

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 266 OF 2014

Aba @ Munjaba s/o Rajabhau Giri
Age 35 years, Occ. Labour,
R/o. Kendrewadi, Tal. Dharur,
District Beed

...Appellant
(Ori. Accused No.1)

versus

The State of Maharashtra
Through Sub Divisional Police Officer
Sub Division, Majalgaon
Additional Charge, Kaij

...Respondent
(Ori. Complainant)

.....
Mr. S.S. Thombre h/f Mr. S.B. Solanke, advocate for the appellant
Mr. S.P. Deshmukh, A.P.P. for respondent-State

.....

**CORAM : V. K. JADHAV AND
S. G. DIGE, JJ.**

**Date of Reserving
the Judgment : 02.07.2021**

**Date of pronouncing
the Judgment : 16.07.2021**

JUDGMENT (PER V.K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge-2, Ambajogai, dated 30.04.2014 in Special Case (under Atrocity Act) No. 3 of 2013.

2. Brief facts giving rise to the prosecution case are as follows:-

- a) The appellant original accused No.1 Aba @ Munjaba s/o Rajabhau Giri was knowing that P.W. 9 Gopinath Nivrutti Tarkase R/o. Kendrewadi, belongs to Mahar caste, which is included in the Scheduled Caste. On the basis of the complaint lodged by said Gopinath Tarkase, crime No. 119 of 2011 for the offences punishable under sections 323, 435, 504 of I.P.C. and under Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter for the sake of brevity referred to as the "Atrocities Act") came to be registered against the appellant accused Aba @ Munjaba s/o Rajabhau Giri on 30.11.2011. In connection with said crime No. 119 of 2011, the appellant-accused Aba @ Munjaba s/o Rajabhau Giri was arrested and he was sent to jail. According to the prosecution story, in order to take revenge against said P.W. 9 Gopinath Tarkase, the appellant-accused Aba @ Munjaba s/o Rajabhau Giri had purchased one carbon mobile from a mobile shop at Ambajogai in the name of P.W. 9 Gopinath Tarkase and obtained a receipt of that carbon mobile in the name of P.W. 9 Gopinath Tarkase. Similarly, accused appellant Aba @ Munjaba s/o Rajabhau Giri purchased a Radio of Aparna company and three battery cells. He also purchased explosive substances i.e. gelatin and detonators from original accused No.2 Datta s/o Sahebrao Jadhav. The said Accused No.2 Datta Sahebrao Jadhav sold the explosive substance to

appellant Aba @ Munjaba s/o Rajabhau Giri. It is the case of the prosecution that absconding accused No.3 Lala @ Bhavarlal Ramdayal Baheti supplied explosive substance viz. Gelatin and detonators to accused No.2 Datta.

- b) It is further case of the prosecution that the appellant-accused Aba @ Munjaba s/o Rajabhau Giri has put those explosive substances i.e. gelatin and detonators in the said radio of Aparna company purchased by him. He has put the said radio in a box. The appellant-accused thereafter put that box containing the said radio and receipt of carbon mobile purchased in the name of P.W. 9 Gopinath Tarkase in one box and put that box in a bag and put that bag in Ambejogai-Kurla, Mumbai Bus bearing registration No. MH-23-BL-2055.
- c) It further reveals from the prosecution story that one Oam Ramesh Nimbalkar was the bus conductor. Even though said bag was not claimed by anybody, the conductor Oam Nimbalkar did not deposit the said bag in the S.T. Depot at Ambejogai and he had taken the said bag at his house. After reaching to his house, when he put battery cells in the Radio and switched on the Radio, there was a blast causing grievous injuries to said bus conductor Oam Nimbalkar and his family members. In the said blast, conductor Oam Nimbalkar lost his two hands below the wrist and both eyes.

His wife Usha lost one eye and one leg below the knee. His mother Kusum lost her eye sight. His son Kunal lost his both eyes.

- d) As per the prosecution case, the accused persons in furtherance of their common intention purchased the explosive substance and Aparna company's radio with intention to injure the life and property of the person. They have also fabricated false evidence for conviction of a member of Scheduled Caste category i.e. P.W. 9 Gopinath Tarkase which may lead to his conviction for more than seven years to capital punishment. Thus, the appellant alongwith absconding accused committed offences punishable under Sections 3, 4 and 5 of the said Act of 1908, Section 336, 337, 338 of I.P.C. and Section 3(2) (ii) of the Atrocities Act.
- e) P.W. 5 Dinkar Sukhdeo Dhambale, who was working as Police Sub Inspector at Kaij Police Station, had received information over telephone on 30.11.2012 about the blast at village Kalegaon Ghat between 2.00 p.m. to 2.15 p.m. He had noted down the said information in station diary and proceeded to the said village at 2.15 p.m. alongwith the police staff. He reached there at 2.45 p.m. and noticed that a blast took place in the house of said conductor Oam Nimbalkar and due to the blast, Oam Nimbalkar, his wife, son and mother got

seriously injured. They were shifted to the Government Hospital at Ambejogai for treatment. Thus, P.S.I. P.W.5 Dinkar Dhambale had carried out the spot panchanama in presence of two panch witnesses (Exh.34) and seized various articles including a bag, a cartoon box having substance of said Apparna radio and pieces of mobile bill. P.W. 5 P.S.I. Dinkar Dhambale had also instructed A.P.I. Pravin Chavan for recording the statement of injured Oam Nimbalkar. A.P.I. Chavan had recorded the statement of conductor Oam Nimbalkar. The bus conductor Oam Nimbalkar had narrated the entire story to A.P.I. Chavan that he was working as Bus conductor. He had taken out radio and three battery cells from the bag and put those cells in the radio. He also narrated that there was one receipt of purchase of mobile having word "Kendrewadi" and went to turn on that radio and there was a blast. P.W.5 Dinkar Dhambale had sent articles and muddemal property for chemical analysis. He had also sent the blood sample of injured persons, including explosive substance and other articles for chemical analysis. Thus, P.W.5 P.S.I. Dinkar Dhambale had lodged the complaint on behalf of the State on 1.12.2012 (Exh.40). On the basis of his complaint, crime No. 145 of 2012 came to be registered for the offences punishable under Sections 336, 337 and 338 of I.P.C. and Sections 3, 4 and 5 of the Explosive Substances Act 1908 (hereinafter for the sake of brevity referred to as "the

said Act of 1908"). After registration of crime, he had handed over the investigation to P.W. 24 Dy.S.P. Shri D.S. Shinde.

