the arguments, now being reagitated by the counsel for the appellants in the impugned orders, and no plausible reasons have

been advanced by the counsel for the appellants to find fault with the conclusion arrived at by the trial court.

306. Counsel for the respondent further submitted that before filing of the challan in the court, the matter remained at the investigation stage and therefore, recording of supplementary statements by the police was in continuation of the investigation and no motives can be attributed to the prosecution witnesses for incorporating those facts which were existing at the site and duly witnessed by the said witnesses. Even otherwise, as per the counsel for the State, the testimony of these witnesses as given by them in the court would be of more relevance, leading towards guilt of the appellants.

307. I have heard learned counsel for the parties at a considerable length and carefully gone through the entire material on record.

308. The first contention raised by the counsel for the appellant was that no offence under Section 201 is made out against the appellants. As per the counsel for the appellants, the prosecution failed to prove on record that the appellants had the requisite knowledge or reason to believe the commission of principal offence by the offenders to whom they had the alleged intention of screening them from legal punishment. Before dealing with the said contention, it would be appropriate to reproduce Section 201 IPC as under:

> **"Section 201. Causing disappearance of evidence of offence, or giving false information to screen offender**

Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

If a capital offence.- shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

If punishable with imprisonment for life.- and if the offence is punishable with [1][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

If punishable with less than ten years' imprisonment.- And if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided fro the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both."

309. Section 201 is a salutary principle of law to deter those who indulge in the act of destroying the evidence so as to screen the principal offenders of the main offence. The punishments prescribed under this Section for the offenders has been made commensurate depending upon the severity of the offence, evidence of which, has been destroyed by the offenders. The punishment extendable to seven years has been prescribed for destroying the evidence punishable with death and punishment up to three years has been prescribed for destroying the evidence of an offence punishable with imprisonment of life or imprisonment which may extend to 10 years and fine, if the sentence is for a term which does not extend up to10 years, then the offence is punishable for a term extendable

to 1/4th part of the longest term of imprisonment provided for the offence or with fine or with both.

310. Roots of Section 201 IPC can be found in the English Law where the aiders and the abettors have been classified as accessories before the fact, accessories at the fact and accessories after the fact. According to Lord Hale of England "an accessories after the fact may be, where a person knowing a felony to have been committed receives, relieves, comforts or assists the felon. Section 201 IPC deals with a situation where the felony has been committed and the person accused of offence under Section 201 has reasons to believe that a felony has been committed, commits any act so as to weaken the prosecution against the principal offenders. Section 201 IPC thus has been designed to penalize the attempts of all those who create bottlenecks and hindrances in the way of the prosecution to apprehend the culprits of the crime and to ultimately ensure their escapement from the clutches of law. Such offenders are the biggest enemies of the society as through their devious acts they render the investigation blindfolded which in our country is already ill equipped due to the lack of modern and scientific devices to apprehend the criminals.

311. The essential ingredients to constitute an offence under Section 201 IPC are as under:

> "Essential Ingredients
>
> The necessary ingredient of an offence under s 201 IPC is actually causing any evidence of the commission of an offence to disappear with the intention of screening

the offender from legal punishment. The essential ingredients of an offence under this section are that:

(i)an offence has been committed;

(ii)The accused knows or has reason to believe that the offence has been committed;

(iii)with such knowledge or belief the accused has:

(a) caused any evidence of the commission of the offence to disappears, or

(b) given any information respecting the offence, which he knew or believed to be false; and

(iv)the accused has done so with the intention of screening the offender from legal punishment; and

(v)if the charge be of an aggravated form, as in the given case, it must be proved further that the offence in respect of which the accused did as in (c) and (d) was punishable with death, or with imprisonment for life or imprisonment extending to ten years."

312. The word 'offence', as used in the above section, does not contemplate that the accused should have the complete knowledge of a particular section of penal code under which the offence is said to have been committed. What the court has to examine is to see as to whether the accused knew or had reason to believe that an offence has been committed. It is certainly for the prosecution to prove that the accused had such sufficient knowledge to form a belief that the offender has committed some offence and to screen him from such offence, particular evidence needed to be destroyed. The Apex Court in **Ram Saran Mahto & Anr. Vs. State of Bihar, AIR 1989 SC 3435** while dealing with the scope of the said section held as under:

"11. The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different

tiers of punishments depending upon the degree of offence in each situation. The two indispensable ingredients for all the three tiers in Section 201 are:

(1) The accused should have had the knowledge that an offence has been committed or at least that he should have had reasons to believe it.

(2) He should then have caused disappearance of evidence of commission of that offence.

The prosecution cannot escape from establishing the aforesaid two basic ingredients for conviction of the accused under Section 201.

12. The gravest degree contemplated in Section 201 is punishable with the maximum sentence of imprisonment for seven years. The minimum requirement for the offence to reach the said peak degree is that the offender should have caused disappearance of evidence of another offence which is punishable with death, and that should be established in addition to the above-mentioned two basic ingredients. Even if the two basics are established, and the prosecution failed to establish the next requirement, the court cannot convict the accused for the highest tier specified in the section.

13. It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of offence under Section 201. Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that the prosecution should have established two premises. The first is that an offence has been committed and the second is that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed, provided the remaining postulates of the offence are also established."

313. In **S.R. Mulani Vs. State of Maharashtra, AIR 1968 SC 829**, the Apex Court held that it will not be a mere suspicion on the part of the offender but he must have either knowledge or reasons to believe that such an offence has been committed then only Section 201 would be attracted. Relevant para 6 of the said judgment is reproduced as under:

"6. The conviction of Appellant 2 under Section 201 IPC depends on the sustainability of the conviction of Appellant 1 under Section 304-A IPC. If Appellant 1 was rightly convicted under that provision, the conviction of Appellant 2 under Section 201 IPC on the facts found cannot be challenged. But on the other hand, if the conviction of Appellant 1 under Section 304-A IPC cannot be sustained, then, the second appellant's conviction under Section 201 IPC will have to be set aside, because to establish the charge under Section 201, the prosecution must first prove that an offence had been committed not merely a suspicion that it might have been committed — and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the

evidence thereof to disappear. The proof of the commission of an offence is an essential requisite for bringing home the offence under Section 201 IPC — see the decision of this Court in Palvinder Kaur v. State of Punjab ."

