

(2001) 05 BOM CK 0009
In the Bombay High Court
Case No : Criminal Writ Petition No. 3 of 2001

Shivendra Bikaram Singh (Ex. Lt.)	Vs	APPELLANT
Union of India(UOI) and Others		RESPONDENT

Date of Decision : 02-05-2001

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156
Evidence Act, 1872 — Section 3, 50
Navy Act, 1957 — Section 101, 102, 103, 163, 77
Penal Code, 1860 (IPC) — Section 325, 352, 425, 452, 497

Citation : (2002) 1 BomCR 695

Hon'ble Judges : B.H. Marlapalle, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : S.G. Dessai, A. and Arun Bras de Sa, for the Appellant; V.P. Thali, Sr.C., G.S.C., for the Respondent

Judgement

A.M. Khanwilkar, J.—This writ petition under Article 226 read with Articles 14 and 21 of the Constitution of India seeks to challenge the order passed by the Court Martial dated 4th September, 2000 (Exh. P.I.); by the Admiral Chief of the Naval Staff dated 8th January, 2001 in Judicial Review of trial by Court Martial (Exh.P.2) as well as order passed by him in exercise of powers conferred u/s 163 of the Navy Act, 1957 vide order dated January 31, 2001 (Exh. P.2/A). The petitioner challenges these orders whereby the Chief of the Naval Staff has maintained the findings of the Court Martial and held him guilty under sections 497, 452 and 325 of the Indian Penal Code respectively read with section 77(2) of the Navy Act, 1957, but modified the sentence to one of Rigorous Imprisonment as a Class I prisoner for a period of 12 calendar months; to be dismissed from Naval Service and to suffer the consequential penalties involved.

2. The petitioner was tried in the Court Martial proceedings for the following charges as set out in the charge-sheet, as amended in terms of Regulation 157, Regulations for the Navy Part II (Statutory) dated August 1, 2000, which read

thus:

"The accused Lieutenant Shivendra Bikaram Singh (03560-R), Indian Navy belonging to Indian Naval Ship Hansa, being a person subject to naval law, is charged for that he:

(1) Did between the 20th day of October, 1997 and the 5th day of November, 1997 commit adultery by having sexual intercourse with Mrs. Aarti Tandon Baijal, the lawful wife of Commander Dilip Baijal (01943-R) whom he knew to be the wife of Commander Dilip Baijal (01943-R) without the consent or connivance of the said Commander Dilip Baijal (01943-R) and thereby committed an offence punishable, u/s 497 of the Indian Penal Code, 1860 read with section 77(2) of the Navy Act, 1957.

(2) Did between the 3rd day of April, 1999 and the 30th day of September, 1999 threaten Mrs. Aarti Tandon Baijal, wife of Commander Dilip Baijal (01943-R) at Vasco. Sub-Division, South Goa, District Goa with grievous hurt to her person with intent to cause alarm to the said Mrs. Aarti Tandon Baijal, wife of Commander Dilip Baijal (01943-R) and thereby committed an offence punishable u/s 506 of the Indian Penal Code, 1860 read with section 77(2) of the Navy Act, 1957.

(3) Did at about 0645 hours on the 30th day of July, 1999, commit house trespass by unlawfully remaining in G-1 Parijat Building, Chowgule Real Estate, Zorint, Zurinagar at Vasco Sub-Division, South Goa, District Goa the residence of Mrs. Aarti Tandon Baijal wife of Commander Dilip Baijal (01943-R), having made preparation for causing hurt to the said Mrs. Aarti Tandon Baijal, wife of Commander Dilip Baijal (01943-R) and thereby committed an offence punishable u/s 452 of the Indian Penal Code, 1860 read with section 77(2) of the Navy Act, 1957.

(4) Did at about 0645 hours on the 30th day of July, 1999, voluntarily cause grievous hurt to Mrs. Aarti Tandon Baijal wife of Commander Dilip Baijal (01943-R), at Flat No. 1, Parijat Building, Chowgule Real Estate, Zorint, Zurinagar at Vasco Sub-Division, South Goa, District Goa and thereby committed an offence punishable u/s 325 of the Indian Penal Code, 1860 read with section 77(2) of the Navy Act, 1957."

At the conclusion of the Court Martial proceedings, the petitioner was found guilty of charges 1, 3 and 4 under sections 497, 452 and 325 of the Indian Penal Code respectively, read with section 77(2) of the Navy Act, 1957 and sentenced to Rigorous Imprisonment as Class I prisoner for a period of 24 months; to be dismissed with disgrace from Naval service and to suffer the consequential penalties involved. The said findings and the sentence were challenged by the petitioner before the Admiral Chief of the Naval Staff who, in turn, in exercise of powers conferred u/s 163 of the Navy Act, 1957 (hereinafter, called as "the Act") maintained the findings of the Court Martial, but modified the sentence awarded to the petitioner as mentioned hereinbefore.

3. The present writ petition raised several issues. The petitioner has mainly contended that the Court Martial proceedings were vitiated on account of the Constitution of the Court Martial for, according to him, in the first place, the Members of the Committee were not appointed in conformity with the provisions contained in section 97 of the Act. It is next submitted that in any case, three of the Members of the Court Martial were affected by incompetency to act as impartial Judges. It is next contended that the objection with regard to the constitution of the Committee as well as to the competency of the concerned Members to act as impartial Judges, was specifically raised, but the same has not been considered and dealt with in accordance with the mandate of section 102 of the Act, inasmuch as the said objection cannot be summarily rejected by the trial Judge Advocate, but has to be necessarily referred to the Members of the Court. It is contended that such an objection is required to be decided separately, the lowest officer in rank being taken first. Whereas, if the objection is in respect of the President, it is required to be decided first where all the other members are required to vote as to the disposal of the objection and if objection is allowed by one half or more of the members entitled to decide the objection, the member objected has to at once retire and his place is required to be filled up before an objection against another member is taken up. It is submitted that if the objection against the President is allowed, the Court Martial stands adjourned until a new President is appointed by convening authority or the empowered officer. It is contended that the petitioner had objected to the competency of Captain Rajeev Girotra (President), Cdr. Candadai Narayan and Cdr. Suresh Mehta to act as impartial Judges, as they being course mates of the complainant, Cdr. Dilip Baijal. There is no dispute that the objection in case of Capt. Girotra and Cdr. Suresh Mehta was not referred to the members as required u/s 102, but was summarily rejected by the trial Judge Advocate in violation of the said section. It is contended that continuance of such members in the Court Martial has caused serious prejudice, resulting in miscarriage of justice to the petitioner. It is submitted that it is enough for the petitioner to plead mere apprehension of bias and there is ample material on record to indicate that the petitioner was justified in entertaining such apprehension of bias in respect of the above said three members of the Court Martial. The next challenge is on the ground that the orders are vitiated due to non-recording of any reasons to support the decision arrived at and, therefore, non est in the eyes of law. With regard to the merits, it is submitted that the offences for which the petitioner was tried by the Court Martial were civil offences which were triable by ordinary Criminal Courts and, therefore, the Court Martial Proceedings in respect of the said offences are totally without authority of law. In so far as the charge u/s 497 of the I.P.C. is concerned, it is submitted that from the First Information Report (F.I.R.) lodged on August 1, 1999, by the complainant, Cdr. Dilip Baijal, who is allegedly the husband of Aarti, did not disclose the offence u/s 497. It is submitted that the investigation was conducted on the basis of the said F.I.R. and charge-sheet came to be filed before the ordinary Criminal Court which was later on transferred, on the application of the Department for being tried as Court Martial

