



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

I N D E X

In

CRIMINAL APPEAL NO.254 OF 2015

WITH

CRIMINAL APPEAL NO.255 OF 2015

WITH

CRIMINAL APPEAL NO.393 OF 2015

WITH

CRIMINAL APPEAL NO.121 OF 2016

WITH

CRIMINAL APPEL NO.180 OF 2016

WITH

CRIMINAL APPEAL NO.181 OF 2016

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(1) CRIMINAL APPEAL NO.254 OF 2015

Bhupesh @ Rinku s/o Vitthalrao Tichkule,
Aged 30 years, Resident of 103,
Shyam Palace, Congress Nagar, Nagpur,
(Original accused No.5)
Presently in Jail.

... Appellant

Versus

The State of Maharashtra,
through Police Station Officer,
Sakkardara, Nagpur,
District Nagpur.

... Respondent

With

(2) CRIMINAL APPEAL NO.255 OF 2015

Laxmikant @ Lacchu s/o Ravindra Faye,
Aged about 31 years,
R/o Bhutiya Darwaja, Mahal, Nagpur,
(Presently in Central Jail, Nagpur).

... Appellant

Versus

The State of Maharashtra,
Through P.S.O., Sakkardara,
Dist. Nagpur.

... Respondent

With

(3) CRIMINAL APPEAL NO.393 OF 2015

Tushar s/o Sahebrao Dalal,
Age 33 years, Occupation – x blank x,
R/o Dattatraya Nagar, Nagpur,
(At present in Central Jail, Nagpur).

... Appellant

Versus

**State of Maharashtra,
Through PSO, Sakkardara, Nagpur. ... Respondent**

**With
(4) CRIMINAL APPEAL NO.121 OF 2016**

**Sameer s/o Suresh Katkar,
Aged about 32 years,
Occ. Labour,
R/o Qtr. No.157/116, New Somwari Peth,
Raghuji Nagar, Nagpur,
(In Jail). ... Appellant**

Versus

**The State of Maharashtra,
Through P.S.O., Sakkardara,
Sakkardara, Dist. Nagpur. ... Respondent**

**With
(5) CRIMINAL APPEAL NO.180 OF 2016**

**Kunal Motiram Maske,
R/o Gangabai Ghat, Corporation Colony,
Nagpur,
At present, Central Jail, Nagpur. ... Appellant**

Versus

**State of Maharashtra,
(Through P.S.O., PS Sakkardara, Nagpur). ... Respondent**

**With
(6) CRIMINAL APPEAL NO.181 OF 2016**

**Amol s/o Mahadeo Mandale,
Aged about 30 years,
Resident of Plot No.50,**

Bhande Plot, Nagpur,
(In Jail).

... Appellant

Versus

**The State of Maharashtra,
through Police Station Officer,
Police Station Sakkardara,
Nagpur.**

... Respondent

Criminal Appeal No.254 of 2015 :

Shri S.P. Dharmadhikari, Senior Advocate, assisted by
Shri U.P. Dable, Advocate for Appellant.

Shri M.J. Khan and Shri J.Y. Ghurde, Additional Public Prosecutors
for Respondent.

Criminal Appeal No.255 of 2015 :

Shri R.M. Daga, Advocate for Appellant.

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Criminal Appeal No.393 of 2015 :

Shri Varun K. Chopra, Advocate for Appellant.

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Criminal Appeal No.121 of 2016 :

Shri R.K. Tiwari, Advocate for Appellant.

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Criminal Appeal No.180 of 2016 :

Shri R.R. Rajkarne, Advocate for Appellant.

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Criminal Appeal No.181 of 2016 :

Shri A.S. Manohar, Advocate for Appellant.

Shri M.J. Khan and Shri J.Y. Ghurde, Additional Public Prosecutors for Respondent.

CORAM : R.K. DESHPANDE and M.G. GIRATKAR, JJ.

DATE OF RESERVING THE JUDGMENT : 17th APRIL, 2018

DATE OF PRONOUNCING THE JUDGMENT : 5th JUNE, 2018

JUDGMENT (PER R.K. DESHPANDE, J.) :

1. All the accused persons are convicted for the offences punishable under Section 302 read with Sections 120-B and 149 of the Indian Penal Code (“IPC”) apart from the offences under Sections 147, 148, 506-B and 149 of IPC in relation to the murder of one Jitendra Marotrao Gawande on 10-1-2013 between 5.30 p.m. and 6.30 p.m. in the Seven Hills Bar and Restaurant at Sakkardara, Nagpur. All of them are sentenced to suffer rigorous imprisonment

for life for the offences punishable under Sections 302, 120-B and 149 of IPC with fine of Rs.2,000/-, to suffer rigorous imprisonment for a period of one year with fine of Rs.5,000/- for the offence punishable under Section 147 of IPC, and to suffer rigorous imprisonment for a period of two years for the offences punishable under Sections 506-B and 149 of IPC with fine of Rs.5,000/-. All the sentences are directed to run concurrently.

Facts of the case :

2. The incident of murder of Jitendra Marotrao Gawande at 5.30 p.m. on 10-1-2013 in the Seven Hills Bar and Restaurant (“the said Bar”) at Sakkardara, Nagpur, is not in dispute. The story deposed by PW 1 Raghuvver Ramesh Vallabhdas, the Manager of the said Bar, is that on the date of the incident at about 5 to 5.30 p.m., four persons entered the said Bar and one of them came to his counter and made a demand for a peg (liquor), which he gave it to him in the glass. The other three persons were standing behind him and all of them were looking outside the door again and again, giving an impression of waiting for someone's arrival. After some time, a

big white car came, from which one person (victim) alighted and entered the said Bar. There were altercation between the four persons and the victim who came in the car, which resulted into quarrel. Out of four persons, two persons started assaulting the victim by means of knife and rest two went outside. The victim, who was assaulted, fell down, the assault continued and thereafter two assailants left the said Bar and the victim was lying in a pool of blood. PW 2 Raju and PW 3 Sitaram, the waiters in the said Bar, were also the eye-witnesses to an incident. PW 1 Raghuvver informed the incident on phone to the police.

3. PW 16 Rupali Bawankar, working as PSI at Sakkardara Police Station, states that she received the information from the Control Room that in the said Bar one person is assaulted by a knife at about 6 p.m. She, therefore, proceeded along with the Head Constable Sawarkar and other staff to the said Bar. Inside the said Bar, she found the victim lying in a pool of blood and he was dead. She arranged two panchas and prepared the inquest panchanama at Exhibit 162. She arranged to collect the blood samples with the help of cotton swab and also seized the glass from the counter of the said

Bar, used for consuming peg by one of the assailants, as was told by PW 1, the Manager of the said Bar. PW 1 showed her the cameras installed in the said Bar, the description of which she mentioned in the spot panchanama at Exhibit 163. PW 1 also showed her LCD TV where the live video of the camera was being displayed. The Finger Print Expert PW 8 Sunil Lonarkar was called, who, after encircling finger prints on the glass, asked the photographer to snap it. The body of the deceased was sent for post mortem examination to the Government Medical Hospital along with the requisition at Exhibit 164.

4. PW 16 called the owner of the said Bar, PW 5 Kailash Gulhane, and after getting the information, the Expert PW 14 Shubham Narayan Padgilwar, who installed the CCTV system in the said Bar, was called. The Expert PW 14 told that he installed the cameras in the said Bar and the same were working properly. According to PW 14, the DVR contains the recording of camera and he showed the recorded footages of the incident from DVR on LCD TV. The camera No.1 contained the footage of two persons assaulting one person by a sharp weapon and the other persons were instigating

the assailants. The footage recorded in the camera No.7 showed that the assailants came inside the said Bar and thereafter the deceased came there. It also indicated the assailants running away from the said Bar.

5. The Expert PW 14 Shubham told that the copy of the said footage can be done and, therefore, PW 16 PSI Rupali arranged the blank pen drive and two DVDs (CDs). PW 14 took the copy of the said footages from DVR in the pen drive and copied in DVD with the help of the laptop. On verification of the pen drive and the DVD in the laptop, it was found that the copies were properly done. The pen drive and the two DVDs were seized and sealed. PW 14 took out the Hard Disk from the DVR, which was seized and sealed. The DVR was also seized and sealed along with the Charging Wire, the Mouse and the Remote. The seizure panchanama of these articles was prepared at Exhibit 99. PW 16 obtained the bills of pen drive and DVD, which were placed on record at Exhibit 165. She prepared the rough sketch of the spot at Exhibits 166 and 167, including the location of the cameras.

6. PW 16 PSI Rupali further states that the complaint dated 10-1-2013 at Exhibit 85 by PW 1 Raghuveer, the Manager, was recorded. Printed FIR at Exhibit 86 was prepared initially against unknown persons, as PW 1 did not state the names of assailants. On the next date, PW 1 gave the names of accused Nos.1 to 5 as assailants. The statements of the Bar owner and the Expert PW 14 Shubham were also recorded and the Scorpio Car in which the deceased came was also seized at Exhibit 107. She identified the articles seized, viz. Article-1 DVR, Article-4 Hard Disk, Article-7 Adapter, Article-10 Mouse, and Article-13 Remote. She states that the labelled Articles 2, 5, 8, 11, 14 and 15 bear her signature whereby the said articles were seized. The CD (DVD) was marked as 'X' for identification and it was played in the laptop. The footages of the camera Nos.1, 2 and 7 were seen by the witness. She states that the footages contained in the CD (DVD) are the same, which were copied from DVR to pen drive and from the pen drive to DVD.

7. In the wee hours of 11-1-2013, the accused Nos.1 and 2 were arrested and investigation was handed over to

PW 18 API Vitthal Salunke. PW 18 API Vitthal Salunke, attached to Sakkardara Police Station, carried further investigation in the matter. He recorded the supplementary statement of the complainant and also the statements of PW 6 Vinay Dubey on 11-1-2013. He arrested the accused No.3 Laxmikant, accused No.4 Amol Mandale, and accused No.5 Bhupesh alias Rinku Tichkule vide arrest panchanama at Exhibits 176 to 178. He seized the clothes of the accused Nos.3 to 5 vide seizure memo at Exhibit 175.

8. On 12-1-2013, PW 18 recorded the memorandum panchanama of the accused No.1 Tushar at Exhibit 138 under Section 27 of the Evidence Act upon expressing an intention to make a voluntary statement and to show the place where he concealed the clothes and the knife. The accused No.1 took them to one heap of soil and after removing one stone from the heap, took out the clothes and the knife. The knife Article 1A was of the size of 14.5 inches, including the handle. It was stained with blood. The clothes were consisting of black and white shirt and blood-stained blue coloured jean. All these articles were sealed under the seizure panchanama at Exhibit 139. Article 16 is the jean and Article 17 is the shirt.

9. On 13-1-2013, the accused No.2 Kunal Maske also intended to make a voluntary statement. The memorandum panchanama at Exhibit 146 under Section 27 of the Evidence Act was prepared. PW 18 API Vitthal took the accused No.2 along with the panchas and the police staff in a Government vehicle. The accused No.2 took them to one house in the slum area and knocked the door. The accused No.2 went inside the house along with the staff. He took out one knife from the loaf (*sajja*) behind the speaker. The knife Article 2A was having blood stains. It was wrapped, seized and sealed under the seizure panchanama at Exhibit 146.

10. On 14-1-2013, the accused No.5 Bhupesh @ Rinku intended to make a voluntary statement and it was recorded under the memorandum panchama at Exhibit 181. Along with him and the police staff, PW 18 API Vitthal went in front of Shyam Palace building, Congress Nagar Square. The accused No.5 Bhupesh showed them a car besides the said building. It was 'Ritz' car, having registration No.MH-31 EA 6696, which was seized under the seizure panchanama at Exhibit 182. It was in the name of Dr. Vitthal

Tichkule, the father of the accused No.5.

11. The accused No.6 Sameer Katkar was arrested on 17-1-2013 under arrest panchanama at Exhibit 186. On 18-1-2013, PW 18 API Vitthal got full size photographs of the accused persons, snapped for the purpose of investigation, by PW 20 Nitin Watkar of Diamond Photo Studio while the accused persons were in police custody. The photographs were handed over and the bill of payment prepared on 18-1-2013 is marked as Exhibit 204. PW 18 states that on 19-1-2013, he sent the clothes of the accused and the deceased and the blood samples of the accused and the deceased under the covering letter at Exhibit 189 to the Regional Forensic Science Laboratory, which were kept in the *Malkhana*.

12. The accused No.6 Sameer Katkar intended to make a voluntary disclosure in respect of the bike used in the crime. It was recorded on 19-1-2013 in the memorandum panchanama at Exhibit 148. He took PW 18 API Vitthal along with the police staff in the Government vehicle to show the way and eventually reached the

place near Shrikrishna. Outside one house, the accused No.6 showed one covered bike 'Hero Honda Splendor' bearing registration No.MH-31 AW 7400. After a minute observation, the blood stains were found on the pillion seat cover. It was collected with the help of cotton, which was sealed in a plastic packet under the seizure panchanama dated 19-1-2013 at Exhibit 149. The said bike standing in the name of Suresh Pandurang Katkar was seized under the seizure panchanama at Exhibit 188.

13. PW 18 API Vitthal prepared the request letter on 2-2-2013 and sent it to the Forensic Science Laboratory at Kalina, Mumbai for examination of Hard Disk and comparison of photographs of the accused with CCTV footage under the letter at Exhibit 195. All the articles were bearing seal as 'VSS'. He also sent the weapons and samples from *Malkhana* to the Chemical Analyzer for analysis under the covering letter dated 4-2-2013 at Exhibit 207. The witness identified the photographs of the accused persons at Exhibits 197 to 202, snapped by Nitin, the Photographer. He also identified the photograph of the deceased Jitendra at Exhibit 196. He identified the clothes of the deceased at Exhibit 152A. He also

identified fifteen photographs snapped from the spot of the incident and sealed, marked as Articles A to O, and CD as Article-P. On 4-2-2013, the Test Identification Parades of the accused persons were conducted by the Executive Magistrate at Exhibits 89 and 94 and accordingly the report was prepared. The thumb impressions of the accused were taken at the time of arrest and were sent to the Finger Print Expert for comparison. The reports dated 22-2-2013 and 14-3-2013 at Exhibits 129 and 128 respectively were received. PW 19 Ms Puja Madhukar Nevage examined the CCTV footages and accordingly issued the report dated 13-1-2014 at Exhibit 57 stating that the persons in the selected CCTV footages are similar with the photographs of the accused Nos.1 to 6.

Controversy in brief :

14. The incident of murder of Jitendra on 10-1-2013 at 5.30 p.m. at the said Bar is not in dispute. But it is the identity of the assailants or involvement of accused in this case, is in dispute. The deceased was stabbed with multiple injuries by the two knives causing his death by the assailants on the spot, is not in dispute. The

entire incident was recorded in CCTV cameras installed and functioning in the Bar. PW 4 Pramod, the real brother of the deceased, has identified each of the accused as the participant in the conspiracy and a member of an unlawful assembly, which blotted out the deceased Jitu, when he was confronted with CCTV footages during his examination-in-chief. The core issue is, therefore, of the admissibility of electronic evidence of footages in CCTV cameras, to identify the assailants as the accused persons. Since PW 1 Raghuveer, the Manager, and PW 2 Raju and PW 3 Sitaram, the waiters in the said Bar and the eye-witnesses to an incident refused to identify the accused as the assailants, they were declared as hostile and cross-examined.

15. The identification of the accused persons was a fact in issue and in terms of Section 5 read with Section 9 of the Evidence Act, it was required to be established beyond reasonable doubt. The prosecution has relied upon the direct evidence of PW 6 Vinay, the chance witness, sitting on his motorcycle at some distance from the said Bar, who saw the accused persons coming out of the said Bar and running away on the motorcycle and in the car. PW 4 Pramod, the

brother of the deceased, has deposed about the motive and also identified the assailants in CCTV footages as the accused persons. The Sessions Court found the evidence of both these witnesses trustworthy to identify the accused persons as the assailants. The Sessions Court also relied upon the other corroborative evidence and the circumstances to hold that the identity of the accused as the assailants of the deceased Jitendra is established beyond reasonable doubt.

16. We now, therefore, proceed to consider the entire evidence on record, the challenges to it and record our findings under different headings.

Spot of incident, its surroundings and installation in the Bar :

17. PW 1 Raghuvver, the Manager in the Seven Hills Bar and Restaurant, has described the spot of incident, surroundings and installation in the Bar. The incident occurred inside the Bar on the ground floor. He states that the Bar is located on the road, which is divided. Adjacent to the road, there is a compound wall of the Bar,

affixed with the iron gate. There is a glass door adjacent to the shutter of the Bar. Adjacent to the glass door, there is a partition of glass. After entry in the Bar from the glass door, there is a hall, thereafter a kitchen, thereafter a lawn and immediately towards left side after entry, there is a counter and adjacent to it, starts kitchen, and towards right side, there is a sitting arrangement for the customers. In the hall, there are eleven tables for the customers.

18. PW 16 Rupali is the Investigating Officer, who reached the spot of incident at about 6 p.m. on 10-1-2013. She prepared the inquest and spot panchanamas at Exhibits 162 and 163 respectively, signed by the panch witnesses, one of which is PW 3 Sitaram Wankhede. PW 3 identifies the inquest panchanama as Exhibit 92 and the spot panchanama as Exhibit 93 (Inquest Panchanama bears Exhibits 162 and 92, whereas Spot Panchanama bears Exhibits 163 and 93). The documents at Exhibits 162 and 163 describe the spot of incident. The glass door of the Bar is fixed facing the northern side. Immediately after entering the Bar, on the eastern side of the wall, a showcase containing the liquor bottles is mounted, in front of which, there is a north-south counter table of

8 feet in length and 4 feet in breadth. In the open space immediately after the counter, the dead body of the deceased was found lying in a pool of blood, having its head on the northern side and legs on the southern side.

19. PW 1 further states that for security purpose, CCTV cameras were installed in the Bar on 21-12-2012, consisting a system of eight cameras and one Digital Video Recorder (DVR). The first camera is installed towards left side of the extreme corner of the hall, over the wall, situated behind the counter. This camera used to record the visual activities on the counter and entries in the hall. There is space of 15 to 20 square feet between the counter and the tables of the customers. The distance between the counter and the tables of the customers is 5 to 6 feet. The second camera is installed on the beam, attached opposite to the wall where the first camera is installed. This camera covers half portion of the hall. The third camera is installed in the hall and used to cover the passage towards lawn. The fourth camera is installed in the kitchen. The fifth camera is installed in the godown on the first floor.

20. About installation and functioning of CCTV cameras in the Bar, PW 1 states that the said system was purchased by him from ITG Solution Company on 21-12-2012 for an amount of Rs.39,100/- and produced the receipt at Exhibit 84. DVR of the said system was installed at the counter and it contains a chip of 500 GB. DVR also contains Hard Disk. The footages of all cameras are being stored in DVR. The DVR has a capacity to store the footage of 10 to 15 days. Thereafter recent footage is stored and footage of first day is deleted automatically. He states that “Sometimes I used to see the recorded footages and the system used to remain on 24 hours.” PW 16 Rupali states that after preparing spot panchanama, the Manager PW 1 Raghuvver of the Bar showed her the cameras installed in the Bar, the description of which she mentioned in the panchanama. Manager showed us LCD TV wherein the live video of cameras were being displayed. She states in para 3 that “I have prepared rough sketch of the spot including location of cameras. The sketch of spot of the incident is the same. These bear my signatures. They are marked as Exhibits 166 and 167.”