314. In the trial court, the defence counsel took a stand that the offenders in the present case at the most had found a damaged vehicle parked in their house with the presence of blood stains and flesh pieces and which could be as a result of an accident with some stray animal. The said theory propounded by the defence counsel before the trial court, and by the counsel for the appellants before this court pleading that the appellants had neither any knowledge about the offence nor had any reasons to believe the commission of offence deserves outright rejection. Counsel representing Rajiv Gupta has also taken unpalatable stand of feigning ignorance of Rajiv Gupta about the parking of offending car in his bungalow till he was told by DW-5 Gaurav Karan at about 9.00 A.M. The prosecution has duly proved on record that by tracing the oil trail the police could reach to 50, Golf Links, the bungalow owned by Mr. Rajiv Gupta. The prosecution also proved that the said BMW Car bearing registration No.M 312 LYP in a damaged condition was found parked on the driveway of the said bungalow. It now also stands established with the stand taken by the counsel representing the main accused Sanjiv Nanda and based on the material on record that Sanjiv Nanda caused the said ghastly accident while driving the said BMW car, therefore, with this position, it cannot be said that the insiders present in the bungalow could not derive

knowledge of the commission of an offence by Sanjiv Nanda while driving his BMW Car. It is also not in dispute that Sidharth Gupta, son of Rajiv Gupta, happened to be the friend of Sanjiv Nanda. The prosecution also proved on record that PW-13 Inspector Jagdish Pandey and PW-11 ASI Ram Avadh reached the said bungalow after tracing the oil marks and even PW-55, Inspector Vimlesh Yadav, SHO of the area also reached the said bungalow at 7.45.A.M. In the background of this scenario, it is not only difficult but well nigh impossible to believe that the appellant Rajiv Gupta and his two employees had no knowledge or had no reason to believe about the occurrence of some major accident involving the said BMW car. The prosecution has successfully proved on record that a BMW car was parked in the said bungalow in a damaged condition after it had caused accident of such a high magnitude in which the precious lives of six people were lost. Can anybody sleep in his house if some one known after causing an accident brings his accidental car and park it there? No person in such a situation can remain asleep and more so when a friend of son of the owner of the bungalow was involved in the offence. After parking the said car, Sidharth Gupta had gone to the residence of the main offender Sanjiv Nanda at Defence Colony. It is equally unbelievable that Siddharth Gupta would not have woken up his father and other family members when the damaged vehicle was allowed to be parked in the said bungalow.

315. Based on the above discussion, I am of the view that all the appellants were fully aware about the commission of offence by

Sanjiv Nanda or at least had reason to believe that an offence has been committed by Sanjiv Nanda while driving his BMW car.

316. Coming to the next important contention raised by the counsels for the appellants that the prosecution failed to prove either with the help of any direct evidence or the circumstantial evidence to establish the fact that the appellants with the common intention to screen the offenders of the main crime washed the said BMW car bearing registration No. M312 LYP to remove blood from the same so as to destroy evidence from the said car.

317. With a view to shatter the case of the prosecution and to substantiate their line of arguments, the counsels for the appellants raised the following points:

(a) The theory of washing of car by the police gets falsified from the PCR messages sent by PW13 Jagdish Pandey and PW58 Kailash Chand.

(b) The story of washing of car by the appellants was introduced for the first time on the suggestion of the prosecution branch whereafter supplementary statement of PW13 was recorded, wherein for the first time accusation of washing of said car was made against the appellants.

(c) Contradictions in the testimonies of prosecution witnesses i.e. PWs-11,13,55 and PW 58.

(d) Collection of 18 chance finger prints by finger print expert PW29 Mr.Nagesh Kumar Wadera and blood stains by PW31 Mr. D.S.Chakoutra,Sr. Scientific Officer after the alleged washing of car by the appellants.

(e) Attaching undue importance to the illegally admissible evidence of videography.

(f) During the course of examination of appellants under Section 313, relevant questions relied upon by the prosecution were not put to the witnesses.

318. This court has already dealt with the admissibility of the PCR messages hereinabove when dealing with the appeal filed by Sanjiv Nanda. It is reiterated that the purpose of these PCR Messages are merely to set the machinery of the police in motion and mostly they are cryptic, precise and sometimes too vague also. The counsel for appellants while relying on **Bani Mahto's case (Supra)** contended that PCR messages are official documents and thus are admissible in evidence. The law with regard to cryptic messages has been authoritatively laid down by the Apex Court in **Rajnish Bauaji Jadeja(supra),** which has already been explained in detail.

319. The learned trial court has also dealt with these PCR messages much in detail. Doubting the accuracy of these messages, the trial court pointed out that in one of the PCR messages, the message flashed was that a red colour contessa car had committed the offence, while in fact the BMW car involved in the accident was of a

black colour. Nevertheless, the trial court even after accepting the correctness of the messages came to the conclusion that Inspector Jagdish Pandey as well as SHO Vimlesh Yadav had seen the vehicle being washed by the appellants. The trial court also observed that till the apprehension of all the accused persons, the investigation was going on a right track and was fully credible but due to the influence of some high-ups the crack started developing in the investigation. The court also observed that the principle of weighing the evidence on golden scales cannot be applied in such a case, because trial in the instant case is an example where the entire criminal justice has been hijacked by the rich and influential persons. The said observations made by the court are not just a passing reference, but painfully describes the concern and anguish of a judge witnessing the assorted game plan of the police to create enough loopholes in the course of investigation so as to ultimately help out the accused. The Apex Court, in a well acclaimed decision of **Zahira Habibulla (supra),** although was confronted with more serious questions concerning the faulty and bias investigation as well as perfunctory and improper conduct of trial by the public prosecutor, directed retrial of the entire case and some of the observations made in the said judgment are of utmost importance in the context of the present case. The relevant paras of the said judgment are referred as under:

> "2. The present appeals have several unusual features and some of them pose very serious questions of far-reaching consequences. The case is commonly to be known as "Best Bakery Case". One of the appeals is by Zahira who claims to be an eyewitness to

macabre killings allegedly as a result of communal frenzy. She made statements and filed affidavits after completion of trial and judgment by the trial court, alleging that during trial she was forced to depose falsely and turn hostile on account of threats and coercion. That raises an important issue regarding witness protection besides the quality and credibility of the evidence before court. The other rather unusual question interestingly raised by the State of Gujarat itself relates to improper conduct of trial by the Public Prosecutor. Last, but not the least, that the role of the investigating agency itself was perfunctory and not impartial. Though its role is perceived differently by the parties, there is unanimity in their stand that it was tainted, biased and not fair. While the accused persons accuse it for alleged false implication, the victims' relatives like Zahira allege its efforts to be merely to protect the accused.

13. Statement of one eyewitness was recorded on 4-3-2002 by PI Baria at S.S.G. Hospital, Vadodara disclosing names of five accused persons and when he was sought to be examined before the Court, summons were issued to this person on 27-4-2003 for examination on 9-5-2003. It could not be served on the ground that he had left for his native place in Uttar Pradesh. Therefore, fresh summons were issued on 9-6-2003 for recording his evidence on the next day i.e. on 10-6-2003, giving only one day's time. When it could not be served, then summons were issued on 13-6-2003 for remaining present before the court on 16-6-2003. It could not be also served for the same reasons. Ultimately, the Public Prosecutor gave purshis for dropping him as witness and surprisingly the same was granted by the trial court. This goes to show that both the Public Prosecutor as well as the court were not only oblivious but also failed to discharge their duties. An important witness was not examined by the prosecutor on the ground that he, Sahejadkhan Hasankhan (PW 48) was of unsound mind. Though the witness was present, the Public Prosecutor dropped him on the ground that he was not mentally fit to depose. When such an application was made by the prosecution for dropping on the ground of mental deficiency, it was the duty of the learned trial Judge to at least make some minimum efforts to find out as to whether he was actually of unsound mind or not, by getting him examined by the Civil Surgeon or a doctor from the Psychiatric Department. This witness (PW 48) has received serious injuries and the doctor Meena (PW 9) examined him. She has not stated in her evidence that he was mentally deficient. The police has also not reported that this witness was of unsound mind. During investigation also it was never stated that he was of unsound mind. His statement was recorded on 6-3-2002.

36. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation — peculiar at times and related to the nature of crime, persons involved — directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

38. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a

> continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

320. Whenever and wherever, either due to money power or political power, the police or the prosecution bend its knees so as to help out the accused of the crime, the task of the courts becomes onerous to ascertain and unravel the truth. In all such cases, the prosecution creates enough loopholes at the stage of investigation itself, and in most of the cases such investigations are more guided by the defence through their legal experts at the cost of sufferings of the victims of the crime and the societal interest. One is totally aghast to find that in FIR as well as in the challan filed by the police under Section 173 of the Cr.P.C., except stating that these appellants have committed an offence under Section 201/34 IPC, no other fact was mentioned to disclose as to how they were found involved in committing the said offence under Section 201/34 IPC. It is only in the supplementary statements of PW-13 and PW58 that it was alleged that these appellants were seen washing the said BMW car, while no such allegation was made in their statements earlier recorded under Section 161 Cr.P.C. In this regard, counsel for appellants relied on decision in **Ram Kumar Pande's case (supra),**

which pertains to different factual scenario and thus is not applicable to facts of the instant case. The trial court could see the said game plan of the prosecution after noticing clear accusations made by the police against the appellants, in their remand application proved on record as Ex. PW58/F. The trial court also considered the said PCR messages to reach to the conclusion that the appellants had washed the said BMW car and thereafter covered the same with tarpoline. In the message sent by PW11 ASI Ram Awadh at 6.10 A.M. the said police officer merely stated that a black colour BMW car in an accidental condition was found parked at 50, Golf Links and when chowkidar of the said bungalow was inquired into but he refused to open the gate. The police officer in the said message also stated that the said car was carrying a sticker under the name of 'Park Lane'. In the message flashed at 7.35 A.M. by Inspector Jagdish Pandey, he stated that one vehicle involved in the accident appeared to be recently washed. In his message he also stated that apart from police other persons were also standing in the bungalow and the accidental car was covered with a tarpoline. SHO Vimlesh Yadav in her statement under Section 161 Cr.P.C. also refered to the presence of the said BMW car at bungalow No. 50, Golf Links and also the fact that she was told by Inspector Jagdish Pandey about the washing of the said car. It is also important to mention here that PW-11,ASI Ram Awadh, PW-13 Inspector Jagdish Pandey andPW55 Vimlesh Yadav in their depositions before the Court duly proved the fact of washing of said car by the appellants and the defence could not

succeed to effectively rebut or discredit their depositions. Be that as it may, it is well settled that statements recorded under Section 161 Cr.P.C. are not a substantive piece of evidence. In this regard, the Hon'ble Apex Court in **Rajendra Singh Vs. State of U.P.- (1007) 7 SCC 378,** observed as under:

> "7. The High Court has basically relied upon the statements of six witnesses which had been recorded by the investigating officer under Section 161 CrPC to record a positive finding that the respondent could not have been present at the scene of commission of the crime as he was present in a meeting of Nagar Nigam at Allahabad. A statement under Section 161 CrPC is not a substantive piece of evidence. In view of the proviso to sub-section (1) of Section 162 CrPC, the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the High Court committed a manifest error of law in relying upon wholly inadmissible evidence in recording a finding that Kapil Dev Singh could not have been present at the scene of commission of the crime."

321. It is a settled legal principle of law that the depositions made in the court by the witnesses cannot be equated with the statements given by these witnesses under Section 161 Cr.P.C. It is also settled legal position that minor or trivial contradictions in the statements of such witnesses cannot over-throw the prosecution case if such statements find due support from other corroborative material.

322. Mr. S.S. Gandhi, learned Senior Advocate representing appellants Bhola Nath and Shyam Singh Rana laid much stress that PW-13 could not have noticed the 'park lane' sticker which was affixed on the back wind screen of the car unless the said witness had gained entry in the bungalow. The contention of the counsel for appellants was that these appellants could not have washed the car once the police officers had already entered the bungalow. This

argument of counsel, no doubt, though specious but taking the totality of the circumstances into consideration, the same falls face down. At the most, it can be said that the said witness might have been able to gain entry from the side gate at 6.10 A.M. and thereafter the three appellants might have washed the said car. It has come on record that PW11 and PW34 had also seen water coming outside from the left side drain of the bungalow. This position is also strengthened from the fact that PW-13 had seen these appellants washing the said car after he peeped inside the bungalow from the side gate, but actually came to know about their identity after having entered the bungalow from the main gate after the arrival of the SHO Vimlesh Yadav. On the same lines, PW-55 SHO Vimlesh Yadav also deposed that she had also peeped inside the gate and saw the car being washed and thereafter she requested the chowkidar to open the gate when exactly she could know the name of the persons who were washing the said car. Taking into consideration the totality of the aforesaid circumstances, I do not find any merit in the contention raised by the appellants that they were not seen washing the BMW car by these witnesses.

323. The other contention of the counsel for the appellants was that as PW29 finger print expert and PW31 Senior Scientific Officer could collect the blood samples and the chance prints from the car it could not have been done from a wet car, would show that the car was not wet, is also devoid of any force. PW-29 in his deposition

clearly stated that he found that the car was wet from the roof top and bonnet was also wet. He came to inspect the said car at about 10.00A.M. and even at that time the car was still wet. The said finger print expert had to wait for some time for the car to dry up and only thereafter he could apply the developing powder for lifting chance prints from the car. It is thus evident from his deposition that chance prints could be lifted even from a car which earlier got wet but the same could be lifted only after it dried up. No suggestion was given to the said finger print expert by the defence that chance finger prints could not be lifted from the car once it got wet, due to water or otherwise. PW-31, Senior Scientific Officer, lifted the blood stains from the steering of the car and also from the bumper of the car and it cannot be ruled out that had the car not been washed by the appellants, the said officer could have collected more blood samples from the car because admittedly six persons had died in the accident and some of those victims even got badly entangled beneath the car. In any event of the matter, no suggestion was given to the said witness that had the car been wet he would not have been in a position to lift the blood samples.

324. Taking these circumstances into consideration, the said argument of the appellants also cannot be sustained and merits rejection.

325. So far the contradiction in the deposition of PW-58 S.I. Kailash Chand is concerned, the time variation of five minutes from 7.45 A.M., when SHO Vimlesh Yadav was said to have taken the

possession of the car and visit of Kailash Chand after receipt of the message at 7.50 A.M. is not that material to disbelieve his court statement as this is a minor discrepancy and not a material discrepancy. In this regard, the Apex Court in **State of Rajasthan Vs. Kalki-(1981)2 SCC 752** explained the difference between material and normal discrepancies in following terms:

> **"8.** The second ground on which the High Court refused to place reliance on the evidence of PW 1 was that there were "material discrepancies". As indicated above we have perused the evidence of PW 1. We have not found any "material discrepancies" in her evidence. The discrepancies referred to by the High Court are, in our opinion, minor, insignificant, natural and not "material". The discrepancies are with regard to as to which accused "pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent, Kalki, gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of the head or from the side of the legs. **In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.** As indicated above we have not found any material discrepancies in the evidence of PW 1."

326. Handing over possession of the car to SHO Vimlesh Yadav at 7.45 A.M. would not mean that the car was immediately driven out from 50, Golf Links, which was lying in a damaged condition, not fit to be driven out. Counsel for the appellants has over-emphasized such minor contradiction in the deposition of PW-58 who was also witness to the washing of the car by the appellants. When he visited the said bungalow, not only did he see that back side number plate was affixed in the reverse direction but after taking out the same, he tallied it with the number plate, which was found by him from the

site of the accident. Therefore, this contention of counsels for the appellants is of no assistance to them.

