

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.454 OF 2014

ALONG WITH

CRIMINAL APPLICATION NO.1231 OF 2017

ALONG WITH

CRIMINAL APPLICATION NO.105 OF 2017

ALONG WITH

CRIMINAL APPLICATION NO.1191 OF 2015

ALONG WITH

CRIMINAL APPLICATION NO.380 OF 2017

Manish Naresh Thakur.	]	
Age - 35 years, Occu. : Service (Indian Navy),	]	
R/o. Vidyasagar Park, 1 st Lane, P. Pukur Road,	]	
Bansdroni, Kolkata - 700 070.	]	
(At present undergoing sentence imposed	]	
upon him at Thane Central Prison.)	]	... Appellant /
		Original Accused

Versus

The State of Maharashtra.	]	
(at the instance of Senior Inspector of Police,	]	
M.I.D.C. Police Station,	]	
vide C.R.No.251 of 2007.	]	... Respondent

Mr. Akash Kavade for Appellant.
Mr. J. P. Yagnik, APP for State.

CORAM :- B. R. GAVAI &
SARANG V. KOTWAL, JJ.

RESERVED ON :- 28 JUNE, 2018

PRONOUNCED ON :- 12 JULY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. By this Appeal, the Appellant has challenged the Judgment and Order dated 04/03/2014 passed by the learned Additional Sessions Judge for Greater Mumbai, in Sessions Case No.685 of 2007. By the impugned Judgment and Order, the Appellant was convicted for commission of offence punishable under Section 302 of the IPC and was sentenced to suffer imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo R.I. for one month. The Appellant was also convicted for the offence punishable under Section 3 read with 25 of the Indian Arms Act and was sentenced to suffer R.I. for one year and to pay fine of Rs.250/- and in default of payment of fine, to suffer R.I. for one month. The Appellant was further convicted for commission of offence under Section 4 read with 27 of the Indian Arms Act and was sentenced to suffer R.I. for three years and to pay fine of Rs.500/- and in default of payment of fine, to suffer R.I. for one month. All the substantive sentences were directed to run concurrently.

2. This is another case of a love affair going terribly wrong. The Appellant herein was serving in Navy. In the year 2007, he was posted at INS Garuda, Air Engineering Department, Kochi, Kerala to co-ordinate and supervise maintenance / repair of aircraft and helicopter. After doing various courses, he was selected to undergo Pilot Simulator (Mechanical) training at Moscow, Russia for MIG-29K aircraft. On 25/02/2007, the Appellant reported at INS Hansa at Goa. There, he was learning Russian language. The prosecution story is that the Appellant developed a love affair with the deceased in this case. She was highly educated. She had done her MBA from Birla Institute of Technology, Ranchi, besides obtaining the degree of MCA in the year 2005. She was working with Tata Consultancy Services at Mumbai and she had undergone training for the company at Trivendram. The prosecution case is that, when the deceased was going to Trivendram by Hawrah-Trivendram Express with her brother Shaunak, she got acquainted with the present Appellant. In the month of September 2005, Shaunak received a call from one Nitu who claimed to be the wife of the Appellant and she informed him that friendship between the Appellant and the deceased had become intimate. Shaunak discussed this fact with the deceased and she had

told him that she would not keep any relations with the Appellant. In April 2007, the Appellant called Shaunak and expressed his desire to marry the deceased. Shaunak did not accept his proposal for his sister. On 27/04/2007, the deceased had gone to Jharkhand and had stayed with her family till 08/05/2007. After the deceased returned to Mumbai, the whole affair took a tragic turn. According to the prosecution case, on 12/05/2007 at about 7.00 a.m., the Appellant and the deceased went to hotel Classic Residency in search of a room. On that day, rooms were not available at that hotel and the receptionist made inquiries with another hotel Sun-N-Sheel for vacant rooms. On getting a positive response, he sent the Appellant and the deceased to hotel Sun-N-Sheel. The couple reached there at about 7.30 a.m. and were allotted Room No.202. The prosecution case is that the watchman of Sun-N-Sheel hotel had seen the couple when they had arrived there. The Appellant filled the entry card of the hotel in his own handwriting. His name was entered in the register. The evidence shows that the room was occupied by the couple on 12/05/2007 and 13/05/2007. In the afternoon on 13/05/2007, a waiter had given them lunch and had accepted the bill amount for the same. Thereafter, nobody from hotel Sun-N-Sheel had seen the

couple or had heard anything from their room. At about 1.00 p.m. on 14/05/2007, the Accountant Anup Lal of hotel Sun-N-Sheel received a message from the reception counter that nobody was responding to the calls in Room No.202 and nobody was opening the door. Anup Lal then asked the housekeeping supervisor Robin to check the said room. Robin opened the room with a spare key to find the body of the deceased rolled in the mattress with blood lying all around. On instructions of his boss Lalji Singh, Anup Lal went to MIDC Police Station and reported the matter. The police immediately came to the spot and took search of the room. They recorded statement of Anup Lal and treated it as the FIR. The police conducted spot panchanama minutely in presence of the panchas. Finger print experts and dog squad were called for help. The police found one deformed live cartridge below the mattress on the bed. There was one big knife found in one of the drawers in the room. There was one purse and two bags. One of the bags contained ladies clothes and the other bag contained gents clothes. In the bag containing menswear, there was one white sando banian with letters in blue 'SOUTHERN NAVAL COMMAND'. It also contained a timetable between 18/04/2005 to 24/04/2005 with title 'INS Garuda' and there was one paper on which

phone numbers of three persons viz. Rai, Rahul and Vipul were written. The finger print expert could find two finger prints on a glass and a plastic bottle. The position of the dead body was also observed and it was all noted down in the spot panchanama.

3. The registration card mentioned the word 'Navy' and therefore, the police focused their investigation on the suspect working with Navy. The Naval Officers at Mumbai informed their counterparts in Goa at INS Hansa. The Appellant was found present in his Russian language class on 15/05/2007, from there he was detained by the Naval Officers. His personal belongings were also taken charge of under inventory. The Officers of MIDC Police Station, Andheri, Mumbai, went to INS Hansa along with Officers of Vasco Police Station and took charge of the Appellant. On 17/05/2007, the Appellant's custody was handed over to the Police Officers of MIDC Police Station. On 17/05/2007 itself the clothes which were allegedly worn by the Appellant at the time of the incident, were recovered at his instance from Room No.P/11. During investigation, statements of various witnesses from Mumbai as well as from Goa were recorded. On 20/05/2007, the Appellant made a statement under Section 27 of

the Evidence Act expressing his willingness to show the place where he had concealed the country-made gun, revolver and cartridges used in the crime. The police and panchas reached INS Hansa on 21/05/2007 at 7.00 a.m. and those weapons were recovered from the roof of terrace of a building in INS Hansa. On 26/05/2007 again, the Appellant led the Police Officers to Goa. First he led the Police Officers and the panchas to a lady named Babita Madhurkar from whom he had purchased the chopper, which was allegedly found in the drawer in Room No.202 of Sun-N-Sheel Hotel. The said lady identified the Appellant and accepted the fact that she had sold the chopper to him. Thereafter, the Appellant led the police and the panchas to the Regulating Office at INS Hansa and led them to a person named Dattaprasad Gadgil. From the said person a mobile instrument of Nokia company and four telephone bills in the name of the deceased were seized. It is the prosecution case that, the said phone instrument was that of the deceased. The Appellant also produced a SIM Card broken in two pieces from a side of a drainage pipe. On 30/05/2007, Test Identification Parade ('TI parade') was arranged at Arthur Road Jail, Mumbai, wherein some of the witnesses identified the Appellant.

4. The recovered firearms and the bullet found in the Room No.202 of Sun-N-Sheel hotel as well as the bullet recovered from skull of the deceased were sent for examination to ballistic experts. Specimen finger prints of the Appellant were sent for comparison with the chance prints found on the glass and the bottle in the room. Sanction for prosecuting under the Arms Act was obtained. The various test reports were collected and at the conclusion of the investigation, the charge-sheet was filed.