- f) P.W. 24 Dy. S. P., Shri D. S. Shinde has carried out investigation in connection with the crime. He has recorded the statement of the mobile shop owner and also seized the office copy of the bill of said mobile in presence of panch witnesses. He has also seized the bill book (Exh.56) and the receipt book (Exh.60). He has also collected the documents pertaining to the complaint filed by the wife of the applicant-accused viz. Ratnamala against P.W.9 Gopinath Tarkase. He had also seized the mobile purchased in the name of P.W. 9 Gopinath Tarkase from the house of accused Aba @ Munjaba s/o Rajabhau Giri as per the memorandum of recovery panchnama (Exh.78). He has also seized a kit and speaker of the said radio at the instance of appellant-accused Aba @ Munjaba s/o Rajabhau Giri by drawing panchanama (Exh. 79) and recovery panchanama (Exh.80). He has also made search of the house of accused and sized various articles. He has also collected medical certificate of the injured persons. It also reveals from the investigation that the appellant-accused No.1 Aba @ Munjaba s/o Rajabhau Giri was in jail for 17 days in connection with the crime registered on the basis of complaint by P.W. 9 Gopinath Tarkase under the provisions of the Atrocities Act. It has been revealed

during investigation that in order to take revenge against said P.W.9 Gopinath Tarkase, the appellant-accused No.1 Aba @ Munjaba s/o Rajabhau Giri had purchased the radio and the mobile and planted explosive substance in the radio. After completion of investigation, he has filed charge sheet against the accused persons.

- g) Learned Additional Sessions Judge-2, Ambajogai has framed charge against the appellant-accused No.1 Aba @ Munjaba s/o Rajabhau Giri and the accused No.2 Datta Sahebrao Jadhav. Both the accused pleaded not guilty and claimed to be tried. The prosecution examined in all 24 witnesses to substantiate the charge levelled against them. The defence of the accused is of total denial. The learned Additional Sessions Judge has also recorded the statements of the appellant-accused under Section 313 of Cr.P.C.
- h) The learned Additional Sessions Judge-2, Ambejogai, by the impugned judgment and order of conviction dated 30.4.2014 has convicted the appellant-accused as follows :
 - (i) Appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri is convicted for the offence punishable under section 338 of I.P.C. and sentenced him to suffer R.I. for two years and to pay fine of Rs.1000/- i/d to suffer R.I. for two

months.

- (ii) The appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri has also been convicted for the offence punishable under Section 3 of the Explosive Substance Act and sentenced him to suffer imprisonment for life and to pay fine of Rs.10,000/- i/d to suffer S.I. for two years.
- (iii) The appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri has also been convicted for the offence punishable under Section 3 (2) (II) of the Atrocities Act and sentenced him to suffer R.I. for seven years and to pay fine of Rs.10,000/- i/d to suffer S.I. for two years.
- (iv) The learned Additional Sessions Judge has directed that all sentences shall run concurrently
- (v) The appellant accused Aba @ Munjaba s/o Rajabhau Giri is under trial prisoner. He is entitled for the set off for the period of detention in prison under Section 428 of Cr.P.C.
- (vi) The learned Additional Sessions Judge-2, Ambajogai has acquitted original accused No.2 Datta s/o Sahebrao Jadhav of all the charges.

3. Hence, this appeal.

4. Mr. Thombre, learned counsel for the appellant submits that in terms of the provisions of Section 7 of the said Act of 1908, there is restriction on trial of offences and no court shall proceed with the trial of any person for an offence against this Act except with the consent of the District Magistrate. Learned counsel submits that the appellant accused Aba @ Munjaba s/o Rajabhau Giri was charged for the offences punishable under Sections 3, 4 and 5 of the said Act of 1908 and he has been tried for the said offences alongwith I.P.C. sections. Learned counsel submits that the investigating officer has not obtained the consent of the District Magistrate at any point of time in terms of the provisions of Section 7 of the said Act of 1908. Consequently, the trial vitiates so far as the charges under said Act of 1908 framed as against the appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri.

5. Learned counsel for the appellant submits that the prosecution case entirely rests upon circumstantial evidence and there is no direct evidence in this case. The prosecution has failed to prove the chain of circumstantial evidence. Learned counsel submits that P.W.11 Shamsundar Somani is the owner of Somani Mobile Gallery Shop at Ambajogai. He was shown a white colour mobile handset from a plastic bag wrapped with a white paper and tied with thread. He has identified the said mobile of carbon company model K-52 and further explained that the said mobile was sold out

from his shop. Learned counsel submits that said P.W.11 Shamsundar Somani has further deposed about the bill book, name of customer who has purchased it, and IMEI number of mobile etc. He has further deposed that when the police came to him for taking bill book, at that time appellant-accused No.1 Aba @ Munjaba s/o Rajabhau Giri was accompanied with the police. Learned counsel submits that P.W.11 Shamsundar Somani has identified appellant-accused Aba @ Munjaba s/o Rajabhau Giri sitting in the court hall for the first time. He has identified the appellant accused Aba @ Munjaba s/o Rajabhau Giri only for the reason that he was brought to his shop by the police. Learned counsel submits that there is no identification parade. The identification of the accused for the first time before the court is a weak type of evidence. Witness P.W. 11 Shamsundar Somani has admitted in his cross examination that there used to be 50 customers visiting his shop daily for purchase of mobile handsets. There is no facility of CCTV footage in his shop. Learned counsel submits that even though the prosecution has examined P.W.13 Parmeshwar Kolse, an employee of the said mobile shop, however, he has also identified the appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri while in the court hall for the first time. Both the witnesses have identified the appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri in the court only for the reason that the appellant accused was taken to the shop by the police during the course of investigation. According to them, he is the same person brought to their shop by the police.

6. Learned counsel for the appellant submits that the prosecution has examined P.W.14 Shaikh Majed to prove that the appellant accused had purchased a radio of Aparna company from his shop. However, P.W. 14 Shaikh Majed has not supported the prosecution case. The investigating officer has allegedly taken the appellant accused to the shop of P.W.14 Shaikh Majed. According to P.W.14 Shaikh Majed, at that time he came to know the name of accused as Aba @ Munjaba Giri. The accused Aba @ Munjaba Giri has stated before him that he has put one end of gelatin wire to the spring of battery cell and another at on/off point of radio. He has further deposed that, at that time accused admitted that he has kept that radio in Ambajogai-Mumbai Bus. Learned counsel submits that such type of statement, which is in the form of confession in presence of police is not admissible. Learned Judge of the trial court, however, has relied upon this inadmissible statement of P.W.14 Shaikh Majed. Learned counsel submits that P.W.14 Shaikh Majed has stated that accused has not purchased anything from him.

7. Learned counsel for the appellant accused submits that the prosecution has examined P.W.16 Sominath Harale to prove memorandum panchanama and recovery panchanama of mobile handset Exh.78, memorandum panchanama Exh.79 and recovery panchanama of radio kit and speaker of radio Exh.80 and house search panchanama Exh.81. As per memorandum panchnama and

the recovery panchanama Exh.78, the prosecution alleged that on 5.12.2012 at the instance of the appellant accused, a mobile handset purchased by him in the name of Gopinath Tarkase came to be seized from the place of his house where it was hidden. The appellant-accused was arrested on 2.12.2012. However, the panchanama Exh. 78, 79, 80 and 81 were drawn on 5.12.2012. The investigating officer had not taken search of the house of accused till that time. As per the memorandum panchanama Exh.79 and recovery panchanama Exh.80, the prosecution claims that at the instance of accused, a radio kit of Aparna company and speaker of radio came to be seized from the place of the house of accused where it was hidden. However, the investigating officer has not shown the said kit of radio of Aparna make and other parts recovered at the instance of the appellant accused to P.W. 14 Shaikh Majed (radio shop owner). It is impossible to conclude that bill No. 2690 dated 21.8.2012 is the bill prepared during the course of day to day transaction of the shop. Learned counsel submits that furthermore, it is difficult to believe that P.W. 11 Shamsundar Somani, who was dealing with more than 50 customers daily and selling more than 200 mobile handsets in a month could identify the accused when he was taken to his shop.