327. Coming to the next contention of the counsels for the appellants with regard to the inadmissibility of videography on which much reliance was placed by the trial court, I find that PW-59, Constable Ram Lal, who prepared the video film of the spot had duly proved the same as Ex.PW-59/19. None of the appellants cross-examined the said witness to discredit his testimony or to challenge the authenticity of the video film taken by him from the spot. Video comes within the definition of 'document' under Section 3 of the Evidence Act. In Halsbury Laws of England, 4th Edition, at Page 56, it has been observed that documents include in addition to a document in writing, any plan, graph, drawing, photographs, disk, sound track or similar device or any film, micro-film, tape or similar device, just like any other document, therefore, the video can also be proved through the evidence of an expert who had taken the video of the scene of crime. The video, being in the nature of a document, is a corroborative piece of evidence but the authenticity and genuineness of the video should be proved in the same manner as any document or a site plan is required to be proved under the Evidence Act.

328. It is a matter of record that the learned presiding judge of the trial court personally viewed the said video and copy of the same was also supplied to the defence counsel. After viewing the said video, so far the appellants are concerned the court found that on

the back side of the BMW car, the number plate was not visible. The court had drawn conclusion that since there was no damage seen at the back of the car where the number plate was affixed, therefore, it was apparent that non visibility of the number plate in the video is an indicator to the fact that the efforts were made by the accused persons to remove the number plate so that no one could identify the car. Although the court could clearly view from the video the removal of the back side number plate, yet, it did not make it a ground for exonerating the accused persons on account of the fact that no specific charge was framed in this regard against the appellants. Therefore, I do not find any illegality committed by the trial court in taking into consideration, the said removal of the number plate after viewing the video as one of the important circumstance to assess the exact intention of the accused persons. The trial judge also saw the area/floor/path way where the car was parked appearing to be washed after having seen the video. The said video was also viewed by this court in the presence of both the parties and one could clearly see the wet patches on the floor/path way around the car and to this extent the observations of the court did not appear to be incorrect, more particularly when no challenge was made by the defence to the authenticity and genuineness of the said video. It is being made clear here that the prosecution failed to produce any witness so as to explain the scene of crime as videographed by PW59, and therefore, this court is not attaching much importance to the said video, except to the limited extent the

things are clearly visible to the naked eye. The damaged BMW car had duly been shown in the said bungalow of appellant Rajiv Gupta i.e. 50, Golf Links and the said car had been shown with its front facing the main gate and one can clearly see wet patches on the floor/path way around the said car, and this is a clear pointer to the fact that the car was washed prior to the video taken by PW-59. Washing of car is otherwise evident from the other evidence proved on record and even the expert witnesses in their depositions have deposed about the said car in a wet condition at the time of their visit. The video also clearly shows that the car from the outside appeared to be totally clean which is again an indicator to the fact that it was washed by the persons present inside the bungalow. No doubt, on the wintry morning of 10.1.1999, the presence of 'mist' could have contributed wet conditions but not to the extent as has been proved on record through the depositions of the prosecution witnesses and videography.

329. The decision of the Hon'ble Apex Court relied upon by appellants in **Col. Mohan Singh's case(Supra)** is not applicable to the facts of the case as there the prosecution was unable to prove that the accused washed the car but herein the prosecution has been able to prove the case.

330. The decision in **Jagdish Narain(Supra)** and **Tori Singh (Supra)** are also not of any assistance to the appellants as the facts of these two cases do not have any similarity to the facts of the

present case. Thus, the contention of counsel for the appellants in this regard is equally devoid of any merit.

331. This brings me to the next contention of the counsel for the appellants that during the recording of the statements of the appellants under Section 313 Cr.P.C., relevant evidence relied upon by the prosecution was not put to the appellants.

332. Grievance raised by the counsels for the appellants is that none of these witnesses were questioned with regard to the removal of the number plate and why and how water was coming out of the house or the floor under the car was wet. Counsels for the appellants placed reliance on the judgment of the Apex Court reported as **Sharad Birdichand Sharda Vs. State of Maharashtra,AIR 1984 SC 1622** and judgment of the Bombay High Court reported as **Ashok Sadashiv Astikar Vs. State of Maharashtra,1989 (1) Crimes 642.**

333. There cannot be any dispute to the legal position settled by the Apex Court in a catena of judgments including these two judgments that any circumstance in respect of which an accused was not examined under Section 313 Cr.P.C., cannot be used against him. The precise question arising from the fact of the present case is to what extent appellants can take advantage of this position. Undoubtedly, the direct question with regard to the removal of the number plate was not put to any of the appellants, although indirectly question no. 23 was put and in the charge also no such

accusation was made against the appellants, and keeping these facts in view, the trial court also did not lay much importance to the said fact of removal of number plate by the appellants so as to hold the appellants guilty. In any case, the said circumstance is clearly visible to the naked eyes after viewing the video of the said bungalow where the car was parked and the same cannot be totally glossed over as one of the circumstances to prove destruction of evidence by the appellants. As regards the contention of the counsel for the appellants that no questions were put to these appellants with regard to how floor under the car was wet or the water was coming out of the bungalow, I find that question no. 15,16,24,25,34,35 and 68 put to these appellants demolish the said argument. It would be appropriate to reproduce the same as under:

> "Ques.15. It is also in evidence against you that PW13 Inspector Jagdish Pandy on reaching the main entrance-gate found that the water was coming out from the Kothi beneath the gate and the gate was closed which arose suspicion in his mind. What have you to say?
>
> Ans. I do not know.
>
> Ques.16. It is also in evidence against you that the water which was coming out from the gate through the Nali was, in fact, the same water which was being used for washing/cleaning the BMW Car which was found parked on the driveway of the Kothi in a damaged condition. What have you to say?
>
> Ans.16. I do not know.
>
> Ques.24.It is in evidence against you that BMW car was found at the house of Siddharth Gupta at 50, Golf Links, and you, Bhola Nath and Shyam Singh were noticed washing the BMW Car. What have you to say?
>
> Ans.24. It is incorrect. It is a false allegation. I was woken up by Gaurav Karan at about 9.30 A.M. and when I came down to the Ground Floor there was no BMW car parked at my residence.
>
> Ques.25. It is in evidence against you that at 50 Golf Links you, accused Shyam Singh Rana and accused Bhola Nath, tried to clean/wash the car with a view to destroy the evidence available on the BMW Car. What have to say?

Ans.25. It is incorrect. I was sleeping at that time and was woken up by Shri Gaurav Karan at about 9.30 A.M. and when I came down to the Ground Floor I did not see any BMW car at my residence and nor did I wash any car.

Ques.34. It is in evidence against you that the entrance iron gate of that H.NO. 50, was closed. On inquiry, it was found later on that it belongs to you. Insp. Jagdish Pandey PW13 peeped from the space from one side of iron gate and saw one black car parked there. Bonnet of that car was damaged and its lights were broken. Before peeping inside, he noticed that water was coming out from inside the house. He then knocked at the gate but it was not opened by anyone from inside. When he peeped inside the house, he had also seen that three persons were washing that blacked BMW Car. When the gate was not opened he gave a message to the SHO, Lodi Colony and then SHO PW55 and S.I. Kailash Chand PW58 also reached there. What have you to say?