5. As the case was exclusively triable by the Court of Sessions, it was committed to the Court of Sessions, Greater Mumbai. It appears from the record that the learned Magistrate, while committing the case to the Court of Sessions, had not complied with the requirements of Section 475 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'). This aspect is important, as the learned Counsel for the Appellant has taken a serious objection in respect of breach of the provisions of Cr.P.C. and of the Navy Act in that behalf. The further procedure followed by the Sessions Court and the effect of the objection raised in this context, will be dealt with in detail at a proper place in this Judgment. Suffice it to mention at this stage that,

initially the charge was framed u/s 302 of the Indian Penal Code, u/s 3 r/w 35 and u/s 4 r/w 27 of the Indian Arms Act, 1925 on 21/01/2008 vide Ex.9. The plea was recorded on that day at Ex.10. After that, the Appellant preferred an Application vide Ex.15 pointing out that the learned Magistrate had not given written notice to the Commanding Officer. It was contention of the Appellant that he was in the active naval service and therefore, such written notice was mandatory. The learned Sessions Judge allowed the Application vide his order dated 25/03/2008 below Ex.15 and issued notice to the concerned authority of Naval Department of Central Government of India, in respect of commission of offence by the Appellant and invited their remarks about the case. A copy of the charge-sheet was also sent. The Commanding Officer from INS Garuda, Naval Base, Kochi, vide the letter dated 22/04/2008 informed the trial Court that Indian Navy did not wish to take over the case and the Court could continue with the proceedings. The said letter was taken on record at Ex.18 and thereafter the charge was framed again on 27/06/2008 vide Ex.19 and the plea was recorded on the same day vide Ex.20 and thereafter the trial proceeded.

6. In support of its case, the prosecution examined 29 witnesses on different points. After recording the evidence led by the prosecution, the learned trial Judge recorded the statement of the Appellant u/s 313 of the Cr.P.C. The Appellant led his own evidence by examining six defence witnesses, including himself. These defence witnesses were examined mainly to show that the Appellant was present at his base at INS Hansa, Goa, on the date when the offence was allegedly committed in Mumbai. The main thrust of the Appellant was on establishing defence of *alibi*. Some of the witnesses were examined to show that the Appellant's name and pictures were already published in the newspaper before the identification parade was held.

7. We have heard Mr. Akash Kavade, learned Counsel for the Appellant and Mr. J. P. Yagnik, learned APP for State. With their assistance, we have gone through the voluminous evidence on record of this case. Their submissions shall be referred to when the context of their submissions is discussed hereinafter.

8. There are no eyewitnesses to the incident and hence, there is no direct evidence available for the prosecution to prove its case. The case is based purely on the circumstantial evidence. The Hon'ble Supreme Court in many cases has laid down the guiding factors in deciding a case based on circumstantial evidence. One of them is the case of *Sharad Birdhichand Sarda Vs. State of Maharashtra*¹. In paragraph No.153 of the said judgment the Hon'ble Supreme Court has laid down five principles which are termed as “5 Golden Principles” by the Hon'ble Supreme Court itself. Paragraph No.153 reads thus :

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt of to be drawn should be fully established.

*It may be noted that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*² where the following observations are made : [SCC para 19, p.807 : SCC (Cri) p.1047]*

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

¹ (1984) 4 Supreme Court Cases 116

² (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783

- (2) *the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) *the circumstances should be of a conclusive nature and tendency,*
- (4) *they should exclude every possible hypothesis except the one to be proved, and*
- (5) *there must be a chain of evidenced so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

Keeping these principles in mind, we have analyzed the prosecution evidence.

9. Following are the circumstances which the prosecution has endeavoured to establish to complete the chain of circumstances :

- (a) The Appellant and the deceased were together from 12/05/2007 and they were seen by different witnesses on 12/05/2007 and 13/05/2007.
- (b) Recovery of weapon and ballistic expert's opinion.
- (c) Finding of the Appellant's fingerprints on the articles in Room No.202.

- (d) Recovery of mobile handset used by the deceased and the telephone bills which were recovered at the instance of the present Appellant.
- (e) Absence of the Appellant from INS Hansa from 11/05/2007 to 15/05/2007.
- (f) Motive and burden of proof under Section 106 of the Evidence Act.

10. Before referring to these circumstances vis-a-vis the evidence led by the prosecution, some of the uncontroverted circumstances can be mentioned as follows :

- (a) dead body of the deceased was found in Room No.202 of Sun-N-Sheel hotel on 14/05/2007,
- (b) the deformed bullet was found in the room and another bullet was recovered which was lodged in the skull of the deceased,
- (c) The deceased has died homicidal death because of the firearm injury,
- (d) PW 18 Dr. Mahadev Bansode attached to J. J. Hospital, Mumbai, had conducted the post-mortem examination.

He had recovered a copper jacketed bullet with deformed tip which was lodged in the occipital area. He had found the following injuries :

- (i) Firearm entry wound over right side of forehead, star shaped, size 1 cm X 8 cm with 1.5 cm circular defect in frontal bone situated 8 cm above right ear. The bullet passed through dural right cerebral hemisphere posteriorly and lodged in occipital area with fracture of occipital bone due to hit by bullet,
- (ii) Firearm entry wound over right side of neck situated 11 cm below right ear and 2 cm from midline of size 3.5 X 3 cm with blackening in area of 2 cm diameter. On dissection the bullet passed through subcutaneous muscle posterior aspect of trachea to the left and downwards and backwards and passed out through muscle of back on left side through firearm exit wound.
- (iii) Firearm exit wound of size 2 X 1.5 cm everted margins situated 5 cm below shoulder and 10 cm from the midline. All the track is lacerated and

haemorrhagic,

- (iv) 4 abrasions seen over left breast of size 1 X 0.5 cm each red colour horizontally placed, 1 cm away from each other.

The cause of death is 'haemorrhage and shock due to multiple firearm injuries'. He has further opined that the weapon was fired from a distance of about 30 cms.

11. There is not much controversy about the dead body being discovered at around 1.00 p.m. on 14/05/2007. PW 1 Anup Lal who was working as an Accountant in Sun-N-Sheel hotel at that time, had reported the matter to the MIDC Police Station. The FIR was registered vide C.R.No.251 of 2007 on 14/05/2007 at 3.15 p.m. The information was given to the police station at 2.00 p.m. The FIR is produced on record at Exh.24.

12. PW 2 Pranali Parulekar and PW 3 Raju Thakur were the pancha witnesses in whose presence the spot panchanama at Exh.30 was conducted. PW 2 was working in the same hotel. As mentioned earlier, during the spot panchanama, different articles were seized.

The spot panchanama was conducted between 4.05 p.m. to 8.35 p.m. on 14/05/2007. The police had seized two bags containing menswear and ladies-wear, a ladies purse which contained the identity card of the deceased on the basis of which her identify was found out. Importantly, one deformed cartridge was found below the mattress. Certain finger prints on the glass and the bottle in the room were observed by the finger print expert and their photographs were taken. One sando banian with the letters in blue 'SOUTHERN NAVAL COMMAND' was recovered. The spot panchanama shows that the dead body was identified by one Vandana Sarkar who was sister of the mother of the deceased. All these facts are sufficiently established by the prosecution and we see no reason to disbelieve the prosecution case in respect of discovery of the dead body and recovery of the articles from the said room. The police machinery had acted swiftly at that time and had immediately conducted the spot panchanama with the help of experts.

13. Insofar as the incriminating circumstances against the Appellant are concerned, the prosecution has led evidence through various witnesses. We shall consider each of these circumstances

hereinafter.

14.