21. PW 16 further states that after receiving the information from the Bar owner, the Expert, who installed the CCTV system, was called. The name of the said Expert is Shubham Narayan Padgilwar (PW 14). PW 17 states that “he told me that he used to visit Seven Hills Bar and to see the proper working of cameras. He saw the cameras and told us that they are working properly. He told that recording of cameras is being recorded in DVR.” PW 14 Shubham was working in ITG Solution Company, which is engaged in installation of CCTV camera and thumb impression machine, apart from dealing with development of software and security system. He states that “In December 2012, we installed CCTV camera in Seven Hills Bar. We had installed eight cameras there. Four cameras were of IR Dom and four cameras were of IR Bullet. In the said system, there was one DVR, containing Hard Disk of 500 GB for the storage of video recording. All the cameras were connected with DVR by cable. In front of counter, one LCD TV was there. The DVR was connected to the said LCD TV for viewing video recorded. One camera was installed at the entrance gate. One camera was installed on wall behind the counter. Two cameras were installed in the hall. One camera was installed in the kitchen and one in the godown at

the first floor. Two cameras were installed behind the door in open space.”

22. PW 14 Shubham further states that the Hard Disk was of the capacity of storage of video recording of 15 days. After the recording of 15 days, video recording of camera of first day, is automatically deleted from the storage and video recording of camera of 16th day is saved. He states that “I checked the picturization of all the cameras on LCD TV. All cameras were working properly. I set the time and date in the system. I started recording by all 8 cameras. I also checked and found that video recording is properly being stored. After installation, I apprised the Bar Manager the procedure of operating system. We used to visit once in a week to verify whether the system is working properly. I also visited Seven Hills Bar for verification and found that the system was working properly. I also enquired on phone from Seven Hills Bar and found that the system is working properly.”

Our findings on the spot of incident, its surroundings and installation in the Seven Hills Bar :

23. In our view, the spot of incident, its surroundings,

installation of CCTV cameras and their functioning at the time of incident on 10-1-2013 at 5.30 p.m. in the Seven Hills Bar are completely established on the basis of the oral evidence of witnesses PW 1, PW 3, PW 14, PW 15, PW 16 and the documents at Exhibits 160, 162, 163, 84, 166 and 167. There is no challenge to it in the cross-examination. The evidence is corroborative and we do not finding any reason to discard it. We find such a view taken by the Sessions Court, relying upon the oral evidence of PW 1 Raghuveer, PW 2 Raju, PW 3 Sitaram, PW 14 Shubham, PW 15 Sachin, PW 16 Rupali and Exhibit 84 receipt, to be legal, correct and proper.

Arrest of the accused persons :

24. The case of the prosecution is that two knives and two vehicles were used in the crime. Accused No.1- Tushar came out of the Beer Bar with a blood-stained knife in his hand and along with accused No.5- Bhupesh and accused No.4- Amol, sat in a car, which was driven by accused No.3- Lashu and fled away from the spot. Accused No.2- Kunal was having blood-stained knife in his hand and he occupied a seat of a pillion rider on a two-wheeler, of which

accused No.6 Sameer was a rider. Accused No.1- Tushar and accused No.2- Kunal were arrested by Suresh Dambre on 11-1-2013 at 05.30 hours vide arrest memos at Exhibits 179 and 180 respectively. Accused No.3- Lashu, No.4- Amol and accused No.5- Bhupesh were arrested subsequently on 11-1-2013 vide Exhibits 176, 177 and 178 respectively. Accused No.6- Sameer was arrested on 17-1-2013 vide arrest memo at Exhibit 186. They continue to remain in jail till today.

Discovery under Section 27 of the Evidence Act by accused No.1- Tushar :

25. Exhibit 138 is the confessional statement under Section 27 of the Evidence Act, of the accused No.1, and Exhibit 139 is the seizure memo of knife, having total length of 14.5 inches, of which the blade was of 9.5 inches and the grip was of 5 inches. The seizure memo shows the blood stains on the blade as well as the grip of the said knife. Article 16 is the blue coloured jeans of 'Wrangler', and Article 17 is the black coloured full shirt, having white strips, containing blood stains, were also seized under seizure memo at Exhibit 139.

26. PW 18 Vitthal Salunke is the Investigating Officer and in his oral evidence he states in para 3 that on 12-1-2013, the accused No.1- Tushar told him that he is intending to make voluntary statement. PW 18, therefore, arranged for two panchas through constable, one of which was PW 9 Lalit Meshram. PW 9 Lalit states in his oral evidence that he agreed to act as a panch at the request of the Police Inspector. He states that at about 4.30 to 4.45 p.m. he went to the Police Station Sakkardara and the Police Inspector called one accused and asked his name. He was Tushar Dalal. He states that the Police Inspector told us that the said accused had hidden the articles and he is going to discover it. The statement of the accused was reduced in writing in memorandum panchanama of 12-1-2013, marked as Exhibit 138.

27. PW 9 states that he along with one another panch, Police Inspector and other staff and the accused Tushar sat in one white coloured Jeep and went to Sakkardara Chowk, then to Chhota Tajbag, then to Tukdoji square and thereafter in front of Ajni Police Station as per the direction of the accused. He further states that

after reaching Ramteke Nagar, the accused asked to take turn and accordingly the vehicle was turned and it was stopped on *kaccha* road. All of them alighted from the vehicle. The accused along with one constable were ahead and behind them the police and the panchas. There was heap of soil and there was ditch, full of water. There was one big stone on the heap. Accused moved the said stone beside. Beneath the said stone, accused took out jeans pant, shirt and one knife. The accused showed articles to them. There were blood stains on the jeans pant, shirt and knife. Police took possession of the articles and then they returned towards Jeep. The articles were wrapped in the separate brown colour envelope which was signed by the panchas, accused and the Police Inspector.

28. PW 9 further states that the seizure memo dated 12-1-2013 shown to him was prepared, bearing his signature, marked as Exhibit 139. He identified the clothes seized in the Court as also the knife. The knife seized from accused No.1- Tushar is marked as Article 1-A, whereas his jeans is marked as Article 16 and the shirt as Article 17. PW 9 thus corroborates the evidence of PW 18 Vitthal Salunke. There is no cross-examination on all these

points. Relying upon the evidence of PW 9 and PW 18, it has to be held that the document at Exhibit 139 is proved and the discovery of knife as Article 1-A and the clothes as Articles 16 and 17 of the accused No.1- Tushar at Exhibit 139 becomes admissible in evidence.

Discovery under Section 27 of the Evidence Act by accused No.2- Kunal :

29. PW 18 Vitthal Salunke, the Investigating Officer, states in para 4 of his evidence that on 13-1-2013, the accused No.2- Kunal Maske told him that he is intending to make voluntary statement and, therefore, two panchas were arranged, one of which was PW 11 Akash Dhawale. PW 11 Akash states in his evidence that he was asked the willingness to act as panch which he expressed and accordingly when he went to the Police Station Sakkardara, the constable brought one accused who told his name as Kunal Maske. PW 11 identifies him in the Court. The accused No.2- Kunal told that he would take out the knife which is used in the crime and clothes which he wore at the time of committing crime. The memorandum panchanama at Exhibit 146 was prepared.

30. PW 11 states that he along with other panch, the accused No.2 Kunal, constable and PSI Salunke left the Police Station between 11.15 and 11.30 a.m. by the Government vehicle and through Tiranga Chowk, Jagnade Chowk, Gangabai Ghat by cement road, the accused asked to stop the vehicle in front of Syyed Ali Dargah. All of them alighted from the vehicle. The accused was heading them and all others followed him. The accused took them in front of his house and knocked the door. One lady opened the door. The accused called her as mother and went inside. There was a speaker box on the loft (*sajja*). The accused No.2 took out the knife behind the speaker box and gave it to PSI Salunke. PSI Salunke measured the said knife. The drawing of it was drawn. The knife was wrapped in *Khaki* envelope and it was sealed with lock seal. The seizure memo at Exhibit 147 is proved to have been drawn by PSI Salunke in presence of PW 11 Akash. There is no cross-examination on these points. Relying upon the oral evidence of PW 11 and PW 18, it has to be held that the documents at Exhibits 146 and 147 are proved. Consequently, discovery of knife as Article A-2 vide Exhibit 147, at the instance of accused

No.2- Kunal becomes admissible in evidence.

Discovery under Section 27 of the Evidence Act by accused No.5- Bhupesh @ Rinku :

31. Exhibit 181 is the confessional statement of accused No.5- Bhupesh on 14-1-2013 under Section 27 of the Evidence Act, and Exhibit 182 is the seizure memo of 'Ritz' car, having registration No.MH-31 EA 6696. It is the name of Dr. Vitthal Moritam Chitkule, the father of accused No.5. The photostat copies of tax invoice, RC book and insurance of the said car are marked as Exhibit 183. PW 18 Vitthal, the Investigating Officer, states that accused No.5 made a voluntary statement that he is going to show the place where he has kept the vehicle used in the crime. He proves Exhibits 181 and 182. He states that he went along with the accused No.5, panchas and the staff in the Government vehicle, and the accused No.5 showed the way and took them in front of Shyam Palace Building, Congress Nagar Square. The vehicle was stopped. All of them alighted from the vehicle. The accused No.5 showed the car besides the said building. PW 13 Jagdish Wankhede, a panch witness, admits his signatures on seizure panchanama of car at Exhibit 153 and on the seizure memo of clothes of accused No.5 at

Exhibit 154 and also on Exhibits 155 and 156, but denies the contents of it.

Discovery under Section 27 of the Evidence Act by accused No.6- Sameer :

32. According to PW 18 Vitthal, accused No.6- Sameer intended to make a voluntary statement on 19-1-2013 that he is going to show the place where he has kept the bike used in the crime. Two panchas were arranged, one of whom was PW 12 Suresh Gupta, and the memorandum of panchanama under Section 27 of the Evidence Act was prepared at Exhibit 148. It was signed by him, panchas and the accused No.6. All of them went in the Government vehicle and the accused No.6 showed the way and took them near Shrikrishna. The vehicle was stopped and all of them alighted from it. The accused No.6 went near one house and knocked the door. One middle-aged person came out of the house and the accused No.6 called him as 'Papa'. Outside the house, the accused No.6 showed one covered bike, i.e. 'Hero Honda Splendor', bearing No.MH-31 AW 7400. PW 18 further states that after minutely observing the bike, some blood stains were found on the pillion seat cover, and the same were collected with the help of cotton, which was sealed in one plastic

bag. The bike was seized under the seizure panchanama at Exhibit 149. PW 18 is completely supported by PW 12 Suresh Gupta, a panch witness, to prove Exhibit 149. The bike was standing in the name of Suresh Pandurang Katkar, the father of the accused No.6. The tax receipt and the original invoice of the vehicle were seized under the seizure panchanama at Exhibit 188.

Seizure of the clothes of the deceased :

33. PW 18 states that on 11-1-2013, he seized the clothes of the deceased from Police Constable Premkumar under the seizure panchanama in presence of panchas, bearing his signature and marked as Exhibit 152A. The white coloured half shirt, sando baniyan, jeans pant, underwear, pair of shoes, blue coloured socks, chocolate coloured belt, white coloured handkerchief and wrist watch of 'Titan' were shown to him and he identified the said items. All these items were marked as Exhibits 18 to 26.

Forwarding of clothes and articles seized and sealed, to the Chemical Analyzer for opinion :

34. PW 18 further states that “On the same day (i.e. 19-1-2013), I sent the clothes of the accused and the deceased and the blood samples of the accused and the deceased with my covering letter to RFSL, which were kept in *Malkhana*.” The blood samples were sealed by CMO, who affixed his seal impression on the covering letter dated 19-1-2013, marked as Exhibit 189. PW 18 took out the weapons and samples from *Malkhana* and sent to the Chemical Analyzer for analysis under the covering letter dated 4-2-2013 at Exhibit 207.

Our findings on the issues of arrest of the accused persons and discovery under Section 27 of the Evidence Act at their instance :

35. The entire evidence on the arrest and discovery from the accused persons, as narrated above, is not seriously challenged in the cross-examination. The accused Nos.1, 2, 3, 4 and 5 were arrested on 11-1-2013. Weapons from accused Nos.1 and 2 were seized vide Exhibits 138 and 139 on 12-1-2013 and on 13-1-2013 vide Exhibit 147 respectively. Seizure from accused Nos.5 and 6 was on

14-1-2013 vide Exhibit 182 and on 19-1-2013 vide Exhibit 149 respectively. The clothes seized were forwarded on 19-1-2013 vide Exhibit 189 to the Regional Forensic Laboratory at Nagpur. The weapons seized and sealed were taken out from *Malkhana* and sent to the Chemical Analyzer for analysis under covering letter dated 4-2-2013 at Exhibit 207. There is no question of any explanation in respect of clothes and articles seized, or the delay, if any, as alleged. The defence under Section 313 of the Code of Criminal Procedure is that it is false. There is a corroborative evidence available on record and discussed above. We have, therefore, no hesitation to accept the entire evidence and we do not find any valid reason to discard it. We concur with such a view taken by the Sessions Court. What is the effect of it and in what manner it forms a chain of circumstantial evidence against the accused, can be seen at a later stage.

Query Report in respect of weapons seized :

36. PW 10 Dr. Nitin Shyamrao Barmate conducted post mortem over the body of deceased Jitu and has described 11 stab injuries,

12 incised wound, constituting external injuries and internal injuries in thorax, abdomen, cavity, stomach and kidney. He has proved the post mortem report at Exhibit 141. In response to the requisition letter dated 2-2-2013 at Exhibit 142 for weapon query in respect of two knives – Articles 1 and 2 – sent to him, he gave his opinion on 2-2-2013 at Exhibit 143. Paras 4, 5 and 6 of his opinion being relevant, are reproduced below :

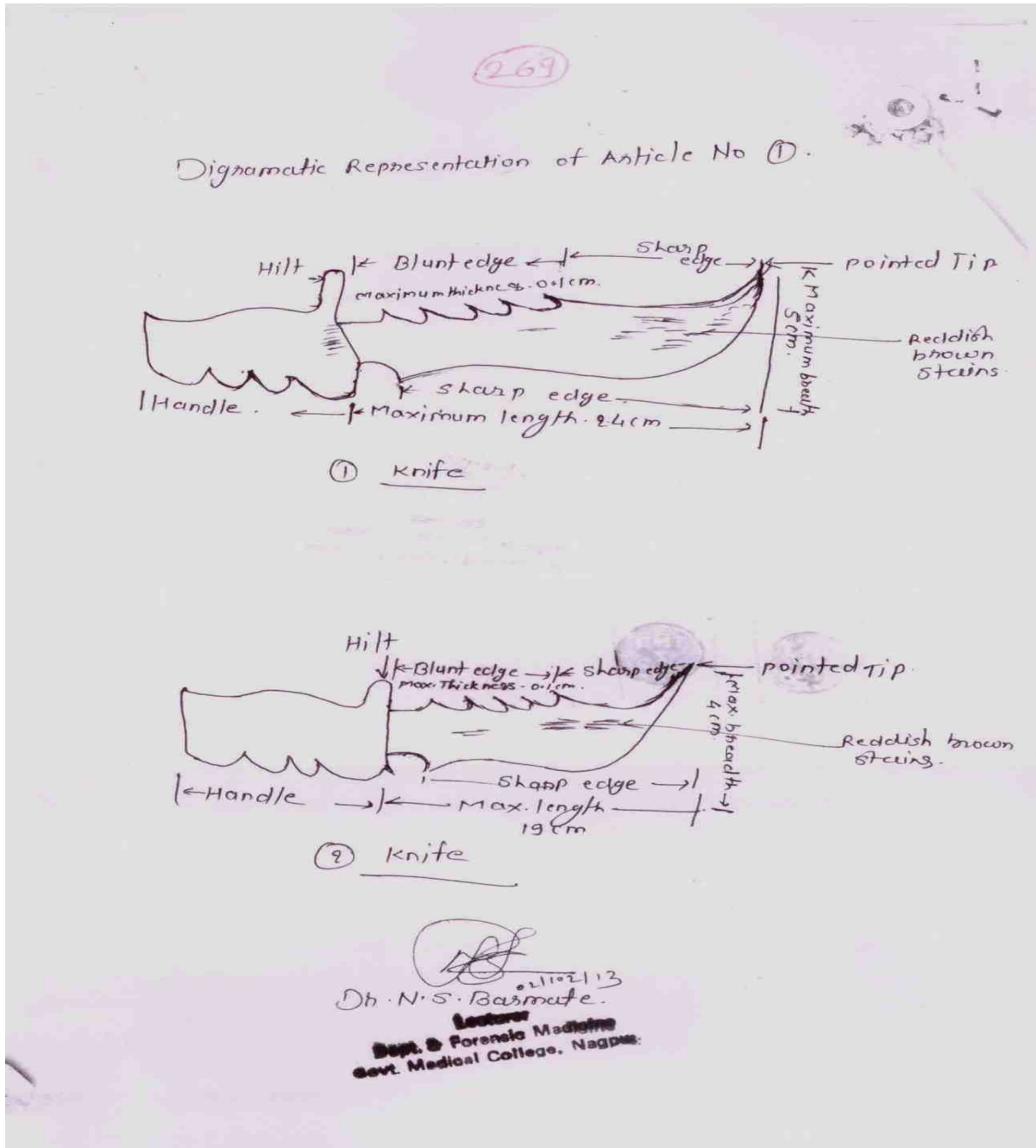
“4] First knife was having blade and handle. Length of blade was 24 cm., breadth 5 cm, thickness .1 cm, 1 edge was sharp other edge sharp and distal 1/3 portion and blunt and serrated, pointed tip, reddish brown stains present over both sides of the blade. Joint of blade and handle was fixed. Handle of the said weapon was yellowish metal and wooden covering, length 13 cms, breadth 6.5 cms and thickness 1.5 cm. Hilt of size 9 cm in length and 1-5 m breadth. Reddish brown stains present over the handle.”

“5] Second knife was having blade and handle. Length of blade was 19 cm, breadth 4 cm, thickness .1 cm, 1 edge was

sharp, other edge sharp and distal 1/3 portion and blunt and serrated pointed tip, reddish brown stains present over both sides of the blade. Joint of blade and handle was fixed. Handle of the said weapon was yellowish metal and wooden covering, length 11 cms, breadth 5.5 cms and thickness 1 cm. Hilt of size 7 cm in length and 1 cm in breadth. No evidence of stains or foreign body.”

“6] All injuries No.1 to 24 mentioned in column no.17 of PM report are possible by first knife. Injuries No.1, 4, 5, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, mentioned in column No.17 of PM report are possible by second knife.”

The report issued is along with diagrammatic representation of the weapons, which is reproduced below :



37. Exhibit 66 is the report of the Chemical Analyzer in respect of the blood sample of the accused No.2- Kunal, showing his blood group as 'A'. Exhibit 72 is the report of the Chemical Analyzer in respect of the blood sample of the accused No.1-Tushar, showing his

blood group as 'A'. The report of the Chemical Analyzer at Exhibit 68 in respect of the blood found on the knives seized from the accused Nos.1 and 2 shows the human blood. Exhibit 69 is the report of the Chemical Analyzer, showing the blood detected on Articles 16 and 17, the clothes of the accused No.1- Tushar, as of human, and the group of it, is found to be inconclusive. The blood on the clothes seized from the person of the deceased is found to be of group 'B' in Exhibit 69, the report. Exhibit 69 shows that the blood stains on the seized pant of accused No.3- Lashu were washed and no blood was detected on his full shirt. On the clothes of accused No.5- Bhupesh, No.4- Amol and No.6- Sameer, no blood was found.