8. Learned counsel for the appellant submits that the circumstances relied upon by the prosecution have no definite tendency to point out the guilt of the accused. It may create suspicion

against the accused and same cannot take the place of truth. There is no evidence as to who has kept the said parcel containing the radio alongwith bill of mobile handset in the bus. It is a part of evidence that the said bus went from Ambajogai to Kurla and remained in Kurla Bus depot for entire night and then on the next day, the bus was returned to Ambajogai. Thereafter, the said bus went to Latur and again returned to Ambajogai. During this journey, several commuters boarded the bus and left the bus. Learned counsel submits that the prosecution has examined P.W.17 Vikas Lamkane in the police station on 3.12.2012. At that time, said S.T. bus was parked in the police station. According to P.W.17 Vikas, the appellant accused has made statement before panchas in presence of police admitting his guilt. Learned counsel submits that the trial court has committed grave error in law while relying upon such inadmissible evidence. There is no chain of circumstantial evidence. The prosecution has miserably failed to prove beyond reasonable doubt the involvement of the accused in the commission of crime. The appellant accused is entitled for benefit of doubt.

9. Learned counsel for the appellant, in order to substantiate his contentions, placed his reliance on the following cases:-

- I. ***National Investigation Agency v. Vinay Talekar and Ors.***, reported in 2020 All MR (Cri) 3518.
- II. ***State of M. P. v. Bhupendra Singh***, reported in AIR 2000 SC 679.

- III. ***Hussain s/o Ismail and one another v. State of Madhya Pradesh***, reported in 2012 CJ (MP) 1726.
- IV. ***Prakash Chandra Yadav v. State of Bihar***, reported in LAWS (PAT) 2016-12-39.
- V. ***Ajibure Sheikh v. The State of Jharkhand and Ors.***, reported in AIR JHARR 2008 (1) 974.
- VI. ***Prasadi Mahto @ Talo Mahto and Taleshewar Mahato v. State of Jharkhand***, reported in LAWS (JHAR) 2007-2-21.
- VII. ***Govindan Sasi v. State of Kerala***, reported in KER LJ 1999-1-694.
- VIII. ***Seeni Nainar Mohammed and Ors. v. State Rep. By Deputy Superintendent of Police***, reported in AIR 2017 SC 3035.
- IX. ***Al Hadi Badar Naseer Mohammed v. State of Maharashtra***, reported in 2010 All MR (Cri) 1568.
- X. ***Lakhwinder Singh and Ors. v. State of Punjab***, reported in AIR 2003 SC 2577.
- XI. ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in AIR 1984 SC 1622.
- XII. ***Hari Nath and Ors. v. State of U. P.***, reported in AIR 1988 SC 345.
- XIII. ***Arjun Singh v. State of Himachal Pradesh***, reported in AIR 2009 SC 242.
- XIV. ***Ramkishan v. The State of Maharashtra***, reported in 2014 (4) BomCR (Cri) 305.
- XV. ***Ramshetya Amrya Bhosale and Kunil v. State of Maharashtra***, reported in 2013 All MR (Cri) 3029.

10. Learned A.P.P. submits that though the prosecution case rests upon the circumstantial evidence, however, the prosecution has proved the case against the accused through the chain of circumstantial evidence. There is strong motive on the part of the appellant accused to commit the crime. The prosecution has

examined P.W.9 Gopinath Tarkase, who belongs to Scheduled Caste category. The agricultural land of the appellant is adjacent to his land. On the basis of his complaint, the appellant accused was arrested and remained in jail for certain period. After release from the jail, the appellant accused has given threat to P.W. 9 Gopinath Tarkase to kill him and he will break his hands and legs. P.W. 9 Gopinath Tarkase has deposed that the appellant accused has purchased mobile phone deliberately in the name of P.W. 9 Gopinath Tarkase. Learned A.P.P. submits that in order to take revenge of P.W.9 Gopinath Tarkase, the appellant accused has planned a blast and accordingly kept a bag containing radio and cells in the bus alongwith the receipt of mobile handset purchased in the name of P.W. 9 Gopinath Tarkase. It was revealed during the course of investigation that the appellant accused with malafide intention to take revenge of P.W. 9 Gopinath Tarkase had purchased a radio and mobile handset in the name of P.W. 9 Gopinath Tarkase and planted explosive substances in the radio. The appellant accused has made such an arrangement that once the battery cells put and the radio is switch on, the explosion would occur. Learned A.P.P. submits that the prosecution has proved the motive behind the crime beyond doubt.

11. Learned A.P.P. submits that the prosecution has examined P.W.11 Shamsunder Somani, mobile shop owner and his employee P.W.13 Parmeshwar Kolse. The prosecution has proved beyond

doubt that prior to the incident, the appellant accused had purchased the said mobile handset from the shop of P.W.11 Shamsundar Somani. Even P.W.11 Shamsundar Somani has identified the appellant accused before the Court. It is clear that the appellant accused had purchased the said mobile handset and obtained a receipt in the name of P.W.9 Gopinath Tarkase. Learned A.P.P. submits that even though P.W. 14 Shaikh Majed, the radio shop owner, has not supported the prosecution case to some extent, however, the appellant-accused has made confessional statement before him admitting therein that he has kept the said radio in the bus.

12. Learned A.P.P. submits that there is recovery of said mobile handset from the place of house of the appellant accused where it was kept hidden. Furthermore, at the instance of appellant accused, a radio kit of Aparna make alongwith speakers came to be seized from his house. Furthermore, by drawing house search of the appellant accused, the articles came to be seized.

13. Learned A.P.P. submits that the conductor P.W. 20 Oam Nimbalkar and his entire family sustained grievous injuries on their persons. There is clear evidence that P.W.20 Oam Nimbalkar, the bus conductor, took the said unclaimed parcel containing the radio to his house and as soon as he inserted the battery cells in the radio and turned on the radio button, there was a huge blast in his house

itself. In consequence thereof, both the hands of P.W.20 Oam Nimbalkar were amputated from elbow, left eye was completely damaged, his both legs below knee got burnt. His son Kunal, aged 3 years, also lost sight of his one eye. His wife has lost sight of her right eye. Furthermore, in one leg of his wife a rod has been implanted due to fracture. His aged mother has also lost fingers of her right foot. Her right hand also got burnt. His mother cannot walk without the help of stretcher.

14. Learned A.P.P. submits that the consent of the District Magistrate as required under Section 7 of the said Act of 1908 is not mandatory and it is merely directory. Learned A.P.P. submits that for want of consent of the District Magistrate, the trial does not vitiate. Learned A.P.P. submits that the prosecution has proved the case beyond reasonable doubt against the accused. Learned Judge of the trial court rightly convicted the appellant-accused. There is no substance in this appeal. The appeal is liable to be dismissed.

