

(2021) 06 BOM CK 0040

In the Bombay High Court

Case No : Criminal Appeal No.570 Of 2014

Akbar Khan Ajmer Khan And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 10-06-2021

Acts Referred:

Army Rules, 1950 — Rule 3, 3(a), 4, 5, 6
Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 164, 192, 213, 244, 254, 294
Code Of Criminal Procedure, 1898 — Section 243, 245, 247, 248, 549
Army Act, 1950 — Section 3, 3(i), 3(ii), 3(vii), 3(xvii), 4(i), 9, 69, 70
Air Force Act, 1950 — Section 72
Evidence Act, 1872 — Section 30

Citation : (2021) 06 BOM CK 0040

Hon'ble Judges : Sadhana S. Jadhav, J;N.R. Borkar, J

Bench : Division Bench

Advocate : Aisha Mohammed Zubair, P.P. Shinde

Final Decision : Partly Allowed

Judgement

Sadhana S. Jadhav, J

1. The appellants have taken an exception to the Judgment and Order dated 23rd May 2014 passed by the Ad hoc District Judge-3 and Additional

Sessions Judge, Nashik in Sessions Case No.282 of 2012 by which the appellants have been convicted for the offence punishable under sections 302,

120-B r/w 34 of Indian Penal Code for life imprisonment and pay fine of Rs.500/- each, in default to suffer S.I. for one month each.

2. Such of the facts necessary for the decision of this appeal are as follows :-

(i) That the appellant no.1 - accused no.1 - Akbar Khan was married to Afsana Begum. The appellant no.1 was working as Hawaldar in Light

Regiment and hence, was residing in the Military Quarters Nos. P-9/8/ OG Line, Deolali Camp, Dist. Nashik. The appellant's duty was at the Army

Rest House from morning to evening i.e. 6.30 am to 1.00 pm and from 3.00 pm to 6.00 pm.

(ii) The incident in question has occurred on 7th September 2012. On 7th September 2012 the wife of the appellant Afsana Begum (hereinafter

referred as ""the deceased"") was taken to the Medical Officer Hospital by Subhedar Prasad and Nursing Assistant Naik Mehetre. At about 6.30 pm,

the deceased Afsana was found unconscious at her family quarters. Her pulse could not be recorded. At about 6.50 pm, she was examined by Major

Satish Dhage (P.W.1). He could not find any respiratory movement, B.P. was not recordable, her pupils were dilated and fixed. P.W.1 tried to revive

the patient but there was no response and hence, she was declared dead and the conclusion drawn by P.W.1 was that she was brought in dead

condition. He addressed a letter to the Civil Police Station, Deolali Camp reporting death case and the said certificate is at Exh.26. P.W.1 on external

examination, had found multiple irregular abrasions on her anterior aspect neck. Abrasions were found at the middle of neck region, there was blood

stains and small abrasions around mouth. He issued a certificate of medico-legal case which is marked at Exh. 27. A death notification was issued in

the name of the deceased which is at Exh.28. According to P.W.1, the cause of death was not known. Despite an opportunity P.W.1 has not been

cross-examined and hence, it can be safely stated that the said documents which are at Exhs.26, 27 and 28 are admitted by the accused. At Deolali

Camp, Accidental Death No.41 of 2012 was registered at about 11.30 pm on 7th September 2012 at station diary No.54/2012 and the said A.D.

report is at Exh.38. The prosecution has examined as many as 20 witnesses to bring home the guilt of the accused.

3. That the inquiry in A.D. No.41/2012 was given to Anil Pawar, Investigating Officer - P.W.20, who in the course of inquiry visited the house of the

appellant. He found that the domestic articles were scattered helter- skelter and the pillows were lying down. He suspected that it could be only the

husband of the deceased to be the perpetrator because the ingress and egress to the military quarters is not very easy. He soon realised that the scene

of there being a theft in the house was created and therefore, he inquired with the Medical Officer of Civil Hospital, Nashik about the cause of death.