Our findings on the weapons seized and the report of the Chemical Analyzer :

38. The oral evidence of PW 10 Dr. Nitin, the post mortem report at Exhibit 141, the query report at Exhibit 143 about two knives, viz. Articles 1 and 2, and the reports of the Chemical Analyzer at Exhibits 66, 68, 69 and 72, constitute an incriminating evidence proved against the accused Nos.1 and 2. In response to the question Nos.114 in respect of report at Exhibit 143, put in the

statement under Section 313 of the Code of Criminal Procedure is that “I do not know”; whereas in response to the question Nos.186 to 196 regarding the Chemical Analyzer's reports at Exhibits 66, 68, 69 and 72 is that “It is false”. The discovery of the weapons of knife under Section 27 of the Evidence Act at the instance of accused No.1- Tushar and accused No.2- Kunal at Exhibits 139 and 147 is established and its user in crime is established as per query report at Exhibit 143 and the reports of Chemical Analyzers at Exhibits 66, 68, 69 and 72. We concur with such a view taken by the Sessions Court.

39. It may have happened that some of the panch witnesses on the weapons or clothes or other articles seized have not supported the story of prosecution or have become hostile. In our view, once the discovery is proved by examining the Investigating Officer, who seized the weapons, clothes or other articles from the accused persons under Section 27 of the Evidence Act and nothing is brought adverse to the prosecution in his cross-examination, there cannot be any hesitation to accept his evidence to hold that the discovery or seizure is established. This is in concurrence with the view taken by the Sessions Court.

40. In this regard, we may usefully refer to the recent decision of the Apex Court in the case of *Mukesh and another v. State (NCT of Delhi) and others*, reported in (2017) 6 SCC 1. Paras 448 to 450 of the said decision being relevant, are reproduced below :

“448. While the prosecution has been able to prove the recoveries made at the best of the accused, the defence counsel repeatedly argued in favour of discarding the recoveries made, on the ground that no independent witnesses were examined while effecting such recoveries and preparing seizure memos.”

“449. The above contention of the defence counsel urges one to look into the specifics of Section 27 of the Evidence Act. As a matter of fact, need of examining independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the Judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. In the present case, PW 80 SI Pratibha Sharma has deposed in her cross-examination that no independent person had agreed to become a witness and in the light of such a statement, there is no reason for the courts to doubt the version of the police and the recoveries made.”

“450. When recovery is made pursuant to the statement of the accused, seizure memo prepared by the investigating officer need not mandatorily be attested by independent witnesses. In State (Govt. of NCT of Delhi) v. Sunil, [(2001) 1 SCC 652 : 2001 SCC (Cri) 248], it was held that non-attestation of seizure memo by independent witnesses cannot be a ground to disbelieve recovery of articles' list consequent upon the statement of the accused. It was further held that there was no requirement either under Section 27 of the Evidence Act or under Section 161 CrPC to obtain signature of independent witnesses. If the version of the police is not shown to be unreliable, there is no reason to doubt the version of the police regarding arrest and contents of the seizure memos.”

Oral evidence of PW 6 Vinay :

41. We now consider the oral evidence of PW 6 Vinay Ramraj Dubey, a chance witness, about its trustworthiness. PW 6 states that on the day of incident, i.e. 10-1-2013, he wanted to have beer at the Seven Hills Bar and hence he proceeded at 6 to 6.30 p.m. In order to see a missed call, he stopped just before Seven Hills Bar, outer wall of petrol pump, near small tree. At that time, he saw the accused No.3 Lashu Faye

(Laxman) coming out of the said Bar hurriedly and sitting in the car. The car then moved from the place and stopped at some distance away, proceeding towards Chhota Tajbag Chowk. The next was the accused No.6 Sameer Katkar, who came out of the Bar on a two wheeler. The third was the accused No.2 Kunal Maske, possessing a blood-stained knife, who sat on the pillion seat on the vehicle of Sameer Katkar. After some time, the accused No.1 Tushar Dalal came out of the Bar, holding in his hand a blood-stained knife. The accused No.5 Rinku (Bhupesh) and the accused No.4 Amol Mandale also came along with Tushar and all of the three sat in the car, which was standing ahead of Bollywood Centre Point Hotel and the car left. He claimed to be knowing the accused as criminals in the locality and identified all of them in the court-room. PW 6 admits in his examination-in-chief that though he stayed at that place for some time and came to know that somebody was murdered, he did not speak of it to anybody. He was knowing that the area comes within the jurisdiction of Police Station Sakkardara, and on the next day morning at about 9 to 9.30 a.m., he went to Police Station Sakkardara and stated the incident to the police. His statement was typed on the computer in Marathi and was read over to him by

translating it in Hindi.

42. PW 6 Vinay states that Bhande Plot Chowk is towards north of the said Bar, at the distance of 300 meters. The distance between Chhota Tajbag Chowk and Bhande Plot Chowk is about one kilometer. There is a road in front of the Seven Hills Bar, flowing from Bhande Plot Chowk to Bollywood Centre Point Hotel, and thereafter up to T-point of Chhota Tajbag, the road has a cement divider. He states that when one goes to Chhota Tajbag from Seven Hills Bar, there is a road towards left after the petrol pump. Bollywood Centre Point Hotel is facing road, which ends towards Chhota Tajbag Chowk, where the divider ends at the T-point. He states that if one has to go to Bhande Plot Chowk from Bollywood Centre Point Hotel, he has to take U-turn.

43. PW 6 further states that he stays at Dwarkapuri, and Bhande Plot Chowk is about 4 to 5 kms. away from his house. He admits that in the locality where he resides, there are 5 – 6 Beer Bars. He states that he filled petrol in his two wheeler from the petrol pump, which is at the distance of 25 to 30 feet from Bollywood

Centre Point Hotel. He volunteers that the petrol pump is facing 25 to 30 feet on the road and the Bollywood Centre Point Hotel is facing on the road about 300 to 325 feet. He then took U-turn, and since there was a call on his mobile, which he missed, he stopped just before Seven Hills Bar, outer wall of petrol pump, near small tree, to see the call. It is from that place he claims to have seen the accused persons at the distance of 25 – 30 feet.

44. In the cross-examination, PW 6 Vinay claims ignorance about the existence of Battery Shop, Pan Thela, Tea Stall or Fabrication Shop, near the petrol pump where he filled the petrol in his two wheeler. He also claims ignorance about existence of certain landmarks, confronted to him in the cross-examination. He states that “I cannot assign any reason as to why the fact that he filled petrol in his two wheeler from the petrol pump besides Bollywood Centre Point Hotel and thereafter he took U-turn, does not find place in his statement”. He states that “Since the police did not ask him about it, I did not state”. He states that “I had stated to the police that Lashu left from there and stopped some distance away, Lashu was proceeding towards Chhota Tajbag Chowk and thereafter Sameer

Katkar came to Seven Hills Bar and thereafter Tushar Dalal came out of the said Bar and he was holding blood-stained knife, all the three sat in the car by running, which was standing ahead of Bollywood Centre Point Hotel, the car left, I was frightened and I stayed there for some time”. However, he further states that “I cannot assign any reason as to why these facts do not find place in his statement to the police”. He states that “I cannot assign any reason why the portion marked 'A' is appearing in my statement”. He denies the suggestion that he is the childhood friend of Jitu Gawande and that he never went to Seven Hills bar on 10-1-2013 and that he was a regular witness of Sakkardara Police Station. He denies the suggestion that – (1) he had not seen the incident and police had falsely planted him as an eye-witness, (2) he never visited Sakkardara Police Station prior to incident, or (3) he acted panch in murder case of Sheetal Kale.

45. PW 18 Vitthal Salunke was the Investigating Officer, who took over the investigation on 11-1-2013 from PW 16 Rupali Bawankar, who conducted initial investigation in the matter. In para 30 of his cross-examination, he states that “I visited Seven Hills Bar on 10-1-2013 at 7 p.m. to 8 p.m., but did not take part in

the investigation”. He started investigation on 11-1-2013 at 7 p.m. He recorded the statement of PW 6 Vinay on 11-1-2013 from 9.30 a.m. to 9.45 a.m. In para 29, he states that the portion marked 'A' in the statement of PW 6 Vinay was recorded as per his say and it is at Exhibit 210. The said statement in Marathi, marked as portion 'A', is reproduced below :

“ नंतर पोलिसांकडून मला माहिती मिळाली कि, खुन झालेला इसम हा जितेंद्र गावंडे आहे.”

[Later on I came to know from the Police that a person murdered is Jitendra Gawande]

He further states that PW 6 had not stated that “I filled petrol in my two wheeler from the petrol pump besides Bollywood Centre Point Hotel and took U-turn, there was a call on my mobile which I missed to see, I stopped just before Seven Hills Bar, outer wall of petrol pump and near small tree, Lashu left from there and stopped some distance away, Lashu was proceeding towards Chhota Tajbag Chowk, thereafter Sameer Katkar came out of Seven Hills Bar, thereafter Tushar Dalal came out of Seven Hills Bar and he was holding blood-stained knife (the omission is in respect of coming out

of Seven Hills Bar and blood-stained), all the three sat in the car by running which was standing ahead of Bollywood Centre Point Hospital, the car left, I was frightened and I stayed there for some time, I returned back to house as I was frightened, I did not tell the incident to anybody as I was frightened and I could not sleep for whole night”.

46. In the cross-examination, PW 18 Vitthal, the Investigating Officer, was shown rough sketch of the site location map, taken on record and marked as Exhibit 209. He categorically states that the position shown in the map is correct. Perusal of the map at Exhibit 209 shows that to the north of Seven Hills Bar and Restaurant, there is Bhande Plot Chowk, and the Bar is located on the road flowing from Bhande Plot Chowk to Chhota Tajbag Chowk T-point. Adjacent to Seven Hills Bar on the eastern side, is the place of Ahmed Classes, and on the west side, is the Supreme Services. The Indian Oil Petrol Pump is adjacent on the western side of Supreme Services. The map at Exhibit 209 further depicts that adjacent to the western side of Supreme Services, is the Hindustan Steel Traders, and thereafter a lane before and adjacent to Bollywood Centre Point

Hotel. Thus, there is a plot in between the Indian Oil Petrol Pump and Seven Hills Bar and Restaurant on the western side.

Our findings on the oral evidence of PW 6 Vinay Dubey :

47. Except the aforesaid evidence, there is no other evidence on this point, relevant to be considered. We, therefore, proceed to appreciate the evidence to test the veracity of the testimony of PW 6 Vinay. On the eastern side of Seven Hills Bar and Restaurant is Bhande Plot Chowk and on the western side of it is Chhota Tajbag Chowk. This is very clear from the site location map at Exhibit 209. The said Bar is on the road from Bhande Plot Chowk to Chhota Tajbag. The road is 30-meter wide and divided by a cement divider in two parts – one for going to T-point at Chhota Tajbag from Bhande Plot Chowk, and other, after U-turn, from T-point at Chhota Tajbag, return to Bhande Plot Chowk. One cannot go to the other side of the road divider, unless there is a crossing provided. It is not the evidence that there is any crossing provided in the divider for the vehicles. Even the map at Exhibit 209 does not show any crossing. Once Seven Hills Bar is crossed while coming from Bhande Plot

Chowk, and U-turn is taken from the T-point at Chhota Tajbag, one cannot reach to the said Bar again unless, either another U-turn is taken from Bhande Plot Chowk after crossing a distance of one kilometer or comes back from T-point at Chhota Tajbag. This position becomes very clear and established from the reading of oral evidence of PW 6 Vinay in the light of the site location map at Exhibit 209, proved by PW 18, the Investigating Officer.

48. The Seven Hills Bar is located on the left side of the road flowing from Bhande Plot Chowk and going to Chhota Tajbag Chowk, which is clear from the site location map at Exhibit 209. The vital evidence as to the end from which PW 6 Vinay was going to the Seven Hills Bar – whether Chhota Tajbag Chowk on the western side or Bhande Plot Chowk from eastern side – is totally absent. It is not the case of PW 6 that he went to Seven Hills Bar by entering wrong side from Chhota Tajbag Chowk, located on the western side of the said Bar. He also does not say that he went to the said Bar from Bhande Plot Chowk on the eastern side.

49. If it is assumed that he was going from Chhota Tajbag Chowk on the western side and had reached the petrol pump near Seven Hills Bar, it is not the version of PW 6 that before taking U-turn, he witnessed the incident. Taking of U-turn means he was on return from the Seven Hills Bar and also the petrol pump to Chhota Tajbag and turning to the other side of the divider on the T-point to reach Bhande Plot Chowk. In such situation, unless he takes another U-turn from Bhande Plot Chowk after crossing the distance of one kilometer and thereafter half kilometer, he will not reach to the Seven Hills Bar. It is not the version of PW 6 that he took another U-turn from Bhande Plot Chowk to reach the said Bar. In such a situation, PW 6 could not be near Seven Hills Bar or the petrol pump, but he went away from it, at the time of the incident.

50. If it is assumed that PW 6 went to Seven Hills Bar from Bhande Plot Chowk on the eastern side, he will have to cross the said Bar to reach to the petrol pump located on the western side of the Bar. It is not his version nor it appears from the map at Exhibit 209 that the petrol pump is located on the eastern side of the said Bar. It is also not his version that he went to the petrol pump

after crossing the said Bar. Be that as it may, it is his version that after filling petrol, he took U-turn after Bollywood Centre Point Hotel, which means that he went away from the said Bar up to Chhota Tajbag on the western side and thereafter to the other side of road divider. It is not the version of PW 6 that he witnessed the incident before taking U-turn after Bollywood Centre Point Hotel. In such a situation also, PW 6 could not be near the said Bar or the petrol pump at the time of incident.

51. The positive case of PW 6 is that he stopped just before the Seven Hills Bar, outer wall of petrol pump and near small tree, to see a missed call at the distance of 25 to 30 feet and witnessed the incident. It is, therefore, probable that he was going to Seven Hills Bar from Bhande Plot Chowk on the eastern side. Though the petrol pump shown in Exhibit 209, a site location map, is on the western side of the said Bar, it is not adjacent to it, but there is one plot of Supreme Services in between the said Bar and the petrol pump. There is no evidence to show the width of this plot, though the width of the plot of the petrol pump, as deposed by PW 6, is 25 to 30 feet, facing the road. In such a situation, it is improbable that PW 6 was at

the distance of 25 to 30 feet on the western side of the said Bar and from the outer wall of the petrol pump, adjacent to the said Bar, he witnessed the incident.

52. The theory of witnessing the incident from the petrol pump, taking U-turn and thereafter checking missed call, is a complete omission, which has been pointed out in earlier paras, is established. There is complete improvement in the version of PW 6. His previous knowledge about the accused persons has become doubtful. Leaving apart inherent inconsistencies, the version of PW 6 Vinay becomes untrustworthy and unbelievable. Not only that, but his acquaintance with the accused persons is doubtful. The presence of PW 6 on the spot at the time of incident seems to be also doubtful. The Sessions Court ought not to have treated him as an eye-witness to establish the identity of the accused persons. We do not concur with the view taken by the Sessions Court to accept the version of PW 6 Vinay as trustworthy.

Finger Print of Accused No.1- Tushar :

53. PW 1 Raghuveer, the Manager of the Seven Hills Bar, deposed that the incident took place on 10-1-2013 at about 5 to 5.30 p.m. when four people entered the Bar. One of them came to his counter and asked counter peg of Rum. PW 1 prepared a peg (liquor) and gave it to him in a glass. The other three people were standing behind him. In para 8, he deposes after watching the footage of camera No.1 in which the incident, which happened in the Bar, appears. He states that “In footage of camera no.1, on counter, there are glasses on right side”. In the cross-examination, a suggestion was put to him in para 26, in response to which, he states that “It is not correct to say that the glasses which were lying on the counter broke down in the said quarrel”. Except this, there is no cross-examination on this aspect.

54. PW 16 Rupali, the first Investigating Officer, states in para 2 of her deposition as under :

“ 2] Manager told me that the glass which were kept on the counter used by the assailants. Investigation Car had come

*there. Finger Print Expert took the finger prints from the glass. Thereafter, the said glass were sealed. I also mentioned location of camera in spot panchanama. Accordingly, spot panchanama was prepared. I and panchas were put signature on it. Spot panchnama now shown to me is the same. It bears my signature and the panchas. It is marked at **Exhibit 163.***

Exhibit 163 is the spot panchanama under which four glasses used for serving peg were seized.

55. PW 8 is Sunil Laxman Lonarkar, working as Junior Expert API (finger print in I Car Unit Crime Branch, Nagpur). He states in para 2 that on 10-1-2013, he received message from police control room at about 6-30 p.m. to visit the place of scene of crime of murder at Seven Hill Bar, Nagpur. He states in para 2 that on 10-1-2013, he received the message from the police at about 6.30 p.m. to visit the place of incident and, therefore, he along with the driver of the vehicle and photographer went on the spot at about 7 p.m. API Salunke and PSI Bawankar were there, who told him to check four glasses kept on the counter of the Bar. In para 3, he states that “I applied the universal powder on the said glasses with the help of brush. Out of four, I could find the finger print on one of the glass.

I encircled the said finger print and put my signature on it beside the encircle on the glass. Photographer snapped photographs of the said finger prints”. He states that the police gave him requisition and he also issued spot inspection report dated 10-1-2013 to the police, which is at Exhibit 116 and it bears his signature.

56. Exhibit 116, which is the panchanama of four glasses on which gray powder was applied, shows that on glass No.1, one finger print was found, and on glass No.2 two finger prints were found. In para 4, he states that after 2 – 3 days he received three photographs of finger print of the said glasses, and out of it, he declared two photographs as not fit for further process, and one photograph was found fit for the process, as it contained 8 ridge character in the said photograph. Exhibit 120 is the left thumb impression, marked as 'A-1' of accused No.1 Tushar, encircled with red ink, and Exhibit 127 is the enlarged photograph of Exhibit 120. Exhibit 126 is the enlarged finger print impression developed on drinking glass, marked as 'A'. He states in his evidence that “During my examination, I found Nine ridge characteristics of Exhibits 126 and 127 were matching”.

57. Exhibit 128 is the report by the Deputy Director/Deputy Superintendent of Police, Finger Print Bureau, CID, stating that out of three chance finger prints, one chance finger print developed on the glass (काचेचा ग्लास) concerned in Sakkardara Police Station. It states that the left thumb finger print on the F.I. Slip of suspect- (1) Tushar Sahebrao Dalal received for comparison. Exhibit 129 is the report stating that out of three chance finger prints, one chance finger print, marked 'A', developed on the glass is identical with the left thumb finger print, marked 'A-1' on the F.I. Slip of suspect- (1) Tushar Sahebrao Dalal received for comparison vide letter No.604/2013, dated 21-2-2013. Exhibit 131 is the statement of reasoning and opinion in connection with crime in question, opining that the chance finger print, marked 'A' is identical with left thumb finger print, marked 'A-1' on the finger impression clip of suspect – Tushar Sahebrao Dalal.

Objection of the defence to the oral evidence of PW 8 Sunil, Finger Print Expert, and his reports at Exhibits 129 and 121 :

58. The objection to the admissibility of the evidence of PW 8 Sunil, the Finger Print Expert, and the reports submitted by him

at Exhibits 129 and 131 is that there is no evidence on record to show as to when and how the finger prints of the accused No.1-Tushar were obtained at Exhibits 120 and 127, which were found matched with the chance finger print. In this regard, paras 5 and 6 of the oral evidence of PW 8 Sunil need to be seen, and hence the same are reproduced below :

“5] I requested PS Sakkardara to send the finger impression slip (specimen) of the suspected. On 19-1-2013, I received request letter of PS Sakkardara along with six finger impression slips (specimen). I have brought the original request letter. Witness produced the request letter, it is taken on record and it is marked at Exh-118. (On oral request of witness the original letter is returned back to him after verifying the xerox copy of the letter). On the said six finger impression slips (specimen), there was no plain finger print of the suspected and only rolled prints were there. Therefore, I requested on telephone to send fresh finger print impression slips containing plain print and roll print. I had also made endorsement to that effect on the requisition letter Exh 118.”