15. Learned A.P.P. for the respondent, in order to substantiate his contentions, his reliance on the following cases:-

- i) ***Deepak Khinchi vs. State of Rajasthan, reported in 2012 (5) SCC 284;***
- ii) ***State of Goa vs. Babu Thomas, reported in 2005 AIR (SC) 3606.***

16. We have carefully considered the submissions advanced by learned counsel for the appellant-accused and learned A.P.P. for the respondent State. With their able assistance, we have perused the grounds taken in the appeal, annexures thereto, the record and proceeding and the case laws cited by the respective parties.

17. Learned counsel for the appellant accused has vehemently submitted that for want of compliance of Section 7 of the said Act of 1908 entire trial vitiates. In the instant case, undisputedly, the prosecution has not obtained the consent of the District Magistrate as contemplated under Section 7 of the said Act of 1908. The appellant accused was charged and tried of the offences punishable under Sections 3, 4 and 5 of the said Act of 1908. Learned counsel submitted that in terms of the provisions of Section 3 of the said Act of 1908, the punishment for causing explosion likely to endanger life or property, is death or rigorous imprisonment for life and shall also be liable to fine. Even in Section 4 of the said Act of 1908, the prescribed punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

In section 5 of the said Act of 1908, the punishment for making or possessing explosives under suspicious circumstances is with imprisonment for a term which may extend to ten years and shall also be liable to fine and in the case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine. The trial court has convicted the appellant accused for the offence punishable under sections 3 of the said Act of 1908 and sentenced him to suffer life imprisonment and to pay fine of Rs.10,000/- i/d to suffer S.I. for two years. Learned counsel submits that the penal provisions are required to be strictly construed. In terms of Section 7 of the said Act of 1908, no court shall proceed to the trial of any person of an offences against this Act except with the consent of the District Magistrate. The power of granting consent under Section 7 of the said Act of 1908 rests with the Central Government. The Central Government has delegated it to the District Magistrate. Learned counsel for the appellant accused submitted that the trial thus vitiates for want of consent as required under Section 7 of the said Act of 1908.

18. Learned A.P.P. has however, submitted that the word used in Section 7 of the said Act of 1908 is “consent” and not “sanction”. It is thus not mandatory to obtain the consent and the very word used in Section 7 of the said Act of 1908 indicates that the requirement of obtaining consent of the District Magistrate is directory.

19. We have carefully gone through the judgment of the trial court. We find that the trial court has placed reliance on the judgment of the Supreme Court in the case of ***State of Tamil Nadu vs. Sivarasan Alias Raghu Alias Sivarasa, reported in 1996 DGLS (Soft) 1743*** and further referred the observations of the Apex Court. The learned Judge of the trial court has referred the observations of the Apex Court as-

“Section 7 does not require sanction but only consent for prosecution and prosecuting a person for offence under Explosive Substance Act. The object of using the word “consent” instead of “sanction” in section 7 is to have a purely subjective appreciation of the matter before giving the necessary consent.”

In para 69 of the judgment, the trial court has made the following observations:-

“69. According to Explosive Act, 1884 particularly Section 9 of it District Authority has to carry out inquiry into the incident. That inquiry was not carried out by District Magistrate of the Collector. They could get knowledge of incident of heinous crime of bomb blast. Considering other evidence mere opinion obtaining consent of District Magistrate which is technically aspect did not fatal the case of prosecution. In my opinion provision of Section 7 of Explosive Substance Act is directory and not mandatory.”

20. We are of the considered opinion that the approach of the trial

court is incorrect and improper. The Explosives Act, 1884 was enacted to regulate the manufacture, possession, use, sale, transport, import and export of explosives. In terms of provisions of Section 8 of the Explosives Act, 1884, whenever there occurs in or about, or in connection with, any place in which an explosive is manufactured, possessed or used etc. any accident by explosion or fire attended with loss of human life or serious injury to the person or property then in terms of Section 9 of the Explosives Act, 1884, inquiry into the accidents is contemplated by the District Magistrate or any other Magistrate subordinate to him to hold the said inquiry. On the other hand, the said Act of 1908 was enacted to curb and punish the person who committed the crime by means of explosive substances. Thus, the entire approach of the learned Judge of trial court by referring Section 9 of the Explosives Act 1884, which contemplates inquiry into the accident, for interpreting Section 7 of the said Act of 1908 and further observed that the consent of the District Magistrate is directory in nature is absolutely incorrect, improper and illegal. Thus, considering the seriousness of the cause for enacting the Act and prescribe the punishment, which extend to imprisonment for life, the restriction has been imposed on the trial of offences in terms of the provisions of Section 7 of the said Act of 1908. Section 7 of the said Act of 1908 is reproduced herein below:-

“7. Restriction on trial of offences: No Court shall proceed to the trial of any person for an offence against this

Act except with the consent of the District Magistrate.”

We find the very wording of section 7 directing that no court shall proceed to the trial of any person for an offences against this Act except with the consent of the District Magistrate is mandatory in nature and not directory. As per the statement of Objects and reasons, the Governor-General-in-Council considers it necessary to supplement the existing law by an Act on the lines of English Explosive Substances Act, 1883, which was enacted for the express purpose of dealing with anarchist crime.

21. In a case of ***State of Madhya Pradesh vs. Bhupendra Singh***, reported in **AIR 2000 SC 679**, the Supreme Court has observed that power of granting consent under Section 7 of the said Act of 1908 rests with the Central Government. The Central Government has delegated it to the District Magistrate. Thus, it is not competent for the State Government to further delegate the power to Additional District Magistrate, which the Central Government has delegated to the District Magistrate. In the facts of the said case, the Supreme court held that sanction granted by the Additional District Magistrate was not valid. Though there is no authoritative pronouncement of the Supreme Court as to whether obtaining the consent of the District Magistrate is mandatory or directory, however, in para 3 of the judgment, the Supreme court has observed that for a prosecution under the said Act of 1908, the consent of the Central Government is

requisite by virtue of the provisions of Section 7 thereof. It is further observed by the Supreme Court that the power granting consent under Section 7 of the said Act of 1908 rests upon the Central Government and the Central Government has delegated it to the District Magistrate.

22. In a case of ***Hussain s/o Ismail and one another v. State of Madhya Pradesh***, reported in **2012 CJ (MP) 1726**, in para 5, the Madhya Pradesh High Court has made the following observations:-

“5. Appellants have been tried for the offence punishable under section 3 read with Section 5 of the Explosives Act but learned Trial Court has failed to see that there was no consent of District Magistrate for trial of the appellants for the offence punishable under Section 3 read with Section 5 of the Explosives Substances Act, 1908. Section 7 of the said Act makes a provision that no Court shall proceed to the trial of any person for an offence against this Act except, with the consent of the District Magistrate. There is no letter of consent from District Magistrate for prosecution of the appellants or other accused persons. Therefore, trial of the appellants for the offence punishable under Section 3 read with Section 5 of the Explosives Substances Act, 1908 is vitiated, therefore, learned Trial Court is not justified in convicting the appellants for the offence punishable under Section 3 read with Section 5 of the Explosives Substances Act, 1908.”

It is observed by the High Court of Madhya Pradesh that there is no letter of consent from the District Magistrate for prosecution of the appellant or other accused persons. Therefore, the trial of the

appellant for the offences punishable under Section 3 read with Section 5 of the said Act of 1908 is vitiated. Therefore, the trial court is not justified in convicting the appellants for the offence punishable under Section 3 r.w. section 5 of the said Act of 1908.