proceedings. It is, therefore, submitted that there was no formal complaint by the husband alleging commission of offence punishable u/s 497 of the I.P.C. and in absence of complaint by the husband, the Court could not take cognizance of the said offence in view of mandate of section 198 of the Code. It is further submitted that at any rate, the basic ingredients of the offence, i.e. the relationship of Cdr. Dilip Baijal with Aarti that of lawful husband and wife, has not been established for there is no legal evidence in that behalf; and in absence thereof, the charge relating to the offence punishable u/s 497 of I.P.C. should necessarily fail. This submission proceeds on the premise that the mandate of proviso to section 50 of the Evidence Act postulates that, mere opinion, although based on evidence about relationship of one person to another, is not sufficient to prove a marriage in the prosecution of offence u/s 497 of I.P.C. and since there is no legal evidence with regard to the factum of marriage and its legality between Cdr. Dilip Baijal and Aarti, the main ingredient of the offence remains unestablished and the charge in that behalf cannot proceed in law. Besides, it is submitted that, in fact, the charge of offence punishable u/s 497 is for a period between 20-10-1997 and 5-11-1997, but, there is absolutely no legal evidence on record to establish the offence during the said period; and, therefore, the petitioner cannot be convicted on the basis of general observations made in the evidence. In other words, it is contended that there is no evidence connecting the petitioner with reference to the charge as framed. With reference to the charges with regard to the offences punishable under sections 452 and 325 of the I.P.C. are concerned, it is submitted that these charges should also fail because in the first place there is inexplicable delay in lodging the F.I.R. inasmuch as the incident took place on the morning of 30th July, 1999; whereas the F.I.R. has been lodged by Cdr. Dilip Baijal only on 1st August, 1999 and no tangible explanation has been offered for the said delay. According to the petitioner, the only explanation which can be inferred from the record is that Cdr. Dilip Baijal (complainant) had visited the Police Station on 31st July, 1999, but was asked to come on 1st August and, therefore, the F.I.R. came to be registered only on 1st August, 1999. According to the petitioner, unexplained delay in lodging the F.I.R. is fatal to the prosecution, especially in view of the circumstances that the complainant Cdr. Dilip Baijal claims that he met his wife Aarti on the night (around 11 p.m.) on 30th July, 1999, but the main servant, who in her statement recorded by the police during investigation of the case mentioned that Cdr. Dilip Baijal had visited in the morning of 30th July and he and his wife as well as she had cleaned the floor to remove the blood stains. However, this witness has not been examined during the Court Martial proceedings, though available; and no explanation has been offered for non-examination of this witness-which is fatal to the prosecution. According to the petitioner, this witness clearly belies the claim of Cdr. Dilip Baijal that he visited his wife only at the night at around 11 p.m. on 30th July. It is further contended although Ms. Aarti had admittedly talked over 42 different telephone calls made during the entire day on 30th July, 1999, out of which four calls were admittedly outgoing calls, she did not make grievance about the trespass committed by the

petitioner or the incident of assault to any one which is unusual and remains unexplained. Whereas, when she was taken to the for Medical College Hospital by Vijay Saxena, she had disclosed the cause of injury to the concerned Doctor, P.W. 10, as having been caused due to fall from the staircase. Besides, it is an admitted position that the relevant witness Vijay Saxena, who had taken Ms. Aarti to the hospital, has not been examined, though the police had recorded his statement during the investigation of the F.I.R. and was undoubtedly available to depose before the Court Martial. The petitioner submits that all these circumstances read together with the factum of unexplained delay in lodging the F.I.R., the same were unquestionably fatal to the prosecution and the alleged offences under sections 452 and 325 cannot be pressed against the petitioner. Besides the delay in lodging the F.I.R., the petitioner submits that since there is absolutely no legal evidence to convict the petitioner, for the offences punishable under sections 452 and 325 of the I.P.C., the conviction so recorded by the Court Martial was unsustainable. It is urged that admittedly to bring home the charge of section 452, the only ocular evidence is of P.W. 6, (Aarti Baijal). Her evidence has not been corroborated, though such an evidence was available, and, it would be, therefore, fatal to the prosecution. It is also urged that the cause of injury disclosed by Ms. Aarti to Doctor P.W. 10 was due to fall from staircase which clearly conflicts with the allegations in the F.I.R. which was recorded on 1-8-1999. According to the petitioner, there is apparent conflict between the allegations in the F.I.R. and the evidence available prior to the registration of the F.I.R., whereas allegations as to the cause of the injury due to assault by the petitioner is based on posterior evidence, which ought to be looked upon with suspicion and circumspection. According to the petitioner, such an evidence has been obviously created and, if the same is discarded, then there is no legal basis to convict the petitioner of the alleged offences u/s 452 of the I.P.C. According to the petitioner the offence u/s 452 is intricately connected with the offence u/s 325 of the I.P.C. and, therefore, if the offence u/s 452 of the I.P.C. fails, no conviction can be recorded against the petitioner for the offence u/s 325, sine qua non for the said offence is that the accused had the intention to cause hurt. The learned Counsel for the petitioner besides making oral arguments, has also submitted written submissions dated 12-4-2001 reiterating the above said points.