It is pertinent to note that the post-mortem notes which are at Exh.75 are admitted by the accused no.1. The Medical Officer upon seeing the post-mortem notes which are at Exh.75 informed P.W.2 that the cause of death is ""asphyxia due to throttling"". P.W.2 had also gone through the certificate issued by the Medical Officer, Civil Hospital, Nashik which indicated clearly that the cause of death was ""asphyxia due to suffocation"". The Medical Officer had given a letter to P.W.2 in respect of the cause of death on 8th September 2012 i.e. on the very next day. It was also clarified by the Medical Officer that it may be a case of throttling, strangulation, gagging and smothering. The said letter is at Exh.33. P.W.2 was rest assured that it could be none other than the accused no.1 - appellant. He inquired with the neighbour Hawaldar Hukum Singh (P.W.7) and he had learnt that a lady teacher used to visit the house of Hukum Singh to take tuition and the said lady teacher had seen the accused going on his bicycle at about 4.30 to 4.45 pm. In further inquiry, he had also learnt that the senior of the accused Ujwal Kumar Bir (P.W.6) had called upon the accused as he had not reported on duty at the stipulated time. He further learnt that the accused had not received call of P.W.6 and subsequently replied that he was held up as his bicycle was punctured. This was sufficient material for P.W.2 to suspect the involvement of the appellant and hence, he lodged FIR at the Deolali Camp Police Station against the accused for the offences punishable under section 302 of IPC.

4. On the basis of his report, Crime No.53 of 2012 was registered at Deolali Police Station and the investigation was set in motion. P.W.2 has deposed to that effect before the Court. In the cross-examination, he has admitted that ""it is correct to say that the accused had not attended duty on time.

Hence, on the ground doubt/suspicion, I have filed the complaint against the accused."" It is also admitted that he had not recorded the statement of the witnesses Hawaldar Hukum Singh, Ms. Rakhi Saini and Hawaldar Ujwal Kumar Bir. He has further admitted that civilians were having access with the said quarters but he had lodged report on the basis of the information given by the Doctor, Ms. Saini and Mr. Singh.

5. At the same time, Police Hawaldar Rokade had informed about A.D. Inquiry to Police Constable Rajendra Tejale (P.W.3) who had rushed to the spot immediately and the spot panchanama was conducted in A.D. No.41/2012. The scene of offence panchanama is at Exh.47 which shows that the

scene of offence panchanama was rather conducted in A.D. Inquiry. It was conducted between 11.45 am to 12.30 pm and the same is substantiated

by P.W.3 - Rajendra Tejale. It is pertinent to note that the FIR was lodged thereafter at about 21.10 hours. The Police had taken precaution that they

should not unnecessarily implicate the accused. In the course of spot panchanama, P.W.3 had found that there were blood stains on the bed sheet,

pillows were lying under the bed. The recitals of the scene of offence panchanama which is at Exh.47 indicates that there is a door next to the table

on which the television set is placed. In the open space behind it, there is a toilet and the bathroom. In short, the house has two doors, one on the front

side and the other on the rear side. According to P.W.3, P.W.2 had not done any inquiry in the accidental death. The recitals of Exh.47 are proved by

P.W.3. The fact that there was an inquiry of Vinod Kumar Yadav (P.W.4) to verify as to whether the accused was in the office or at home between

2.00 to 2.30 pm has been proved by him in his substantive evidence and according to him, on 7 th September 2012 he wanted a liquor cartel and

therefore, he had call upon the accused between 2.00 to 2.30 pm when he was at home. The Police had called Sukhavindarsingh Nimaz (P.W.5) to

the Police Station on 8th September 2012 and had inquired with him about the accused. He was asked to accompany the Police to the quarters of the

accused to act as a panch at the time of scene of offence panchanama and the recitals of Exh.47 are proved by him.

6. It had transpired in the course of investigation that the accused was working under the supervision of Ujwal Kumar Bir (P.W.6) on 7 th September