23. In a case of ***Prakash Chandra Yadav vs. State of Bihar (supra)*** the High Court of Patna has taken similar view with consensus that there was no proper consent under Section 7 of the Act of 1908 and held that the court below has rightly acquitted the appellant of the charges under the said Act of 1908.

24. In a case of ***Ajibure Sheikh vs. The State of Jharkhand and others, (supra)*** the Jharkhand High court in para 10 of the judgment has made the following observations:-

“10. Section 7 of the Explosive Substance Act reads as under:

7. Restriction on trial of offences: No Court shall proceed to the trial of any person for an offence against this Act except with the consent of the District Magistrate.

From a plain reading of the aforesaid Section, it is clear that the Trial of a case against the accused against whom allegations are for commission of offence under the said Act, the same cannot proceed unless the District Magistrate accords consent/sanction as envisaged under Section 7 of the Explosive Substance Act.

The word used in the aforesaid Section is "Shall" and

therefore, there is a complete restriction on the trial of the offence without the consent or sanction by the District Magistrate.”

It is observed by the Jharkhand High Court that the word used in Section 7 of the said Act of 1908 is “shall” and therefore, there is complete restriction on the trial of the offence without consent or sanction by the District Magistrate.

25. In a case of ***Prasadi Mahto @ Talo Mahto and Taleshwar Mahato vs. State of Jharkhand (supra)*** though the consent as prescribed under Section 7 of the said Act of 1908 was obtained after commencement of the trial, however, in para 6, the Jharkhand High Court has observed that the language of Section 7 of the said Act of 1908 speaks ‘no court shall proceed to the trial of any person’ which puts embargo upon the trial court and for want of consent as required under law before proceeding, the trial of the accused would be irregular and shall stand vitiated.

26. In a case of ***Seenai Nainar Mohammed and others vs. State represented by Deputy Superintendent of Police (supra)*** though the Supreme Court has dealt with the provisions of Section 20-A of Terrorist and Disruptive Activities (Prevention) Act, wherein the bar is created for cognizance of the offence without previous sanction of the Inspector General of Police or as the case may be the

Commissioner of Police. In para 10 of the judgment, the Apex court has observed that *“it shall always be borne in mind by the sanctioning authority that application of such provisions which forms part of penal statutes requires strict interpretation and failure to comply with the mandatory requirement of sanction, before cognizance is taken, as mentioned in Terrorist and Disruptive Activities (Prevention) Act may vitiate the entire proceeding in the case.”*

27. The learned A.P.P. has placed reliance on the judgment in the case of ***Deepak Khinchi vs. State of Rajasthan (supra)***. In the facts of the said case, there was delay in obtaining the consent as required under Section 7 of the said Act of 1908. In para 14, the Supreme court has made the following observations:-

“14. It is true that learned Sessions Judge has, by his order dated 13.9.2007 discharged the appellant of the charges under Sections, 3, 4, 5 and 6 of the said Act because there was no sanction. But, the prosecution has now obtained sanction. The Sessions Judge has accepted the sanction and has directed that the trial should be started against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act, as well. The order of the Sessions Judge is affirmed by the impugned order passed by the High Court. In view of the legal position as discussed above, and in the facts of the case, as narrated above, we see no reason to interfere in the matter and we direct the trial court to frame additional charges against the appellant under Sections 3, 4 5 and 6 of the said Act and to proceed

with the trial. Needless to say that the stay of further proceedings granted by this Court on 5.7.2011 shall stand vacated.”

Thus, the question dealt with by the Supreme Court in the aforesaid case is altogether different.

28. In a case of ***State of Goa vs. Babu Thomas (supra)***, the Supreme Court has dealt with the provisions of Prevention of Corruption Act, 1988, particularly sanction as required under Section 19 of the said Act. The Apex Court has considered the effect of absence of or any error, omissions or irregularity in the sanction required under the provisions of Statute and as to whether failure of justice has in fact been occasioned thereby. The Apex Court has observed in the facts of the said case that the said omission goes to the root of the prosecution case. However, considering the gravity of the allegations, the competent authority was permitted to issue fresh sanction order by an authority competent under the Rules and proceed afresh against the respondent from the stage of taking cognizance of the offence and in accordance with law. It appears from the tenor of the judgment that the case was at the stage of framing of charge and as such, considering the gravity of the allegations, the Supreme court has given direction to issue fresh sanction order. In the instant case, the trial is over without there being any consent by the District Magistrate as mandated by section 7 of the said Act of 1908.

29. We find that the said Act of 1908 is self contained Code and the objects behind enactment of the said Act of 1908 is to deal with anarchist crimes. In view of the same and considering the facts and circumstances of the present case, particularly, when the prosecution claims that the appellant accused has planted explosive in the radio and by keeping one receipt of mobile purchased in the name of P.W.9 Gopinath Tarkase, as he wanted to take revenge and thus responsible for the blast, considering the aims, statement of objects and reasons, the District Magistrate could have applied his mind in terms of the provisions of Section 7 of the said Act of 1908. We are therefore, of the considered opinion that for want of consent as required under Section 7 of the said Act of 1908, the trial of the appellant accused and his conviction under Section 3 of the said Act of 1908 stands vitiated.

30. The provisions of Section 3 of the said Act of 1908 prescribed the punishment for causing explosion likely to endanger life or property. The punishment is provided if the act is done unlawfully and maliciously. The trial court has also convicted the appellant-accused for the offence punishable under Section 338 of I.P.C. and sentenced him to suffer two years rigorous imprisonment and to pay fine. Section 338 of I.P.C. provides punishment for causing grievous hurt by act endangering life or personal safety of others by doing any act so rashly or negligently. We find no relevancy of framing of

charge and recording the conviction under section 3 of the said Act of 1908 which speaks about malicious act and section 338 of I.P.C. provides the punishment for rash and negligent act, lacking an intention.

31. We, however, find it appropriate to deal with other evidence assuming that the consent of the District Magistrate as required under Section 7 of the said Act of 1908 is directory and not mandatory. Even then we are of the considered opinion that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

32. The prosecution case entirely rests upon the circumstantial evidence and there is no direct evidence in this case. For the sake of convenience, we divide the prosecution evidence in five (V) parts, which is as follows:-

PART - I

It deals with evidence of P.W.1 Dr. Yogesh Kale, who has examined the injured persons, P.W.2 Vikram Raut, a villager arrived at the spot after hearing the noise of the blast, panch witness of the spot Panchnama, Exh.34, P.W.7 Bharat Vajinath Patil (Bus driver) and P.W.20 Oam Ramesh Nimbalkar, injured bus conductor.

PART - II

P.W.9 Gopinath Tarkase on the point of motive.

PART - III

P.W.17 Vikas Lamkane, the panch witness before whom the appellant accused allegedly made extra judicial confession.

PART - IV

P.W. 11 to 14 the evidence of mobile shop owner, his employee and radio shop owner and the panch witness of seizure panchanama of receipt book of mobile handset.