4. Mr. Thali, the learned Central Government Standing Counsel appearing for the respondents submits that the scope of writ jurisdiction in such matters is very limited. He has relied on the decisions of the Apex Court to contend that it is not open to the Court to go into the sufficiency or insufficiency of evidence, but the parameters laid down by the Apex Court are that only where it is found that the mandatory provisions of the Act or the Rules have been contravened; or a case where it could be said that there is violation of the principles of natural justice and which has caused miscarriage of justice, which vitiates the entire proceedings or that the authority exercising the jurisdiction has not been vested with the jurisdiction to act. It is, therefore, not open for this Court to wade through the entire evidence which has come on record to find out whether the

conviction recorded by the authorities below is justified and sustainable. According to him, none of the points raised on behalf of the petitioner relating to the Constitution of the Court in conformity with the mandatory provisions or even in respect of the manner of deciding the objection regarding impartiality of two members of the Court, merits inference. He further submits that there is no material to justify the allegation of mala fide. In so far as argument relating to failure to record reasons, he submits that the same is no more res integra and concluded against the petitioner. He submits that the Court Martial was competent to adjudicate the matter relating to the offences punishable under sections 497, 452 and 325 of the I.P.C. and its jurisdiction was not ousted. He submits that there was enough material on record to indicate that Cdr. Dilip Baijal and Aarti were related as husband and wife and the factum of marriage, as such was not in issue and, therefore, the prosecution was not required to establish this ingredient. According to him, the proviso to section 50 of the Evidence Act, which envisages the manner of proof of marriage, was not attracted in the present case, as the relationship was not in dispute and it was not the petitioner's defence that he did not believe Aarti to be the wife of Cdr. Dilip Baijal or that he did not know that Aarti was the wife of Cdr. Dilip Baijal, and only in such a situation, that the prosecution would be under an obligation to establish the legitimate relationship and necessarily the factum of marriage. He submits that, at any rate, the evidence adduced was sufficient to establish the factum of marriage and its legality. He submits that the charge for the offence punishable u/s 497 is based on the complaint of the husband made before the authorities; and, therefore, the Court Martial was competent to try the said offence. In so far as the delay in lodging the F.I.R., is concerned, he submits that the time taken for registering the F.I.R. has been sufficiently explained and there is nothing on record to contradict the same. He submits that in any case, time between 30th July and 1st August, 1999 cannot be said to be unreasonable period so as to conclude that it was fatal to the prosecution. He submits that whether the delay has been explained or not or where there is evidence offering explanation for delay is a matter which would necessarily invite this Court to analyse the evidence on record, which is clearly prohibited. He submits that having regard to the nature of the allegations, it is natural that the victim did not disclose about the offence to anyone as it would have exposed her to criticism from various quarters. He submits that non-examination of Fatima Gaffur or Vijay Saxena for that matter, was of no consequence and had no bearing on the prosecution case. It is submitted that their evidence would have resulted in multiplicity of evidence inasmuch as in the present case the victim was the best witness with regard to the actual incident in question; whereas their evidence would be relevant only with regard to the other circumstances. According to him, on the basis of direct evidence of the victim, which stands corroborated by the injuries noticed on the victim, which are established by the Medical Officer, on the basis of the doctrine of corpus delicti, the evidence which has come on record, was sufficient to hold the petitioner guilty of the alleged offences. He submits that the evidence with regard to the said offences which has come on

record was consistent; and in any case, it is not open for this Court to go into the said evidence to take a contrary view, as the same is impermissible in law. He submits that the record would clearly indicate that ample opportunity was given to the petitioner. The petitioner has cross-examined each witness at length and the evidence that has come on record has been duly analysed and considered by the authorities below before recording the findings of guilt and the same cannot be interfered by this Court in exercise of writ jurisdiction. In other words, he has supported the impugned orders, including the orders passed by the respondent No. 2 confirming the findings of guilt with regard to the offences punishable under sections 497, 452 and 325 of the I.P.C. read with section 77(2) of the Act as well as the modified sentence ordered under the impugned decision.

5. In view of the rival submissions, it will be apposite to first advert to the principal question as to the scope of jurisdiction of this Court in a writ petition which assails the order recording findings of guilt and imposing penalty in exercise of the powers under the Act. No doubt, this issue has attracted the attention of the Apex Court on more than one occasion; and on analyzing the decisions, the principle enunciated by the Apex Court is lucidly stated in the recent decision in the case of Union of India and Others Vs. Himmat Singh Chahar, . Before we advert to the said decision, it would be appropriate to refer to the decision of the Apex Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, . The learned Counsel for the petitioner extensively referred to this authority; and more particularly to paras 45 and 46 thereof to contend that the personnel in services cannot be discriminated with the benefits of liberal spirit of the constitution. He submits that the Apex Court has frowned upon the legislation which did not provide for even an appeal. Relying on the said observations, he contends that the scope of the present writ petition should not be limited or restricted, but the Court should adopt liberal approach and re-appreciate the entire material to reach at its own conclusion about the correctness of the findings of guilt recorded by the authorities. Relying on the observations in the said paragraphs he submits that the provisions in the Act providing redressal before the higher authority, is not an appeal but a "lip service". No doubt the Apex Court made such observations, but on close examination of the said judgment, it will be seen that the same were made by the Apex Court only with a hope that the legislature would take remedial steps, so as to change the value system. Reliance was also placed on the observations made by the Apex Court in the said decision with regard to non-recording of a reasoned order in support of the conclusion reached by the authorities, though the authorities are competent to impose death sentence. This authority, in our opinion, does not enlarge the scope of jurisdiction of this Court in exercise of writ jurisdiction, but, on the other hand, has highlighted the drawbacks and pitfalls in the redressal system which causes prejudice to the service personnel.

6. Reliance is also placed upon, Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), of this decision, by the petitioner to contend that the observations made therein that it is not necessary for the High Court to minutely

examined the record of the General Court Martial as if it was sitting in appeal, were made in the context of the fact that the Division Bench of the Andhra Pradesh High Court said that the learned Single Judge of the same Court minutely examined the records of the Court Martial proceedings and after that came to the conclusion that the respondent therein was denied the reasonable opportunity to defend himself. The Apex Court took exception to such an approach and, therefore, observed that this was a fundamental mistake committed by the High Court. In para 23 of the same judgment, the Apex Court further observed that though the Court Martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the Court Martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. It further observed that if a Court Martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any Court must stay its hand. According to this decision, the proceedings of a Court Martial are not to be compared with the proceedings in a criminal Court under the Code of Criminal Procedure and that these proceedings remain to a significant degree, a specialized part of overall mechanism by which the military decision is preserved. It is for the special need of the armed forces that a person subject to Army Act is tried by Court Martial for an act which is an offence under the Act. It is further observed that the Court Martial discharges judicial function and to a great extent is a Court where provisions of Evidence Act are applicable and the Court Martial has also the same responsibility as any Court to protect the rights of the accused charged before it and to follow the procedural safeguards. It is further observed that on perusal of the provisions of law relating to Court Martial, it is manifestly clear that the procedure prescribed equally provides fair trial to the accused. It further observed that where there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. The Court went on to observe that unless it is shown that prejudice has been caused or mandatory provision has been violated, the High Court should not allow the challenge to validity of conviction and sentence of the accused when evidence is sufficient, Court Martial has jurisdiction over the subject matter and has followed the prescribed procedure and is within its powers to award punishment.