“6] On 22-2-2013, I received letter of P.S. Sakkardara dt- 21-2-2013 along with finger print impression slips containing plain print and roll print of six suspects. I have brought the original letter. Witness produced the letter

dt 21-2-2013. It is taken on record and it is marked at Exh-119. (On oral request of witness the original letter is returned back to him after verifying the xerox copy of the letter). I have brought the original finger print impression slips. Witness produced the six finger print impression slips, these are taken on record and these are marked at Exh-120 to 125. (On oral request of witness the original letter is returned back to him after verifying the xerox copy of the letter). Chance finger print/photographs of finger print collected from glass, was enlarged. Enlarge copy of photograph of finger print collected from glass, now shown to me, is the same. Enlarge copy is marked at Exh 126.”

The only cross-examination on the point is contained in para 11, which is reproduced below :

“11] The earlier finger impression slips which I returned back to police, are not on record. It is not correct to say that as fresh finger prints were not sent to me along with letter Exh- 119, therefore, it is not mentioned so in the said letter. It is not correct to say that letter Exh 118 and 119 are fabricated by me in connivance with I.O.”

59. Query No.103 put to accused No.1-Tushar and answer to it, are reproduced below :

“Q.103 : It has further come in his evidence that on 22.2.2013 he received letter from PS Sakkardara along with finger print impression slip containing plain print and roll print of six suspects. What do you want to say about it?”

Ans. : I do not know.”

60. The finger prints of all the accused were forwarded to PW 8 Sunil under covering letter dated 21-2-2013 at Exhibit 119, received by PW 8 on 22-2-2013. There is no objection to mark the finger print of accused No.1- Tushar as Exhibit 120. The cross-examination tries to raise a doubt about communications at Exhibits 118 and 119 and without background, the suggestion is that the said letters are fabricated. While recording the statement under Section 313, in reply to a question about receipt of letter at Exhibit 119 and finger prints at Exhibit 120, the stand is that “I do not know.”

Our findings on the issue of Finger Prints of accused No.1- Tushar :

61. There is absolutely no cross-examination to raise any doubt about the finger print at Exhibit 120 and enlarged at Exhibit 127 of accused No.1-Tushar, so obtained and forwarded under the letter at Exhibit 119 to PW 8 Sunil, the Finger Print Expert, to compare it with the chance finger print on Exhibit 126. There is no suggestion that the finger prints of the accused No.1- Tushar were not obtained. In the absence of any such cross-examination, we do not find any reason to discard the oral evidence of PW 8, the documents at Exhibit 120 and its enlargement at Exhibit 127 in respect of the finger prints of the accused No.1- Tushar, and Exhibit 126 in respect of chance finger print along with the report at Exhibit 131. We, therefore, reject the contention of the accused that there is no evidence to show that the finger prints at Exhibits 120 and 127 are not of the accused No.1- Tushar. We hold that the prosecution has proved the finger prints of accused No.1- Tushar, which established his presence on the spot at the time of incident.

Core Issue :

62. The identification of the accused persons as the assailants in the present case constituting an unlawful assembly and conspiring to commit an act of murder of Jitu Gawande on 10-1-2013 between 17.45 and 17.56 hours in the Seven Hills Bar and Restaurant, is the core issue to be decided in this case. Basically, there is no challenge to the mode and manner in which an act of murder is committed, the investigation carried out, and the arrest of and recovery from the accused persons, and all these things are otherwise amply proved. We now, therefore, turn to the core issue. The Sessions Court essentially relied upon the oral evidence of PW 6 Vinay, a chance witness, who saw the accused persons as the appellants fleeing away from the spot of incident on the two-wheeler and the car with knives, stained with blood, in the hands of the two accused, namely, the accused No.1- Tushar and the accused No.2- Kunal. We have already found the evidence of PW 6 Vinay to be untrustworthy. We have also held that the presence of the accused No.1 on the spot at the time of incident is established on the basis of his finger prints found on the glass of liquor in the said Bar.

63. The other evidence available on record to identify the accused as the assailants is the oral evidence of PW 19 Ms Puja, the Scientific Officer in the Forensic Science Laboratory, Mumbai, who proved her report at Exhibit 57, opining that the accused persons are similar to the assailants, who committed the crimes in question. It is based upon the photographs of the accused persons at Exhibits 197 to 202 and the persons selected as the assailants from the DVD, marked as Article 18A, which is the backup or a copy of the footages contained in the Hard Disk at Exhibit 1. The another evidence is that of PW 4 Pramod, the brother of deceased Jitu Gawande, who identified all the accused persons as the assailants and described the role played by each of the accused in the crimes in question. This is based on the CD, marked as 'X' for identification, or the DVD, marked as Article 18A. We have, therefore, to see whether the photographs at Exhibits 197 to 202 are proved. The another aspect is of the admissibility of electronic evidence in the form of the DVD at Article 18A and the CD marked as 'X' for identification. All the arguments, therefore, essentially revolve around it and we, therefore, proceed to discuss it one by one.

Consideration of electronic evidence in the form of CD – 'X' marked for identification to establish the entire incident of murder of Jitu at Seven Hills Bar :

64. PW 16 Rupali states in para 3 that “On our request, Shubham showed us the recorded footage of the incident from DVR on LCD TV. In footage recorded by camera no.7, we saw the assailants came inside the Bar, thereafter, we saw the deceased came inside the Bar. Thereafter we saw in the footage the assailants while running away from the Bar.” PW 14 Shubham states in para 4 of his deposition that “On the request of police, I showed them footage recorded in CCTV system, on the LCD TV of Bar. I showed them footage recorded after 5-00 p.m. to 5-30 p.m. In the said footage, some people were assaulting one person.”

65. PW 16 Rupali states that “On enquiry, Shubham told us that copies of the said footage can be done. I arranged a blank pen drive and two DVD (CD). Shubham took the copy of said footages from DVR in pen drive and copied it in DVD with the help of laptop. We verified the pen drive and DVD in laptop and found the copies were done properly. The said pen drive and two DVD were seized

and sealed. On our request, Shubham took out Hard Disk from DVR which was seized and sealed. DVR was also seized and sealed. DVR Charging Wire, Mouse and Remote were also seized and sealed. I and panchas signed on it. Seizure panchanama (Exhibit 99) (Dated 10-1-2013) now shown to me is the same. It bears my signature and panchas. Its contents are correct. I had obtained the bills of pen drive and DVD. The bills of pen drive and DVD now shown to me are the same. It is marked at Exhibit 165.”

66. PW 16 Rupali identifies all the articles seized and her deposition in para 7 being relevant, is reproduced below :

“7] I can identify the articles seized by me. Article-1 DVR, Article-4 Hard Disk, Article-7, Adapter, Article-10 Mouse, Article-13 Remote, now shown to me are the same which were seized by me. Label Article-2, 5, 8, 11, 14 and 15 bear my signature. These are the same whereby the above said articles respectively were sealed. (CD(DVD) X for identification is now played in laptop. The footage of camera nos.1, 2 and 7 are seen by the witness.) The footages contained the CD(DVD) X for identification are the same which were copied from the DVR to Pen Drive and Pen Drive to DVD.”

PW 5 Kailash Gulhane is a panch witness on the seizure panchanama at Exhibit 99 and was called by PW 16 Rupali from cyber cafe near the said Bar. He says that on 10-1-2013, PW 14 Shubham showed footages of all cameras one by one in the said LCD TV. He saw the footages and thereafter in his presence, PW 14 Shubham copied the data in footages in DVD and Pen Drive. He saw the copied data on the laptop and he found it to be correctly recorded in the Pen Drive and DVDs. All these articles were seized and sealed in his presence. He says Hard Disk in DVR was of Toshiba Company and it was taken out in his presence and sealed.

67. PW 14 Shubham further states in para 4 of his examination-in-chief that “On the request of the police, I prepared copy of footage of three cameras from DVR and gave to the police. For that purpose, police had provided me laptop, pen drive and two CDs. Pen drive and CDs were brand new. I had provided copies of footage, wanted by the police in pen drive. I had also copied the wanted footage in two CDs from pen drive. I gave pen drive and both CDs to the police. On enquiry by the police, I told them the

footage are recorded in the Hard Disk of DVR. On the request of police, I took out Hard Disk from the DVR and gave to the police. On request of the police, I also detached DVR and provided to police. Thereafter, police were engaged in the proceedings.

Our findings in respect of electronic evidence of CD – 'X' for identification :

68. Immediately on 10-1-2013 itself, within thirty minutes of the occurrence of an incident, i.e. at 6.00 p.m., the police personnel, led by PW 16 Rupali, the Investigating Officer, reached the spot. The inquest and spot panchanamas were prepared. The installation and locations of all the eight cameras were noted down in the sketch of the spot at Exhibits 166 and 167. For the purposes of security, a system of CCTV, consisting of eight cameras and one DVR containing Hard Disk of 500 GB for storage of video recording, well-connected with the cables, was found installed and functioning properly. The entire incident of murder of Jitu Gawande was recorded in the Hard Disk at Exhibit 1, contained in the DVR. The Sessions Court accepts the evidence of PW 14 and PW 15, the independent witnesses, who have stated that the Hard Disk is of the same Company, which they

had supplied and identified. The Sessions Court accepts such a view corroborated by PW 5 Kailash and PW 16 Rupali, as all the witnesses are found to be independent. We concur with such a view.

69. The evidence of PW 16 Rupali is supported by the oral evidence of PW 14 Shubham and PW 5 Kailash Gulhane, a panch witness. PW 16 Rupali, PW 5 Kailash and PW 14 Shubham identified in their evidence before the Court the articles seized, viz. DVR, Hard Disk, Adapter, Mouse and Remote, as also the CD, marked as 'X' for identification, which was played in the laptop before the Court, from which the footages from camera Nos.1, 2 and 7 were seen by the witnesses. PW 5 Kailash, a panch witness, identifies the DVR as Article 1 and label thereon as Article 2. He identifies envelope in which DVR and label (Articles 1 and 2) were sealed in his presence. He identifies Hard Disk as Article 4 and its label and envelope as Articles 5 and 6 respectively. He identifies footages shown by Shubham, i.e. DVD-X played in the laptop as the same. We, therefore, hold that the DVR, Hard Disk, Adapter, Mouse, Remote, CD marked as 'X', produced before the Court are the same which were seized and sealed under seizure panchanama at Exhibit 99 on

10-1-2013 on the spot of incident.

70. At the request of PW 16 Rupali, the Expert PW 14 Shubham, showed the recorded footages of the incident from DVR on LCD TV. In the footages, the assailants and the deceased were seen inside the Bar. Some people were assaulting one person and subsequently the assailants ran away from the Bar. On the request of PW 16 Shubham the Expert PW 14, took the copies of the footages from DVR in pen drive and copied it in DVD (CD) with the help of laptop. The pen drive and DVD were verified and the copies were found to be done properly. The pen drive and DVD were seized and sealed along with the Hard Disk, taken out from DVR, the DVR Charging Wire, Mouse and Remote under the seizure panchanama at Exhibit 99. PW 16 states that CD (DVD) X for identification is played in the laptop and the footages contained in it are the same which were copied from the DVR to Pen Drive and Pen Drive to DVD. This version is fully supported by PW 14 Shubham and PW 5 Kailash. There is no reason to doubt the oral version of PW 5 Kailash, PW 14 Shubham and PW 16 Rupali and we, therefore, hold that the footages contained in CD marked as 'X' for identification were copied

from those contained in the Hard Disk at Exhibit 1. CD – 'X' is, therefore, a true and genuine copy of the footages in camera Nos.1, 2 and 7 in the Hard Disk at Exhibit 1.

Appreciation of the evidence on the snapping of the photographs of all the accused persons – our findings on it :

71. The photographs of all the accused persons at Exhibits 197 to 202, are compared with the frames of persons selected as assailants in the CCTV footages copied in DVD at Article 18A from the Hard Disk at Exhibit 1. Hence, we consider the evidence of snapping the photographs of the accused persons. PW 18 Vitthal states in para 13 of his examination-in-chief that “On 18-1-2013, on my instructions, full size photographs of the accused were snapped by Nitin Watkar, PW 20, of Diamond Photo Studio. At that time, accused were in police custody. The said photographs were snapped for investigation purpose and were handed over to me in the evening. The amount was paid as per bill dated 18-1-2013 at Exhibit 204.”

72. PW 20 Nitin, in his examination-in-chief, states that a Digital Camera is used by him for snapping the photographs and they are saved in the memory card of the camera. Thereafter, the photographs are uploaded on computer and with the help of pen drive, the same are sent for developing. He further states that six photographs at Exhibits 197 to 202 in the size of 4 x 6 inch might have been snapped by him and he identifies bill at Exhibit 204 issued to PW 18 Vitthal. He subsequently states that the photographs might have been snapped by his worker. This witness was allowed to be cross-examined as he resiled from his statement. The factum of snapping photographs of the accused persons, has been proved. In the cross-examination, no questions are put to challenge the method by which photographs at Exhibits 197 to 202 were prepared. No objection was raised at the time of his evidence in respect of the mode and manner of proof of photographs or its admissibility in evidence. We, therefore, hold that the photographs of accused, at Exhibits 197 to 202 are proved.

73. PW 18 Vitthal states that on 2-2-2013, he prepared the request letter to Forensic Science Laboratory, Kalina, Mumbai, for

examination of Hard Disk and comparison of photographs of accused with CCTV footage. The letter is at Exhibit 195, which he identifies. He states that on 3-2-2013, he sent Hard Disk, blank Hard Disk, DVR, Adapter, Remote, Mouse, photographs of the accused and deceased in sealed condition along with covering letter at Exhibit 195 through Police Constable Premkumar. He states that all the articles were bearing seal as 'VSS'. He states that Police Constable Premkumar collected those articles from *Malkhana* of Police Station Sakkardara. He states that the officials at Kalina were not accepting the photographs without seal on each photograph, and this was informed to him by Police Constable Premkumar on mobile phone. Hence on 6-2-2013, he put the seal on all seven photographs and after re-sealing photographs, he sent Police Constable Premkumar along with all articles to Kalina, Mumbai. There is no reason to doubt the seizure, sealing and forwarding of all the photographs at Exhibits 197 to 202, to the Forensic Science Laboratory, Mumbai, under the covering letter at Exhibit 195, which we accept it as proved. Its receipt in sealed condition by the office of the Directorate of Forensic Science Laboratory, Mumbai, on 8-2-2013 is also proved by PW 19 Puja, who has vouched for it.

Electronic evidence in the form of DVD – Article 18A :

74. On 8-2-2013, the office of the Directorate of Forensic Science Laboratory, Mumbai, received all six photographs of the accused snapped on 18-1-2013, marked as C to I in Exhibit 195-letter along with Hard Disk marked as Exhibit A, DVR marked as Exhibit B, and Remote, Charging Cable, Mouse, marked as Exhibits B(1), B(2) and B(3) respectively. PW 19 Ms Puja, working as Scientific Officer, prepared forensic image of the data, contained in Exhibit 1 Hard Disk to blank Hard Disk provided by Police Station Sakkardara. For the purposes of identification, the primary evidence of Hard Disk having Image of CY 66/13 was marked as Exhibit 1. The DVD in which images were copied, was marked as “Annexure DVD CY 66/13”. We do not find any reason to create any doubt about the receipt in a sealed cover, an electronic evidence of Hard Disk, other connections, and blank Hard Disk by the Forensic Science Laboratory, Mumbai, under covering letter at Exhibit 195 dated 2-2-2013. Hence, we accept such evidence.

75. We have gone through the covering letter dated 2-2-2013 at Exhibit 195, under which PW 18 Vitthal forwarded on 6-2-2013 all the Articles 1 to 15 seized in connection with CCTV cameras, including the Hard Disk of 500 GB of 'Toshiba' Company Model No.HDKPC05A0A02J Part No.(P/N)9F13178 vide Exhibit 99 on 10-3-2013, full size photographs of all the accused persons snapped on 18-1-2013 at Exhibits 197 to 202, to the Director, Forensic Science Laboratory, Kalina, Santacruz, Mumbai, with a request to submit the report on the following three queries, which are in Marathi, but translated in English :

(1) Recordings of eight cameras in the Hard Disk at Exhibit-A be seen in respect of the crime occurred on 10-1-2013 between 17.30 to 18.30.

(2) Whether frames of persons appearing in the Hard Disk seized at Exhibit No.A are the same in the photographs of the persons at Exhibit No.C to Exhibit No.I ?

(3) The backups of recording be obtained in DVD.

76. PW 19 Ms Puja, working as Scientific Officer in the office of the Directorate of Forensic Science Laboratory at Mumbai, states

that “On 8-2-2013, our office received 12 sealed parcel from PS Sakkardara and one blank Hard Disk (According to us, instead of “blank Hard Disk”, it should be “blank DVD”) in Crime No.12/13 of PS Sakkardara under letter dated 2-2-2013 at Exhibit 195.” The parcels were inspected with regard to seal and numbering and were found in sealed condition and the same were sent for cyber analysis of CCTV footage dated 10-1-2013 between 5.30 p.m. to 6.30 p.m. She states that all parcels were opened and were given Exhibit Nos.1 to 12 to the articles.

77. Paras 4, 5 and 6 of the deposition of PW 19 being relevant, are reproduced below :

“4] On 16-12-2013, the above said case came to me for analysis. All the articles Exhs 1 to 12 were received by me. I prepared forensic image of data contained in the Exh.1- harddisk to blank harddisk provided by PS Sakkardara. We gave identification to said harddisk as Image of CY 66/13 Ex- 1. The DVR was connected to the said harddisk, wherein image was prepared. DVR was connected to our screen and image was played. We searched the question footage in the said image. We extracted footage 8 channel (camera) of the time 5-30 to 6-30 pm

dt- 10-1-2013 from said image, and it was written in DVD. We marked the DVD as Annexure DVD CY 66/13. We put said DVD in system. We compared the reference photograph Exhs 6 to 12 with the footage of DVD. We selected the frames of persons from the footage and compared the said frames with reference photograph Exhs 6 to 12. The frames of persons selected, appeared to be similar with the reference photograph of Exhs 6 to 12.”

“5] Each digital record has its unique hash value. I extracted the hash value of the entire data of hard-disk. Accordingly, I noted the hash value in my report. I conducted the test of restoring CCTV hard-disk, using Tableau Forensic Duplicator Model D-2. Hard disk Exh-1 was in proper and working condition. I extracted the hash value of question footage channel 1 to 8 and mentioned in my report. After consultation with HOD, Jt. Director, and Director, I prepared my report. Report Exh 57 now shown to me, is the same. On 13-1-2014 I sent the report along with property and DVD in which footage was extracted in sealed condition to PS Sakkardara through PC Dhok, B.No.5710. I also sent Art.1 DVR, Art.4 Hard disk, Art.7 Adapter, Art 10 Mouse, Art.13 Remote, now shown to me, are the same. 7 brown colour sealed parcel, having seal of FSL are opened, wherein each envelope 1 photograph with one torn envelope are found. Exh 7 to 12 Photographs now shown to me are the same, which were sent to me for

reference. These are the same, which were sent to me as a reference photographs. These are marked at Exhs 196 to 202. The envelopes in which these photographs are found, are marked at Exh. 196-A to Exh 202-A and the respective torn envelopes are marked 196-B to 202-B. DVD X for identification now shown to me, is the same, in which the image was extracted from Hard-disk. DVD is marked at Art.18A.”