2012. He has deposed before the Court that on 7 th September 2012 the accused had reported to him between 6.30 to 6.45 am and on that day, they

were cleaning the rest house. At about 12.00 noon the accused had informed his senior that he had to attend the children parents meeting and

therefore, he was permitted to leave rest house at about 12.15 to 12.20 but he was directed to return upto 3.15 to 3.30 pm. However, the accused had

returned at about 4.45 pm and the reason for his inability to attend in time was that his bicycle was not working and he had to get it repaired and

therefore, he had gone to the market but at the same time, it is the matter of fact which was deposed before P.W.6 that although his senior had called

him 3 to 4 times none of his call was answered and the call which was answered was at about 4.00 pm. The staff was aware that the accused was

also having motorcycle. That, at about 6.30 pm the accused no.1 was informed by his neighbour Hukum Singh that his wife had become unconscious

and therefore, he was relieved immediately. Thereafter, he had not answered call of his senior (P.W.6). P.W.5 entered inside the military hospital

where he found that the people had gathered outside the Military Ward and the accused was crying. P.W.5 had admitted in his cross-examination that

the time of reporting of the staff which was under his control was never noted. But at the same time, he had shown his cell phone to the Police to

verify that he had actually called upon the accused 3 to 4 times. Although duty hours are 6.30 am to 1.00 pm and 3.00 to 6.00 pm, certain omissions

are brought on record, however, they are not material omissions.

7. Hukum Singh - P.W.7 has given reason for calling upon the accused at about 6.30 pm and informed him that his wife is unconscious and that he

was one door neighbour of the accused. That, at about 6.30 pm neighbours of the accused called him and informed that the wife is not opening the

door. The children of Sukhvindarsingh (P.W.5) and the elder son of accused were taking tuition from Ms. Saini in their varanda between 4.00 to 6.00

pm and she is paid Rs.200/- pm. On the day of the incident, P.W.7 had returned home at about 6.15 pm. He then saw the elder son of Akbar Khan -

accused no.1 knocking the door and therefore, he had gone to the house of Sukhvindarsingh (P.W.5). The wife of P.W.5 informed P.W.7 that the son

of the accused no.1 was crying but the door was not opened and therefore, P.W.7 pressed the front door bell which was not responded to. P.W.7

peeped inside and saw that the younger son of the accused was wondering in the house here and there. He was crying. The little child had informed

P.W.7 that his mother was sleeping but she would not woke up. He was therefore constrained to call upon the accused and called him home

immediately. The wife of P.W.5 was aware that there was a door at the rear side and therefore, she would try to go from that door to help the

children and to their surprise, they found the said door open. The wife of P.W.5 saw the wife of the accused sleeping on the cot with a blanket on her

face. P.W.7 had checked her pupils but by then her body had turned cold. P.W.7 and the neighbours had seen blood oozing from her nose. He has

identified the bed- sheet on which she was sleeping. He called for the vehicle and arranged to take her to the military hospital but then the Doctor had

declared her dead.

It is admitted that the civilians can have access to the OG line quarters.

8. Witness nos.9, 10 and 12 are declared hostile witnesses.

9. At the time of inquest panchanama, it was noticed that there were weal marks on her chest and there were injuries on her neck. The inquest

panchanama is at Exh.42 and the contents are proved by Maya Kharale (P.W.11). It is a matter of record that in the course of investigation, the

accused had disclosed that he was in love with his sister-in-law. The accused had disclosed to the Police on 8 th September 2012 that he was in love

with his younger sister-in-law Sitara and he used to talk with her on the cell phone everyday in the morning and in the evening. They have even

clicked photos together which were feed on his memory card and he had kept the same in the suitcase. The said memory card was recovered by the

police at the instance of the accused no.1. The memorandum is at Exh.160 and the recovery panchanama is at Exh.161. The Police had seized 2

memory cards and 4 photographs of the accused with his sister-in-law. The cell phone of the accused was seized and in the course of investigation, it

had transpired that on 7th September 2012 the accused had received 2 phone calls on his phone number which he had received from cell phone

No.9806793492 and subsequently, there were 8 to 10 calls from the number and therefore, the Police suspected that there must have been some

dispute between the husband and wife over the calls. The Police were surprised to know that the wife of the accused would take her elder son Mitas

for tuition but on that day it was the accused who had taken the child for tuition and in the course of inquiry, it was learnt that the said cell phone

number was that of the father of the deceased who had spoken to her at about 2.30 pm on 7 th September 2012 and therefore, the father of the

deceased was informed to reach Nashik and report to Deolali Camp Police Station and upon seeing dead body, the unfortunate father was sure that

his daughter has been killed by throttling. On the basis of the statement given by the accused which was recorded on 12th September 2012 it had