7. Relying on the observations of the above said decision, the learned Counsel for the petitioner contends that the Apex Court has observed that the High Court should allow the challenge to the validity of the conviction and sentence of the accused when evidence is insufficient. According to him, it is therefore open to the High Court to go into the question of sufficiency of evidence, particularly to find out whether there was legal evidence to record the findings of guilt and for that purpose, the Court would necessarily be required to undertake the scrutiny of the evidence on record. The learned Counsel relies on a decision of the Division Bench of this Court in I.C. 32704 IC-32704 X Major K.L. Menhdiratta Vs. Union of India (UOI), Ministry of Defence and Others, to point out that in this

case the Court had analysed and reappreciated the evidence on record. No doubt in the said decision, reliance was placed on the decision of the Apex Court in Lt. Col. Prithi Pal Singh Bedi (supra), however, in the said decision emphasis has been placed on the observations made by the Apex Court. As already observed above, the said observations of the Apex Court in Lt. Prithi Pal Singh Bedi case were only recommendatory in nature and not law within the meaning of Article 141 of the Constitution. In our view, the said decision has been clearly misread. On the other hand, the subsequent decision of the Apex Court in Union of India and others v. Major A. Hussain (supra), and the recent decision reported in Union of India and others v. Himmat Singh Chahar (supra), the Apex Court in para 4 has unambiguously observed that the power of judicial review by the High Court cannot be a power of an appellate authority permitting the High Court to re-appreciate the evidence for coming to a conclusion that the evidence is insufficient for the conclusions arrived at by the competent authorities in Court Martial proceedings. But, the scope of judicial review is very limited to find out whether there has been infraction of any mandatory provisions of the Act, prescribing the procedure which has caused gross miscarriage of justice or whether there has been violation of the principles of natural justice, which vitiate the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. This view has been taken having regard to the scheme of the Act which attaches finality to the findings arrived at by the competent authority in the Court Martial proceedings. The Apex Court in the said decision has observed that if the High Court acts in excess of any of the aforesaid parameters, it would be overstepping in trying to re-appreciate the evidence. In view of the recent pronouncement of the Apex Court, the approach adopted by another Bench of this Court, of re-appreciating the evidence in Major K.L. Menhdiratta's case which is relied upon by the petitioner, can be said to be impliedly overruled.

8. The next argument advanced on behalf of the petitioner that the impugned orders are vitiated on account of non-recording of reasons in support of the conclusion reached by the authorities, the same merely deserves to be stated to be rejected. The said issue is no more res integra. No doubt certain observations have been made by the Apex Court in the judgment reported in Lt. Col. Prithi Pal Singh Bedi v. Union of India and (supra), but the same, as observed by us earlier, are only recommendations and not a law within the meaning of Article 141 of Constitution. However, in the case of S.N. Mukherjee Vs. Union of India, the Constitution Bench of the Apex Court, after adverting to catena of decisions has concluded that at the stage of recording of findings and sentence, the Court Martial is not required to record reasons, but only when it recommends mercy-if the Court makes such recommendation. This enunciation has been summed up in para 43 of the said decision. The Apex Court has further observed that there is nothing in the language of the relevant provisions which may lend support to the plea that reasons are required to be recorded even at the confirmation stage. In the circumstances, this issue is no more res integra. Mr. Dessai, the learned

Counsel for the petitioner has placed reliance on an unreported decision of the Division Bench of this Court in (Criminal Writ Petition No. 491/96), decided on October 17, 1997, particularly para 10 of the said decision, to contend that the order was vitiated for want of reasons recorded in support thereof. The observations made in the said decision are clearly contrary to the ratio of the abovesaid decision of the Apex Court and, therefore, not a good law on this aspect.

9. It is relevant to point out that the respondents have vehemently argued that mere infraction of the mandatory provisions of the Act ipso facto is not sufficient, but the petitioner will have to further establish that the said infraction has caused gross miscarriage of justice. On the other hand, learned Counsel for the petitioner submits that mere infraction of mandatory provisions relating to procedure would be a good ground for interference, by relying upon the observations made by the Apex Court in the decision reported in *Union of India and others v. Major A Hussain* (IC-14827), (supra). In our view, when the statute provides for mandatory provisions relating to procedure, in that situation such a procedure should be adhered to in conformity with the mandate of that provision in its letter and spirit, and cannot be allowed to be whittled down on the ground that no prejudice or miscarriage of justice has been caused due to its non-compliance. The fact that the statute makes mandatory provision relating to procedure presupposes that non-compliance of that would obviously cause gross miscarriage of justice, for such an intention will have to be ascribed to the legislature; and it would be sufficient for the petitioner to establish that the mandate has been breached and nothing more. It is settled principle of law that where a power is given to do certain thing in a certain manner, the thing must be done in that way or not at all see *Dhananjay Reddy v. State of Karnataka*, AIR 2001 S.C.W. 1217. In our view non-compliance of any mandatory provision would inevitably result in interaction of right guaranteed under Articles 14 and 21 of the Constitution of India. The observations made by the Apex Court in *Union of India and others v. Himmat Singh Chahar* (supra) case, if understood thus, we have no hesitation in observing that if any mandatory procedure prescribed by the statute is not followed, in such a situation all consequential steps taken on the basis of such infirm proceedings would also vitiate being nullity in the eyes of law. In other words, infraction of any mandatory provisions relating to the Constitution of the Court Martial will have the inevitable effect of the entire proceedings being vitiated, being void ab initio in which case it would be unnecessary to examine whether any prejudice had been caused to the petitioner or any miscarriage of justice has occasioned for, such a case would fall within the purview of decision rendered by incompetent authority and thus jurisdiction error resulting in nullity.