“6] During comparison of reference photographs, we scanned the reference photographs. In the report, against selected photographs, scanned reference photographs are shown for ready reference.”

PW 19 states that the Hard Disk has Image of CY 66/13 and it was marked as Exhibit-1 for identification. The DVR was connected to the Hard Disk, where the image was prepared and transferred to the blank Hard Disk (According to us, instead of “blank Hard Disk”, it should be “blank DVD”) provided by Police Station Sakkardara. DVR was connected to the screen and image was played. The footage concerned was searched. PW 19 states that “We extracted footage 8 channel (camera) of the time 5.30 to 6.30 p.m. dated 10-1-2013 from said image, and it was written in DVD. We marked the DVD as Annexure DVD CY 66/13. We put the said DVD

in system. We compared the reference photograph Exhibits 6 to 12 with the footage of DVD. We selected the frames of persons from the footage and compared the said frames with reference photographs Exhibits 6 to 12. The frames of persons selected, appeared to be similar with the reference photograph of Exhibits 6 to 12.”

78. PW 19 Ms Puja extracted the hash value of the entire data of the Hard Disk, which was noted in her report. She conducted the test of restoring CCTV Hard Disk, using Tableau Forensic Duplicator Model D-2. She found that the Hard Disk Exhibit-1 was in proper and working condition. She extracted the hash value of question footage channel of 1 to 8 and mentioned in her report. She identifies the report at Exhibit 57, which was sent along with the property and DVD in which the footage was extracted in sealed condition to Police Station Sakkardara through Police Constable Dhok, Buckle No.5710. She also sent Article 1 DVR, Article 4 Hard Disk, Article 7 Adapter, Article 10 Mouse, Article 13 Remote, which she identifies. She also identifies the photographs at Exhibits 7 to 12 sent to her for reference, which were marked as Exhibits 196 to 202. She states that “DVD X for identification now shown to me, is the same, in

which the image was extracted from Hard Disk and it was marked as Article 18A.”

79. The report at Exhibit 57 given by PW 19 Ms Puja shows the comparative analysis of selected frames of video files, named as “CH-01.AVI” and “CH-07-AVI”, with reference to photographs at Exhibits 6 to 12 with the finding that “the persons present in the mentioned video files are found similar with the photographs.” PW 19 states that the report is in respect of comparison of selected frames of the persons from the footages with those photographs of the accused, marked as Exhibits 6 to 12 in the report (According to us, it should be “Exhibits 7 to 12”). The photographs are identified at Exhibits 197 to 202, and “Annexure DVD CY 66/13” was marked as Article 18A in the deposition of PW 19. The opinion expressed was that the photographs of the accused are found to be similar to the frames of the persons selected from the footages.

80. We have been taken through the cross-examination of PW 19 Ms Puja by Shri Subodh Dharmadhikari, the learned Senior Advocate for the accused. In the cross-examination, she states that

“I have done restoring process of CCTV, Hard Disk, extracting the data and comparison with my eyes. I have not conducted any other examination for comparison of reference photographs with selected frames from the footage other than visual examination.” She states that “I enlarged the pictures of people appearing in question footage for comparison. I enlarged the photographs from the footage to the size of the selected frames as appearing in the Court. I did not measure the width and breadth of various parts of the faces of selected frames for comparison with reference photographs.” In para 9, she says that “I did not compare the hash value of the Hard Disk with hash value of the footage of the DVD.” She states that if the files of footage are tampered, it will have different hash value than the hash value appearing in the Hard Disk. She states that “I cannot certify the tampered media as an authenticated media.” She states that “I have not conducted any test for ascertaining that the samples received are not tampered, edited or mastered.

Our findings on electronic evidence of DVD – Article 18A and the report at Exhibit 57 :

81. We hold that the DVR, Hard Disk, Remote, Charging Cable,

Mouse along with blank DVD (Hard Disk) seized and sealed on 10-1-2013 were forwarded by Police Station Sakkardara to the Forensic Science Laboratory, Mumbai, under covering letter dated 2-2-2013 at Exhibit 195. The same were received by the Forensic Science Laboratory on 8-2-2013 in a sealed condition for cyber analysis along with photographs of accused at Exhibits 197 to 202 with a request to submit report on the query. DVD, marked as Exhibit 18A, is proved to be true and genuine copy of the CCTV footages contained in the Hard Disk at Exhibit 1. The frames of persons selected from CCTV footages are found matching with those reference photographs at Exhibits 197 to 202. The report to that effect at Exhibit 57 is proved.

82. We find that, PW 19 Ms Puja has furnished an explanation in respect of the statements given by her in the cross-examination. She states that it was not necessary to compare the hash value, because the Hard Disk contained the entire files, including footage, and it has different hash value than the files of footages. She states that the video was continuous and there was no tampering in the footages. She denies the suggestion that her comparison was not

based on any scientific experiment, and all the experiments which she did, was mentioned in her report at Exhibit 57. She states that Tableau Forensic Duplicator Model D-2 is an equipment, and if one has licence of the said equipment with proper training, can restore the data. She denies the suggestion that the reference photographs are not even similar to selected photographs.

83. What we find from the cross-examination of PW 19 is that, in the present case, it was not necessary to compare the hash value of Hard Disk with the hash value of the footages of DVD, as the Hard Disk contained the entire files and it has different hash value than the files of footages. The video was continuous and there was no tampering in the footages. The Sessions Court holds in para 66 that nowhere it is the case that what is contained in the DVD – Article 18A, is not contained in the Hard Disk (Article 4). The primary evidence was produced on record and it is only for the purposes of reference, DVD – Article 18A was prepared by PW 19 Puja to prepare her report and is shown to the witnesses. It is never contended that DVD – Article 18A does not contain footages in the Hard Disk (Article 4). We concur with such findings.

84. The cross-examination of PW 19 reflects the suggestion that the hash value of the Hard Disk is different from the hash value of the footages contained in CD – 'X' or DVD and, therefore, the only inference which can be drawn is that there was tampering in the recordings of CD – 'X' and DVD. We have seen the Hard Disk, CD – 'X' and DVD. The report of PW 19 at Exhibit 57 shows the storage capacity of Hard Disk as “465.76 GB”, whereas the capacity of CD – 'X' is “52X 700 MB 18 MIN” and that of DVD is of “4.7 GB/16X”. The report shows that 8 CCTV footage files (.AVI) of time period 17.30 to 18.30 of date 10-1-2013 found in the Hard Disk at Exhibit 1 were given in the enclosed DVD, i.e. Article 18A. What we find is that there was a comparative analysis made of the selected frames of the video files named as CH-01.AVI and CH-07.AVI with the reference photographs at Exhibit 6 to Exhibit 12. It is in this background, PW 19 has explained that it was not necessary to compare the hash value of Hard Disk with the hash value of the footages contained in the DVD, as the Hard Disk contained the entire files and it has a different hash value than the files of the footages. We, therefore, are of the view that the suggestion in the

cross-examination was of no significance in the facts and circumstances of this case.

85. We find from the evidence discussed earlier that there was no scope left out for tampering in the process of seizure, sealing, forwarding and receipt of all the concerned articles by PW 19, who has vouched that it is untampered and has withstood it in her cross-examination on all the questions in respect of it. No questions were put to this witness impeaching her credit, as required by Section 155 of the Evidence Act. We, therefore, do not find that the cross-examination of PW 19 is of any help to the accused persons. On the contrary, we are of the view that there is no reason to disbelieve the version of PW 19 on the comparison of photographs with the faces of selected frames, as shown in the report at Exhibit 57.

Oral evidence of PW 4 Pramod to identify the assailants as accused persons :

86. PW 4 Pramod Gawande is the real brother of the deceased Jitu Gawande. He claims to be knowing the accused Nos.1 to 6 as

the friends of the deceased Jitu and on visiting terms to his house. He talks about the motive of the accused Nos.1, 2 and 3 to assault the deceased, who used to repeatedly demand the amount of Rs.50,000/- paid to the accused No.1- Tushar Dalal on credit. Undoubtedly, he is not an eye-witness to the incident, but claims to have seen the accused persons not only in the crime in question on the basis of CCTV footages shown to him in the Police Station on 11-1-2013. This witness was also confronted in the Court with the footages from camera Nos.1, 2 and 7. However, it is not clear whether footages were from CD marked as 'X' or from DVD marked as Article 18A. Be that as it may, CD - 'X' was confronted to PW 1 Raghuv eer, who identified it.

87. PW 4 Pramod identified all the accused persons. According to him two accused were assaulting Jitu by knife, two were watching outside the Bar, and remaining two accused were inside the Bar with the accused, who were assaulting Jitu. He states that the accused No.1- Tushar and the accused No.2- Kunal were assaulting Jitu by knife, the accused No.5- Rinku provided the knife, the accused No.3- Lashu Faye was standing along with the

accused Nos.1, 2 and 5 inside the Bar, the accused No.4- Amol Mandale came from backside of the Bar and took cold drink bottle and brandished to the persons, including the waiters inside the bar, and the accused No.6- Samir was standing outside, near the gate of the Bar.

Our findings on the oral evidence of PW 4 Pramod on the identification of accused persons :

88. The oral evidence of PW 4 Pramod claiming to have seen CCTV footages on 11-1-2013 in Police Station, was possible to get corroboration from the Investigating Officer. The evidence of PW 4 that he was shown CCTV footages on 11-1-2013 in the Police Station does not find any corroboration. In fact, all the items seized on 10-1-2013 were sealed and there is no evidence of re-opening of it. However, his oral evidence about previous acquaintance with the accused persons as the friends of deceased Jitu and in respect of motive, seems to us as natural. It is not questioned in the cross-examination. We, therefore, do not find any impediment in accepting this evidence and we hold that PW 4 Pramod has unequivocally established the motive of the accused to finish the

deceased Jitu and has identified all the accused persons as the assailants of Jitu, on the basis of CCTV footages shown to him in the Court.

89. The objection before the Court to confront PW 4 Pramod with CCTV footages was that he is not an eye-witness and, therefore, the footages can only be confronted to him in the cross-examination. The Court has held that the witness has stated to have seen the footages in the Police Station and, therefore, the objection was overruled. The Court has also held that the footages were shown only for the purposes of identification of the accused persons. The cross-examination of PW 4 on the aspect of his acquaintance with all the accused persons is conspicuously silent. Whether PW 4 was confronted the CCTV footages from CD – 'X' or DVD – Article 18A does not make any difference, as, in our view also, CCTV footages were shown only to identify the assailants, which he has done. This witness has clearly established his previous acquaintance with all the accused persons as the friends of deceased Jitu and in respect of money transaction between accused No.1- Tushar and deceased Jitu. We do not find any reason to

disbelieve the version of PW 4 and we hold that he has identified all the accused persons as the assailants of deceased Jitu Gawande and has attributed each of them the specific role which he has played in the crime in question.

Rival contentions on the question of admissibility of the certificate at Exhibit 160 issued under Section 65-B of the Evidence Act :

90. The prosecution has relied upon the certificate dated 12-2-2013 at Exhibit 160, issued under the signature of PW 15 Sachin, the owner of ITG Solution Company, which installed CCTV cameras in the Seven Hills Bar on 21-12-2012 and continues to monitor its working by sending the employees, including PW 14 Shubham, the Hardware Operator. The certificate at Exhibit 160 is reproduced below :

“ITG Solution

Date : 12-02-2013

Certificate
(U/S 65-B of Indian Evidence Act)

I Sachin Kshirsagar Proprietor of M/s ITG Solution, Plot No-79 Radhakrishna Nagar Behind Radhakrishna Temple, Hudkeshwar Road, Nagpur. To the best of Knowledge and belief certify as under :

- 1) That I Sachin KS am running the Business of CCTV System and IT Solution by ITG Solution.
- 2) That I have Installed the CCTV System in 7 Hill BAR, Near Sakkardhara lake, Sakkardhara Nagpur On 21st Dec 2012, Receipt No-ITG-026
- 3) That CCTV System in 7 Hill BAR, Sakkardhara Nagpur was installed by our Technical Team.
- 4) That the CCTV System was in Operation from 21st Dec 2012 to till Date of Incidence That is 10th Jan 2013.
- 5) That On dated 10th Jan 2013 the CCTV System was working till time after 8:30 pm when Mr. Shubham Padgilwar visited 7 hill Bar, Sakkardhara Nagpur, and CCTV System (HDD and DVR) in the Presence of Investigation Team Of Sakkardhara Police Station and Handed Over CCTV System (HDD and DVR) to the Police

Note:- Copy of Bill is Already Hand Over to the Police Station

Seal of ITG Solutions,
Nagpur and
Signature as- Sachin
Signature and Seal

Place:- Nagpur

Regd. Off.79, Rarhkrishna Nagar, B/H Radhakrishna Temple, Hudkeshwar Rd, Nagpur-34.”

The prosecution claims it to be one issued under Section 65-B of the Indian Evidence Act.

91. Relying upon the provision of Section 65-B of the Indian Evidence Act, it is urged by the learned counsels appearing for the accused persons that unless the conditions mentioned under

sub-section (4) therein are complied with, the proof of an electronic record by oral evidence is not permissible. Our attention is invited to a three-Judge Bench decision of the Apex Court in the case of *Anvar P.V. v. P.K. Basheer*, reported in (2014) 10 SCC 473, more particularly para 14 therein, which is reproduced below :

“14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.”

It is urged that the certificate in the present case, marked as Exhibit 160, does not comply with the mandatory conditions (a) to (e), as aforesaid, laid down by the Apex Court. It is, therefore, inadmissible in evidence.

92. According to the defence, the certificate at Exhibit 160 ought to have been signed either by the owner of the Seven Hills Bar and Restaurant or PW 1 Raghuveer, the Manager, who were occupying the responsible official position in relation to the operation of the CCTV system installed in the Seven Hills Bar and Restaurant, as required by condition (e) in para 14 above. The certificate at Exhibit 160 is signed by PW 15 Sachin, the owner of ITG Solution Company, who has installed the CCTV cameras, and this is no compliance of the mandatory provision. It is further urged that the certificate at Exhibit 160 also does not conform to the conditions stipulated under clauses (a) to (d) in para 14 of the decision in *Anvar's* case, reproduced above.

93. According to the defence, though there was primary evidence available, what was used during the investigation and also before the Court to confront the witnesses, was the secondary evidence in the form of CD, marked as 'X' for identification, and DVD, marked as Article 18A, in respect of which the certificate, as contemplated under Section 65-B of the Evidence Act has not at all been issued. It is, therefore, urged that the identification of the accused persons as the assailants in the present case being based exclusively upon the secondary evidence of electronic record, the same is inadmissible.

Consideration of precedents :

94. In the decision of a two-Judge Bench of the Apex Court in the case of *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*, reported in (2005) 11 SCC 600, an issue of production of electronic evidence on record was considered. In para 150 of the said decision, it was held as under :

“150. According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies”. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in Sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.”

The aforesaid decision holds that “It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 and 65.”

95. The aforesaid decision came up for consideration before a three-Judge Bench of the Apex Court in the case of *Anvar P.V. v. P.K. Basheer*, reported in (2014) 10 SCC 473. In para 21 of the said decision, the Court holds that in *Navjot Sandhu's* case, cited supra, a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65B of the Evidence Act. Probably what the Court intended to say is that the question did not fall for consideration in *Navjot Sandhu's* case.

96. The Apex Court, however, holds that in *Navjot Sandhu's* case, the Court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. It holds that Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. The Court, therefore, holds that the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated in *Navjot Sandhu's* case, does not lay down the correct legal position. The decision in *Navjot Sandhu's* case to the effect that though the certificate containing details in sub-section (4) of Section 65-B is not filed, that does not mean that the secondary evidence cannot be given, even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, viz. Sections 63 and 65, has been overruled. The Court holds in para 22 of *Anvar's* case that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied.

97. In *Anvar P.V.'s* case, the Apex Court holds in para 22 that in the case of CD, VCD, chip, etc., the same shall be accompanied by the

certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. In para 24, the Apex Court holds that the CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It holds that only if the electronic record is duly proved in terms of Section 65-B of the Evidence Act, the question as to its genuineness thereof in that situation, resort can be made to Section 45-A – Opinion of Examiner of Electronic Evidence. It is held that Section 65-B of the Evidence Act is a complete Code.

98. The Court in *Anvar P.V.*'s case, however, clarifies that notwithstanding what we have stated in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

99. In the decision of a three-Judge Bench of the Apex Court in the case of *Tomaso Bruno and another v. State of Uttar Pradesh*, reported in (2015) 7 SCC 178, it was a case where it was held that CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of the crime. It further holds that it would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. It holds that omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case. The Court, therefore, drew an adverse inference against the prosecution under Section 114, illustration (g) of the Evidence Act, that the prosecution withheld the same as it would be unfavourable to them had it been produced. The conviction was, therefore, set aside.

100. In the decision of the Division Bench of the Apex Court, consisting of two Judges, in the case of *Sonu @ Anvar v. State of Haryana*, reported in 2017 SCC OnLine SC 765, it was a case where

CDRs were not certified in accordance with sub-section (4) of Section 65-B of the Indian Evidence Act. The question, which fell for consideration, was about permissibility of an objection regarding inadmissibility of CDRs in evidence before the Apex Court. In para 29, the Court holds that admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It holds that it does not appear from the record that any such objection was taken even at the appellate stage before the High Court.

101. In para 32 of *Sonu @ Anvar's* case, the Apex Court holds that it is nobody's case that CDRs which are a form of electronic record are not inherently inadmissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B(4). The Court holds that the crucial test in such a case is whether the defect could have been cured at the stage of marking the document. Upon an objection relating to the mode or method of proof, the Courts holds that in the present case if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It holds that the mode or method of proof is

procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. It holds that if the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. An example was taken as to the statements under Section 161 of the Code of Criminal Procedure, which fall under the category of inherently inadmissible evidence and CDRs do not fall in the said category of documents.

102. In the order dated 30-1-2018 passed by a two-Judge Bench of the Apex Court in the case of *Shafhi Mohammad v. The State of Himachal Pradesh*, all the decisions, cited supra, were taken into consideration and it is held in paras 14 and 15 as under :

“14. The applicability of procedural requirement Under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act

cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate Under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate Under Section 65B(h) is not always mandatory.”

“15. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate Under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.”

The aforesaid decision of a two-Judge Bench accepts the view taken in *Anvar P.V.*'s case delivered by a three-Judge Bench, but creates one more exception by clarification that in a case where electronic evidence is produced by a party who is not in possession of a device, the applicability of Sections 63 and 65 of the Evidence Act

cannot be excluded. It holds in such situation, there cannot be insistence upon the production of certificate under Section 65-B(4) of the Evidence Act. It further holds that the applicability of requirement of certificate being procedural can be relaxed by the Court wherever interest of justice so require.

Law summarized on electronic evidence :

103. We are not impressed by an argument that the order in *Shafhi Mohammad's* case is not the law laid down under Article 141 of the Constitution of India. We may now, therefore, summarize the law laid down by the Apex Court in the aforesaid decisions in respect of admissibility of electronic evidence :

(1) The purpose of the provisions of Sections 59, 65-A and 65-B of the Evidence Act, is to sanctify secondary evidence. **(Para 14 of *Anvar's* case).**

(2) Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, the question would arise as to genuineness thereof and in that situation, resort can be made to Section 45-A – Opinion of Examiner of

Electronic Evidence. (**Para 17 of Anvar's case**).

(3) The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence, if requirements under Section 65-B are not complied with. (**Para 18 of Anvar's case**).

(4) An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B of the Evidence Act are satisfied. In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B of the said Act, obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record is inadmissible. (**Para 22 of Anvar's case**).