PART - V

P.W.16 Sominath Harale, the panch witness of memorandum panchanama, recovery panchanama of mobile handset and also radio kit and speaker of radio and house search panchanama of the house of appellant accused.

33. Now we proceed to consider;-

Part - I

“The evidence of P.W.1 Dr. Yogesh Kale, who has examined the injured persons, P.W.2 Vikram Raut, a villager arrived at the spot after hearing the noise of the blast, panch witness of the spot Panchnama, Exh.34, P.W.7 Bharat Vaijinath Patil (Bus driver) and P.W.20 Oam Ramesh Nimbalkar, injured bus

conductor.”

The prosecution has examined P.W.20 Oam Ramesh Nimbalkar, who was working as conductor of the S.T. Bus. According to him, the incident had taken place on 30.11.2012. He was on duty on 28.11.2012 on bus Ambajogai to Kurla and registration number of that S.T. Bus was 2055. The said bus left Ambajogai at 4.00 p.m. in the afternoon on 28.11.2012. The bus was proceeding via Barshi – Indapur road. The said bus had stopped at Kallamb. Initially there were 20 passengers boarded in the bus from Ambajogai. On the next day at about 5.30 to 6.00 p.m. (though it is mentioned as “p.m.” it must be “a.m.”) the said bus had reached at Kurla. P.W.20 Oam Nimbalkar (conductor) further deposed that he, alongwith the bus driver P.W.7 Bharat Patil, had taken rest for whole day. During that period the bus was parked in the bus depot. He was also on duty of return of the bus from Kurla to Ambajogai and journey was commenced at 6.30 a.m. in the morning. At that time, some four passengers were in the bus and number of passengers were increased upto 35 to 40 at Lonawala. The bus had reached to Ambajogai at 7.30 a.m. morning on 30.11.2012. According to P.W.20 Oam Nimbalkar, when the bus reached at Ambajogai all passengers left the bus. At that time P.W.20 Oam Nimbalkar, the bus conductor, had checked the bus. He found one box on rack about 3rd seat from back side of the bus. He has retained the box with him with a hope that somebody would claim it. However, no one has

claimed the said box. P.W.20 Oam Nimbalkar has further deposed that after refilling the petrol, the said bus went to Latur. He was also on duty for taking the bus to Latur. The said bus reached at Latur at 9.45 a.m. in the morning and returned to Ambajogai at 11.30 a.m. in the morning. P.W. 20 Oam Nimbalkar deposed that the box was on rack above his seat during that period. He deposited the cash with Ambajogai depot. Further he went to his village Kalegaon Ghat, Tq. Kaij, carrying the said unclaimed box. On reaching to the house, out of curiosity P.W.20 Oam Nimbalkar opened the said box. He had seen one receipt, one radio battery cells. He put the battery cells in the radio and turned on radio button. At that time, his wife, his son and mother were present there. As soon as he turned the radio button on, there was a big noise and everybody including himself sustained severe injuries. There is no evidence as to who has kept the said box in the rack of the bus and as to where it was kept. The evidence of P.W.20 Oam Nimbalkar is important for the prosecution only to the extent that he has noticed one receipt, one radio and battery cells in the box.

34. The prosecution has examined P.W.4 Parsuram Anandrao Kothawale, who is panch witness of the spot panchanama Exh.34. According to him, due to explosion in the house of the P.W.20 Oam Nimbalkar there were pieces of flesh and blood on wall and floor of that room. One Khaki colour shirt with blood stained was lying there. According to him, police have seized that Khaki colour shirt and the

pieces of plastic and papers lying there in his presence. He has further questioned when the pieces of paper joined together there was photo of mobile phone and there was one piece of paper which figure "21.8." and on other piece of paper it is with substance of figure "2012". The said pieces of papers are marked at Exh.35 and that only indicates the photo of mobile alongwith dated 21.8.2012 and nothing more than that. We have carefully gone through the contents of spot panchanama Exh.34. There is only reference of pieces of black plastic rexine and one Aparna A.C./D.C. portable sheet alongwith pieces of paper box. There is no reference about the said papers containing mobile photo, date etc. in terms of Exh.35. It further appears that in the list of seized articles, on the last page of spot panchanama at Sr. No.7 the paper pieces of Aparna radio are mentioned and below that Exh.35 contents found inserted. Flesh

35. P.W.5 Dinkar Dhambale, P.S.I. Beed has drawn spot panchnama Exh.34. According to him, he has seized the Khaki colour blood stained shirt having substance Apparna, three pieces of mobile bill having substance 21.8 and – Kendre - wadi and picture of mobile. We have carefully gone through those pieces Exh.35 and we are unable to draw any conclusion from the said three pieces of mobile bill.

36. In the backdrop of this, we proceed to discuss;-

Part - IV

“The evidence of P.W. 11 to 14, mobile shop owner, his employee, radio shop owner and the panch witness of seizure pancahnama of receipt book of mobile handset.”

The prosecution has examined P.W.11 Shamsundar Somani, the mobile shop owner, P.W.13 Parmeshwar Kolse, employee of P.W.11 Shamsundar Somani, P.W.12 Sharad Mantri, panch of seizure Panchnama of the receipt book of mobile handset and P.W.14 Shaikh Majed, the radio shop owner. We are little bit surprise as to how the police went to mobile shop of Shamsundar Somani. The prosecution has examined P.W.12 Sharad Mantri to prove the contents of panchanama Exh.60. It is merely seizure panchanama, which marked at Exh.60 and it is not memorandum panchnama. It has been recorded in the said panchanama, which is not admissible in evidence, that the present appellant accused has made statement before the police and the panchas that some three months back he had purchased mobile handset of Carbon company from Somani mobile shoppe, Ambajogai. It is further observed that thereafter the panchas, witnesses, police party and appellant accused went towards Somani Mobile Shoppe and the owner of the said Somani Mobile Shoppe P.W.11 Shamsundar Somani has identified the appellant accused as the same person, who had purchased the said mobile of Carbon Company K-52 from his shop

on 21.8.2012 i.e. four months prior to the said so called identification. Accordingly, the Panchnama was drawn for seizure of receipt book wherein on receipt No.2690 was there mentioning that the said mobile has been sold to one Tarkase Gopinath for price of Rs.1850/-.