10. We shall now proceed to deal with the contention that the Constitution of the Court Martial was in contravention of the mandatory provisions. While dealing with this contention, the plea of mala fide raised on behalf of the petitioner will have to be examined as well. On plain reading of section 97 of the Act, it is seen

that the Court Martial shall be constituted and convened in accordance with the provisions contained in sub-sections (2) to (22) of section 97 of the Act. Sub-section (2) provides that the President, the Chief of the Naval Staff or any officer empowered in this behalf by commission from the Chief of the Naval Staff shall have the power to order courts Martial for the trial of offences under the Act. Sub-section (6) provides that the Court Martial shall consist of not less than five nor more than nine officers. Qualification of the officers to sit as Members of a Court Martial is provided for in sub-section (7). The prosecutor is disqualified to sit on the Court Martial for the trial of the person he prosecutes, by virtue of sub-section (8). Sub-section (9) provides that, the officer ordering the Court Martial, who was the Commanding Officer at the time of the commission of the alleged offence, and the officer investigating the offence, shall not be qualified to sit on a Court Martial for the trial of such accused. Sub-section (10) provides that the officers of the Indian Navy (subject to the provisions of sub-sections (7) to (9)) shall be eligible to sit as members of a Court Martial. Provision of said sub-section however postulates that the majority of the members of the Court Martial shall be the Officers of the Executive Branch of the naval service.

11. In the present case, there is no dispute that the Court Martial constituted of not less than 5 nor more than 9 officers. However, one of the grievances made is that there was infraction of the mandate contained in sub-section (10). The grievance made on behalf of the petitioner is that the respondent No. 6, who was acting as President, and respondent No. 7, alone belonged to the Executive Branch of the naval service; whereas the respondents Nos. 8, 9 and 10 who were the Members of Court Martial did not belong to Executive Branch of the naval service. In other words, it was contended that the majority of the Members of the Court Martial did not belong to the Executing Branch of the naval service. The respondents have countered this argument. In the first place, it is contended that this objection was not raised at any stage, nor has been specifically raised in the Memo of the writ petition. It is submitted that the said plea is purely a question of fact and ought not to be permitted at this belated stage. In any case, it is submitted that the officers who were Members of the Court Martial were the Executive Officers. In that context, reliance was placed on a Notification. We find no reason to doubt the correctness of the submission made before us across the Bar on behalf of the respondents which is supported by an official document. Thus the plea raised on behalf of the petitioner that there is infraction of sub-section (10) of section 97 is totally misplaced and ill-advised.

12. The next contention that the Court had to be constituted by the peers of the petitioner, namely the Lieutenant and not by Commanders especially when the President was Acting Captain. We find no merit in this submission. In the present case, Capt. Rajiv Girotra was the President and, fulfilled the necessary qualification u/s 97(16) of the Act. There is no requirement that the members of the Court shall be the peers of the delinquent officer; but on the other hand sub-sections (16) & (17) of section 97 provides for minimum qualification only. The submission that the Constitution of the Court Martial in the present case was not

in conformity with the mandate of sub-section (17) of section 97 of the Act, is, therefore, misconceived. We find from the material on record that the President of Court Martial was Captain Rajiv Girotra whereas other four Members were Commanders in rank. Even the spare members notified were Commanders in rank. Merely because the other Members of the Court Martial were Commanders and higher in rank to that of the petitioner, cannot render the Constitution of the Court Martial infirm or in contravention of section 97 of the Act as such. On the other hand, on plain reading of sub-section (17) of section 97 it would appear that it is only an enabling provision and also provides that regularity or validity of any Court Martial or of the proceedings thereof shall not be affected by any Commander, lieutenant-Commander or lieutenant being required to sit or sitting thereon under any circumstances. The provision, however, stipulates that when any Commander, lieutenant-Commander, or Lieutenant sits on any Court Martial, the members of it shall not exceed five. The respondents are, therefore, right in contending that, in the present case, they had invoked sub-section (17) of section 97 of the Act and that there was no infraction of the said provision in any manner. The grievance of the petitioner is that all the members of the Court Martial were Commanders, and, therefore, he was at a disadvantage and prejudice has been caused to him. In other words, it is submitted that due to the non-inclusion of the junior officers as members, serious miscarriage of justice has occasioned. We find no substance in this submission. Respondents, besides relying on the language of sub-section (17), also relied on the provisions of sub-section (11) of section 97 of the Act. The petitioner contends that by inclusion of the members belonging to the rank of Commanders, the Constitution of the Court Martial has been restricted only to five in number, however, if junior officers were to be included, then the number of members could have been up to 9 officers. We see no reason to entertain such a grievance so long as the Constitution of the Court was not in contravention of any provisions of section 97 of the Act. The possibility of some other officers being included as members or persons belonging to other rank being included as members, does not render the Constitution of the Court Martial illegal or being in contravention of the provisions of section 97 of the Act. On close scrutiny of section 97 it would appear that it is self contained Code which also provides that the members thereof are drawn from at least two ships not being tenders, and commanded by officers of the rank of lieutenant or higher rank. According to the respondents, this provision ensures a fair trial. In the circumstances, we find no merit in the submission advanced on behalf of the petitioner to challenge the Constitution of the Court Martial on this count.

13. The next argument advanced by the learned Counsel for the petitioner is about the manner of dismissal of the objection raised by the petitioner with regard to the competency of the members concerned to act as impartial judges. It is submitted that admittedly in so far as objection as against Captain Rajiv Girotra and another Member Cdr. Suresh Mehta, the same came to be summarily rejected by the trial Judge Advocate without referring it to the members of the

Court as was required by section 102(a) of the said Act. We make it clear that for examining this plea we are not called upon to consider the merits of the case on which the plea of incompetency of the concerned members to act as impartial judges was raised, but only to examine the ambit of the said provision as to in which situation the trial Judge Advocate could reject the objection summarily or whether the objection with regard to the competency to act as impartial Judges should necessarily be referred to the members of the Court. The respondents contend that the trial Judge Advocate was competent to summarily reject such an objection on being satisfied that the grounds on which such objection was raised was devoid of any merits. Before we proceed to consider this submission, it would be apposite to reproduce. Section 102 as well as section 103 of the Act which fall for our consideration which read thus :

"102. Objection to members.---The following provisions shall apply to the disposal of objections raised by the prosecutor as well as the accused :-

(a) any member may be objected to on a ground which affect his competency to act as an impartial Judge; and the trial Judge Advocate may reject summarily without reference to the members of Court any objection not made on such ground;

(b) objections to members shall be decided separately, those to the officer lowest in rank being taken first: provided that if the objection is to the President, such objection shall be decided first and all the other members whether objected to or not shall vote as to the disposal of the objection;

(c) on an objection being allowed by one-half or more of the officers entitled to decide the objection, the member objected to shall at once retire and his place shall be filled up before an objection against another member is taken up;

(d) should the president be objected to and the objection to allowed, the Court shall adjourn until a new president has been appointed by the convening authority or by the officer empowered in this behalf by the convening authority; and

(e) should a member be objected to on the ground of being summoned as a witness and should it be found that the objection has been made in good faith and that the officer is to give evidence as to facts and not merely as to character, the objection shall be allowed.