(a) The Appellant and the deceased were together from 12/05/2007 and they were seen by different witnesses on 12/05/2007 and 13/05/2007 :

The sequence of events on these dates unfolds through the evidence of PW 17 Maria Paul Angelo Chettiar. According to him, he was working as a receptionist at Classic Residency Guest House, Chakala Road, Andheri, from April 2005 to May 2007. He has deposed that he knew the Appellant; as in the past, he had stayed at their hotel. He has further deposed that on the first occasion, he had stayed in the hotel between 23/03/2007 to 25/03/2007 with one lady and on the second occasion, he had stayed there for two days from 06/04/2007. He has further deposed that on 12/05/2007, he had come there at around 6.30 a.m. with the same girl but on that day, there was no vacant room and this witness then made a phone call to Sun-N-Sheel hotel to find the availability of a room. On getting a positive response, he informed the Appellant and accordingly the Appellant and the girl went to Sun-N-Sheel hotel. On 14/05/2007,

the MIDC police officers took this witness to Room No.202 of Sun-N-Sheel hotel and PW 17 then identified the dead body as being that of the girl who had accompanied the Appellant on all the previous occasions mentioned by him. This witness has given two photocopies of the entries of the visits of the Appellant and the deceased to their hotel. Those two photocopies of the entries regarding their past stay at the hotel are produced on record at Exh.97 and Exh.98. The original register was not produced on record as the hotel manager Mr.Babu Shaikh had submitted his report (which was taken on record at Exh.94) that the original register was not available. According to PW 17, the original register was burnt and was not available. PW 17 has further deposed that on 30/05/2007, he was called to Arthur Road Jail to identify the suspect and he claims to have identified the Appellant in the said identification parade. This witness was cross-mined at length. He admitted that he has no document to show that he was working in the hotel Classic Residency at the relevant period. The defence had tried to raise some controversy about his name. However, we see no reason to doubt his version that he was working at hotel Classic Residency during the relevant period. His evidence was also criticized on the ground of his admission that PW 10 Mario

Chettiar was his cousin. PW 10 Mario Lazar Chettiar was examined as a pancha witness for seizure of important articles. This witness PW 10 Mario, in turn, had admitted that he had excellent relations with the Investigating Officer PW 28 Pascal D'Souza. Mr. Kavade, learned Counsel for the Appellant, therefore, submitted that PW 17 was amenable to the police officers and therefore, was not a reliable witness. Just because he was related to PW 10 who was on excellent terms with the Investigating Officer, that cannot be a reason to ignore his evidence, if otherwise it is found reliable. We find that he is a truthful witness and has given reliable evidence in Court. Very significantly, his claim that the couple had stayed at their hotel in the month of March and April, is corroborated by Exh.134 which is an inventory of the articles found with the Appellant when he was taken in charge of by the Naval officers at INS Hansa on 15/05/2017. The said document is produced through the evidence of PW 25 Naorem Arun Singh who was the Commander at INS Hansa, Goa. Exh.134 mentions at serial numbers 5 and 6 the two bills dated 25/03/2007 and 08/04/2007 of hotel Classic Residency. Therefore, PW 17 clearly knew the Appellant from the past occasions and, in fact, there was no necessity to make him identify the Appellant at the identification

parade. In this background, his evidence that on 12/05/2007, he made inquiries with Sun-N-Sheel hotel and then directed the couple to that hotel, assumes great importance. Thus, the prosecution has proved that on 12/05/2007, the Appellant and the deceased had first come to Classic Residency hotel and then were directed to Sun-N-Sheel hotel.

15. The prosecution has examined PW 5 Raviprakash Singh who was the watchman and was on duty at around 7.00 a.m. on 12/05/2007 at Sun-N-Sheel hotel. He has deposed that at that time, the couple came to their hotel in a Maruti car and he had asked his colleague Joginder to take them to the reception counter. He had identified the Appellant at the TI parade held at Arthur Road Jail on 30/05/2007 and has identified the Appellant in Court. His statement was recorded on 17/05/2007 during investigation, however, he had admitted that he had seen the photograph of the person whom he had identified in the TI parade, in newspapers and on TV. He has further admitted that the photograph was published on 3rd or 4th day of the incident. Mr. Kavade rightly submitted that these admissions destroy his evidence and we agree with him on this point. If the photographs

were seen by this witness, then his identification in the TI parade loses all its significance. This witness has also deposed that the Appellant's photographs were published in the newspapers and on TV after 3rd or 4th day of the incident. The defence has tried to capitalize on this admission and, in fact, the accused had examined DW 2 Ketan Ranga who was working in a daily Mumbai Mirror as a crime reporter, DW 3 Rashmi Rajput who was also working similarly and DW 4 Shagnik Chaudhary who was also a reporter. Out of them, the deposition of DW 4 has no value because this witness does not have any personal knowledge about the news item which he was seeking to produce on record. DW 2 has deposed generally about his article dated 19/08/2011 regarding illegal activities which were going on in the Sun-N-Sheel hotel. DW 3 Rashmi Rajput had deposed that her article regarding this case was published in the daily on 18/05/2011 and she has further deposed that the photograph of the accused and the victim were also published along with the said article. The trial Court had declined to read these articles in evidence because they were not properly proved. Therefore, the defence was not successful in proving that the photograph of the accused was published in the newspaper before the TI parade was conducted. At the same time, the admission

given by PW 5 Raviprakash Singh that he had seen the photograph cannot be ignored and therefore, we are not taking into account the evidence of PW 5 Raviprakash Singh against the present Appellant.

16. The prosecution has examined another watchmen working with Sun-N-Sheel hotel who was on duty at that time but he has not supported the prosecution case and was declared hostile.

17. PW 9 Pradip Arjun Singh was a waiter working in Sun-N-Sheel hotel and had served the food around 1.00 p.m. on 13/05/2007 in Room No.202. He had seen a lady and a man in the room. He had served the food and accepted the bill amount. He has not identified the Appellant in the TI parade. Therefore, even his evidence is of no help to the prosecution.

18. In this context, the prosecution has relied on the evidence of PW 11 Ceaser Kashmiro Fernandis who was the receptionist at Sun-N-Sheel hotel. He has deposed that at 7.15 a.m. on 12/05/2007, a couple took a room in their hotel. The man gave their names as Mr. & Mrs. Manish Thakur. The guest registration form was filled by the

Appellant. The entry was made in the register at serial no.616 on page 159. The entry is produced at Exh.59 and the guest registration card is produced on record at Exh.60. This witness had identified the Appellant at the TI parade on 30/05/2007. Statement of this witness was recorded on 17/05/2007. He had gone to the police station on 14/05/2007 at about 4.30 p.m. but at that time, the register was not sealed by the police. The register was produced by him only on 01/06/2007. In the re-examination, he has admitted that the entry no.616 was not in his handwriting but was made by his reliever on his direction, though in the examination-in-chief he had claimed that the entry was in his own handwriting. He was also cross-examined on the aspect that the hotel register showed that the entry no.603 in respect of Room No.202 mentioned that it was allotted to one Mr. Jabel A. Nema on 11/05/2007 and there was no entry of checking-out from the said room. This witness had clarified in the re-examination that on the same night of 11/05/2007, on the request of one Mr. Jabel Nema, he was shifted to Room No.219 and therefore, Room No.202 was vacant and was allotted to the Appellant on 12/05/2007. In the cross-examination, he has deposed that before attending the TI parade and after the incident, he had no occasion to see the photograph of

the Appellant on TV or in the newspaper. This witness has also identified the Appellant before the Court. Incidentally, the SEO who had conducted the TI parade, had expired before his evidence could be recorded and therefore, the memo of the TI parade was brought on record in his absence. The guest registration card was sent for opinion of the expert for comparison with the specimen handwriting of the Appellant. However, there was no conclusive opinion expressed by the expert that the questioned handwriting on the guest register card was that of the Appellant. Though the hotel register is seized by the police on 01/06/2007, there is nothing to indicate that the hotel register itself was manipulated and all the entries therein were manipulated to show that the Appellant had occupied Room No.202 with the deceased. Therefore, the prosecution has proved that Room No.202 was occupied by the couple giving their name as Mr. and Mrs. Manish Thakur. Insofar as the identity of the Appellant is concerned, this witness has stated that he had not seen any photograph of the Appellant before the TI parade. In view of this specific deposition, we cannot presume that the photograph of the Appellant was widely published by the police and therefore, the identification of this witness in the TI parade is vitiated. In any case, this witness had sufficient

opportunity to observe the Appellant when the registration form was filled by him. This witnesses identifying the Appellant in Court is, therefore, of conclusive nature. In this view of the matter, we are inclined to accept his evidence and therefore, reading his evidence together with the evidence of PW 17, we hold that the prosecution has proved beyond reasonable doubt that the Appellant along with the deceased had checked-in the Room No.202 of Sun-N-Sheel hotel at around 7.30 a.m. on 12/05/2007.