37. We have carefully gone through the evidence of P.W.11 Shamsundar Somani and his employee P.W.13 Parmeshwar Kolse. According to them, bill No. 2690 bears name of customer as Tarkase Gopinath. The said bill also bearing IMEI number and battery number. The said bill 2690 is marked at Exh.55. P.W.11 Shamsundar Somani has further identified the appellant accused sitting in the court as the person, who had been to his shop with the police and that he had sold the Carbon company mobile handset to the appellant accused. P.W.11 Shamsundar Somani was also shown the pieces of bill Exh.35 even though those pieces Exh.35 hardly indicate anything. P.W.11 Shamsundar Somani has deposed that said Exh.35 is the bill of his shop and without any further reference also stated that pieces of bill Exh.35 is of bill No. 2690. P.W.11 Shamsundar Somani has admitted in his cross examination that there used to be 50 persons visiting to his shop daily for purchase of mobile handsets and there is no facility of CCTV footage in his shop. He might have sold 200 to 300 mobiles in the month of August, 2012. He has further admitted that so far as the bill which is seized and marked Exh.55 is concerned, there is no name and stamp of his shop on the said bill. We also compare the bill book

Exh.56 with the pieces of bill Exh.35 found on the spot. We do not find any similarity in that. Even assuming that the office copy of the bill book not necessarily to be printed copy, however, even then we are unable to subscribe the view expressed by the trial court believing this vague evidence. There is no identification parade conducted by the investigating officer during the course of investigation. P.W.11 Shamsundar Somani has identified the appellant accused in the court only for the reason that the appellant accused was taken to his shop by the police on 3.12.2012. Even in the month of December, 2012 (four months after the purchase), P.W.11 Shamsundar Somani and his employee P.W.13 Parmeshwar Kolse could identify the appellant accused as the same person, who had purchased the mobile handset from their mobile shop on 21.8.2012. Furthermore, we are also shocked to observe that the panch of seizure panchanama of bill book, P.W.12 Sharad Mantri is a relative of P.W.11 Shamsundar Somani. He has admitted that P.W.11 Shamsundar Somani is his brother-in-law. It is also admitted by P.W. 11 Shamsundar Somani that the second panch Shaikh Juned was also in his employment. So far as the statement of appellant accused recorded in panchnama Exh.60, which is in the form of confession, is hit by Sections 25 and 26 of the Evidence Act and the same is not admissible. The Investigating officer has not drawn memorandum panchanama to that effect and simplicitor drawn seizure panchanama Exh.60.

38. We have carefully seen the bill book Exh.56. We noticed some of the receipts were blank and even on some of the receipts stickers of IMEI numbers are not affixed. Exh.35 is small pieces of torn portions of paper and portions 1 and 2 are images of mobile handset. The torn piece No.3 shows the name as Ambajogai. The torn piece No.4 shows the date 21.8. and below it Kendrewadi and torn piece No.5 shows 50-L and below that P, below that R. We are unable to understand as to on what basis P.W.11 Shamsundar Somani has stated that Exh.35 are torn pieces of the original bill No. 2690 issued to the customer and office copy of the same is at Exh.55. It is also difficult to believe that P.W.11 Shamsundar Somani and his employee Exh.13 Parmeshwar Kolse have identified the appellant accused as the person, who had purchased the said mobile in the name of P.W.9 Gopinath Tarkase. We have already observed that there is no identification parade conducted during the course of investigation and the identification of the accused for the first time in the court is a very weak type of evidence and it was of no consequence. Thus, it is useful to refer the observations of the Supreme Court in the cases of **Arjun Singh vs. State of Himachal Pradesh Aupra)** and **Ramashetya Amrya Bhosale and Kunil vs. State of Maharashtra, (supra)** wherein the Supreme court has made the observations that the identification of person, not well known to witness, for first time in court as weak type of evidence and it was for the investigating agency to get identity of suspects fixed in course of investigation by holding test identification parade.

39. We have also carefully gone through the evidence of P.W.14 Shaikh Majed, the radio shop owner. P.W.14 Shaikh Majed has not supported the prosecution case. Learned A.P.P. in the lower court subjected him to cross examination at length. During the cross examination, the witness was referred to article No.7 i.e pieces of cartoon box and P.W.14 Shaikh Majed has accepted that the said Article box is of Aparna radio. He has admitted that he is selling Aparna Radio in the box shown to him. However, he has denied that one month before the police came to him and the appellant accused No.1 had purchased the radio of Aparna company for Rs.350 from him. P.W.14 thereafter cross examined by learned A.P.P. before the trial court and he has deposed that,

“It is true that at that time accused admitted that he has put one end of gelatine wire to the spring of battery cell and another at on/off point of radio. It is true that at that time accused admitted that he has kept that radio in Ambajogai - Mumbai bus”.

It is surprising that the trial court has considered this inadmissible evidence. Learned Judge of the trial court has reproduced these two admissions given by this witness in the judgment and relied upon the same while convicting the accused. The learned Judge of the trial court has not considered the provisions of Section 26 of the Evidence Act. It is part of evidence that the

appellant accused came to be arrested on 2.12.2012 and he was in police custody when he allegedly made the said confession or extra judicial confession. It is hit by section 26 of Evidence Act and cannot be admitted in the evidence. In the case of **Commissioner of Police, Delhi vs. Narender Singh, reported in AIR 2006 SC 1800**, in para 30 and 31 the Supreme Court has made the following observations:-

“30. Section 26 also speaks about confession by an accused while in custody of police. Sections 25 and 26 of the Evidence Act although seek to achieve the same purpose but they operate in somewhat two different fields. Section 25 raises an embargo as regard proof of confession before a police officer. The same need not be in police custody; whereas Section 26 raises a bar as regard admissibility of such confession, if made by an accused in the custody of a police officer although such a confession might have been made before a person who is not a police officer.

31. The policy underlying behind Sections 25 and 26 is to make it a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of a Magistrate, shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible, except so far as is provided by Section 27 of the Act.”

40. We are of the considered opinion that the prosecution has failed to prove beyond reasonable doubt the circumstance that the

appellant accused had purchased the mobile handset and radio from the shops of P.W.11 Shamsundar Somani P.W.14 Shaikh Majed, respectively. We find it difficult to believe that the appellant accused allegedly purchased the said mobile handset in the name of P.W.9 Gopinath Tarkase. We discard the evidence of P.W.11 Shamsundar Somani on the point of identification for the first time of the appellant accused before the court, as a person allegedly purchased the said mobile handset from his shop in the name of P.W.9 Gopinath Tarkase. P.W.14 Shaikh Majed though has deposed about extra judicial confession made by the appellant accused before him, however, the same is hit by Section 26 of the Evidence Act and thus inadmissible in evidence. Even assuming that such a statement has been made by the appellant accused, we find it difficult to believe the same, as there is no further evidence collected by the investigating officer to show that the appellant accused is technical expert to convert the radio by connecting certain wiring to such an extent that after insertion of battery cells there would be an explosion of the radio.

41. We now consider the evidence as per;-

Part - V

“evidence of P.W.16 Sominath Harale, the panch witness of memorandum panchanama, recovery panchanama of mobile handset and also radio kit and speaker of radio and house search panchanama of the house of appellant

accused.”

The prosecution has examined P.W.16 Sominath Harale, the panch witness of memorandum panchanama and recovery panchanama of mobile handset Exh.78, memorandum panchanama Exh.79 and recovery panchanama of radio kit and speaker of the radio at Exh.80 and house search panchanama Exh.81. We need to mention here that though the appellant accused was arrested on 2.12.2012 and though allegedly he was taken in the mobile shop and radio shop of P.W.11 Shamsundar Somani and P.W.14 Shaikh Majed, respectively, however, the investigating officer has shown the recovery of mobile handset and radio kit at the instance of the accused from his house by drawing two memorandum panchanama and two recovery panchanama Exh.78 to 80 respectively. We need to mention that P.W.16 Sominath Harale, who is panch witness of the said panchanama is the Talathi of village Kalegaon Ghat and his counterpart i.e. second panch is Circle Officer of the said Circle. Apart from this, there is one another panchanama drawn by said panch witness in the house search of accused Exh.81. All these panchanamas were drawn on 5.12.2012 one after another and last panchanama was Exh.81 is the house search panchanama. The memorandum panchanama alongwith recovery panchanama Exh.78 speaks about recovery of mobile handset of Carbon Company K-52 at the instance of accused. It is difficult to understand as to what prevented the investigating officer to search the house of the

accused from the date of his arrest till the aforesaid panchanamas were drawn on 5.12.2012. Even though panchanama Exh.81 was drawn for searching the house of appellant-accused, earlier to that memorandums and recovery panchnama Exh.78, 79 and 80 respectively, were drawn. Thus, the only inference could be drawn that the memorandum and recovery panchnama Exh.78 to 80 have been drawn to create evidence against the appellant accused. We do not think that the appellant accused has made the said disclosure statement voluntarily while in the police custody.