(5) The view taken by the Apex Court in *Navjot Sandhu's* case that even if the certificate containing the details in sub-section (4) of Section 65-B of the Evidence Act is not filed, that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65 of the said Act, stands overruled and is declared to be no longer a good law. (**Para 22 of Anvar's case**).

(6) If an electronic record as such used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance of the conditions in Section 65-B of the said Act. **(Para 24 of Anvar's case)**.

(7) The objection that the electronic record tendered in evidence is inadmissible in the absence of a certificate, as required by Section 65-B(4) of the Evidence Act pertains to the mode or method of proof which is procedural, and objections, if not taken at the trial, cannot be permitted to be taken at the appellate stage. **(Paras 29 and 32 of Anvar's case)**.

(8) Withholding of the best evidence in the form of electronic record clinching the issue, raises a serious doubt about the case of the prosecution and an adverse inference against the prosecution under Section 114, illustration (g) of the Evidence Act can be drawn that the prosecution withheld the same, as it would be unfavourable to them had it been produced. **(Paras 21 and 28 of Tomaso Bruno's case)**.

(9) The applicability of procedural requirement under Section 65-B of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is

produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. The requirement is not always mandatory. (Para 14 of *Shafhi Mohammad's case*).

(10) The applicability of requirement of certificate being procedural can be relaxed by Court whenever interest of justice so justifies. (Para 15 of *Shafhi Mohammad's case*).

Certificate at Exhibit 160 does not fulfil the requirements of sub-section (4) of Section 65-B of Evidence Act :

104. Keeping in view, the law laid down by the Apex Court, we must hold that the certificate at Exhibit 160 does not comply with all the requirements of sub-section (4) of Section 65-B of the Evidence Act in relation to the proof of CD, marked as 'X' for identification, and DVD, marked as Article 18A, though it may be possible to urge that some of the conditions are complied with. The certificate is in fact not in respect of the secondary evidence of CD – 'X' or DVD –

Article 18A, which are used in evidence. Exhibit 160- Certificate is proved in respect of the evidence of what it conveys through it, but it does not satisfy the requirements of sub-section (4) of Section 65-B, as are laid down in para 14 of *Anvar's* case by the Apex Court and is, therefore, inadmissible in evidence as certificate under Section 65-B. We, therefore, hold it against the prosecution that the certificate at Exhibit 160 cannot have presumptive value as is attached to it under the said provision. The Sessions Court has held that PW 15 Sachin has issued such certificate at Exhibit 160 and he was occupying a responsible position in respect of installation and functioning of the system. In our view, this is not enough to hold that Exhibit 160 satisfies the requirements of Section 65-B.

105. The findings recorded by us in the aforesaid paras on the inadmissibility of Exhibit 160 as an evidence under Section 65-B of the Evidence Act does not relieve us from considering the position of law laid down by the Apex Court in its various decisions on the question as to whether the provision of Section 65-B of the Evidence Act is attracted or not in the facts and circumstances of this case. Hence, we proceed to deal with all such decisions.

Our understanding of law on electronic evidence:

106. What we understand from the law summarized as above is that Section 65-B of the Evidence Act deals with the secondary evidence and not with the primary evidence in the form of electronic record. If the reliance is placed on the primary evidence, then it is not necessary to produce the certificate under Section 65-B of the Evidence Act in compliance with the conditions stipulated by the Apex Court in para 14 of its decision in *Anvar's* case. In case where the electronic evidence is produced by a party, who is not in possession of the device, the applicability of Sections 63 and 65 of the Evidence Act is not excluded, and in such a case, the procedural requirement under Section 65-B of the Evidence Act is not at all attracted. In cases where the provision of Section 65-B is not attracted, oral evidence of electronic record becomes admissible and recourse could be to the provisions of Sections 59, 63 and 65 of the Evidence Act.

107. Though the provision of sub-section (4) of Section 65-B of the Evidence Act is mandatory and non-compliance of it, makes the secondary evidence of electronic record inadmissible, nonetheless, it is procedural dealing with the mode and manner of proof. Any objection as to its admissibility has, therefore, to be raised at the time when such evidence is sought to be tendered. However, if such secondary evidence is permitted to be tendered without any objection, the demand for compliance of the conditions in sub-section (4) of Section 65-B is deemed to have been waived, as has been considered in the case of *Tomaso Bruno*, cited supra. Such objection cannot subsequently be entertained by the Court to deprive the party tendering such evidence, an opportunity to rectify the defects or the deficiencies. Therefore, the question as to whether the provision of sub-section (4) of Section 65-B of the Evidence Act is attracted or not, will have to be decided in the facts and circumstances of each case and the Court can relax such requirement whenever interest of justice so requires or justifies.

Our view on the admissibility of electronic evidence in the facts and circumstances of this case :

108. PW 14 Shubham states that he had also copied the wanted footage of three cameras from DVR in the Pen Drive. He states that “I had also copied the wanted footage in two CDs from the Pen Drive, which were given to the police.” The Sessions Court, relying upon the oral evidence of PW 14, holds in para 66 that the copies of footages, which were made in Pen Drive, were kept by police for investigation purpose and they are not produced before the Court. We do not find any fault in such a view taken by the Sessions Court.

109. The Hard Disk, which is a primary electronic evidence, containing Image of CY 66/13, is marked as Exhibit 1 without any objection as to its admissibility. A DVD, which is the copy of the Image or a copy of the Hard Disk prepared and identified by PW 19 Ms Puja is marked as “Annexure DVD CY 66/13” - Article 18A is also admitted in evidence without any objection of it being a true copy of the footages in the Hard Disk. On our independent consideration of the entire evidence, we find that the DVD at

Article 18A is the true and genuine copy of footages contained in the Hard Disk and no fault can be found with the comparison report at Exhibit 57. The Sessions Court records the finding in para 78 that PW 19 Ms Puja has clarified that the video is continuous and she ruled out the possibility of tampering of Hard Disk or even DVD – Article 18A. We concur with it. Thus, the primary as well as the secondary evidence of electronic record produced on record is true and genuine.

110. On the basis of the oral evidence of PW 5 Kailash, PW 14 Shubham, PW 16 Rupali, Exhibit 99 seizure panchanama, bill of Pen Drive and DVD/CD at Exhibit 165, sketch of spot at Exhibits 166 and 167 and bill for purchase of CCTV system at Exhibit 84, we have already held that – (1) CCTV system containing Hard Disk and cameras to record all happenings in the Bar was installed, (2) it was functioning on the date of incident, (3) it recorded the entire incident of murder of Jitu on 10-1-2013 at 5.30 p.m. onwards, (4) recorded footages in cameras were viewed on LCD TV on the spot, (5) copies of footages from cameras 1, 2 and 7 in the Hard Disk, taken in CD – 'X' are true and genuine, and

(6) CD – 'X' and entire system of CCTV cameras was seized and sealed under panchanama at Exhibit 99, and (7) all these articles are identified by the witnesses in Court. The Sessions Court also records the finding in para 73 that from the date of seizure till opening of parcel, containing Hard Disk, by PW 19 Ms Puja, the label seal (Article 5) on the parcel was intact. We accept such finding.

111. One more additional aspect we would like to consider. On CD – 'X' placed on record, it is written “CAPTAIN PRO COMPACT DISC RECORDABLE” and on DVD, it is written as “DVD-R”. After its search on Internet, we find that it is known as “CD-R” or “DVD-R”, which is a type of “Write Once, Read Many” (WORM) compact disc format that allows one-time recording on disc and it is different from CD-RW which allows you to write data and then erase to re-use the disc. As long as CD-R disc has not been finalized, you can erase it and re-use it the same way you could a standard CD-RW disc. The finalization process makes it impossible to re-use a CD-R after its been recorded to and so long as that has not happened you can continue to record data to a disc as often you would like. In our view, it means that the CD – 'X' and DVD – Article 18A placed on

record are of type “Write Once, Read Many” and are not capable of multiple recordings, once the process is finalized. No questions were put in the cross-examination of PW 14 Shubham or PW 19 Ms Puja, on the question of re-use of CD – 'X' and DVD – Article 18A before finalization of recording. It was not the suggestion to PW 14 Shubham or PW 19 Puja that multiple CDs or DVDs were used while copying the data in CD – 'X' or DVD – Article 18A. It was not the suggestion that CD – 'X' or DVD – Article 18A were of “RW” type and not “R” type. There was no suggestion that the Hard Disk, other than one at Exhibit 1, was used for copying purposes. Once the recording in CD – 'X' and DVD was complete, there was no scope to tamper with it as they were not re-usable.

Significant aspects to be noted in respect of electronic evidence produced :

112. We would like to note most significant aspects in respect of the electronic evidence produced on record. It was not the objection raised that the CCTV system installed in the said Bar was neither functioning at the time of incident nor did record the incident of murder of Jitu Gawande. It was also not the objection raised that

the Hard Disk at Exhibit 1 was tampered or contained something other than what was recorded by the cameras in operation connected to it. It was neither the objection raised nor was there any cross-examination suggesting that the CD 'X' in question does not contain images of the footages contained in the Hard Disk or that it is not a true copy of footages contained in three cameras recorded in the Hard Disk at Exhibit 1. It is also not an objection that DVD at Article 18A is not the true copy of the Hard Disk at Exhibit 1. It was also not the objection raised before the Court that the witnesses should be shown the CCTV footages from the primary evidence of Hard Disk produced on record. PW 14 Shubham, who prepared CD – 'X', and PW 19 Puja, who prepared DVD – Article 18A, have deposed that they have copied it from the Hard Disk at Exhibit 1. There is no challenge to this version of independent witnesses, which is not tested in the cross-examination, as required by Section 155 of the Evidence Act; impeaching their credit. In view of such position, we hold that the objection raised to the admissibility, loses its significance and is, therefore, rejected.

Other objections to electronic evidence :

113. The Sessions Court has dealt with two objections raised by the defence in paras 76 and 77 as under :

“76. Evidently, in the requisition letter (Exh. 195) model number of hard-disk, which was sent for forensic examination is HDKPOK02J, whereas in report (Exh. 57), the number of hard-disk is mentioned as WD5000AAKX-00ERMA0. Taking help of this discrepancy, learned Advocate for the accused No.1, vehemently submits that the hard-disk examined by the expert is not the same. Bare perusal of hard-disk (Article-4) goes to show that apart from number mentioned in the requisition letter (Exh. 197), various other numbers are mentioned on the hard-disk itself. The number WD5000AAKX-00ERMA0 is one of the numbers printed on the said hard disk Apart from HDKP05AOK02J. So, it appears that the expert has written in her report one of the another number, which is appearing on the hard-disk (Article-4) containing number HDKP05AOK02J. Therefore, I do not find force in the argument of learned Advocate for accused No.1 that it is not the same hard-disk.”

“77. It is also submitted by learned Advocate for the accused that the CD as well as hard-disk are not exhibited and they have been given Article Numbers, therefore, they cannot be read in evidence. Let me state, in general practice any document of paper is given an exhibit number and whereas, any article, though it may be document within the meaning of Evidence Act, are given article numbers for the convenience purpose. So, mere on this ground it cannot be said that hard-disk and DVD/CD are marked as Article No.4 and 18, respectively and not given exhibit numbers, therefore they cannot be read in evidence. Article or Exhibit Numbers are given only for identification and convenience purpose during the trial. Deciding its probative value is entirely different thing. So, if the other criteria is satisfied, then they can be read in evidence, irrespective of the fact that they are given article numbers. Therefore I do not find force in the argument of Learned Advocate for defence.”

We do not find any fault in rejecting the objection and we concur with it.

Ourself witnessing CCTV footages from the Hard Disk, CD and DVD :

114. The Hard Disk at Exhibit 1 contained in the DVR is

available on the record of the Sessions Court. The witnesses PW 1 Raghuv eer, PW 2, Raju, PW 3 Sitaram, PW 4 Pramod, PW 5 Kailash, PW 14 Shubham, PW 16 Rupali and PW 18 Vitthal were confronted with the relevant portion in CD – 'X' and Annexure DVD CY-66/13 (Article 18A) during the course of their examination-in-chief. We asked the learned counsels appearing for the parties as to whether there is legal impediment for this Court to view the footages from the Hard Disk, DVD and CD, and their response is that there cannot be. In fact, all of them expressed that the Sessions Court should have got the entire system produced on record assembled and the witnesses should have been confronted with the footages recorded in the Hard Disk at Exhibit 1. We, therefore, called upon the Technicians from the establishment in the High Court in our Chamber. We opened the seals of the articles sealed and produced. We got it assembled and have ourselves viewed the footages contained in the Hard Disk at Exhibit 1, which was connected to the DVR, CD – marked as 'X' and DVD at Article 18A.

115. After witnessing the footages in the Hard Disk, CD and DVD, we neither find any difference nor any discontinuity or insertions in the Hard Disk at Exhibit 1. On the contrary, we find that the recordings in the Hard Disk and the DVD and CD are in the same continuity and corresponds with each other. We find that the DVD at Article 18A and CD – 'X' are the true and genuine copies of the footages in camera Nos.1, 2 and 7 in CCTV recorded in the Hard Disk at Exhibit 1. We also find that the entire electronic evidence produced on record is not only consistent with each other, but also consistent with the oral evidence of the witnesses. Probably for this reason, there was no insistence from the defence for showing the footages from the Hard Disk, which is a primary electronic evidence.

116. We do not find it necessary to consider the question as to the admissibility of secondary evidence produced by a person not in power and possession of the CCTV system. We find that the primary as well as secondary evidence of electronic record is produced, and that the secondary evidence is a true and genuine copy of relevant primary evidence available on record. In the absence of any objection or cross-examination of the witnesses, PW 1 Raghuv eer,

PW 2 Raju, PW 3 Sitaram, PW 4 Pramod, PW 5 Kailash, PW 14 Shubham, PW 16 Rupali and PW 18 Vitthal, on the aspect of CD – marked as 'X' and DVD at Article 18A not being the true and genuine copies of the footages contained in the Hard Disk at Exhibit 1, in our view, the provision of Section 65-B of the Evidence Act is not at all attracted so as to make the electronic evidence in the form of CD and DVD inadmissible to establish the incident and the identity of the assailants. We, therefore, hold that the electronic evidence tendered in the form of Hard Disk at Exhibit 1, CD – 'X' and DVD – Article 18A is admissible in the facts and circumstances of the case without a certificate under Section 65-B of the Evidence Act. We, therefore, accept such a view taken by the Sessions Court to be legal, correct and proper.

Activities in the Seven Hills Bar :

117. PW 1 Raghuveer states that the Bar used to open at 10.30 a.m. and used to close at 11 p.m. There are six waiters, one cook and one security guard. In the morning, two waiters used to come for a work and they used to remain in the Bar upto 2 p.m.

Four waiters used to come at 2 p.m. and used to remain in the Bar till 11 p.m. Cook and guard used to come at 2 p.m. He states that “I used to come to Bar at 2 p.m. and my job was to provide service to the customers by sitting on the counter.” He states that the Bar provides service of liquor for drinking to the customers at the counter. Waiters used to provide service to the customers at the table. After taking orders from the table, waiters used to come to the counter and used to take liquor from him as per the orders of the customers. He states that in the year 2013, Raju Vargat, Anil Tiwari, Vinay Tiwari, Manish Tiwari, Devendra and Gajanan were working as waiters in the Bar, whereas Rupesh Gade and Sitaram Wankhede were the security guard and cook respectively.

Actual incident, complaint, the persons present on the spot, and their oral evidence :

118. PW 1 further states that the incident took place on 10-1-2013, on which date he came to the Bar at 2 p.m., and Sitaram Wankhede, Anil Tiwari, Raju Vargat and Rupesh attended the duty. At about 5 to 5.30 p.m., four people came in the Bar. He states that “One of them came to my counter and asked counter peg of Rum. I prepared peg (liquor) and gave it to him. Other three people were

standing behind him. I provided Rum to the said person in a glass. Thereafter, I was busy in my work. In our Bar, there is door of glass which is adjacent to the shutter of the Bar. Besides the said door, there is partition of glass. I saw from the glass partition, one car came there. Those three persons were looking towards car. I felt that they were waiting for somebody because those persons were looking outside the Bar again and again. The said car was of white colour. It was big car. After some time, one person came out of the said car and entered in the Bar. He was talking to all four persons. They were talking in Marathi. I do not know Marathi. They started talking loudly, therefore, I paid attention towards them. One of them, closed the door of the Bar. The said person was one of the four persons. Those four persons started quarrelling with a person who came in the car. Out of four, two persons started assaulting the said person by means of knives. Those knives might have brought by those persons. Rest of two persons went outside. The person to whom assault was made fell down. In spite of that those persons were assaulting the said person, who fell down. Thereafter they left the Bar. There was pool of blood. I had been to rescue him but one of them brandished knife towards me and asked me to go inside.

Therefore, I went inside the counter.”

119. PW 1 Raghuveer states that at the time of incident, CCTV cameras were on. In para 7, he states that “When incident happened, I, Raju Vargat, Sitaram Wankhede and Anil Tiwari were present. Nobody other was present there except us. I made phone call on 100 number and informed the incident.” In para 11, he states that within 20 to 25 minutes, police came there and enquired with him about the deceased. He further states that “I told police that I do not know deceased. I was taken to police station. I informed the police about the incident.” He states that “What I told, police wrote.” He identifies the oral complaint dated 10-1-2013 at Exhibit 85, and the printed complaint at Exhibit 86. He says that “No further enquiry was made by police with me at Bar.”

120. PW 1 states that “I do not remember the description of the said persons. I cannot identify those persons due to passage of time.” The Court, therefore, granted permission to the prosecution to cross-examine PW 1. The portions marked 'A', 'B', 'C', 'D', 'E' and 'F' in the complaint at Exhibit 85 were confronted to this witness in the

cross-examination. The said statements are reproduced below :

“Portion 'A' : थोडी देर बाद उनमे से एक आदमी ३० ते ३५ साल उम्र के आदमी को जिसने व्हाईट रंग की शर्ट पहनेनी थी उसे लेकर आये।”

[Portion 'A' – Translated – *After some time one amongst them brought a person aged about 30 to 35 years wearing white T-shirt.*]

“Portion 'B' : बाद मे व्हाईट शर्ट वाला आदमी उस ब्ल्यू शर्ट वाले लडके को बारबार चेक कर रहा था और बाकी लोग उसके आजुबाजु खडे होकर देख रहे थे ।”

[Portion 'B' – Translated – *Subsequently a person wearing white shirt was checking the person wearing blue shirt and rest of the persons standing were watching him.*]

“Portion 'C' : वह एक दुसरे के खंदेपर हात रखकर गले मिलकर बातचित कर रहे थे तो मुझे लगा की वह सभी लोग एक दुसरे को पहचानते है। तब ब्ल्यू शर्ट पहने हुये आदमीने व्हाईट शर्ट वाले आदमी को गालीगलोच करना शुरु किया । ”

[Portion 'C' – Translated – *They were keeping hands on the shoulder of each other and were talking and hugging. I therefore thought that they were knowing each other. At*

that time person wearing blue shirt started abusing the person wearing white shirt.]