Ans.34. It is incorrect.

Ques.35. It is in evidence against you that thereafter the gate of the house NO. 50, Golf Links was got opened. The names of the persons washing the car were revealed as accused Rajiv Gupta, accused Shyam Singh and accused Bhola Nath. What have you to say?

Ans.35. It is incorrect. I was sleeping at that time and was woken up by Shri Gaurav Karan at about 9.30 A.M. as stated earlier.

Ques.68. It is in evidence against you that PW29 Nagesh Kumar Wadhera, Finger Print Expert, lifted the chance finger prints from the BMW Car on 10.1.99 at the request of the Police and submitted the report Exbt.PW29/A. At the time of lifting of the chance prints, the BMW car was sent and he had to wait for the car to dry up. What have you to say?

Ans.68. I do not know."

334. The contention that the video was not put to the accused persons is falsified from the question no. 33 put to the accused under Section 313 Cr.P.C. The same is reproduced as under:

"Ques.33. It is in evidence against you that on 10.1.99 PW 59 Const. Ram Avtar, photographer took the photographs of the scene of occurrence from different angles and he also prepared the video film from the scene of occurrence to the place of 50, Golf Links. The photographs are Exht. PW59/1 to 18 and the video recording is Exht. PW59/19. What have you to say?

Ans. I do not know."

335. In view of the foregoing, I am of the view that the evidence on which the prosecution has placed reliance was broadly put to the accused persons and that they cannot complain of being kept in the dark with regard to any incriminating evidence relied upon by the prosecution and believed by the trial judge. Therefore, there is no merit in the contentions raised by the counsels for the appellants.

336. Another argument advanced by the counsels for the appellants was that the prosecution in the present case has unnecessarily intermeddled with the process of the investigation, although it is only the duty of the senior police officers to exercise such powers to supervise the investigation and to make suggestions if so required. Counsel thus urged that supplementary statements recorded by the police in the present case on the suggestion of the prosecution branch are in violation of Section 36 of Cr.P.C. and amounts to interference in the powers to be exercisable by the police alone. In support of his argument, counsel for the appellants placed reliance on the judgment of the Apex Court reported as **R. Sarala Vs. T.S. Velu, AIR 2000 SC 1731.** The relevant para of the said judgment is referred as under:

> "2. Investigation and prosecution are two different facets in the administration of criminal justice. The role of Public Prosecutor is inside the court, whereas investigation is outside the court. Normally the role of Public Prosecutor commences after investigating agency presents the case in the court on culmination of investigation. Its exception is that Public Prosecutor may have to deal with bail applications moved by the parties concerned at any stage. Involving the Public Prosecutor in investigation is un judicious as well as pernicious in law. At any rate no investigating agency can be compelled to seek opinion of a Public Prosecutor under the orders of court. Here is a case wherein the investigation officer concerned is directed by the High Court to take back the case from the court whereat it was laid by him after completing the investigation and he is further directed to consult the Public Prosecutor and submit a

fresh charge-sheet in tune with the opinion of the Public Prosecutor. In such a course permissible in law?"

337. The said observations made by the Apex Court were peculiar to the facts of the said case. In the said case despite the police having filed the challan under section 304 and 498A IPC against the accused persons, the High Court of Madras exercising powers under Section 482 Cr.P.C., on the petition of the accused persons gave directions for placing the papers before the public prosecutor to give an opinion in the matter and thereafter to file amended charge sheet in the court. In the backdrop of the said facts, the court made the said observations. Even otherwise, there cannot be any quarrel with the said legal position that the role of public prosecutor commences after investigating agency present the case in the court on culmination of the investigation and the police while discharging their duties under Section 156 are not to be guided by the public prosecutors to guide the course of investigation. The factual scenario of the present case is entirely different as the supplementary statements were taken by the police not on the advice of the public prosecutor but by the erstwhile department of prosecution. It is a trite law that before filing of the challan under Section 173 Cr.P.C. or the supplementary charge sheet under Section 173(8) of Cr.P.C., the investigation remains within the realm and domain of the police and they are well within their rights to seek any opinion of the experts or of any agency before the presentation

of challan so as to build a proper and foolproof case against the culprits of the crime. There is nothing wrong if the police takes any legal advice or any other advice on administrative side to see that no lacuna is left in the challan to be filed under Section 173 Cr.P.C. Essentially, there is a difference between the prosecution department discharging their duties on the administrative side and legal duties after the presentation of the challan. It is not the case of the appellants that after filing of the challan the services of the public prosecutor were taken to seek their advice or opinion. Thus, it cannot be said that supplementary statements were recorded later on in order to inculpate the appellants in a false case. The decision in **Deepa Bajwa's case (Supra)** is of no assistance to the counsel for the appellants as the same was on different facts as therein, the issue was whether it was in the knowledge of the accused as to which caste the complainant belonged to but in the instant case police had the knowledge of washing of the car as it is mentioned in application for police remand that the car was being washed. Thus, there is no merit in the said contention of the counsel for the appellants.

338. The next contention of the counsels for the appellants is that the learned trial court has committed error by perusing the police diaries and case diaries without giving an access of the same to the defence. This argument of the counsel for the appellants is totally misplaced as the learned trial court has not used the police and case diary as a piece of evidence to prove guilt of the present appellants.

The case diaries were examined by the learned trial judge to find out the reasons behind the murky investigation. The judgment of the Kerala High Court in **Ammini's case (Supra)** is of no help to the counsel for the appellants as the same clearly permits the trial court to use the case diaries to ascertain the time on which the investigation began and closed on which day, the places visited by the officers and the circumstances ascertained through investigation. Relevant para 57 of the same is referred as under:

> "57. The Sessions Judge adopted another method to scrutinise the confession. He made a meticulous comparison of Ext. P 40 with the statement of the fourth accused recorded by the police during investigation which is incorporated in the Case Diary file. The Sessions Judge traced out one or two minor discrepancies and blew them up out of proportion and observed that they are "significant omissions which in my view are of some material consequence". One such discrepancy is that the accused mentioned 9-6-1980 as the date of visiting Merly's house, whereas the date 10-6-1980 is shown in the statement of the police. Another omission is that he mentioned the name of Chinnappan (P.W. 27) in his statement to the police whereas he did not mention that name in Ext. P 40. (But it is Clear that he referred to P.W. 27 in that statement). The method adopted by the Sessions Judge is one forbidden by law. Section 162 of the Code imposes the inhibition that no statement made by a person to the investigating officer during investigation shall be used for any purpose except as provided in that Section. But the Sessions Judge appeared to be under the impression that he can do so by virtue of Section 172(2) of the Code. That sub-section reads as follows :
>
> "Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial".
>
> Sub-section (i) enjoins on the police officer making the investigation to enter his proceedings in the investigation day by day, in a diary "setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation". The diary mentioned in Section 172(1) and the statements recorded under Section 161(3) of the Code are obviously different. Statements recorded under Section 161(3) are cover ed by the sweep of inhibition contained in Section 162 of the Code. The prohibition imposed in Section 162 cannot be circumvented by resort to Section 172(2) of the Code. The two are different records, though the statements recorded under Section 161(3) and the diary envisaged in Section 172(1) may together be incorporated in the same file which police call "Case Diary File", for the sake of convenience. That apart, Section 172(2) itself embodies an inhibition that the diary envisaged in that section is not to be used as evidence in the case. The only use of the diary is "to aid" the Court in the trial, to ascertain the time at which the investigation was begun and closed on each day, the places visited by the officer, and the circumstances ascertained through investigation. It is not a substitute for evidence in the case for the

purpose of making a comparison with the testimonies of witnesses or judicial dying declarations or judicial confession. The Sessions Judge by adopting the above method had committed an illegality."