42. We now consider;

Part - II

“The evidence of P.W.9 Gopinath Tarkase on the point of motive.”

The prosecution has examined P.W.9 Gopinath Tarkase. The evidence of this witness is on the point of motive. He was questioned by the investigating agency as to whether he has purchased the Carbon company mobile handset in the month of August, 2011. However, he told them that he had purchased the carbon company mobile 19 months back and it is now kept with his cousin brother's son at Ambajogai for repair. He was also questioned as to how receipt of mobile in his name was in the parcel of radio and it got blast. We repeat here that on the basis of those

5/6 torn pieces of paper, nothing can be inferred that those pieces of paper are of purchase bill of mobile handset of Carbon Company. P.W.9 Gopinath Tarkase told the investigating agency that the appellant accused can do it. P.W.9 Gopinath Tarkase has quoted the incident dated 29.2.2011. According to him, the appellant accused beaten him in the night and set his house on fire. He has filed a case under the provisions of Atrocities Act and the appellant accused remained in jail for some days in connection with the said crime. After release from jail, the accused gave him threats that he will kill him and he will break his hands and legs. On the basis of such scanty evidence, the prosecution has shown the same as motive on the part of appellant accused to use the explosive for the blast of the radio to take revenge against P.W.9 Gopinath Tarkase.

43. We have already discussed the evidence of P.W.20 Oam Nimbalkar, the bus conductor. We have also referred the journey of the Bus from Ambejogai to Kurla. The said Bus was kept in the Bus Depot at Kurla for the night. Thereafter, the said Bus returned to Ambajogai by crossing a long distance and even thereafter gone to Latur and came back to Ambajogai. There is nothing in the evidence to indicate that as to who has kept the said parcel/bag containing the radio in the rack of the bus. There is no evidence to show that the appellant accused is having expertise to prepare such circuits attaching the explosives gelatine in such a manner in the radio that as soon as the battery cells are inserted in the radio and if radio is

thereafter put on by switching the button, there would be a blast. The prosecution has made one another futile attempt to link the appellant accused with the circumstances of keeping the said bag /box containing the radio in the rack of the said S.T. bus.

44. We now consider the evidence as per;-

Part - III

“The evidence of P.W.17 Vikas Lamkane, the panch witness before whom the appellant accused allegedly made extra judicial confession.”

The prosecution has examined P.W.17 Vikas Lamkane, the panch witness. According to P.W.17 Vikas Lamkane, at about 5.00 p.m. he was called in the police station. One S.T. bus bearing registration No. 2055 was already kept stationary in the police station. The appellant accused who has disclosed his identity to him was also there at that time. P.W.17 Vikas Lamkane has further deposed that the appellant accused took panch witness and the police to the bus. The appellant - accused shown them the seat where he sat and also disclosed to them where he has kept one Aparna company radio, carbon company mobile bill issued in the name of Gopinath Tarkase in the box and that box was put in a nylon bag. The investigating officer drawn the panchanama Exh.85 to that effect. It is called as निशानदेही पंचनामा (Nishandehi panchanama).

We are unable to understand this terminology. We are also surprised to see that such inadmissible evidence of the disclosure allegedly made by the appellant accused in the panchanama and the panch witnesses came to be recorded by the trial court. It is simpliciter panchanama titled as निशानदेही पंचनामा (Nishandehi panchanama) as Exh.85 in which a detail disclosure statement allegedly made by the appellant accused is mentioned and P.W.17 Vikas Lamkane has accordingly deposed before the Court. It is not necessary to repeat here that despite the bar of Sections 25 and 26 of the Evidence Act the learned Judge of the trial court has not only recorded the evidence of P.W.17, which is inadmissible, but also relied upon the said evidence.

45. We have already discussed that the prosecution case entirely rests upon the circumstantial evidence. It is well settled that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra (supra)** and even in catena of cases, while appreciating the circumstantial evidence, held thus:-

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

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’

established. There is not only a grammatical but legal distinction between 'may be proved' and 'must be or should be proved' as was held by this court in Shivaji Sahebrao Bobade vs. State of Maharashtra reported in 1973 Cri.L.J. 1783 where the following observations were made.

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 conjecturers from sure conclusions.

(ii) the facts so established should be consistent only with the hypothesis of the guilt of accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) the circumstances should be of a conclusive nature and tendency.

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence 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."

46. In the instant case, we do not think that the circumstances relied upon by the prosecution are of conclusive nature and tendency. There is no complete chain of circumstantial evidence and we are unable to infer, in all human probability, that the said act must

have been done by the appellant. The appellant accused is certainly entitled for the benefit of doubt. So far as the conviction of the appellant under Section 338 of I.P.C. is concerned we find absolutely no evidence against the appellant accused about it. Similarly on the basis of scanty evidence of P.W.9 Gopinath Tarkase the conviction of the appellant accused recorded under Section 3(2) (ii) of the Atrocities Act is also liable to be quashed and set aside. We thus proceed to pass the following order:-

O R D E R

- I. Criminal appeal No. 266 of 2014 is hereby allowed.
- II. The impugned judgment and order dated 30.04.2014 passed by the Additional Sessions Judge-2, Ambajogai, in Special Case (under Atrocity Act) No. 3 of 2013, thereby convicting the appellant accused No.1 Aba @ Munjaba s/o Rajabhau Giri for the offence punishable under section 338 of I.P.C., and sentencing him to suffer R.I. for two years and to pay fine of Rs.1000/- i/d to suffer R.I. for two months, further convicting him for the offence punishable under Section 3 of the Explosive Substance Act and sentencing him to suffer imprisonment for life and to

pay fine of Rs.10,000/- i/d to suffer S.I. for two years and also convicting him for the offence punishable under Section 3 (2) (II) of the Atrocities Act and sentencing him to suffer R.I. for seven years and to pay fine of Rs.10,000/- i/d to suffer S.I. for two years, is hereby quashed and set aside.

- III. The appellant accused Aba @ Munjaba s/o Rajabhau Giri is hereby acquitted of all the charges. The appellant accused shall be set at free forthwith if not required in connection with any other case.
- IV. The fine amount, if deposited, shall be refunded to him.
- V. The appellant-accused Aba @ Munjaba s/o Rajabhau Giri shall execute P.B. of Rs.15,000/- with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.
- VI. Criminal Appeal No. 266 of 2014 is accordingly disposed off.

(S. G. DIGE, J.)

(V. K. JADHAV, J.)