transpired that he had given cell phone to his sister-in-law bearing cell phone no.8817318586 which was taken in the name of the father of the

accused. The same was verified by the appellants after recording the statement of father of the accused - Ajmer Khan. Moreover, the Police had also

recorded the statement of Harikumar Nair (P.W.19) who had disclosed that on 7th September 2012 in the afternoon at about 2.15 pm to 2.45 pm, he had met the accused at Sansari Naka Railway Line and he had inquired with the accused as to why he was whiling away time with his friends during duty hours. At that time, the accused had disclosed that he had relatives from his village and therefore, he was to treat them with meat and therefore, had gone to purchase meat. Unfortunately, P.W.19 has resiled from his earlier statement and is therefore, declared hostile.

10. Accused no.2 happens to be the nephew of accused no.1. That, on 22nd August 2012 the accused no.1 had been to Bhind, M.P. to meet his in-laws and had informed his nephew that he was in love with his sister-in-law and therefore, intended to eliminate Afsana. He had requested his nephew to look out for the boys who could be hired to kill his wife and that he would pay them Rs.500/-. On 24th August 2012, the accused no.1 had returned to Nashik. He had informed him that the accused nos.3 and 4 are willing to do the job and that he would accompany them on 6th September 2012 to Nashik. They had reached Nashik Road Railway Station at about 12.00 to 12.15 on 7th September 2012. He had also passed on the cell phone numbers of two boys whom he had hired. The cell phone no.9806793492 was of Narendra Singh.

11. Now, it is necessary to examine the involvement of the appellant nos.2/accused no.2. The first and foremost involvement of appellant no.2 is surfaced on the basis of the statement made by the accused no.1. Prima facie, it appears that the accused no.1 had not named anybody. However, in all probabilities, it was the CDR (Call Detail Records) on the basis of which it was traced that the accused no.2 and the two absconding accused were in Nashik on the relevant date and at the relevant moment i.e. between 11.00 am to 4.00 pm on 7th September 2012. It is true that P.W.15 Chandrakant Bhor, Nodal Officer, Reliance Communications has deposed before the Court that cell phone no.8817318586 was issued in the name of Ajmer Khan i.e. the father of accused no.1. It had transpired that the said number was being used by Sitara - Sister-in-law of the deceased. Cell phone number of the accused no.1 which is again issued by Reliance Communications is 8928188041.

12. Evidence of Rajendra Aher - P.W.13 has substantiated that he was a part of the investigation and had recorded the statement of Sitara. However,

none of the witnesses named by P.W.20 including Sitara or Umeshchandra Raut has not been recorded. The admission in the cross- examination

would show that on the basis of the documents seized by the investigating officer it had transpired that the sim cards were not issued in the name of

the accused. It is also admitted that Akram Khan was not subjected to Test Identification Parade.

13. Balwinder Kour Sukhvindar Singh Nimaz - P.W.14 happens to be the wife of Sukhvindarsingh Nimaz (P.W.5). In fact, the person who reached

the spot at the first instance is Balwinder Kour (P.W.14) who is the neighbour of accused no.1. Her son takes tuition along with the elder son of the

accused no.1. According to her, on that day, it was the accused no.1 who had dropped his son for tuition in the varanda. After the tuitions, the children

had gone to their respective houses, the elder son of the deceased Mitas knocked the door of the house, there was no response. He knocked it for a

long time but in vein so finally Mitas went to the house of Balwinder Kour (P.W.14) and informed her that his mother was not opening the door.

Thereafter, P.W.14 requested Hukumsingh to call upon the accused and informed him that his wife was not opening the door. There was no response

to the door bell also. Finally, she entered the house through the rear door only to see that the deceased was lying on the cot with a blanket on her body

and that there were blood stains on the bed-sheets. The younger son was wondering in the house. At that juncture, P.W.7 peeped into the house and

saw the second son wondering. He was informed by the little child that the mother was sleeping and therefore, he called upon his senior Major Satish

Dhage who happens to be a Doctor at the Military Campus and they all have arranged to admit in the Hospital. All these facts are proved by P.W.1,

P.W.7, P.W.14. Even it is clear that the case rests upon substantive evidence.