19.

(b) **Recovery of weapon and ballistic expert's opinion :**

The next circumstance brought on record by the prosecution is the recovery of weapon at the instance of the Appellant and the ballistic expert's opinion in respect of the bullet recovered from the skull of the deceased. This circumstance, in our opinion, is one of the most important circumstances and the evidence adduced by the prosecution in that behalf goes a long way in determining the fate of the present case. To establish this circumstance, the prosecution has examined PW 19 Amarjeet Yadav, PW 23 Mrutyunjay Tripathi, PW 25 Naorem Arum Singh and PW 28 Pascal D'Souza. PW 19 was a

pancha in whose presence the statement of the Appellant was recorded and the recoveries were effected. PW 23 was employed at INS Hansa and he was present at the time of recovery of weapons. PW 25 was the Commander at INS Hansa and PW 28 was the Investigating Officer who had supervised and effected the recovery.

20. PW 19 and PW 28 have deposed about how the statement was made by the Appellant and how the police party and the panchas went to INS Hansa to effect the recovery. PW 28 deposed that on 20/05/2007, the Appellant made a voluntary statement in presence of panchas that two country-made revolvers and cartridges used in the crime were kept hidden by him at Vasco and expressed his readiness to produce the same. Accordingly, his statement was recorded under memorandum which is produced on record Exh.100. A private vehicle was arranged and police and the panchas were led by the Appellant to INS Hansa at Vasco, Goa. On 21/05/2007, they were given entry passes and thereafter they entered the campus of INS Hansa. PW 28 met the Regulating Officer who deputed two staff members to accompany them. Thereafter, the Appellant led them to 'P' mess and from that place, they were led to the roof. The Appellant removed

one plastic bag which was kept below the mangalore tiles. The packet was opened and it was found that there were 3 folded paper packets inside. These packets were also opened. Those packets contained one single bore country-made revolver which was 10 inches in length, another single bore silver coloured country-made revolver 5.½ inches long and 6 cartridges. Four of the cartridges were 8mm cartridges and the other 2 were 2.½ CMM. The weapons were sealed and seized with the help of Goa police. The panchanama was produced on record at Exh.100A. These articles were produced before the Court during trial vide Articles Z/2, Z/3 and 6 cartridges were produced together vide Article Z/4 colly. These weapons were carried by the Investigating Officer after he was issued gate pass for the confiscated weapons and the cartridges. The gate pass was issued by the Commander and it was produced on record at Exh.137. The gate pass which was issued when they had entered INS Hansa is produced on record at Exh.199. These weapons and the articles were then forwarded to the ballistic expert for further examination.

21. The prosecution has examined PW 19 Amarjeet Yadav as a pancha who was present when the recovery of weapons was effected.

He has deposed more or less on the similar lines as those deposed by PW 28. He has identified those articles before the Court. In his cross-examination, he has admitted that since past more than 15 years, he was visiting MIDC Police Station whenever required. He has categorically admitted that he had acted as a pancha in many cases for the MIDC Police Station and in particular he had acted as a pancha in one or two cases which were investigated by PW 28 PI Pascal D'Souza. He has not ruled out the possibility that such number may actually be up to 10 cases. He has also admitted that he knew PW 3 and PW 4 who were the panchas for the spot panchanama and for panchanama of seizure of clothes of the deceased respectively and he also knew Melton Fernandes who was one more pancha for the prosecution. Thus, there is no doubt that he was a stock pancha of the MIDC Police Station. He has further admitted in his cross-examination that after 10 to 15 minutes of recording the memorandum statement of the Appellant, they left the police station to go to Goa and the vehicle was already parked outside the police station. He has further admitted that before their departure, the police did not give their personal search or the search of the vehicle to him. On the next day morning, the Navy police were throughout with them and before collecting the

bag, Vasco police had also come there. He has further deposed in his cross-examination that he was standing at a distance of about 15 to 20 ft. from the terrace. He has admitted that some policemen had gone to the terrace and they came back after 25 to 30 minutes and they showed him the articles which were seized from the terrace. He has further admitted that he did not remember as to how many packets of seized articles were prepared in his presence. He has further admitted that another pancha Milton was standing with him and he also did not go to the terrace.

22. The prosecution has examined PW 23 Mrutyunjay Tripathi in this connection for proving the recovery of weapons at the instance of the Appellant. PW 23 was serving as a Leading Patrol Man at INS Hansa, Dabolim in Goa and was attached to the regulating office. He has deposed that on on 21/05/2007 at 8.00 a.m., Mumbai police came to their office and his superior instructed him and one M. Kamraj to assist the Mumbai police. He has deposed that he went with them to Block No.P/11. He has deposed that he went along with the Appellant on terrace of that Block and from that terrace, from the side of one Syntex water tank, one polythene bag was seized by the

police. He has deposed that two weapons were found in that bag. He has deposed that the polythene bag was taken out by the police and he has denied that the Appellant himself removed the tiles and then took out the polythene bag. On his statement that the police themselves removed the tiles, he was declared hostile at the request of the learned APP and during cross-examination by the learned Prosecutor, he further admitted that the Appellant removed the tiles and then took out the polythene bag containing the weapons and the cartridges. He has signed the panchanama at Exh.100A. The Advocate appearing for the Appellant before the trial Court, cross-examined this witness not only on the point of recovery of weapons but also on the point of general procedure when a staff member goes out and enters the campus or when a visitor enters the campus. He was cross-examined on the point of procedure of search in these cases of entry on and exit from the campus. He has deposed that INS Hansa is a prohibited place and not accessible to everyone and therefore, for a visitor's entry, record was maintained in visitor's book, store register, liberty register, etc. He has deposed that at the place of entry, the search of the visitors and staff is taken and the entries were made in the relevant register. He has further deposed that in case of a Sailor,

they are searched for their belongings, if suspected. In the cross-examination, he has reiterated that his statement in the examination-in-chief that the polythene bag was taken out by the police, was correct.

23. The prosecution has examined PW 25 Naorem Arun Singh who was the Commander at INS Hansa, Goa. He has deposed that on 15/05/2007, he was directed by the Commanding Officer Shri Gopalkumar to take the Appellant in custody and he was informed that the instructions had come from the Commanding Officer of Western Naval Command Headquarters at Mumbai. He has produced on record the inventory of belongings of the Appellant which had this witness's signature. The said inventory is produced on record at Exh.134. This witness has further produced on record the gate pass of the confiscated country-made revolver at Exh.137 and gate pass for other confiscated items at Exh.138. He has deposed that INS Hansa had 12 entry / exit gates and the person in service could move to and fro by showing his identity card. In the cross-examination, he has categorically deposed that at the time of entry and exit relating to non-defence personnel, their belongings are checked. On further

cross-examination, he admitted that he was not remembering which standing order mentions such procedure. He has further deposed that on 16/05/2007, he had met the Mumbai police on the first occasion and that he had deputed Sailor of Naval police to assist them even on that occasion.

24. The defence has criticized the evidence of recovery of weapons at the instance of the Appellant on various grounds. Mr.Kavade, learned Counsel for the Appellant, submitted that the pancha PW 19 who had accompanied the police party to INS Hansa, was a stock pancha as was admitted by the pancha himself and therefore, his evidence was not reliable. He further submitted that even the evidence of PW 23 Mrutyunjay Tripathi throws doubt on the prosecution case in respect of the recovery. He submitted that PW 23 has admitted that the police themselves had taken out the polythene bag from the roof. He further submitted that the vehicle was already parked outside the police station before the police and panchas started from Mumbai. He further submitted that in any case, the pancha had admitted that he was standing at some distance from the terrace with co-pancha and had not seen the Appellant actually taking out the

articles from the terrace. He further submitted that the evidence of the Investigating Officer Pascal D'Souza was not enough to hold that the recovery was satisfactorily proved by the prosecution. Mr. Kavade further submitted that the prosecution case shows that the Investigating Officers had already visited INS Hansa on 16/05/2007 to take custody of the Appellant and therefore, planting of the weapons at that time was not ruled out.