103. Further objections.---(1) The trial Judge Advocate shall then ask the accused whether he has any further objections to make respecting the Constitution of the Court, and should the accused raise any such objection, it shall then be decided by the Court, which decision shall be final and the Constitution of the Court-Martial shall not be afterwards impeached and it shall be deemed in all respects to have been duly constituted.

(2) If the accused should have no further objection to make to the Constitution of the Court or if any objection is disallowed, the members and the trial Judge

Advocate shall then make an oath of affirmation in the form set out in section 104."

14. The scheme under Chapter XIII of the Act seems to be that as soon as the proceedings commence and upon the accused enters appearance before the Committee, it is incumbent upon the trial Judge Advocate to ask the accused if he objects to any member of the Court, by virtue of sub-section (5) of section 101 of the Act. When such inquiry is made, it is open for the accused to take objection, if any. The objection can be on different grounds. The Act envisages that the objection with regard to any member of the Court, is to be dealt with at the threshold. Thereafter, the trial Judge would proceed to ask the accused whether he has any further objection, by virtue of section 103 of the Act. Thus, there is qualitative, difference between objections raised under sections 102 and 103 of the Act respectively. In so far as the objections relating to the member as such would fall u/s 102 of the Act, whereas one relating to the Constitution of the Court generally would fall u/s 103 of the Act. In so far as the objections perceived by section 102 of the Act are concerned, the same can be mainly analysed as objection on the ground which affects the competency of any member to act as an impartial Judge or any other ground, albeit qua the member. The manner of deciding such objection is provided in the said section. We would advert to the established procedure of law a little later. This section also provides as to the consequences of accepting and rejection of such objections and steps to be taken thereafter. Every objection relating to the ground of member's competency to act as an impartial Judge is concerned, the same is required to be referred to the members of the Court, but if it relates to ground other than being affected by impartiality of Judge, then the same can be rejected summarily by the trial Judge Advocate; whereas objections referred to as further objections in section 103 are essentially in respect of the Constitution of the Court which shall be decided by the Court. In the context of language of sections 102 and 103 of the Act, it is submitted on behalf of the respondents that when an objection with regard to the competency of any member to act as an impartial Judge is taken, the same should necessarily be first scrutinized by the trial Judge Advocate and if he finds that the ground is ill-advised or inappropriate, he may summarily reject such objections without reference to the members of the Court. On the other hand, the petitioner contends that the trial Judge Advocate could summarily reject the objections not made on the ground which affects the competency of any member to act as an impartial Judge, but when any objection is raised as against a particular member regarding his competency to act as an impartial Judge, the trial Judge Advocate has no option but to make reference thereof to the members which shall be decided separately as provided for by section 102 of the Act. The respondents have relied on the provisions of section 130 of the Army Act. However, on perusal of the scheme of the Army Act, we find that there is material difference between the two schemes.

15. In our view, the language of Clause (a) of section 102 of the Act, clearly postulates that when the objection is taken against any member about the

competency to act as an impartial Judge, in that case, the trial Judge Advocate has no jurisdiction to reject the same summarily, but has to stay of his hand and instead is under obligation to refer the same to the members for deciding the same in the manner provided for by section 102 of the Act. This provision is in the nature of an opportunity being offered to the concerned member against whom ground of impartial Judge is alleged, so that he can refuse himself from being member of the Court in view of the allegations made against him. It is possible that, in a given situation, the member concerned may offer explanation to the said objection, and if that is done, the objection would be put to vote, but inspite of explanation given by the member the objection is allowed by one half or more of the officers entitled to decide the objection, the member objected to shall at once retire and his place shall be filled up before objection against another member is taken up. It is seen that a panel of two substitute members was kept ready in the present case for the aforesaid purpose. From the scheme of the Act, it appears that, once the objection is rejected by the Court, the said decision becomes final. If we were to accept the submission of the respondents that, the trial Judge Advocate himself could examine, in the first instances, as to whether the ground about the competency to act as impartial Judge is made out or not, it would result in rewriting the said provision and empowering the trial Judge Advocate to deal with such objection without referring the same to the members. Having regard to the nature of proceedings faced by the accused in the Court Martial, it would be appropriate that the Member against whom such objection is raised is himself called upon to deal with the same. The subjective satisfaction of the trial Judge Advocate can be no substitute for the explanation that would be offered by the concerned member of the Court which may satisfy the delinquent officer, who in turn may not purse the same against such a member. Whereas, permitting the trial Judge Advocate to summarily reject such an objection, surely, cannot satisfy the apprehension entertain by the accused of likelihood of bias at the hands of that member. In this context, it would be appropriate to observe that the procedural safeguard should be commensurate with the sweep of the powers. The Court Martial proceedings are undoubtedly vested with the wider power, the greater the need for the restrain in its exercise and correspondingly more liberal the construction of the procedural safeguards envisaged by the statute. Understood thus, the interpretation given would ensure that justice is not only done but seems to have been done in so far as the objection raised by the accused with regard to the competency of the member on the ground of impartiality. For, undoubtedly, only that member alone can satisfy the apprehension of the accused, and assuming that the accused is not satisfied with the explanation, then it is for the Court to accept or reject the said objection as per the procedure provided by section 102, which decision becomes final. It is not possible to countenance the interpretation that the objection with regard to competency of a member on the ground of being impartial Judge, if raised, can be summarily rejected by the trial Judge. In the circumstances, whenever an objection with regard to competency to act as impartial Judge is raised, the trial Judge Advocate has to stay of his hands and has no option, but to refer the same

to the members of the Court. Whereas, only such objections against any member on the ground other than competency to act as impartial Judge is concerned, the same can be decided summarily by the trial Judge Advocate. Thus, when a specific ground of impartiality of a member is raised, then the trial Judge Advocate cannot usurp powers that are exclusively vested in the members of the Court. Any other interpretation would result in doing violence to the mandatory provisions and resultantly to the legislative intent.