“Portion 'D' : फिरसे काउंटर के पास आकर उसने उसके साथवाले आदमी से अवजार मांगा तब उसके साथ वाले आदमी ने उसको अवजार दिया और उसने अवजार लेकर व्हाईट शर्टवाले आदमी को दिखाकर डराने लगा ।”

[Portion 'D' – Translated - *Again he came near the counter and asked one of his accomplices to give weapon and the accomplice gave it to him and threatening started to a person wearing white shirt.]*

“Portion 'E' : तब उनके साथ वाला और एक लडका दुबला पतलासा लंबे बाल वाला बार के अंदर से आया और उसने वहाँपर रखी कोल्ड्रीक की बॉटल उठायी और उससे हमारे वेटरों को डराया । तब उनके साथ वाले और दो आदमी बाहर से कोई आ रहा है की नही यह देख रहे थे और दरवाजे से अंदर बाहर कर रहे थे ।”

[Portion 'E' – Translated – *At that time, the accomplice or one another of slim and heighthed personality with long hair came in the Bar, took up a bottle of cold drink and started threatening the waiters. Two other persons accompanying them started watching outside to see if there is someone coming inside and they were going out and coming in.]*

“Portion 'F' : मैं अगर उन आदमीयों को वापस देखुंगा तो पहचान लुँगा ।”

[Portion 'F' – Translated – *If I see the said persons I can identify them.*]

The witness says that “I do not remember whether deceased was wearing white shirt. I do not remember whether I had stated to police that after some time one of them brought a person aged 32 to 35 years wearing white shirt. I cannot assign any reason why portion 'A' is appearing in my report.”

PW 1 further states that “I do not remember whether I had stated to the police that the person wearing white shirt was checking the person, wearing blue shirt. I do not remember whether other persons were looking to them. I cannot assign any reason why portion 'B' is appearing in my report.”

He further states that “I do not remember that all persons were talking each other by hugging. It is not correct to say that I felt that all those persons might be knowing each other. I do not

remember person wearing blue shirt, started abusing the person wearing white shirt. I do not know why portion 'C' is appearing in my report.”

PW 1 further states that “As I was busy in my work, therefore, I could not pay attention whether the person wearing blue shirt, demanded weapon to the person who showed the weapon to the person wearing white shirt and frightened him. I do not know why portion marked 'D' is appearing in my report.”

PW 1 further states that “I do not remember whether out of four persons, a thin person having long hair came from one side of hall by taking one cold drink bottle and threatened the waiters of the Bar. I do not remember out of those, two persons were looking outside to see whether anybody come inside the bar and were coming and existing from the door. I cannot assign any reason why portion marked 'E' is appearing in my report.”

He further states that “I do not remember whether I stated to police if, I had seen assailants, I can identify them.

I cannot assign any reason why portion marked 'F' is appearing in my report.”

PW 1 further states that “It is not correct to say that I am deposing false that I do not remember, portion marked 'A' to 'F' to police. It is not correct to say that I had stated portion marked 'A' to 'F' to police.”

121. The complaint at Exhibit 85 by PW 1 Raghuveer was recorded by Police Sub-Inspector Jagdish Pawar, PW 17. He states that “I was asked to take the complaint of complainant. At about 8.00 p.m. complainant came to police station. I recorded his oral complaint on computer. Complainant signed on the said computerized report.” He identifies the complaint at Exhibit 85 shown to him and states that it bears his signature. He states that the contents are written as per the say of the complainant and he prepared the printed FIR and registered the offence under relevant Sections vide Crime No.12/13 and the printed FIR is identified at Exhibit 86, which bears his signature and the signature of the complainant. He states that the portion marked 'A' to 'F' in the

complaint at Exhibit 85 are written as per the say of the complainant. In the cross-examination, he denies that the said portions were written by him on his own.

122. PW 18 Vitthal, who took over the investigation on 11-1-2013 at 9 a.m., states that the complainant approached him and told that he wants to state something and, therefore, the supplementary statement of the complainant was recorded as per his say. The portions marked 'A' to 'F', appearing in the statement of PW 1, recorded on 11-1-2013, were confronted to him as Exhibits 174-A to 174-F. The said statements are reproduced below :

“Portion 'A' : कल मैने मेरी आँखो से खुन होते हुये देखने से मै डर गया था और खुन करनेवाले गुंडो की दहशत की वजह से पूरी जानकारी नही दे पाया था और खुन करनेवाले गुंडो का नाम मुझे मालूम होते हुये भी मैने पुलीस को नही बताया था ।”

[Portion 'A' – Translated – *Yesterday I witnessed the murder. However, I was scared and because of terror of gundas I could not give the complete information to the police in spite of knowing their names.*]

“Portion 'B' : कल ता. १०.०१.२०१३ को शाम ०५.३० बजे के आसपास हमारे बार मे हमेशा आनेवाले ग्राहक तुषार दलाल, कुणाल म्हस्के, लच्छु फाये और रिंकु टिचकुले आये । मैने कई बार उनको उधार दारु दि है इसलिए मै उन्हे अच्छे से पहचानता हूँ । उस दिन वह लोग बार में आनेपर मैने हमेशा कि तरह उनको ग्लास मे शराब दि ।”

[Portion 'B' – Translated – Yesterday on 10-1-2013 at about 5.30, the usual customers in the Bar Tushar Dalal, Kunal Maske, Lashu Faye and Rinku Tichkule came. I had supplied them liquor on credit on earlier occasions and therefore I know them very well. On that day I served them liquor in the glass as usual, when they came in the Bar.]

“Portion 'C' : कुछ समय बाद लच्छु फाये हमारे बार में हमेशा आनेवाला ग्राहक जिसको में उधार दारु पिलाता था इसलिए उसे पहचानता था उस जितू गांवडे को बार में लेकर आया ।”

[Portion 'C' – Translated – After some time Lashu Faye who is our usual customer to whom I know and used to serve liquor regularly brought with him Jitu Gawande.]

“Portion 'D' : तुषार जितू गांवडे को हिंदी में बोला, साले बार बार पैसे मॉगता है तुझे दिखाता हूँ । उतने मे तुषार ने रिंकू को कुछ मांगा तब रिंकू ने उसके पास का चाकू जैसा अवजार तुषार के हाथ मै दिया । ”

[Portion 'D' – Translated – *Tushar said in Hindi to Jitu Gawande “Sale bar bar paise mangta hai, tuze dikhata hu”. Immediately Tushar demanded something from Rinku and Rinku immediately gave him weapon like knife to Tushar.]*

“Portion 'E' : *उत्तने में कुणालने अपने पास का चाकू निकालकर जितु गांवडे को मारने के लिए दौडा तब लच्छु फाये कुणाल और तुषार को बोल रहा था “ जित्या को छोडो मत मार डालो” । तब तुषार और कुणाल ने जितु गांवडे को चाकू जैसे अवजार से मारना शुरु किया ।”*

[Portion 'E' – Translated – *Immediately Kunal took out the knife and started assaulting Jitu Gawande and at that time Lashu Faye told Kunal and Tushar “Don't leave Jitya, kill him.” At that time Tushar and Kunal started assaulting Jitu Gawande with knife.]*

“Portion 'F' : *उत्तने में मेरे बार के ओपन रेस्टॉरंट की तरफ से हमारे बार मे हमेशा आनेवाला अमोल मांदाळे यह भी वहाँपर आया ।”*

[Portion 'F' – Translated – *Immediately Amol Mandale our usual customer came inside the Bar from the open restaurant.]*

PW 18, in response to the questions put to him in cross-examination in para 22, states that on 11-1-2013 at

about 9 a.m., he recorded the statement of the complainant and it lasted for 15 minutes.

123. PW 1 Raghuveer states that “On 11-1-2013, my statement was not recorded by police.” He states that “I cannot assign any reason why portion marked 'A' is appearing in my supplementary statement.”

He states that “It did not happen that the customer Tushar Dalal, Kunal Maske, Lassu Faye and Rinku Chitkule who used to visit frequently in our bar, had been to my bar on 10-1-2013 at about 5.30 p.m.” He states that “I cannot assign any reason why portion 'B' is appearing in my supplementary statement.”

PW 1 states that “It did not happen that after some time, Lashu Faye brought Jitu Gawande in the bar. I cannot assign any reason why portion marked 'C' is appearing in my supplementary statement.”

He states that “As I was busy in my work, therefore, I do not say that after some time Tushar asked Jitu Gawande “*sale bar bar Paise mangta hai, tuze dikhata hu*”, therefore, Tushar demanded something to Rinku then Rinku gave weapon like knife to Tushar. I cannot assign any reason why portion marked 'D' is appearing in my supplementary statement.”

PW 1 states that “It did not happen that when Kunal also rushed to assault Jitu Gawande by taking out knife, Lashu Faye told Kunal and Tushar “*Jitya ko chodo mat, mar dalo*”.” He states that “It is not correct to say that I had stated to police that Tushar and Kunal started assaulting Jitu Gawande by means of knife.” He further states that “I cannot assign any reason why portion marked 'E' is appearing in my supplementary statement.”

He states that “It did not happen that Amol Mandale, who used to often visit my bar, came there. I cannot assign any reason why portion marked 'F' is appearing in my supplementary statement. It is not correct to say that as I was knowing the name of assailants, therefore, I had stated their names to police. I cannot say that

accused are the same persons, who are assailants in the incident dt- 10-1-2013.”

124. Though PW 1 Raghuveer stated that Raju Varghat was present on the spot of incident when the incident happened, PW 2 Raju denies his presence on the spot and claims ignorance about the incident. He was confronted with the statements said to have been recorded by the police under Section 161 of the Code of Criminal Procedure on 10-1-2013, marked as 'A', 'B', 'C', 'D', 'E', and 'F', which are reproduced below :

“Portion 'A' : शाम ०५.३० बजे के आसपास बार में भिड़ नहीं थी तब बार में चार पाँच लोग आए जिनकी उम्र अंदाज़न २५ से ३० साल होगी वह काउंटर के पास खड़े होकर उन्होंने उनका ऑर्डर दिया। थोड़ी देर बाद एक ३०दक३५ साल उम्र का आदमी जिसने व्हाइट रंग की शर्ट पहने थी वह आया और वह लोग काउंटर के पास खड़े रहकर मराठी में बातचीत करने लगे। तब व्हाइट शर्ट पहनने वाले आदमी ब्ल्यू शर्ट पहने हुये आदमी से जोरजोरसे बात कर रहा था और ब्ल्यू शर्टवाला आदमी व्हाइटशर्ट पहने आदमी के साथ पैसे के लेन देन के बारे में बातचित कर रहा था।”

[Portion 'A' – Translated – *In the evening at about 5.30 there was no rush in the Bar and at that time 4 to 5 persons aged about 25 to 30 years came near the counter in the Bar*

and gave order. After some time one person wearing white shirt aged about 30 to 35 years came inside and all of them were standing in front of the counter and talking in Marathi. At that time, person wearing white shirt started talking to person wearing blue shirt in a loud voice on the money transaction.]

“Portion 'B' : बाद मे बातो ही बातो मे उनका झगडा हो गया और वह एक दुसरे को गालीगलोच करने लगे। तब ब्ल्यु शर्ट वाले जिसकी उम्र २५ से ३० साल की, दुबला पतला आदमीने उसके साथ आया हुआ गोल चेहरेवाला जिसकी उम्र अंदाजन २५ से ३० साल होगी उससे चाकु मांगा तो उसने अपने पास का चाकु ब्ल्यु शर्ट वाले लडके के हात मे दिया ।”

[Portion 'B' – Translated – *Subsequently the altercations between them started, converting in quarrel and abusing each other. At that time person wearing blue shirt aged about 25 to 30 years having slim personality demanded knife from a person with a round face aged about 25 to 30 years, who gave it to him.]*

“Portion 'C' : तब ब्ल्यु शर्ट वाले लडके ने व्हाईट शर्ट वाले आदमी को अवजार से मारना शुरू किया। तब मेरे मॅनेजरने उनको झगडा मत करो ऐसा कहा। उतने मे मारनेवाले आदमी के साथ आया हुवा सफेद टी शर्ट वाला, उंचा और जिसने दाढी रखी थी वह आदमी ने भी उसके पास का चाकु निकालकर उस व्हाईट शर्टवाले आदमीपर वार किये।”

[Portion 'C' – Translated – *At that time, person wearing blue shirt started assaulting the person wearing white shirt. At that time Manager started intervening. One amongst the assaulters wearing white T-shirt, heighted and having beard, took out the knife and started assaulting a person wearing white shirt.]*

“Portion 'D' : तब मेरा मॅनेजर झगडा छुडाने गया तो उसी दाढीवाले ने चाकु दिखाकर मेरे मॅनेजर को डराया।”

[Portion 'D' – Translated – *At that time Manager tried to pacify but the person having beard threatened the Manager with knife.]*

“Portion 'E' : तभी एक आदमी जिसकी उम्र ३०दक३५ साल होगी जिसके सर के सामने के बाल कम थे और गोरा चिट्टा था जो मारने वाले लोगो के साथ आया था और वही काउंटर के पास खडा था । वह आदमी चाकु से वार करनेवाले दोनो को कह रहा था जित्या को मार डालो । ”

[Portion 'E' – Translated – *At that time, a person aged about 30 to 35 years, having thin hair on the head and came along with the assailants, was also standing near the counter. He started saying the assaulters “Kill Jitya”.]*

“Portion 'F' : एक आदमी दुबला और लंबे बालोवाला, २५ से ३० साल उम्रवाला मारनेवाले लोगो के साथ था और व्हाईट शर्टवाला आदमी

निचे गिर नहीं रहा था उसने मारने वाले दोनो के चाकु पकड रखे थे तबी व्हाईट शर्टवाले को गिराने के लिए उसने अपने हात मे बार मे रखी हुई कोल्ड्रींग की बॉटल उठायी तब तक व्हाईट शर्ट वाला आदमी फर्शपर गिर गया और तब लंबे बालवाले आदमीने हमको देखकर उस बॉटलसे डराया ।”

[Portion F – Translated – The person wearing white shirt was not falling down and he caught the knife in his hand. At that time, another person of a slim personality, having long hair, aged about 25 to 30 years, accompanying the assailants, picked up a cold drink bottle. In the meantime, the person wearing white shirt fell down and we were threatened with the bottle of cold drink.]

PW 16 Rupali, the Investigating Officer, states in para 4 of her deposition that “I recorded the statement of Raju Varghat. Portion marked 'A' to 'F' in his statement were recorded as per his say. It is marked at Exhibits 168-A to 168-F.”

125. PW 1 Raghuvеer also states that Sitaram Baburao Wankhede, PW 3, was also present when the incident occurred. The statement of PW 3 was recorded on 10-1-2013 by PW 16 Rupali, the Investigating Officer. Portion marked 'A' in the statement of PW 3 recorded in Marathi is reproduced below :

“Portion 'A' : मला आमचे बारचे काउंटरचे दिशेने भांडण होण्याचा आवाज आला व ते पाहण्यासाठी मी तिकडे गेलो. तेव्हा काउंटर समोर एका पांढरा शर्ट घातलेल्या व्यक्तीवर दोन लोक चाकुने वार करीत होते. वार करणांदक्या इसमापैकी एक उंच व दाढी असलेला व पांढरा टि शर्ट घातलेला मजबुत बांध्याचा होता तर दुसरा साधारण उंचीचा सडपातळ व निळ्या रंगाचा शर्ट घातलेला होता. तेव्हा आमचे मॅनेजर यांनी त्यांना भांडण करू नका असे सांगितले असता मारणांदक्या इसमापैकी दाढीवाल्या इसमाने आमचे मॅनेजरला चाकु दाखवून धमकावले. दरम्यान एक ३० ते ३५ वयाचा व मारणांदक्यांच्या बरोबर असलेला पुढे टक्कल असलेला गोरा इसम काउंटरवर उभा होता व तो चाकुने वार करणांदक्या इसमांना मारण्यासाठी सांगत होता. तेव्हा मारणांदक्यांचा एक साथीदार जो गोल चेहंदक्याचा, गोरा, फुल बाहीचा टिशर्ट घातलेल्या २० ते ३० वयाचा होता तो बारचे आत बाहेर करीत होता. त्यांचा आणखी एक साथीदार सडपातळ, काळासावळा व लांब केस असलेला जो आमचे ओपन रेस्टॉरंट कडून आला व मार खाणारा जमीनीवर पडत नव्हता व त्याने मारणांदक्यांचे दोन्ही चाकु पकडलेले होते व मारणारे त्यास खाली पाडण्याचा प्रयत्न करीत होते व तो पडत नव्हता तेव्हा त्याने बारमधील एक कोल्ड्रींकची बॉटल उचलली व मार खाणांदक्याचे दिशेने गेला इतक्यात मार खाणारा खाली पडला तेव्हा कोल्ड्रींक बॉटल हातात घेतलेला इसम मागे आला व त्याने आम्हाला पाहून धमकावले व काही वेळाने ते सर्व मारेकरी मार खाणारा मेला असे समजून तेथून बाहेर निघून गेले।”

[Portion 'A' – Translated – I heard the noise from the counter and therefore I went there. I saw that a person wearing white shirt was being assaulted by two persons with knife. One was strong and stout, having beard, wearing white shirt, and the other was slim and wearing blue shirt.

At that time our Manager asked them not to quarrel, but he was threatened by a person having beard with knife. In the meantime, one accomplice aged about 30 to 35 years was standing on the counter and asking the assailants to kill. At that time, one of the assailants, having a round face, fair in colour, wearing full T-shirt, aged about 20 to 30 years, was going out and coming in the Bar. Along with him, one more accomplice of slim personality, having long hair, came inside from the open restaurant and picked up a cold drink bottle, as he saw the person assaulted was not falling on the floor and had caught hold of the knives. However, immediately the person assaulted fell on the floor and the person having cold drink bottle in his hand came back and started threatening us. Subsequently all of them left, presuming that the person assaulted has died.]

PW 16 states in her deposition in para 5 that “I recorded statement of Sitaram Wankhede. Portion marked 'A' in his statement was recorded as per his say and it is marked as Exhibit 169.”

126. PW 1 Raghuveer, the Manager, though deposed the entire incident, states in para 7 of his deposition that “I do not remember the description of the said persons (assailants). I cannot identify those persons due to passage of time.” He stated that at the time of

incident, CCTV cameras were on and he can identify footages of the incident, and after seeing it, he can identify the assailants. At that stage, APP made request to the Court to show CCTV footage from the CD deposited in the Court. It was objected on the ground that the accused are not shown to the witness and the witness has not turned hostile. Keeping the objection open, the Court granted permission to the learned DGP to show the CCTV footage. The CD deposited in the Court was, therefore, opened and played in the laptop. The Court noted that none of the defence counsel or the DGP objects about non-functioning of the laptop. However, the objection of the defence was that it is only after showing CD, further evidence of this witness can be recorded. The Court, keeping aside the objection to be decided subsequently, permitted playing of CD in the laptop.

127. In the footage of camera No.1 started running, PW 1 identified himself and one Anil Tiwari present at the time of happening of the incident and says that “I can identify the assailants”, immediately turns around, and says that “I cannot identify the assailants because the video is not so clear.” Except refusing to identify the accused persons/assailants, the deceased and

the clothes worn by them, there is complete narration of incident – step by step – identifying every other thing shown in the footages. The CD, which was played, was marked as 'X' for identification and it was re-sealed by the Court.

128. PW 2 Raju Vargat, the Waiter in the Bar, who also admits his presence at the time of incident along with 2 to 3 other Waiters, refused to identify the accused persons even in the Test Identification Parade. He states that at the time of incident he was inside the kitchen and does not know what happened after 2.30 p.m. He was permitted to be cross-examined by APP. In cross-examination, he states that “My statement was recorded by police on 10-1-2013.” He further states that “I cannot assign any reason why portion marked A, B, C, D, E and F is appearing in his statement.” After he was confronted with CD, marked as 'X' for identification, which was run in the laptop, he fails to identify the accused persons or the assailants.

129. PW 3 Sitaram, working as Cook, admits that at the time of incident, he was himself and PW 1 Raghuveer, PW 2 Raju Vargat,

and one Tiwari were present inside the Bar. He, however, says that “I was inside the kitchen and, therefore, I do not know what happened in the Bar and I came to know about murder after the incident, which took place near the counter.” He accepts to have signed the inquest panchanama at Exhibit 92. This witness also refused to identify the assailants in the Test Identification Parade. The Court permitted APP to cross-examine him. He claimed complete ignorance about the incident and the assailants.