14. P.W.16 - Sachin Bhadange who is the Nodal Officer of Aircel Company has proved that the cell number 9806793492 is from Gwalior, M.P. On

the basis of record i.e. CDR from 1 st August 2012 to 13th September 2012 was used by Narendra Singh from Gwalior, M.P. and cell number

8656066589 was issued in the name of Vaishali from Gwalior, M.P. but was being used by the accused no.2 as per the Police investigation.

15. Dattaram Angare (P.W.17) who was working as the Nodal Officer for Idea Cellular Ltd., has on the basis of the CDR has deposed before the

Court that cell phone no.8805715526 was issued in the name of accused no.1 but was being used by the deceased. The said document which is at

Exh.126 and proved by P.W.17 is admitted by the accused under section 294 of Cr.P.C.

16. Amit Karkera - P.W.18 who is the Nodal Officer of Uninor Cellular Ltd., has on the basis of the record proved that the cell phone no.8177958221

has issued in the name of Vinodkumar Singh but is used by accused no.2. It is admitted by the accused under section 294 of Cr.P.C.

17. Anil Pawar - P.W.20 happens to be the Investigating Officer of Crime No.53/2012 registered at Deolali Camp Police Station. He has proved the

omissions and contradictions in the evidence of the witnesses. He had proved the steps taken by him in the course of investigation. He had also

verified from Philips who was engaged in the work of repairs of vehicle and was named by accused no.1. Upon enquiry, Philips had disclosed that his

shop was closed between 2.00 to 5.00 pm. He has deposed before the Court in respect of his investigation about the Call Detail Records of the

accused. He has also stated before the Court that he has recorded the statements of Vijay Devadia - owner of Hotel Sharda who disclosed that the

accused no.1 had taken lunch along with three other persons on 7 th September 2012 between 2.00 - 3.00 pm. That the accused no.2 Akram was

produced before the Judicial Magistrate, First Class on 20 th September 2012 and he had disclosed the names of B.P. Singh and Vijay Singh Parihar.

18. The chain of events established by the prosecution are as follows :-

(A) The accused no.1 had left the place of service at about 12.15 pm under a false pretext of attending the parents-teachers' meeting;

(B) The accused no.1 reached home, changed his clothes and had been to Deolali Railway Station where he met three people. In the said vicinity, he

had met P.W.19 - Harikumar Nair who has been declared hostile. Accused no.1 returned home between 3.00 to 3.15 pm and had left the house at

about 4.15 pm on his bicycle;

(C) The accused no.1 had not received the calls from his senior i.e. P.W.6 Ujwal Kumar Bir and had finally answered the fourth call of his senior and

informed that his cycle was punctured and therefore, there was a delay in reporting to the job. At about same time i.e. between 2.00 to 2.30 pm, he

had answered the call of P.W.4 - Vinod Kumar Yadav;

(D) Since the main door was found to be locked from inside it can be inferred that the accused no.1 had taken exit from his house through the rear

door for the reasons best known to him at about 4.15 pm;

(E) The photographs with Sitara and her daily communication with accused no.1 clearly establish that he was in an intimate relationship with his sister-

in-law Sitara;

(F) That the cell phone used by Sitara to communicate with the accused no.1 was issued in the name of the father of the accused no.1 only to

camouflage the regular calls between them and to conceal the said fact from his wife Afsana; (G) That, soon after he left the house the wife of

accused no.1 was found dead;

(H) That, the cause of death was asphyxia due to throttling/ smothering. There were injuries on her neck;

(I) That, accused no.1 had deliberately created a scene of theft in his bedroom, however, that was not first disclosure made by him;

(J) That, Mrs. Saini takes tuitions in the varanda and they had not seen anyone entering the house. Moreover, the door on the rear side was not broke

open and therefore, there is a possibility of two things; firstly, the accused had taken the aid of some other person to eliminate his wife between 2.00

to 4.15 pm or that he had killed his wife during that period and had peacefully taken exit from the rear door.

19. There is no cogent and convincing evidence besides the calls to even remotely suggest that the accused no.2 was in the house of the accused no.1

between 2.00 to 4.15 pm on 7th September 2012. The prosecution has failed to substantiate their contention that the cell phone which was issued in

the name of Vaishali from Gwalior, M.P. was rather being used by the accused no.2. The Nodal Officer i.e. P.W.16 has clearly established that the

said cell phone No.8656066589 was issued in the name of Vaishali but has failed to substantiate that the user of the said number was none other than

the accused no.2 who happens to be 20 year old nephew of accused no.1.