25. On the other hand, Mr. Yagnik, learned APP for the State, submitted that just because the pancha had appeared in other cases for the same police station, it was no ground for rejecting his testimony outright. He further submitted that the recovery was made from a place which was known only to the Appellant and therefore, it satisfied all the requirements of law.

26. Having given anxious consideration to this aspect of the matter, we are of the opinion that though Mr. Kavade has raised some valid points in respect of the reliability of the pancha witness, the evidence led by the prosecution in respect of these recoveries is satisfactorily proved beyond reasonable doubt. It is true that pancha

PW 19 Amarjeet Yadav was with MIDC Police Station for a number of cases and he could easily be termed as their stock pancha. He has also admitted that even his co-pancha had worked with the police. Therefore, these panchas cannot be termed as independent witnesses. Fortunately for the prosecution, their evidence in respect of the recovery is saved by other independent witnesses i.e. Naval officers. PW 23 Mrutyunjay Tripathi has given somewhat wavering evidence in respect of seizure of the articles. At one place, he has deposed that the police took out the articles and at the other, he has deposed that the Appellant took out the articles. However, the fact remains that he was near the terrace when the recovery was effected. He was deputed by his superior PW 25 Naorem Singh and therefore, he was throughout present with the police party from Mumbai. The gate passes produced on record show that the police party, when they had entered INS Hansa campus, were searched. Thereafter, this witness PW 23 was always with them till the articles were recovered and seized. The police party, the panchas and the Naval officers were led by the Appellant to the terrace of 'P' mess in INS Hansa. From the evidence, it is crystal clear that when the police party, along with the Appellant, had gone to the terrace, they did not have the articles with

them. The articles were certainly seized from the terrace. Though there is some controversy as to whether the Appellant himself took out the articles or the police took out the articles from under the tiles, one thing is certain that the Appellant led the police to the terrace from where the weapons were recovered. Therefore, in our opinion, all the requirements of Section 27 of the Evidence Act are satisfied as the articles were recovered at the instance of the Appellant from a place which was within exclusive knowledge of the Appellant. Mr. Kavade tried to submit that there was a possibility that those articles were planted on 16/05/2007 itself. We do not find any force in the submission because as per the procedure, even on that day, it was not possible for the MIDC police to carry with them these weapons and plant them on the terrace of 'P' mess. Therefore, we are of the firm opinion that the prosecution has been able to prove this very important circumstance of recovery of the weapons at the instance of the present Appellant.

27. The prosecution has linked this weapon with the bullet recovered from the skull of the deceased and the one which was found on the spot. For this purpose, the prosecution has examined PW 27

Vikas Gite who was examined as the ballistic expert. After deposing about his credentials, he has deposed that on 14/05/2007, on the request of MIDC police, he and his team members had gone to Room No.202 of Sun-N-Sheel hotel. He has described the bullet injuries on the dead body. He was shown one bullet which was found by the police at the spot. On 22/06/2007, their office received 3 sealed packets from Sr.P.I. of MIDC Police Station. The first packet contained one single barrel breech loading country-made handgun, the second packet contained another similar gun and the third parcel contained 3 intact KF 8 mm rifle cartridges, 1 KF 8 mm rifle cartridge having light indentation, 1 intact 0.38" revolver cartridge and another 0.38" revolver cartridge having indentation cap. On 10/08/2007, the analysis was started and a report dated 18/09/2007 was prepared which is produced on record at Exh.156. On his testing, he found that the weapons which were sent to him were in working condition. Exh.1 was capable of chambering and firing 8 mm rifle cartridges and Exh.2 was capable of chambering and firing 0.38" revolver cartridges (Exhibit numbers are as per his office record). These two guns were the guns sent by the MIDC police which were recovered at the instance of the Appellant. Thereafter, he compared the 3 bullets for

characteristic lengthwise superficial brushing marks under comparison microscope. Exh.1 of BL/416/17 was the bullet retrieved from the body of the deceased, Exh.17 of BL 564/07 was the bullet found on the spot. These two bullets tallied amongst themselves and also tallied with 8 mm rifle bullet test fired from the country-made handgun in Exh.1. Thus, his evidence, in effect, shows that one of the guns which was recovered at the instance of the Appellant from INS Hansa, was used to fire bullet on the deceased. This witness had further tested the bullet in Exh.17 of BL 564/07 for its corresponding hole on the kurta in Exh.19 and even this test showed positive result that the kurta of the deceased had a hole caused by the bullet fired from the 8 mm rifle. This witness was cross-examined at length, firstly on his experience and qualification and secondly, on the tests conducted by him and comparison of bullets on the basis of tests conducted by him in the background of some passages from the books on the subject. We have gone through his cross-examination and we see no reason to disbelieve his credentials and the result of his test analysis. In our opinion, the prosecution has satisfactorily linked the recovery of weapons and the bullets recovered from the spot and the dead body of the deceased.

28.

(c) **Finding of the Appellant's fingerprint on the articles in the Room No.202.**

For this purpose, the prosecution has examined the fingerprint expert Rajendra Kulkarni as PW 20. He has deposed that on 14/05/2007 at about 4.00 p.m., he received a message from MIDC Police Station requisitioning his services in connection with their C.R.No.251 of 2007. Therefore, along with his photographer Shri Ghadge, he went to Room No.202 of Sun-N-Sheel hotel at Andheri (East). He inspected the articles which were lying in the room. On his inspection, he found two fingerprints on a glass and on a plastic bottle in the room. The photographer took the photographs of those fingerprints. On 05/06/2007, he received the specimen fingerprints of the Appellant. On 05/07/2007, he received the photographs of the fingerprints along with the negatives of the fingerprints on the glass. He then compared the 3 chance prints with the specimen fingerprints of the Appellant and found that one chance print which was developed on the glass used for drinking water, was identical with left ring fingerprint of the specimen fingerprint of the Appellant. The other 2 chance prints were found unfit for comparison. He then made

his report which is produced on record at Exh.110. He was cross-examined at length in respect of the various characteristics vis. arches, loops, composites, etc. He withstood the cross-examination and remained firm on his opinion. During cross-examination, he admitted that the photograph of the fingerprint did not bear the signature of the photographer. Mr. Kavade criticized his evidence on the ground that the photographer who had taken the photographs of the fingerprints on the said glass, was not examined. He also criticized that the police had not followed the statutory procedure for taking fingerprints of the Appellant. Mr. Yagnik, on the other hand, rightly submitted that the photographer Shri Ghadge was brought by PW 20. This photographer was not a police photographer. Therefore, there was no possibility of tampering with the photographs which were received by this witness. We agree with Mr. Yagnik that there is no reason to suspect that there was tampering with the photographs which were given to PW 20 for comparison. Taking of photographs for fingerprint examination was a process which was followed by PW 20 Rajendra Kulkarni and the photographer Shri Ghadge as a team. Therefore, the evidence of PW 20 Rajendra Kulkarni was sufficient to establish the procedure followed for comparison of the fingerprints.

Therefore, in our opinion, the non-examination of the photographer in this case does not harm the prosecution in any manner. Thus, the prosecution has been able to prove one more important circumstance which also proves that the Appellant had occupied that particular room.