16. In the present case, there is no dispute that in so far as the objection against Cdr. Candadai Narayan regarding his competency to act as an impartial Judge is concerned, the same was referred to the Members of the Court and was rejected. However, admittedly, objection with regard to the competency of Captain Rajiv Girotra, (President) as well as, Cdr. Suresh Mehta to act as impartial Judges is concerned, the same came to be summarily rejected by the trial Judge Advocate. In view of the interpretation given by us in the foregoing paragraphs, summary rejection of the objection with regard to Captain Rajiv Girotra (President) and Cdr. Suresh Mehta, was obviously not in accord with procedure established by law and there is clear breach of mandatory provisions relating to procedure of Court Martial, which has undoubtedly caused gross miscarriage of justice to the petitioner. In the circumstances, the Constitution of the Court Martial, in the present case, itself becomes susceptible to serious challenge on account of competency of Captain Rajiv Girotra (President) and Cdr. Suresh Mehta to act as impartial Judges. On this count alone, the petitioner would succeed as all the subsequent steps taken by such a Court are nullity and non est in the eyes of law.

17. In so far as the objection with regard to Cdr. Candadai Narayan is concerned, as mentioned earlier the same was referred to the Members of the Court and the same was rejected. Once the same is rejected, it becomes final and this Court cannot go into the correctness of the said decision. It would be relevant to refer to the decision of Delhi High Court in the case of Capt. Ram Kumar Vs. Chief of the Army Staff, . In para 20 of the said decision, it is observed that no doubt it is a fundamental principle that justice must not only be done, but should "manifestly and undoubtedly" be seen to be done. Delhi High Court referred to the decision of the Apex Court in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, to observe that person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter and that the accused should have no "apprehension" that the justice will not be done to him by the Court before which he is arraigned. The Court further observed that there must be "a reasonable ground for assuming the possibility of a bias" which is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice" and the question is always one "of fact to be decided in each case. It must be proved that there is a real likelihood of bias or that a reasonable person, under the circumstances of the case, will think that the Judge is bias. These observations are made with reference to the decision reported in Sankal Chand Himatlal Sheth v. Union of

India, 1977 (1) SL.R. 784. The Court went on further to observe, that a mere suspicion of bias or a surmise or conjecture would not be enough-while advertent to the decision reported in *Kanhayalal v. Municipal Board, Rajaldesar*, 1980 (1) SL.R. 75 and in the case of *S. Parthasarathi Vs. State of Andhra Pradesh*, . In the said case, the Delhi High Court in para 21 observed that since the members of the Court came to the conclusion that the member was not biased, consequently he was not disqualified from being a member of the Court.

18. However, in the present case, reference with regard to the objection to the aforesaid two officers (Captain Rajiv Girotra (President) and Cdr. Suresh Mehta) was not made to the Court; and therefore, the objection with regard to bias and their competency to act as impartial Judges remained unresolved as required by the mandatory provisions of the statute. The consequences whereof are that the Constitution of the Court Martial itself is not proper and in effect coram non iudice. It is relevant to point out that admittedly objection to Captain Rajiv Girotra (President) as well as Cdr. Suresh Mehta was specifically raised by the petitioner, but the same was rejected summarily by the trial Judge Advocate without referring the same to the Court. In other words, these two persons continued to participate as Members of the Court Martial, though incompetent to do so in law. Besides, they participated when the objection of Cdr. Candadai Narayan was referred to the Court. In that sense, because of their participation, the opinion expressed by the Court on the objection of Cdr. Candadai Narayan becomes tainted and thus vitiated. Understood thus, even the objection regarding Cdr. Candadai Narayan is also not decided as per the procedure established by law. A fortiori, all the steps taken by such an infirm Court Martial are non est, void ab initio and nullity in the eyes of law.

19. Although it is unnecessary to go into the other questions, for the petitioner should succeed on the sole ground of non-compliance of mandatory procedure established by law while considering the objection regarding incompetency of Captain Rajiv Girotra (President) and Cdr. Suresh Mehta, even then if we were to examine the issue as to what constitutes bias and the legal effect of the possibility of bias, it would be appropriate to refer to the decision of the Apex Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, . The Apex Court while considering the ground that the proceedings of Court Martial were vitiated by bias on the part of the respondent 4 in that case who participated in and dominated the proceedings, the Apex Court observed thus:

"The "Act" constitutes a special law in force conferring a special jurisdiction on the Court Martial prescribing a special procedure for the trial of the offences under the "Act". Chapter VI of the "Act" comprising of sections 34 to 68 specify and define the various offences under the "Act". Sections 71 to 89 of Chapter VII specify the various punishments. Rules 106 to 133 of the Army Rules, 1954 prescribed the procedure of, and before, the Summary Court-Martial. The Act and the Rules constitute a self-contained Code, specifying offences and the procedure for detention custody and trial of the offenders by the Court-Martial.

The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute. The oft quoted words of Frankfurter, J. in *Vitarelli v. Seaton*, 359 U.S. 535 are again worth recalling:

"....If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed

This judicially evolved Rule of administrative law is now firmly established and, if I may add, rightly so. He that take the procedural sword shall perish with that sword."

"The history of liberty" said the same learned Judge "has largely been the history of observance of procedural safeguards." 1942 U.S. 332

We are afraid, the non-compliance of the mandate of section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings. Indeed it has been so held by this Court in *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, where Desai, J., referring to the purpose of section 130 observed :

".....Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection.....

.....This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection.

.....The provision conferring a right on the accused to object to a member of the Court Martial sitting as a member and participating in the trial ensures that a charge of bias can be made and investigated against individual members composing the Court Martial. This is pre-eminently a rational provision which goes a long way to ensure a fair trial."

What emerges, therefore, is that in the present case there is a non-compliance with the mandate of section 130 with the attendant consequence that the proceedings of the Summary Court Martial are rendered infirm in law. This disposes of the first limb of the contention (a).

6. The second limb of the contention is as to the effect of the alleged bias on the part of respondent 4. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.

It is the essence of a "judgment that it is made after due observance of the

judicial process; that the Court of Tribunal passing it observes, at least the minimal requirement of nature justice is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non iudice" (See (Vassiliades v. Vassiliades), AIR 1945 P.C. 38.

7. As to the test likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself however, honestly, "am I biased?" but to look at the mind of the party before him.

Lord Esher in *Allinson v. General Council of Medical Education and Registration*, 1894 (1) Q.B. 750 said :

"The question is not whether in fact he was or was not biased. The Court cannot inquire into that....."