20. The learned counsel for the appellants has without going into the merits of the matter and dislodging the circumstances put forth by the prosecution

has vehemently submitted that the trial of the accused no.1 is vitiated and that the accused needs to be acquitted or the matter has to be remanded to

the concerned Court for adopting appropriate procedure and has not followed

Chapter 6-C of the Army Rules, 1950 contemplating the criminal cases

affecting persons belonging to the armed forces. The learned counsel for the appellants has demonstrated Rules 3 and 4 Volume III of Chapter 6-C

which read thus :-

3. Where a person subject to Military Naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be

tried by a court-martial, such Magistrate shall not proceed to try such person, or to inquire with a view to his commitment for trial by the Court of

Sessions or High Court for any offence triable by such court unless:-

(a) he is of opinion for reasons to be recorded, that he should so proceed without being moved thereto by competent Military, Naval or Air Force

authority, or

(b) he is moved thereto by such authority.

4. Before proceeding under clause (a) of rule 3, the Magistrate shall give written notice to the commanding Officer of the accused and until the expiry

of a period of seven days from the date of the service of such notice, he shall not

(a) convict or acquit the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (V of 1898), or hear him in his defence

under section 244 of the said Code; or

(b) frame in writing a charge against the accused under section 254 of the said Code;

or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under section 213 of the said Code;

(d) transfer the case for enquiry or trial under Section 192 of the said Code.

21. In fact, Section 3 of Army Act, 1950 contemplates as follows :-

3(i) ""active service"", as applied to a person subject to this Act, means the time during which such person -

(a) is engaged in operations against an enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country;

22. To substantiate her contention, the learned counsel has placed implicit reliance upon the judgment of this Court in the case of Kanwardeepsingh

Harbansingh Bedi Vs. State of Maharashtra 1, wherein this Court has placed implicit reliance upon the judgment in the case of Superintendent and

Rememberancer of Legal Affairs, West Bengal Vs. Usha Ranjan Roy Choudhury (reported in [1986 (Supp.) SCC 190]), wherein the Court was

dealing with the law as to whether Section 549 of Code of Criminal Procedure, 1898 i.e. 475 of the Criminal Procedure Code, 1973 is applicable or

can be exercised by the Special Judge in West Bengal as well, has observed thus :-

Rule 3 of the said Rules requires that when person subject to military, Naval or Air Force law is brought before a Magistrate on accusation of an

offence for which he is liable to be tried by Court Martial also the magistrate shall not proceed with the case unless he is requested to do so by the

appropriate military authority.

23. In that case, the accused was a Naval Officer. The Court has held as under :-

When an accused has been delivered by a Magistrate under Rules 5 and 6 the Commanding Officer or the competent military, naval or air force

authority must, as soon as may be, inform the Magistrate whether the accused has been tried by a court martial or other effectual proceedings have

been taken or ordered to be taken against him. The communication of such 1 2009 ALL MR(Cri) 1946 information is mandatory. When the

Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken or ordered to be taken against him, he is

obliged to report the circumstance to the State Government and the State Government, in consultation with the Central Government may take

appropriate steps to ensure that the accused person is dealt with in accordance with law. The policy of the law is clear. Once the criminal court

determines that there is a case for trial, and pursuant to the aforesaid rule, delivers the accused to the Commanding Officer or the competent military,

naval or air force authority, the law intends that the accused must either be tried by a court martial or some other effectual proceedings must be taken

against him. To ensure that proceedings are taken against the accused, the Rules require the Commanding Officer or the competent authority to

inform the Magistrate of what has been done.

24. In fact, the Apex Court, in the subsequent judgments, has clarified the said position. In fact, it appears that the judgment of the Apex Court in the case of Balbir Singh vs. State of Punjab 1995 SCC (1) 90, had clarified the position of law. It appears that the judgment of the Apex Court in the case of Balbir Singh Vs. State of Punjab has clarified section 70 of the Army Act as follows :-

70. Civil offence not triable by court- martial. A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court- martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by "" notification in this behalf.