Concurring with the findings of Sessions Court :

130. The Sessions Court holds that though PW 1 Raghuveer, the Manager, identified his Bar, the entire articles in the Bar, including the staff, and also the incident happened, as appearing in the CD, he fails to identify the assailants as the accused persons. This witness did not support the theory of the prosecution to identify the assailants. It further holds that PW 2 Raju saw the murder, but went on deposing that he does not know who committed the murder. He identified the Bar and the Manager, but failed to identify the assailants as the accused persons when he was confronted with

DVD – Article 18A. It further holds that PW 3 Sitaram was also shown CCTV camera footages. Though he identified the Manager, waiter Anil did not identify the assailants in the CD as the accused persons. We endorse the view taken by the Sessions Court. Not only that, but we proceed further and hold that there is a deliberate design on the part of the eye-witnesses in failure to identify the assailants as the accused persons, obviously for the reasons best known to them.

Law on unlawful assembly and criminal conspiracy :

131. The accused are held guilty of the offences punishable under Sections 302 read with Sections 120B and 149 apart from the offences under Sections 147, 148 and 506B of IPC. The offences under Section 147 deals with punishment for rioting, Section 148 deals with rioting, armed with deadly weapon, and Section 149 makes every member of unlawful assembly guilty of offence committed in prosecution of common object. Section 120B of IPC deals with punishment for 'criminal conspiracy', as defined under Section 120A of IPC.

132. So far as the offence punishable under Section 149 of IPC making a member of unlawful assembly guilty of offence committed in prosecution of common object is concerned, three ingredients are required to be satisfied – (1) there must be an unlawful assembly of five or more persons, (2) there must be commission of offence by any member of an unlawful assembly, and (3) such offence must be committed in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object. The common object has to be inferred from the facts and circumstances of the case. It is enough if each has the same object in view and their number is five or more and they act as an assembly to achieve that object. The common object may be formed at any stage by all or a few members of the assembly and the other members may join or adopt it. Once the ingredients of the offence punishable under Section 149 of IPC are established, it is immaterial that any person of unlawful assembly did nothing with his own hands. It is the common object which makes the person vicariously liable for the acts of an unlawful assembly.

133. Section 120-A of IPC defines 'criminal conspiracy'. It states that when two or more persons agree to do, or cause to be done - (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. The proviso clarifies that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The explanation clarifies that it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. Section 120-B of IPC, dealing with the punishment of criminal conspiracy, stipulates in sub-section (1) that whoever is a party to a criminal conspiracy to commit an offence punishable with death imprisonment for life or rigorous imprisonment for a period of two years or upwards, shall, where no express provision is made within Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

134. In the decision of the Apex Court in the case of *Mukesh v. State (NCT of Delhi)*, reported in (2017) 6 SCC 1, the purpose of the

provisions and principles are highlighted, which we propose to state. The underlying purpose for the insertion of Sections 120-A and 120-B of IPC was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. Criminal thoughts in the mind when take concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means then even if nothing further is done an agreement is designated as a criminal conspiracy.

135. The decision in *Mukesh's* case lays down that it is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. Hence, the criminal conspiracy can be proved by circumstantial evidence. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Entering into an agreement by two or more persons to do an illegal act or legal act by illegals means is the very quintessence of the offence of conspiracy. While dealing with the act of criminal conspiracy, the Court has to enquire whether the two persons are independently pursuing the same end or they have come

together in the pursuit of an unlawful object. The former does not render them conspirators, but the latter does. It is essential that an offence of conspiracy requires some kind of physical manifestation of agreement. The evidence as to the transmission of thoughts sharing the unlawful design may be sufficient.

136. The decision in *Mukesh's* case further holds that to constitute a criminal conspiracy, it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The conspiracy is seldom an open affair and agreement can be inferred by necessary implication. Everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement, but also to collateral acts incident to and growing out of the original purpose.

Objection to the identification of accused :

137. Shri Adwait Manohar, the learned counsel appearing for one of the accused, invited our attention to the oral evidence of the complainant PW 1 Raghuv eer, who has deposed that on the date of the incident at about 5 to 5.30 p.m., four persons entered the Bar and one of them came to his counter and made a demand for peg. The other three persons were standing behind him and all of them looking outside the Bar again and again giving an impression of waiting for someone's arrival. He submits that in the absence of identification of these four persons out of six, and attributing specific acts to each of them, it is not possible to convict the accused persons in respect of the offences alleged to have been committed by them.

Our findings on identification of accused, unlawful assembly and criminal conspiracy :

138. It is not in dispute that PW 1 Raghuv eer was the Manager in the enclosed Bar, sitting on the counter. Obviously, he could say something definite about the persons who entered the Bar. He deposes that the four persons entered the Bar and one of them came

to his counter and demanded a peg. The other three persons were standing behind him. He deposes that the assault was by two persons by means of knives which they might have brought with them. He does not speak of the remaining two assailants, other than four. In our view, if the evidence brought on record establishes an unlawful assembly of six persons/assailants, who have conspired to commit an offence of murder of deceased Jitu, which is accomplished, the question as to which four out of six assailants have assaulted the deceased by knives, loses its significance, for the reason that they are found to be the members of unlawful assembly and the participants in the conspiracy. Merely because PW 1 Raghuv eer could see only the activities of four assailants, would not be enough to destroy the story of the prosecution.

139. We ourselves have seen the CCTV footages recorded in the primary document of Hard Disk seized at Exhibit 1, by getting DVR seized assembled. We also saw the footages in CD – 'X' and DVD Article 18A seized, in the laptop. The assailants were six in number. Four of them came inside the Bar. They were waiting for someone to come in the Bar. One of them wearing blue coloured

shirt was near the counter and started consuming a peg of liquor served to him, probably on his demand. The other three assailants were standing behind him and all of them were seen to be waiting for somebody, as they were looking outside the Bar again and again. After some time, a white coloured big car came outside the Bar and a person wearing white shirt (referred to now as “the deceased”, since his identity is not in issue) alighted from it and came along with one another accomplice, inside the Bar. Thus we found in the CCTV footages a group or an assembly of five assailants/persons inside the Bar along with the deceased.

140. Then we saw in the footages, the altercations were between the deceased and the person wearing blue shirt who was consuming liquor. The accomplice, who brought the deceased, left the Bar and went outside. One of the accomplices in the assembly of four inside the Bar, supplied a knife to a person wearing blue shirt, who started assaulting the deceased. Thereafter one another assailant/person in the assembly wearing white T-shirt having beard and heightened strong personality, took out a knife, which was already with him, and joined the assault on the deceased. When the inmates

other than the assailants in the Bar tried to proceed, one of the accomplices brandished them with cold drink bottle picked up from the Bar. After some time only two persons assaulting the deceased remained in the Bar and others went outside. After the object was accomplished, one of the two assailants firstly came out and fled away from the spot as a pillion rider, on a motorcycle of one more accomplice waiting as rider on it. The assailant wearing blue shirt came outside the Bar and along with four others, boarded a 'Ritz' car standing outside the gate of the Bar and fled away. Thus, it was clearly a group or an assembly of six assailants involved in the attack on the deceased Jitu, playing different roles to attain a common object.

141. We find that an assembly of six assailants was constituted, as all of them came together at the Bar. Some of them were inside the Bar and the others were outside. Their body language and the movements in and out of the Bar were uncomfortable and suspicious. The stability was in the movement of one of the assailants in blue shirt, consuming a peg of liquor besides the counter. There was a

close watch by all of them on the inmates of the Bar as well as the surroundings outside the Bar. One of the assailants outside the Bar brought the deceased inside the Bar. The deceased also seemed to be in a drunken condition, as he came with the support of one of the assailants. The assailant in blue shirt and the deceased started talking to each other. The deceased was also hugging the said assailant and the body language of both showed their previous acquaintance or friendship.

142. After some time, the deceased checked the person of the assailant in blue shirt. The other assailants were in a position protective to the assailant in blue shirt. None other than the assailant in blue shirt was talking to the deceased and they were watchful on the movements of both. The assailant in blue shirt was trying to find an opportunity which he exploited when none other than the four assailants were in the Bar, apart from the staff. He shut the glass door, demanded the knife, which was provided by one of the assailants, and started assaulting the deceased. The other assailant, who was already having a knife, took it out and joined the assault on the deceased. Rest of the assailants inside the Bar took

care to see that no one intervenes and at times brandished those who tried to intervene. The deceased was multipally stabbed by both the assailants. After some time, the other assailants left the Bar, except the two who continued the assault probably till the deceased was finished. The assaulter in white T-shirt having beard and strong personality tried to leave the Bar, but then again turned and pulled the assailant in blue shirt to come out. The assailant in blue shirt was continuing the assault probably to ensure that the deceased does not survive and thereafter both of them went outside. Four assailants boarded the 'Ritz' car standing outside the gate of the Bar and one assailant having beard, sat as a pillion rider on the motorcycle. Thus, the two assailants fled away on the motorcycle.

143. PW 4 Pramod was shown CCTV footages and he has identified all the six accused and attributed to all of them the specific acts appearing in the CCTV footages. His evidence of identifying the assailants as the accused persons has already been held to be trustworthy by us. He states that accused No.1- Tushar and accused No.2- Kunal were assaulting Jitu by knife, accused No.5- Rinku Tichkule provided the knife, accused No.3- Lashu Faye was standing

along with the accused Nos.1, 2 and 5 inside the Bar, accused No.5- Amol Mandale came from backside of the Bar and brandished the persons in the bar with a cold drink bottle, accused No.6- Sameer was standing outside the Bar near the gate, and he identified all the accused Nos.1 to 6.

144. We are of the view that the oral evidence of PW 4 Pramod and the CCTV footages contained in the primary evidence of Hard Disk and those contained in CD – 'X' and DVD – Article 18A read with the oral evidence of PW 19 Ms Puja and her report at Exhibit 57 clearly establish an unlawful assembly of six accused persons, who had conspired to commit the murder of deceased Jitu at the given time and place. It was pre-planned or pre-meditated. Each of the member of unlawful assembly was assigned a specific role, which everyone has performed. It was a smooth operation carried out. The offence of murder was committed in prosecution of common object to get rid of the demand for money by the deceased. Upon accomplishing the purpose, they fled away from the spot of incident with the blood-stained knives in their hands on two vehicles, i.e. 'Ritz' car and Hero Honda 'Splendor' motorcycle. The common object

of murder of the deceased got terminated or accomplished. We have, therefore, no hesitation to confirm the findings of the Sessions Court that the offences punishable under Section 149 and 120-B of IPC are fully established.

Chain of the facts and circumstances established :

145. We now turn to the facts and circumstances of the case, which are established and we narrate the same serially as under :

(1) The deceased Jitu was murdered in the Seven Hills Bar and Restaurant (“the said Bar”) on 10-1-2013 at 5.30 p.m.

(2) The spot of incident, its surroundings, installation of CCTV system and its functioning on the date and time of incident are established. [Para 23].

(3) The accused No.1- Tushar and accused No.2- Kunal were arrested on 11-1-2013 at 05.30 hours, the accused

No.3- Lashu, No.4- Amol and No.5- Bhupesh were arrested subsequently on 11-1-2013. The accused No.6 was arrested on 17-1-2013. They continue to remain in jail till today.
[Para 24].

(4) Consequent upon the information given by the accused No.1- Tushar, knife stained with blood as Article 1A, was recovered under Section 27 of the Evidence Act along with jeans and shirt, i.e. Articles 16 and 17, having blood stains, wore by him vide Exhibit 139.
[Paras 28 and 35].

(5) The information furnished by the accused No.2- Kunal led to recovery of blood-stained knife under Section 27 of the Evidence Act, seized on 13-1-2013 vide Exhibit 147 and marked as Article A2. **[Paras 30 and 35].**

(6) The accused No.5- Bhupesh alias Rinku furnished the information on the basis of which the 'Ritz' car having registration No.MH-31 EA 6696 was recovered and seized

on 14-1-2013 vide Exhibits 182 and 153.

[Paras 31 and 35].

(7) The accused No.6- Sameer furnished the information in respect of two-wheeler Hero Honda 'Splendor', bearing registration No.MH-31 AW 7400, which was seized on 19-1-2013 under the seizure memo at Exhibit 149. **[Paras 32 and 35].**

(8) The clothes of the deceased having blood stains were seized on 11-1-2013. **[Para 33].**

(9) All the clothes seized and sealed were forwarded to the Regional Forensic Science Laboratory at Nagpur for chemical analysis on 19-1-2013 vide Exhibit 189. The weapons, i.e. knives, seized and sealed were forwarded on 4-2-2013 to the Chemical Analyzer vide Exhibit 207. **[Para 34].**

(10) Exhibits 68 and 69 are the reports of the Chemical Analyzer in respect of the blood found on the knives seized from the accused Nos.1 and 2 and on Articles 16 and 17, the clothes of the accused No.1- Tushar as of human. **[Para 37].**

(11) PW 10 Dr. Nitin, who conducted the post mortem over the body of the deceased Jitu, gave his opinion at Exhibit 143 on 2-2-2013 in respect of the weapon queries at Exhibit 142 dated 2-2-2013, stating that the injuries on the body of the deceased Jitu are possible by the knives at Articles 1A and A2. User of weapons recovered and seized under Section 27 of the Evidence Act, in the crime in question, is established. **[Para 38].**

(12) The finger prints of the accused No.1- Tushar are found on the glass seized from the counter of the said Bar on 10-1-2013 and the report at Exhibit 131 compares the chance finger prints at Exhibit 126 with the finger prints of the accused No.1- Tushar at Exhibit 120 and establishes

the presence of accused No.1 on the spot of incident at the time of occurrence. **[Para 61].**

(13) For the purposes of security, a system of CCTV, consisting of eight cameras and one DVR containing Hard Disk of 500 GB for storage of video recording, well connected with cables, was found installed and functioning properly. The entire incident of murder of Jitu Gawande was recorded in the Hard Disk at Exhibit 1, contained in the DVR. **[Para 68].**

(14) The entire system of CCTV cameras installed and functioning in the said Bar at the time of incident, consisting of DVR, Hard Disk, Adapter, Mouse, Remote, and CD - 'X' were seized and sealed at Exhibit 99 on 10-1-2013 and PW 16 Rupali identified the same in Court. **[Para 69].**

(15) CD - 'X' is a true and genuine copy of the footages in camera Nos.1, 2 and 7 in the Hard Disk at

Exhibit 1. [Para 70].

(16) Full size photographs of all the accused were snapped by PW 20 Nitin Watkar of Diamond Photo Studio on 18-1-2013 at Exhibits 197 to 202. All these photographs of the accused along with the Hard Disk, DVR, Remote, Charing Cable, Mouse, etc., were forwarded on 3-2-2013 in a sealed envelope along with the covering letter dated 2-2-2013 at Exhibit 195 to the Directorate of Forensic Science Laboratory at Mumbai for submitting the report on the queries made therein. **[Paras 71 to 74].**

(17) PW 19 Ms Puja, the Scientific Officer, working in the office of Forensic Science Laboratory at Mumbai, has proved the DVD, marked as “Annexure DVD CY 66/13” (Article 18A), as the true and genuine copy of the Hard Disk at Exhibit 1. The frames of persons selected from CCTV footages are found matching with those reference photographs at Exhibit 197 to 202 and report at Exhibit 57 is proved. **[Para 81].**

(18) There was no scope left out for tampering in the process of seizure, sealing, forwarding and receipt of all the articles sent to PW 19 and no questions were put to PW 19 impeaching her credit, as required by Section 155 of the Evidence Act. **[Para 85]**.

(19) PW 4 Pramod, the brother of the deceased, has proved motive on the part of accused No.1- Tushar, to whom the deceased was demanding refund of Rs.50,000/- lent to him. **[Para 88]**.

(20) PW 4 Pramod identified the assailants as the accused persons and attributes to each of them the specific role played by them, on the basis of the CCTV footages shown to him during the examination-in-chief before the Court. **[Para 89]**.

(21) The primary evidence in the form of electronic evidence of Hard Disk and the copies of it in the form of

CD, marked as 'X' for identification, and DVD as Article 18A, found to be true and genuine copies of the footages contained in the Hard Disk, are produced on record and proved. **[Paras 109 to 113].**

(22) We ourselves have seen/viewed the primary electronic evidence in the form of CCTV footages from the Hard Disk at Exhibit 1 and we have also viewed CD – 'X' and DVD – Article 18A and we neither find any difference in it or discontinuity or insertions not found in the Hard Disk at Exhibit 1. On the contrary, we find that it corresponds with each other and are true and genuine. It is consistent with the oral evidence of the witnesses also. **[Paras 114 and 115].**

(23) The electronic evidence tendered in the form of Hard Disk at Exhibit 1, CD – 'X' and DVD – Article 18A, is admissible in the facts and circumstances of this case, without a certificate under Section 65-B of the Evidence Act. **[Para 116].**

(24) The eye-witnesses to the incident, who are PW 1 Raghuveer, PW 2 Raju, and PW 3 Sitaram, have turned hostile and refused to identify the accused persons for the reasons best known to them. [Para 130].

Unlawful assembly and criminal conspiracy :

(25) CCTV footages in the Hard Disk at Exhibit 1 clearly indicate that the assailants were six in number, constituting an unlawful assembly, out of whom, four were inside the Bar, one of them wearing blue shirt was near the counter and consuming the peg of liquor, and the other three were standing behind him. [Para 138].

(26) A person wearing white shirt (the deceased) alighted from the car outside the gate and he was brought inside the Bar by one another accomplice. Thus, there was a group of five persons inside the Bar along with a person who came in the white shirt. [Para 139].

(27) A person wearing blue shirt was supplied a knife by one of the accomplices and he started assaulting the deceased who came in the car. One another assailant wearing white T-shirt having beard and heightened personality also joined the assault on a person wearing a white shirt. One of the five accomplices in the Bar brandished the inmates of the Bar other than the assailants with cold drink bottle when then tried to intervene. **[Para 140].**

(28) After the object of killing the deceased was accomplished, the assailant wearing blue shirt came out of the Bar and along with four others boarded the 'Ritz' car outside the gate and fled away and two others fled away on the motorcycle. **[Para 140].**

(29) PW 4 Pramod has identified all the six accused persons as the assailants and attributed to all of them the specific acts appearing in the CCTV footages confronted to

him during the course of his examination-in-chief.

[Para 143].

Our conclusion :

146. After narrating the facts and circumstances proved on record and keeping in view the law laid down in para 153 by the Apex Court in the matter of circumstantial evidence in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*, reported in (1984) 4 SCC 116, we hold that the facts and circumstances established in the present case are conclusive in nature pointing towards the guilt of all the accused persons for the offences alleged against them. The chain of circumstantial evidence is completely established, without any missing link. The facts and circumstances proved are consistent only with the hypothesis of the guilt, without leaving any reasonable ground for the conclusion consistent with the innocence of the accused persons and exclude every possible hypothesis except the one which is proved, i.e. the guilt of the accused for the offences alleged. The offences alleged against all the accused are established beyond reasonable doubt. We are, therefore,

constrained to maintain the conviction of the accused persons recorded by the Sessions Court for the offences punishable under Sections 302, 120-B, 147, 148, 149 and 506-B of IPC along with the sentence imposed upon each of them for the offences established and the fine imposed.

147. We, therefore, dismiss all these appeals. We direct the office to re-seal all the articles, which were opened by us, and remit back to the Sessions Court along with the R & P.

(M.G. Giratkar, J.)

(R.K. Deshpande, J.)

PD Lanjewar, PS