339. On the same lines the Apex Court in **Sidharath Vs. State of Bihar,AIR 2005 SC 4352** has approved such power of the court calling for case diaries to find out anything happened during the investigation of the crime. Relevant para 26 of the said judgment is reproduced as under.

"26. Lastly, we may point out that in the present case, we have noticed that the entire case diary maintained by the police was made available to the accused. Under Section 172 of the Criminal Procedure Code, every police officer making an investigation has to record his proceedings in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. It is specifically provided in Sub-clause (3) of Section 172 that neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 of the Cr.P.C. or the provisions of Section 145 of the Evidence Act shall be compiled with. The Court is empowered to call for such diaries not to use it as evidence but to use it as aid to find out anything that happened during the investigation of the crime. These provisions have been incorporated in the Code of Criminal Procedure to achieve certain specific objectives. The police officer who is conducting the investigation may come across series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been Page 965 careful in seeing that the trial of the case was conducted in accordance with the provisions of the Cr. P.C."

340. Similar view was taken in **Mukund Lal Vs. UOI & Anr.** reported in **1989 (Supp(1) SCC** 622 relied upon by counsel for the respondent State.

341. Based on this legal position, the argument raised by the counsel for the appellants with regard to the case diaries also merits rejection.

342. Counsels for the appellants also argued that defence witnesses were not given same treatment as given by the trial court to the prosecution witnesses. As per counsel for the appellants even evidences of DW6, DW8 and DW9 were not dealt with by the trial court, thus causing prejudice to their case. In support of their arguments, counsels placed reliance on the judgment of the Apex Court in **AIR 1981 SC 911 Dudh Nath Pandey Vs. State of U.P.**, which law is not disputed.

343. Indisputably, the defence witnesses are to be given the same treatment as prosecution witnesses by the trial court, yet at the same time, it is for the trial court to form an opinion about the creditworthiness and reliability of the witnesses produced by the defence as well as by the prosecution. The trial court in the impugned judgment has clearly held that the defence witnesses namely, Gaurav Karan, Karan Singh and Sudhir Singh being interested witnesses and due to the false testimony of DW-6 and DW-9, their evidence was considered not worthy of any credence. No doubt, there could have been more elaborate discussion on the

depositions of the said defence witnesses, but even in the absence of the same, it cannot be said that the trial court has not taken into consideration the evidence of the said defence witnesses, before giving the final verdict. Perusal of testimonies of DW6 Ms. Himalyani Gupta, DW9 Shri Sudhir Sareen and statement of Rajiv Gupta under Section 313 Cr.P.C., clearly show contradictions as to on whose call Himalyani went to the police station as Rajiv Gupta in his statement said that he called up Himalyani Gupta, whereas Sudhir Sareen, DW9 also stated that he called up Himalyani Gupta. Since there are apparent contradictions in the testimonies of DW6, DW9 and Rajiv Gupta, thus the trial court rightly rejected the evidence of the said defence witnesses.

344. It was also argued that Rajiv Gupta could have no motive to destroy the evidence as his son stood discharged. Reliance in this regard was placed on the decision in **Sukharam Vs. State of M.P.-1992 Cr.LJ 861(Supra),** wherein it was held that where the offence is proved by way of circumstantial evidence, motive needs to be proved, I feel that this contention of the counsel for the appellant is also devoid of merit. It is no more res integra that motive is essentially to be proved where there is no sufficient circumstantial evidence to conclusively establish guilt of the accused persons but where there is sufficient circumstantial evidence completing the chain, motive need not be proved. In this regard Hon'ble Apex Court in **Uday Kumar Vs. State of Karnataka-(1998)7 SCC 478** observed as under:

> "16. It was then contended on behalf of the appellant that Suresh being the son of his sister (appellant's) and the relations between them being cordial and affectionate, there was no reason for the appellant to commit the present crime. We are not impressed by this submission because of our aforesaid conclusions about the guilt of the appellant. It might be, as stated earlier, the appellant appears to be very much obsessed with superstitious beliefs and it is because of that he did this crime. However, this observation is not germane to the finding of guilt against the appellant. There is no suggestion to any of these witnesses that any outsider had entered the premises and then committed the crime. In the absence of such material on record, we do not accept this contention. It is true that in a case of circumstantial evidence, motive is one of the circumstances which assumes importance but it cannot be said that in the absence thereof, other proved circumstances although complete the chain would be of no consequence. It was then contended on behalf of the appellant that he (appellant) was coaching badminton (shuttle) to a number of young boys and girls. He was also distributing toffees, sweets etc. to the boys and girls. He was known for his affectionate and loveable conduct. If this was the image of the appellant, it was urged that it would be unbelievable that he would commit the crime in question. Assuming that the appellant possessed these good qualities but that would not make the prosecution evidence unbelievable which is otherwise found unimpeachable."

345. In any case, the argument is such that it amounts to putting the cart before the horse. The mere fact that son of Rajiv Gupta was subsequently discharged cannot be a ground to pick holes in the investigation so as to allege false implication.

346. As discussed above, there is sufficient circumstantial evidence against Mr. Rajiv Gupta and thus, motive need not be proved. Hence, this contention of counsel also merits rejection.

347. This now brings me to deal with the last submission of the counsel for the appellants that Part-III of Section 201 would be attracted in the present case and not Part-II of Section 210. The crux of the argument of the counsel is that the punishment envisaged in Part-II of Section 304 in comparison to Part-I of Section 304 is 'disjunctive' and not 'conjunctive', i.e. the offence punishable under Section 304 (II) can extend to 10 years or with

fine, while under Section 304-I, it can extend to 10 years along with the liability to pay fine as well. Counsel thus urged that because of Section 304-II being 'disjunctive' therefore, Part-III of Section 201 IPC would get attracted, which deals with the commission of offence punishable with imprisonment for any term not exceeding 10 years. The said argument of the counsels for the appellants is totally misplaced looking into the scheme of Section 201 IPC. Under the said scheme, the offence punishable under this Section is no more severe than the principal offence committed by the offender, the punishment thus, accordingly varies, keeping in view the punishment for which principal offence has been categorized in the said section. The first category pertains to capital offence where the accused knows or believes to have committed an offence which is punishable with death. The second category deals with a case of punishment with imprisonment for life or with imprisonment which may extend to 10 years, while the third and last category relates to offences punishable with not exceeding 10 years of imprisonment. The legislative intent is quite clear and explicit and cannot be given different interpretation as was sought to be placed by the counsel for the appellants. Clearly Section 304 (II)IPC would attract the IInd Part of Section 201 IPC and for less than 10 years imprisonment Part III of Section 201 will get attracted. The judgment of the Apex Court cited by the counsel for the appellants in the case of **State of Maharashtra Vs. Jugminder Lal-AIR 1966 SC 940** is not applicable to the facts of the present case, where the

issue relating to expression 'shall be punishable' used in Section 3 (1) of Suppression of Immoral Traffic in Women & Girls Act 1956 was under consideration. The Apex Court held that the expression 'shall be punishable with imprisonment and also with fine' manifests that the court is bound to award sentence consisting both of 'imprisonment and fine' and does not give any discretion to award either of them. The situation of the said case is not applicable to the facts of the present case, in view of the scheme envisaged under Section 201 IPC.