25. Section 72 of the Air Force Act which corresponds to Section 70 of the Army Act provides as under :-

72. Civil offences not triable by court- martial.- A person subject to this Act who commits an offence of murder against a person not subject to

military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not

be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf.

The section on its plain language, lays down that where a person subject to the Act is charged with the offences listed therein while on ""active

service"" he shall be deemed to be guilty of an offence against the Act and could be tried by a court-martial irrespective of the fact that the victim is

not subject to military, naval or air force law.

Section 4(i) of the Act defines Active Service and provides: ""4. (i) 'active service', as applied to a person subject to this Act, means the time during

which such person-

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) is engaged in air force operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to, or forms part of, a force which is in military occupation of any foreign country;

The above definition, however, is not exhaustive. The Central Government has the power to enlarge the definition by a declaration issued under

Section 9 of the Act. Section 9 reads as follows:

9. Power to declare persons to be on active service. Notwithstanding anything contained in clause (i) of Section 4, the Central Government may, by

notification, declare that any person or class of persons subject to this Act shall, with reference to any area in which they may be serving or with

reference to any provision of this Act or of any other law for the time being in force, be deemed to be on active service within the meaning of this

Act.

12. The Government of India in exercise of the powers conferred by Section 9 issued Notification No. SRO 8-E on 5- 12-1962 declaring ""that all

persons subject to the said Act, shall, wherever they may be serving be deemed to be on 'active service' within the meaning of the said Act, for the

purposes of the said Act and of any other law for the time being in force"".

26. In the case of Balbir Singh (supra), the appellant was on casual leave while on active service and he was armed with a notification dated 5 th

December 1962.

27. In the case of Madan Lal Vs. Union of India and Anr. (2002) 10 SCC 185, the Apex Court had held as follows :-

A bare reading of Section 70 of the Army Act makes it crystal clear that a person who commits an offence of murder against a person not subject to

military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not

be deemed to be guilty of an offence against this Act and cannot be tried by a Court Martial.

28. It would be apt to place reliance upon the judgment of this Court in the case of Sandeep Sanjay Vithal Vs. The State of Maharashtra 2004 Cri. LJ

3678.

The Apex Court has held as follows :-

9. Section 70 of the Army Act 1950 provides that a person subject to the said Act who commits an offence of murder against a person not subject to

military, naval or air force law or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not

be deemed to be guilty of an offence under the said Act and shall not be tried by a court-martial, unless he commits any of the said offences either

while on active service, or at any place outside India, or at frontier post specified by the Central Government by notification in that behalf.

10. Reading of the above provision of the said Act would be incomplete unless we take note of the definitions of certain expressions found in the said

Act. Section 3(ii) defines the term ""Civil offence"" to mean an offence which is triable by a criminal court. The term ""court martial"" is defined under

Section 3(vii) to mean a court-martial held under the said Act, while the term ""Criminal court"" means a court of ordinary criminal justice in any part of

India. The word ""offence"" defined in Section 3 (xvii) means any act or omission punishable under the said Act and includes a civil offence as defined

in the said Act. The expression in ""active service"" as applied to a person subject to the said Act has been defined under Section 3(i) to mean that the

time during which such person- (a) is attached to, or forms part of a force which is engaged in operations against an enemy or (b) is engaged in

military operations in or is on the line of march to, a country or place wholly or partly occupied by an enemy or (c) is attached to or forms part of a

force which is in military occupation of a foreign country.

12. The provisions of law comprised under Sections 69 and 70 read with various definitions of the terms and expressions used in the said Act which

are to be found in Section 3 thereof, make it abundantly clear that if offence is committed by the army personnel against a person subject to military

laws and while being on active service certainly he would be subjected to the proceedings before the court martial. However, any such offence

committed against a person not subject to military laws and otherwise than on active service then he would be subjected to the provisions of the said

Code as regards the place and court trial. The said provisions clearly distinguishes 'active service' from merely being in service of Army. When the

person is either attached or engaged in military operations against an enemy or at a place wholly or partly occupied by enemy, or is attached to a force

which is in occupation of the foreign country, only in those situations an army person could be said to be ""on active service"". Merely because a person

has joined the military service, he cannot be said to be ""on active service"" within the meaning of the said expression under the said Act.