29. Mr. Kavade, learned Counsel for the Appellant, submitted that the provisions of The Identification of Prisoners Act, 1920 (for short, 'the said Act') were not followed while taking fingerprints of the Appellant and the evidence of the fingerprint expert could not be taken into consideration. He submitted that the fingerprints of the Appellant could only be taken under the orders of a Magistrate and the police officers had no powers, on their own, to take fingerprints of the Appellant. We are unable to accept these submissions of Mr. Kavade. The question raised by him is no more *res integra*. It is necessary to consider the relevant provisions of said Act to deal with this submission. Section 2(1)(a) of the said Act mentions that 'measurements' include finger impressions and foot-print impressions and Section 2(1)(b) defines the 'police officer' to mean an officer in-charge of a police-station, a police officer making an investigation

under Chapter XIV of the Code of Criminal Procedure, 1898 or Chapter V of City of Bombay Police Act, 1902 or any other police officer not below the rank of Sub-Inspector. This would, of course, include the corresponding provisions of the Cr.P.C., 1973 instead of the reference to the Cr.P.C., 1898. Section 4 of the said Act provides for taking of measurements or photograph of unconvicted persons. The relevant provision reads thus :

“4. Taking of measurements or photograph of unconvicted persons - Any person -

- (a) who has been arrested -*
 - (i) under section 55 of the Code of Criminal Procedure, 1898 (V of 1898), or under section 4 of the Bombay Beggars Act, 1945 (XXIII of 1945),*
 - (ii) in connection with an offence punishable under section 61D of the Bombay District Police Act, 1890 (Bom. IV of 1890), or under section 112 of the City of Bombay Police Act, 1902 (Bom. IV of 1902), or under section 6 or 9 of the Bombay Beggars Act, 1945 (Bom. XXIII of 1945), or in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards, or*
- (b) In respect of whom a direction or order under section 46 of 46B of the Bombay District Police Act, 1890 (Bom. VI of 1890), or under section 27 of the City of Bombay Police Act, 1902 (Bom. IV of 1902), or under sub-section (1) or (2) of section 23 of the Bombay Beggars Act, 1945 (Bom. XXIII of 1945), or under section 2 of the Bombay Public Security Measures Act, 1947 (Bom. VI of 1947), has been made,*

shall, if so required by a Police officer, allow his measurements or photograph to be taken in the prescribed manner.”

Section 5 reads thus :

“5. Power of Magistrate to order a person to be measured or photographed -

If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898) [or the City of Bombay Police Act, 1902 (Bom. IV of 1902) it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate or the First Class [or a Presidency Magistrate]:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.”

Mr. Kavade, therefore, submitted that the person arrested on the allegations of commission of the offence punishable with life imprisonment or death penalty, was not covered under Section 4 because it mentioned a restricted term of sentence and life imprisonment or death penalty would not be covered. According to him, Section 5 of the said Act was attracted and it was necessary to

take permission from the learned Magistrate before taking fingerprints of the accused. This contention is in terms repelled by the Hon'ble Supreme Court in a recent Judgment delivered on 02/07/2018 in the case of *Sonvir Singh Vs. The State of NCT of Delhi*³. In the said Judgment, the Hon'ble Supreme Court has squarely held that the person who is arrested for commission of offence punishable with life imprisonment or death penalty, was covered under Section 4 of the said Act. Hence, in the instant case before us, we are satisfied that Section 4 of the said Act was applicable and the concerned police officers were well within their rights to take the fingerprints of the Appellant. These fingerprints were sent for comparison with the chance prints.

30.

(d) **Recovery of mobile handset used by the deceased and the telephone bills which were recovered at the instance of the present Appellant :**

In this connection, the prosecution has examined PW 8 Kaushik, PW 16 Anil Gala and PW 10 Mario Chettiar. PW 8 Kaushik

³ Criminal Appeal No.958 of 2017, decided on 02 July, 2018

was cousin of the deceased. He has deposed that in January 2006, the deceased had purchased mobile handset of Nokia company from Anupama Stationery Stores at Borivali. He has mentioned the model number as 6101. This witness had produced the cash memo of her mobile phone before the police. The cash memo was found in the room of the deceased.

PW 16 Anil Gala was working with the aforementioned Anupama Stationery Stores at Borivali and he has deposed that he had sold one Nokia 6101 handset on 15/01/2006. He has produced the receipt at Exh.81. It bears the IMEI number of the phone.

The prosecution has examined PW 10 Mario Chettiar as a pancha for recovery of the mobile handset and the phone bill. He has deposed that on 25/05/2007, he was called by MIDC Police Station to act as a pancha. In his presence, the Appellant had shown his willingness to point out the person in Goa with whom he had kept the mobile phone. He had also shown his willingness to point out the shop from where he had purchased a chopper. Accordingly, his statement was recorded which is produced on record at Exh.56. Thereafter, they reached INS Hansa and entered the campus after obtaining entry pass. The Appellant led them to one Mr. Dattaprasad

Gadgil and at the Appellant's instance, the said person Mr. Gadgil produced a mobile phone and the telephone bills. The panchanama drawn in respect of the said recovery shows that the said person Mr. Gadgil had taken out these articles from the drawer of C-41 Chief Mess. The panchanama mentions IMEI number of the mobile handset and the bills mention the name of the deceased to whom they were issued by the telephone service provider. Before effecting this recovery, the Appellant had led the police party and the panchas to one Babita Madhurkar from whom he had purchased the chopper. However, since nothing was recovered or found on the basis of this information, this particular circumstance of showing the place from where the chopper was purchased, has no significance in the context of the present case. However, recovery of the mobile handset and in particular, the telephone bills in the name of the deceased, assumes great importance. Mr. Kavade submitted that the afore-mentioned Mr. Gadgil was not examined and PW 10, the pancha, in his cross-examination, had admitted that the Investigating Officer Mr. D'Souza was known to him for the last 15 years and had close family ties with him. Therefore, he was not an independent witness. While we agree with his submission that PW 10 was not an independent witness and

therefore we are not relying on his evidence, however, the fact remains that the police party had gone to INS Hansa and those bills and the mobile handset were recovered from there at the instance of the Appellant, is a fact which is proved by the prosecution mainly because as discussed earlier, it was not possible to carry any article inside INS Hansa campus without being searched at the entry gate. Thus, we are of the opinion that the prosecution has proved that the telephone bills in the names of the deceased and her mobile handset were recovered at the instance of the present Appellant.

31.

(e) **Absence of the Appellant from INS Hansa from 11//05/2007 to 15/05/2007 :**

To establish this circumstance, the prosecution has examined PW 22 Smt. Vasudha Bhaskar who was teaching Russian language to the Appellant at INS Hansa. She has deposed that she was conducting her classes from 8.00 a.m. to 1.00 p.m. from Monday to Friday. She knew the Appellant. In the past, she had scolded the Appellant for not doing his homework. She has specifically deposed that on 14/05/2007, he was absent from the class. (The evidence

shows that 14/05/2007 was Monday. There were no classes on Saturday and Sunday i.e. 12/05/2007 and 13/05/2007.) On 15/05/2007, the Appellant was taken in custody from her class. She has deposed that she remembers the date because the Appellant was taken in custody from her class. Mr. Kavade submitted that her evidence was not acceptable because she has not produced attendance register. We find that she is an independent witness and has given sufficient reason for remembering the date and there is no reason to disbelieve her deposition that the Appellant was not present in her class on 14/05/2007.

32. In this context, the prosecution has also relied on the evidence of PW 25 Naorem Arun Singh who was the Commander at INS Hansa, Goa. On instructions, he had taken the Appellant in custody on 15/05/2007 as mentioned earlier. He himself made inquiries with the Appellant and at that time, the Appellant had told him that he was at Mumbai from 11/05/2007 to 14/05/2007. The defence had raised an objection that this part of his deposition was not admissible; but in our opinion, his absence from INS Hansa during the relevant period is an important circumstance and does point to his

guilt. Therefore, this amounts to an extra-judicial confession in that regard. This witness is a Senior Naval Officer and we see no reason to disbelieve him. This witness was cross-examined in respect of the procedure in respect of maintenance of books regarding presence or absence of a Sailor. In the cross-examination, he has deposed that the long leave for a Sailor is sanctioned by the Head of the Department and for short leave, no sanction is required but the concerned Sailor can write in the liberty book and proceed on a short leave. The short leave meant that he could leave after day's work and had to return by 1.00 a.m. This indicates that the Sailor could leave INS Hansa without making entry as per his choice. If he did not make any entry, there was nothing to show that he had left the place.