348. Considering the foregoing discussion, it is manifest that the prosecution has successfully discharged its burden.

Conclusion

349. In view of the above discussion, the appellants have been rightly convicted under S. 201/34 IPC.

Sentence

Sanjeev Nanda

350. Time now to deal with the issue of sentence to be awarded to the appellant, Sanjiv Nanda, whose conviction has been converted by this court from Section 304 II Indian Penal Code, 1860 to one under S. 304-A Indian Penal Code, 1860.

351. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant

discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case.

352. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix and undue sympathy to impose inadequate sentence would do more harm to the justice delivery system and will undermine the public confidence in the efficacy of law. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.

353. In **Dalbir Singh v. State of Haryana, (2000) 5 SCC 82**, the Apex Court observed that 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 and also observed as under:

> When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

354. Similar view was taken in **State of Karnataka v. Sharanappa Basanagouda Aregoudar,(2002) 3 SCC 738**, the relevant observations are reproduced below:

> 6. We are of the view that having regard to the serious nature of the accident, which resulted in the death of four persons, the learned Single Judge should not have interfered with the sentence imposed by the courts below. It may create and set an unhealthy precedent and send wrong signals to the subordinate courts which have to deal with several such accident cases. If the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the courts should have deterrent effect on potential wrongdoers and it should commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system.

355. Keeping in mind the above, I would now delve on the contentions of the parties regarding the sentence to be awarded.

356. Mr. Ram Jethmalani, Senior Advocate for the appellant vehemently submitted that the appellant was a young boy of 19 years of age at the time of commission of offence and already his entire career on all fronts i.e. educational, matrimonial and professional stands ruined due to loss of about precious 10 years in facing ordeal of protracted trial and imprisonment for some period. Counsel further contended that the appellant had already felt quite repentant and remorseful for the six deaths and causing injury to one victim for which he paid compensation of Rs.10 lacs each to the families of death victims and Rs. 5 lacs to the injured victim. Counsel also urged that his conduct in the jail and during the trial remained exemplary. Counsel also submitted that the said offence committed

by the appellant is his first offence and that too was just a mishap that happened in his life. Counsel also pleaded that the appellant belongs to a very respectable business family and is also the grand son of national hero late Admiral S.M. Nanda. The counsel also drew attention of this court to the fact that while being in custody the appellant took part in various social activities and worked with Mr. Arun Kapoor and Ms. Rekha Puri of Ritnjali, an NGO working for upliftment and betterment of under trials and convicts. In the affidavits filed by Mr. Arun Kapoor and Ms. Rekha Puri of Ritnjali, they have stated that the appellant taught computers and English to the inmates of Tihar Jail.

357. Opposing the reduction of sentence Mr. Pawan Sharma, APP for the State submitted that the trial court has taken into consideration all the aforesaid pleas before awarding the said sentence. Counsel further submitted that the case in hand is not a simple case of accident but is a case where the appellant had deliberately killed six persons and some of these were even entangled beneath his car, therefore, no leniency can be shown to the appellant. Counsel further submitted that the said accident in question has brought darkness in the families of six persons who became victims to the accident caused by the appellant, who forgetting all norms, was driving the BMW car in a highly drunken state and at an excessive high speed. Counsel further submitted that the said compensation of Rs. 65 lacs was paid by the appellant at the time of grant of bail, the appellant should not seek any reduction

of sentence just because he has paid the said amount to the families of the victims or to the injured. Counsel also submitted that the appellant through his power of money had adopted dubious methods to win over the witnesses, police and the prosecutors and for all such acts of the appellant he deserves even more severe punishment than granted by the trial court.

358. Having heard learned counsels for the parties, I am of the view that the appellant may have undergone trauma and agony and no doubt has faced trial for about 9 years which must have affected his life education wise, career wise and marriage wise but it is all on account of his own doing. There is an old adage which says that 'as you sow, so shall you reap'. Yes, he paid Rs. 65 Lacs to the family of victims of the accident but as contended by public prosecutor, he did so more with a view to secure bail than out of compassion for the victims. If he was really so compassionate towards the victims, why did he take to his heels after causing the accident, knowing fully well the enormity of the casualties. One also cannot lose sight of the fact that every possible effort was made to destroy the evidence, to win over the witnesses, and to influence the prosecution and the police. The unholy nexus between the defence and the prosecution as shown by NDTV needs no reminder. A section of our society who wields money and muscle power labours under a mistaken belief that by use of their such power they can escape from the clutches of law but what they forget is the maxim 'Be howsoever high you are, the law is above you'. Let us also not lose sight of the plight of those families

who have lost their dear ones and their lives have been plunged into darkness by a singular act of this young man who for his own enjoyment was stalking the roads of Delhi as a merchant of death. I, therefore, feel that the accused deserves no leniency in the matter of sentence and the mitigating circumstances, which Mr. Jethmalani has pointed out clearly, outweigh the devastating effect of the accident. Hence, I sentence accused Sanjiv Nanda to rigorous imprisonment of 2 years under Section 304-A IPC.

Rajiv Gupta, Shyam Singh Rana and Bhola Nath

359. With regard to the accused Rajiv Gupta, Shyam Singh Rana and Bhola Nath in criminal appeal Nos. 767/2008 and 871/2008 against whom conviction has been upheld by this Court for committing offence under Section 201/34 IPC, the provision which will now be attracted would be part III of Section 201 IPC on account of the fact that the offence against Sanjeev Nanda, the main accused has been converted from Section 304 Part II IPC to Section 304 A IPC.

360. Mr. Dinesh Mathur, Sr. Advocate appearing for Rajiv Gupta and Mr. S.S. Gandhi, Sr. Advocate for Shyam Singh Rana & Bhola Nath, prayed for leniency in favour of these accused persons on the ground that in the event of this Court holding these persons guilty of the said offence under Section 201 IPC a lenient view may be taken against them as all the offenders are the first offenders. Counsels

also claimed that the appellant Rajiv Gupta is a leading business man and being a respectable person has deep roots in the society.

361. In so far offence under Section 201 IPC is concerned, this Court has already taken a view that commission of offence under Section 201 IPC has to be viewed very seriously as the persons found guilty of this offence create bottlenecks and hindrances in the way of prosecution to apprehend the culprit of the main crime and, therefore, no leniency can be shown to such offenders.

362. However, since the conviction against the accused Sanjiv Nanda has been converted from Section 304 Part II to Section 304 A IPC the natural fall out would now be that the appellants will be guilty of an offence under Section 201 Part III of IPC. The Lower Court has sentenced Rajiv Gupta to undergo rigorous imprisonment for a period of one year along with imposition of fine of Rs. 10,000/- while Shyam Singh Rana & Bhola Nath were sentenced to undergo rigorous imprisonment for six months besides imposition of fine of Rs. 100/- each.

363. Having heard the counsels for the appellants I am of the view that as in the case of the main accused Sanjeev Nanda I have declined to invoke the Probation of Offenders Act, I am not inclined to do so in their case as well. Considering the enormity of the main offence committed by Sanjeev Nanda resulting in the death of six persons and causing injury to one person and having regard to the complicity of these accused in destroying evidence so as to mislead

and derail the investigation in screening the main offender, I feel they deserve no leniency, hence I sentence accused Rajiv Gupta to undergo rigorous imprisonment for six months and to Shyam Singh Rana and Bhola Nath to undergo rigorous imprisonment for three months each.