29. The learned counsel while placing reliance upon the judgment of the Bombay High Court in the case of Kanwardeepsingh (supra), has missed the

facts of the case. In that case, the accused and the victims were on duty, they were sailing in a ship to their headquarter and while on voyage, the

incident had occurred where the accused and the victims were in the same service and therefore, the Bench had referred to the military provisions.

Hence, the facts are irrelevant for the purpose of deciding the present case on the lines of the argument propounded by the Advocate for the

appellants.

30. The present one is a case of circumstantial evidence. At this stage, it would be apt to refer to the judgment of the Apex Court in the case of Sarbir

Singh vs. State of Punjab 5. The Supreme Court, in the said case had referred to the judgment in the case of Reg Vs. Hodge reported in [(1838) 2

Lewin 227], wherein it was held as thus :-

A note of caution has also been struck regarding the role of imagination. In the case of Reg v. Hodge, (1838) 2 Lewin 227, it

5. 1993 SCC Supp (3) 41 was said:

The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form

parts of one connected while; and the more ingenious the mind of the individual, the more likely was it, considering such matter, to overreach and

mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them

complete.' It has been impressed that suspicion and conjecture should not take place of legal proof. It is true that the chain of events proved by the

prosecution must show that within all human probability the offence has been committed by the accused, but the Court is expected to consider the total

cumulative effect of all the proved facts along with the motive suggested by the prosecution which induced the accused to follow a particular path.

The existence of a motive is often an enlightening factor in a process of presumptive reasoning in cases depending on circumstantial evidence.

31. In conclusion, the Supreme Court had held thus:-

According to us the evidence adduced on behalf of the prosecution is clear, unambiguous and in unmistakable terms establish that the appellant is the perpetrator of the crime and nothing has been brought to our notice which leaves any gap in the circumstances to establish the guilt of the appellant.

32. The circumstances clearly indicate that the wife of accused no.1 had died homicidal death at the hands of the accused no.1. The act was

premeditated and sketched in such a way as to camouflage the death as must have taken place in the course of commission of theft. However, the

entire episode points towards the guilt of accused no.1 and the appeal as far as accused no.1 is concerned deserves to be dismissed. The motive of

the accused no.1 was to eliminate his wife in order to be able to marry in-law i.e. Sitara - sister of the deceased. The question remains as to whether

it was necessary to eliminate his wife and deprive the children of their mother's love and care at such a tender age. In fact, children have lost love of

their father also and hence, it is clear that the accused had ignored his children due to the smoke screen of love. She was killed in the living house

which was occupied exclusively by the couple and their children and at least, at that relevant time, there is no iota of evidence to indicate that at the

relevant time any intruder had trespassed the house. Hence, the accused no.1 deserves no leniency in the eyes of law.

33. As far as accused no.2 is concerned, there is no cogent and convincing material on record which would clearly establish the guilt of the accused.

The statement of the accused no.1 while in police remand cannot be relied upon to the disadvantage of the co-accused. It is not the case of the

prosecution that the statement of accused no.1 or accused no.2 was recorded under section 30 of the Indian Evidence Act and conviction cannot be

based on the basis of the Call Detail Records, more so, when the sim card was not issued in the name of the accused or any of his family member.

The investigating agency has neither recorded any statement under section 164 of Cr.P.C. Hence, the accused no.2 deserves to be acquitted with the

aid of benefit of doubt.

34. Hence, we pass the following order :-

ORDER

(i) The appeal is partly allowed;

(ii) The conviction and sentence passed against the accused no.1 by the Ad hoc District Judge-3 and Additional Sessions Judge, Nashik in Sessions

Case No.282 of 2012 vide judgment and order dated 23rd May 2014 is hereby upheld and confirmed;

(iii) Accused no.2 is acquitted of all the charges levelled against him;

(iv) Accused no.2 be released forthwith, if not required in any other offence;

(iv) Fine amount, if any paid, be refunded;

(v) Appeal is disposed of on above terms.

34. It is informed across the bar that at present, accused no.1 is enlarged on emergency parole on the ground of pandemic situation. Accused no.1

shall surrender within 2 weeks to serve the rest of the sentence.