33. This fact is important in the context of the specific defence of *alibi* taken by the Appellant. For this purpose, the Appellant has examined DW 1 Aman Deep Singh. This witness has deposed that during the relevant period, he was posted at INS Hansa and he knew the Appellant as they were serving together. He has deposed that a Sailor had to make an entry in the liberty book if he was going away and he had to make entry in the same book when he came back. He

has deposed that 12/05/2007 was Saturday and the Sailors played cricket inside the campus. He has deposed that on 13/05/2007, the Appellant was one of the players who had played cricket. He has deposed that they were together and then had gone to sleep. He has deposed that on 14/05/2007, he was on night duty and came back on 15th morning. On that day, later, he came to know that the Appellant was taken in custody. He has further deposed that he had gone to the Regulating Officer of INS Hansa and had disclosed that the Appellant was with him on 12th and 13th May, 2007 at INS Hansa. He claimed that the Officer had told him to keep quiet. In short, he had lend support to the case of the Appellant in establishing the *alibi*. In the cross-examination, he has admitted that he himself did not play cricket because his left hand was fractured. He has also admitted that his accommodation was separate from that of the Appellant. He has deposed that he had informed the Regulating Officer that the Appellant was with him on 13/05/2007. He was asked in the cross-examination as to who was the Regulating Officer. The cross-examination showed that N. Arunkumar Singh was the Regulating Officer at INS Hansa. Considering the evidence of DW 1, we find that he was a friend of the Appellant and has tried to help him. If the

Appellant was really with him, this witness had not done anything substantial in pointing this fact and pursuing the same before the higher authorities or before the police. He himself had to admit in the cross-examination that he did not play cricket and he has also admitted that for the first time during his deposition he had disclosed that the Regulating Officer had asked him to keep quiet. The Regulating Officer N. Arunkumar Singh was examined by the prosecution as PW 25 but he was not cross-examined on these lines and no suggestions were put to him that DW 1 told him that the Appellant was with him on 13/05/2007. Because of these aspects, we are not inclined to place reliance on his evidence.

34. The Appellant has examined DW 5 Uttam Singh who claimed to be an investment manager with ICICI Bank, for the branches at Borivali, Bhayander, Mira Road (East), Malad and Kandivali Thakur Complex. He deposed that he and his old customer Mr. Prabodh Zha had gone to Goa on 13/05/2007. They met the Appellant there and discussed the investment plans. He has deposed that he was in the visitors room with the Appellant for about 40 to 45 minutes after 1.30 p.m. on 13/05/2007. He has deposed that he had

collected the cheque from the Appellant and came to Mumbai on the next day. He has produced a cheque bearing no.380103 of ICICI bank dated 13/05/2007 having account no.68229002 on record at Exh.266. In the cross-examination, he has admitted that he had not deposited the cheque. Even mere perusal of the cheque shows that the cheque was not deposited in the bank. No explanation is offered by this witness as to why this cheque was not deposited in the bank. He has claimed ignorance of any visiting book being kept at Navy base, which itself is unbelievable. There is nothing on record to show his such visit at INS Hansa on 13/05/2007. The conduct of this witness and his non-deposit of the cheque dated 13/05/2007 shows that he is a false witness and is not reliable.

35. The Appellant himself has deposed as DW 6. He has given background of his association with Navy and he has claimed to be present at INS Hansa on the relevant dates, but he has not produced a single document in his support to show his presence at INS Hansa. He has deposed that on 12/05/2007, he played a cricket match inside the naval base and at that time, DW 1 Aman Deep Singh was umpiring the match. DW 1 Aman Deep Singh has not said anything about being an

umpire in the match. The Appellant has not examined any of the players who had purportedly played that match. The Appellant has further deposed about the visit of DW 5 and his colleague Prabodh Zha on 13/05/2007. In short, though he has claimed to be present at INS Hansa from 12th to 15th May 2007, he has not supported his claim through cogent evidence and his defence of *alibi* is not acceptable. This gives rise to an adverse inference against him. ***The Hon'ble Supreme Court, in the case of Sahabuddin and Another Vs. State of Assam***⁴, had an occasion to lay down the effect of evidence of alibi being not acceptable to the Court. The Hon'ble Supreme Court, in paragraph 27 of the said Judgment, has discussed the effect thus :-

*“27. Once, the Court disbelieves the plea of alibi and the accused does not give any explanation in his statement under Section 313 CrPC, the Court is entitled to draw adverse inference against the accused. At this stage, we may refer to the judgment of this Court in the case of Jitender Kumar v. State of Haryana*⁵, where the Court while disbelieving the plea of alibi had drawn an adverse inference and said that this fact would support the case of the prosecution.

(SCC p.226, paras 70-71)

“70. The accused in the present appeal had also taken the plea of alibi in addition to the defence that they were living in a village far away from the place of occurrence. This plea of alibi was found to be

⁴ (2012) 13 Supreme Court Cases 213

⁵ (2012) 6 SCC 204 : (2012) 3 SCC (Cri) 67

without any substance by the Trial Court and was further concurrently found to be without any merit by the High Court also. In order to establish the plea of alibi these accused had examined various witnesses. Some documents had also been adduced to show that the accused Pawan Kumar and Sunil Kumar had gone to New Subzi Mandi near the booth of DW-1 and they had taken mushroom for sale and had paid the charges to the market committee, etc. Referring to all these documents, the trial court held that none of these documents reflected the presence of either of these accused at that place. On the contrary the entire plea of alibi falls to the ground in view of the statements of PW-10 and PW-11. The statements of these witnesses have been accepted by the Courts below and also the fact that they have no reason to falsely implicate the accused persons.

71. Once PW-10 and PW-11 are believed and their statements are found to be trustworthy, as rightly dealt with by the Courts below, then the plea of abili raised by the accused loses its significance. The burden of establishing the plea of alibi lay upon the appellants and the appellants have failed to bring on record any such evidence which would, even by reasonable probability, establish their plea of alibi. The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. (Ref. **Sk. Sattar v. State of Maharashtra**⁶.)”

Thus, we find that the Appellant has not only failed to establish his defence of *alibi*, but we are of the opinion that he has taken a false

⁶ (2010) 8 SCC 430 : (2010) 3 SCC (Cri) 906

defence of *alibi* and therefore, adverse inference is required to be drawn against him.

36.

(e) **Motive and burden of proof under Section 106 of the Evidence Act :**

It is difficult to find out the motive in such cases. It is always difficult to extract the reason for commission of such an offence from the deep, dark recesses of the human mind and convert it into any tangible evidence recognized by law. Undoubtedly, it is a difficult task in such cases. In this case in particular, the victim had willingly accompanied her potential murderer unsuspecting of his intentions. The culprit had accompanied her after making all the preparations and in particular, carrying weapons with him. The couple had checked-in early in the morning of 12/05/2007. The waiter had seen the couple around noon time of 13/05/2007. Nobody had heard any quarrel or raised voices from their rooms. That means at least for more that 24 hours nothing untoward happened and suddenly on 14/05/2007, the dead body of the victim was discovered. What transpired within that period can be answered

only by two persons, one of whom is the victim who is dead and the other is the Appellant, who is denying presence on the scene. Once we have reached the conclusion that the Appellant was present with the deceased, then under Section 106 of the Evidence Act, the burden shifts on him which, in this case, he has not discharged. This is one more circumstance against the Appellant.