364. In view of the findings given by this Court, with regard to the conduct of Sunil Kulkarni holding that he has deliberately and intentionally given false evidence, I feel that it is expedient in the interest of justice where proceedings under Section 340 Cr.P.C. should be initiated. Accordingly, I direct the Registrar General of this Court to file a complaint against him under Section 340 Cr.P.C. before the Court of competent jurisdiction.

Safety aspects

365. Before concluding, I would like to discuss the apathy of the government towards public safety. As the Indian economy is booming, the changes in the lifestyle of people are so visible. Even as darkness falls on the capital, the streets are full of cars, motorcycles, scooters, trucks, tankers and state transport buses. There are no stop signs, no speed limits and as the heavy vehicles go zig zag on the roads, it is hard to ignore the disturbing reality – many of commercial and private drivers behind the wheels are drunk and no one checks them.

366. A recent survey in Delhi has found that drivers of more than 45 per cent of vehicles involved in accidents consume alcohol and 50 per cent of the road accidents happen because of drunken driving.

367. Visibly, changed lifestyles and lack of parental & societal control over the youngsters results in indulgence into drinking habits and often these youngsters venture on roads in inebriated conditions risking the life of the pedestrians, companions and fellow drivers along with their own lives.

368. Each year, 1.2 million fatal road accidents are reported worldwide. India's road mishaps account for 10 percent of the toll. According to the Department of Road Transport and Highway, Government of India, India holds the dubious distinction of registering the highest number of road accidents in the world. According to the experts at the National Transportation Planning and Research Centre (NTPRC), the number of road accidents in India is three times higher than that prevailing in developed countries. The number of accidents for 1000 vehicles in India is as high as 35 while the figure ranges from 4 to 10 in developed countries. Rash driving and road accidents and consequent deaths have made India the land of highest deaths in road accidents. India with 1.3 lakhs accidents has pushed China back to second position. This is despite India having less than 1% of the world's vehicle population. According to the survey most of the cases are of hit and run. In case of speed of less than 30 kmph there are chances of survival of pedestrians, but in case of speed of more than 50 kmph death is almost certain.

369. According to a recent article in English daily the national capital tops in road accidents in the metros, with pedestrians accounting for almost half the fatalities in Delhi as road conditions are most unsafe for them. According to the Centre for Science and Environment (CSE) report released on 12/6/2009, the total number of accidents in Delhi is almost 2.5 times higher than that of Kolkata, and 2.1 times higher than Chennai. Pedestrians in Delhi, where a third of working people walk to work, accounts for 47 per cent of fatalities in these accidents.

370. Due to rise in vehicular traffic, both motorized and non-motorized, no perceptible improvement in the quality and the size of the roads, the pedestrians who constitute almost half of the total ratio of accidents are the soft targets. The said CSE report says, "The walkers remain invisible in the maze of motorized traffic that chokes our roads. They walk in extremely unsafe and hostile conditions, in constant conflict with motorized traffic and are easy victims to crashes and accidents".

371. Accidents not only result in loss of precious lives of the citizens but also affect the entire economy of the country. According to the Planning Commission, the social cost of road accidents in India stands at Rs 55,000 crore annually. This constitutes 3% of the country’s GDP.

372. The aforesaid statistics clearly show that India has not taken road safety very seriously so far and does not have a comprehensive

policy on road safety. Public safety is the last in the list of priority of the govt. Slayer BRT corridors, Killer Blueline buses and slaughterer Delhi-Gurgaon Expressway and very recently unfortunately Delhi Metro Rail Corporation of which every citizen is most proud of has joined the list of State apathy towards the citizens.

373. Considering the above data, it is manifest that public safety is an area of great concern to India, which has recorded one of the highest accident rates in the world. Incident management needs improvement, both on highways and within cities, towns and villages. All Indian cities are already struggling with traffic flow problems due to the various types of vehicles on the road, the lack of need-based road and traffic design and engineering, and the unchecked growth of private vehicles and with the entry of the new cheap car 'Nano' on the roads of India very soon, the situation is likely to worsen. The absence of intermodal planning is leading to poor connectivity between various modes of transport and poor passenger/customer satisfaction. Most of the times after a mishappening due to poor strategy of the government on public safety, instead of taking responsibility and coming up with stricter laws and better public safety planning, the government shirks its responsibility by suggesting the citizens and especially, pedestrians that they should be more careful on the road.

374. Today, India is making a mark in the world map due to myriad reasons but the internal situation of the country when it comes to public safety is gloomy. It is high time that government should

become sensitive to the plight of the citizens and come up with stringent laws and better planning to curb drunken driving and such other menaces in the society which are reasons for fear in the mind of the pedestrians, each day, when they move out of their homes, whether they would safely reach home.

In this regard, following guidelines are recommended:-

1. Proper and strict implementation of the excise laws for minimum age for consumption of liquor;

2. Proper lights on the streets and better maintenance of roads so as to reduce occurrence of any kind of accidents;

3. Improvement in the methods of investigation so as to make it more scientific.

4. To introduce and implement the system of Native Citizen cards as being talked about, maintain complete data of citizens as the country which will facilitate checking of persons and their records.

5. Installation of CCTV cameras on major roads.

6. Random checking by the police to prevent the menace of drunken driving specially near pubs, five star hostels, discos etc.

375. The aforesaid suggestions are illustrative but not exhaustive.

376. Before finally parting, I feel that this case has raised questions serious enough to invite serious consideration about the way our society and moral values are taking a beating. An accident which was the result of a rash and negligent act was turned into a sinister game with ulterior design to defeat the justice delivery system. Not only we saw a vily witness in Sunil Kulkarni but also found that the prosecution was no less slippery. It is time to think and ponder how fast and to what extent we can take corrective measures to ensure that the justice delivery system does not become a laughing stock and is not reduced to a mockery by persons like Sunil Kulkarni and police officials of doubtful integrity. It also calls for introspection on the part of legal fraternity so as to ensure that the fair name of legal profession does not in any way come into disrepute.

377. One other aspect which needs to be deliberated is the role of media especially in criminal trials. No doubt the media has an important role in disseminating information, creating public opinion in matters which are of vital concern to the society, exposing misdeeds of high and mighty but it is being exceedingly felt that while doing so in some cases particularly relating to crime and punishment, the media is going over board. Many a times, an accused who is yet to be tried and convicted, is pronounced guilty by the media by referring to such evidence which is not even admissible in evidence, such as, confessional statements made before police officers. The various channels of electronic media in order to outdo each other repeats an incident ad nauseam little realising that it has

the effect of generating public opinion against the culprit even before he is found guilty. Let not the media forget that judges are also humans and like any other human sometimes even they can err because of the hype created in relation to a particular incident. Like all other wings of our democratic set up such as executive, judiciary and legislature who are supposed to remain within their bounds, Media, which is the fourth estate, must also not cross the 'Laxman Rekha'. If it abides by this principle, it will be doing more good to the society and to the administration of justice.

378. In view of the above discussion, the appeals stand disposed of.

July 2009 **KAILASH GAMBHIR, J.**

MG/PKV/RKR