37. To establish the motive, the prosecution has examined PW 7 Shaunak who was the brother of the deceased, PW 14 K. Satishkumar Subuddhi and PW 15 Vipul Pathak who were colleagues of the deceased working in the same company. PW 7 has deposed as mentioned earlier that on a train journey, the Appellant and the deceased met which ultimately led to her death. He has deposed that he had received a phone-call from the Appellant's wife informing about the love affair between the deceased and the Appellant. He has also deposed about the phone-calls received from the Appellant to express his desire to marry the deceased and finally he has deposed about the telephone call received from the deceased herself on 13/05/2007 telling him that the Appellant wanted to marry her. He has deposed that he had felt that she was tense at that time. That was

the last this witness had heard from the deceased. PW 14 and PW 15 have deposed that the Appellant was introduced to them by the deceased as her friend. PW 14 has deposed that in the past, the Appellant had asked for phone number of PW 15 Vipul. PW 15 Vipul Pathak is another important witness and it appears that the friendship that the deceased had with this witness, was not liked by the Appellant. PW 15 has deposed that in the month of March 2007, he had received a call from the Appellant. At that time, the Appellant had warned him to keep away from the deceased as the Appellant and the deceased were in love. This witness had then informed the deceased whereon the deceased told him that she did not want to marry the Appellant as he was already married and she wanted to get separated from him. This witness claims to have distanced himself from the deceased and had refrained from contacting her when she had gone to Jharkhand around 22/04/2007. The prosecution has led this evidence to show that there was a feeling of insecurity in the mind of the Appellant and the closeness of PW 15 Vipul with the deceased had given rise to jealousy. This evidence has not been shaken. The Appellant has examined himself as DW 6 but he has not spoken a word about the deceased and his friendship with her in his

examination-in-chief. Only in the cross-examination, he has acknowledged her presence. This, by itself, is quite strange because while examining himself, he had sufficient opportunity to describe the exact relationship he shared with the deceased.

38. Hence, we are of the opinion that the prosecution has proved beyond reasonable doubt that the Appellant was having love affair with the deceased, their love affair was going through troubled times, that they were together from early morning of 12/05/2007, they were seen together by the receptionist of hotel Classic Residency and then by the receptionist of hotel Sun-N-Sheel, the weapons were recovered at his instance, the bullets found at the spot and recovered from the dead body of the deceased matched with the weapon recovered at the instance of the Appellant, Appellant's absence during the relevant time from his Naval base at INS Hansa was established, the defence of *alibi* taken by the Appellant was proved to be false, the Appellant did not discharge the burden cast upon him under Section 106 of the Evidence Act. The prosecution has proved each of the circumstances beyond reasonable doubt and has thus formed a chain so complete so as to leave the only inference of the guilt of the

Appellant. Hence, we are satisfied that the Appellant is guilty of commission of murder of the deceased.

39. The prosecution examined PW 29 who had accorded sanction for prosecuting the Appellant for the offences under the Arms Act. Mr. Kavade submitted that the sanction was not properly granted and therefore, cognizance under the Arms Act was bad in law. We have gone through the evidence of PW 29 and we do not find any infirmity in the sanction. Hence, we do not accept the submission of Mr. Kavade that the sanction under the Arms Act for prosecution was not properly granted.

40. Before parting with the Judgment, we have to deal with an important issue raised by Mr. Kavade. He has submitted that there was breach of mandatory provisions of Section 475 of the Cr.P.C. The relevant provisions of Section 475 (1) reads thus :

“475. Delivery to commanding officers of persons liable to be tried by Court-martial.---

(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to

cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for purpose of being tried by a Court-martial.”

He has submitted that the Magistrate has not informed the Commanding Officer of the Appellant as required under Section 475 of the Cr.P.C. He further submitted that the learned Sessions Judge also erred in informing the Commanding Officer about the case, because Section 475 had cast that duty only on the Magistrate. He further submitted that the learned Sessions Judge erred in setting aside the first charge and framing fresh charges after receiving the letter from Navy. Mr. Kavade relied on a Judgment of a Division Bench of this Court in the case of ***Kanwardeepsingh Harbansingh Bedi Vs. The State of Maharashtra***⁷ in which case, the Division Bench had quashed and set aside the order of conviction and sentence being nullity in law for not following the required procedure under Section

⁷ Criminal Appeal No.89 of 1988, decided on 07/05/2009

475 of the Cr.P.C. The matter was remanded back for proper compliance of the procedure.

41. To consider his objection, it is necessary to refer to a few more provisions. Section 78 of the Navy Act, which is a relevant provision, reads thus :

“78. Jurisdiction as to place and offences.---

(1) Subject to the provisions of sub-section (2), every person subject to naval law who is charged with a naval offence or a civil offence may be tried and punished under this Act regardless of where the alleged offence was committed.

(2) A person subject to naval law who commits an offence of murder against a person not subject to army, naval or air force law or an offence of culpable homicide not amounting to murder against such person or an offence of rape in relation to such person shall not be tried and punished under this Act unless he commits any of the said offences---

(a) while on active service; or

(b) at any place outside India; or

(c) at any place specified by the Central Government by notification in this behalf.”

The expression 'active service' is defined under the Navy Act under Sub-Section (1) of Section 3 which reads thus :

“3(1) ----- “active service' means service or duty---

(a) during the period of operation of a Proclamation of Emergency issued under clause (1) of article 352 of the Constitution, or

(b) during any period declared by the Central Government by notification in the Official Gazette as a period of active service with reference to any area in which any person or class of persons subject to naval law may be serving.”

This indicates that if a person subject to naval law commits an offence of murder of a person not subject to naval law, such person shall not be tried under the Navy Act unless he has committed this offence while on active service. Without going into the question as to whether the Appellant was in active service, this question can be decided in the light of the procedure followed by the Sessions Court. The learned Sessions Judge, in this case, after realizing the procedure envisaged under Section 475 of the Cr.P.C. was not followed when it was brought to his notice by the Appellant himself vide Exh.15; by the order dated 25/03/2008 passed below Exh.15, had observed that the Navy should be informed about the pending case against the Appellant. Accordingly, the Commanding Officer was informed about the case. The Sessions Court received the reply dated 22/04/2008 which is on record at Exh.18 wherein the Commanding Officer had clearly mentioned that the Navy did not wish to take over the case and the Sessions Court could continue with the proceeding.

Thereafter, the Sessions Court had framed the charge afresh and had proceeded with the trial. In our opinion, the provisions under Section 475 of the Cr.P.C. as well as under the Navy Act are enacted to enable the Navy in such cases to take a decision as to whether the accused should face the proceeding before the Naval Officer under the Navy Act or before the Courts of law under the Cr.P.C. The accused, obviously, cannot choose the forum and the first option is given to the Naval Officers. In the instant case, the Navy has clearly informed the regular Court that the Navy did not wish to take over the case and the Sessions Court could continue with the proceedings. This, in our opinion, is sufficient compliance of the requirements under Section 475 of the Cr.P.C. and therefore, in this case, the trial cannot be said to be vitiated and the further proceedings continued by the Sessions Court. cannot be faulted with. In this context, a reference can be made to the observations of the Hon'ble Supreme Court in the case of ***Balbir Singh and Another Vs. State of Punjab***⁸. In the case before the Hon'ble Supreme Court, the Air Force authorities had not made any grievance at any stage regarding their right to decide whether to try the accused who were working with them, by Court-martial. The

⁸ (1995) 1 Supreme Court Cases 90

Air Force authorities had not questioned the validity of the trial of the accused by the criminal Courts at any forum whatsoever. The right to exercise the option was with the authorities and the accused had no right to choose a particular forum for trial and therefore, it was held that the grievance raised by the accused was untenable. Deriving support from these observations, we are of view that the Navy was sufficiently informed about the pendency of the case and since they had clearly requested the Sessions Court to proceed with the trial, we do not think that the trial is vitiated.

42. Though we have reached a conclusion that the prosecution has proved its case beyond reasonable doubt, we must observe that the investigation in this case leaves a lot to be desired. The Investigating Officers should never lose sight of the fact that their investigation should be such that the material collected by them should stand the scrutiny of Courts in accordance with law. Merely nabbing the culprits should not be the ultimate aim of any investigation. The Investigating Officer must be able to understand the possible objections and defence which could be raised on behalf of the accused during trial. Care and caution should be exercised by the

Investigating Officer that their investigation passes the basic test of judicial scrutiny. Unless the accused are held guilty by the Court in accordance with law, the investigation is just an exercise in futility.

43. We also record our appreciation for the manner in which this Appeal is conducted before us by Mr. Kavade, the learned Counsel for the Appellant and Mr. Yagnik, the learned APP for the State.

44. In view of the above discussion, we find no merit in the Appeal and accordingly the Appeal is dismissed.

45. With the disposal of the Appeal, Criminal Applications do not survive and stand disposed of accordingly.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)