In the administration of justice, whether by a recognized legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration any person who is to take part in it should not be in such position that he might be suspected of being biased."

In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, 1969 (1) Q.B. 577 Lord Denning M.R. observed :

".....in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was an impartial as could be nevertheless if right minded person would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit....."

Frankfurter, J. in *the Public Utilities Commission of the District of Columbia v. Pollak*, 1951(343) U.S. 451 said :

"The judicial process demands that a Judge move within the framework of relevant legal Rules and the Court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly led others to

believe they are operating Judges rescue themselves. They do not sit in judgment....."

Referring to the proper test, Ackner L.J. in Regina v. Liverpool City Justices, Ex parte Topping, 1983 (1) W.L.R. 119 said :

"Assuming, therefore, that the justices had applied the test advised by Mr. Pearson---do I feel prejudiced? then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely the quashing of the conviction would follow."

Thus tested the conclusion becomes inescapable that, having regard to the antecedent events the participation of respondent 4 in the Court-Martial rendered the proceedings coram non iudice....."

20. In the light of the aforesaid, the petitioner is right in contending that it was enough for him to make out a case that he was in possession of the relevant information, which was disclosed while taking objection; and, therefore, the bias was likely to be caused at the hands of the concerned officers as they were likely to be disposed to decide the matter only in particular way. In the present case, the trial Judge Advocate-in the first place acted in excess of authority in usurping the power of the Court to decide the objection, and at any rate clearly applied wrong test in answering the same. In 1969 (1) Q.B. 577 Lord Denning M.R. observed that in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of other. The Court looks at the impression which would be given to other people, even if he was an impartial. Similar view is expressed by Ackner L.J. in 1983 (1) W.L.R. 119 that if the Judges were to apply the test---do I feel prejudiced?, then they would apply the wrong test and exercise of their discretion on the wrong principle would result in quashing the conviction. These enunciations if read along with the observations of Frankfurter. J., in 1951(343) U.S. 451---that it is true that reason cannot control the subconscious influence of feeling of which it is unaware when there is ground for believing that such unconscious feeling may operate in the ultimate judgment or may not unfairly led others to believe they are operating, Judges rescue themselves and not sit in judgment, the inescapable conclusion is that the participation of the objected members in the Court Martial rendered the proceedings coram non iudice.

21. As mentioned earlier, it is wholly unnecessary to examine other contentions, but since both sides have addressed this Court at length even on other points we may deal with the same in appropriate manner a little later.

22. The next point raised on behalf of the petitioner is that the Court Martial had no jurisdiction to try the offence in question. According to the petitioner, the law mandates that only the offences which are adumbrated in the said Act can be

tried by the Court Martial and not all civil offences. "Civil Offence" has been defined by the Act. Section 3(3) of the Act provides that "civil offence" means an offence triable by a Court of ordinary criminal jurisdiction in India. Sub-section (1) of section 77 of the Act postulates that every person subject to naval law who commits a civil offence punishable with death or with imprisonment for life shall be punished with the punishment assigned for that offence. Sub-section (2) of section 77 provides that every person subject to naval law who commits any other civil offence shall be punished either with the punishment assigned for the offence or with imprisonment for a term which may extend to three years or such other specified punishment. Needless to mention that sub-section (1) of section 78 has no application to the present case because, none of the offences in question are punishable with death or with imprisonment for life. There can be, however, no dispute that the offences in question would fall within the ambit of sub-section (2) of section 77 of the Act. The purport of sub-section (2) of section 77 is, in effect, to modify the punishment provided by the provisions of the Indian Penal Code or similar other statutes, which make any act of commission or omission, an offence. Insofar as the offences in question in the present case are concerned, they are punishable with imprisonment upto five years and seven years, respectively. In the circumstances, the said offences can be ascribed to offences provided for in sub-section (2) of section 77 of the Act and by virtue of the said provision, the same becomes punishable either with imprisonment assigned for offences under the Indian Penal Code or with imprisonment for a term which may extend for three years or such other punishment as provided for in the Act.

23. After analysing the abovesaid position, the contention raised on behalf of the petitioner can, however, be answered with reference to section 78 of the Act. Sub-section (1) of section 78 contemplates that subject to the provisions of sub-section (2), every person subject to naval law who is charged with a naval offence or a civil offence may be tried and punished under this Act regardless of where the alleged offence was committed. This provision, however, makes exception as provided for under sub-section (2) of section 78 of the Act, for it opens with the expression "Subject to the provisions of sub-section (2)". There can be no dispute that the petitioner was a personnel in Navy; and therefore, a person subject to naval law. Since the petitioner, being a person subject to naval law and the offence charged for is a civil offence, he could be tried and punished under the provisions of the Navy Act regardless of where the alleged offence was committed.

24. However, to overcome this difficulty, the argument advanced on behalf of the petitioner is that the offences alleged against the petitioner are excluded from being tried and punished under the Navy Act. The buttress this point, reference is made to sub-section (2) of section 78 of the Act, which provides that a person subject to naval law who commits an offence of murder against a person not subject to army, naval or air force law or an offence of culpable homicide not amounting to murder against such person or an offence of rape in relation to

such person shall not be tried and punished under this Act unless he commits any of the said offences---(a) while on active service; or (b) at a place outside India; or (c) at any place specified by the Central Government by notification in this behalf. This contention clearly overlooks that none of the offences alleged against the petitioner fall within the offences enumerated in this sub-section. Even giving liberal interpretation to the expression "or an offence of rape" occurring in sub-section (2), the same will have no application to the facts of the present case. Insofar as the offence punishable u/s 497 is concerned, it is Commander Dilip Baijal, the husband of the victim Aarti Baijal, an aggrieved person competent to pursue this offence, who is also a Naval Officer. In this view of the matter, the sub-section shall have no application. We, therefore, unhesitatingly hold that this argument is totally misconceived, for the offence alleged against the petitioner is one u/s 497 of the Indian Penal Code, which has no casual connection with the offence of rape. The offence punishable u/s 497 of Indian Penal Code is of adultery and not of rape per se. Taking any view of the matter, this ground on which the proceedings before the Court Martial have been attacked is totally without any substance and the same is, therefore, rejected.

25. Coming to the next argument that there is no legal evidence to record finding of guilt against the petitioner insofar as the offence punishable u/s 497 of the Indian Penal Code is concerned, the argument proceeds on the premise that for establishing that the woman who was subjected to adultery was the lawfully wedded wife of a particular person, the essential ceremonies constituting marriage between the woman and such a person must be proved. It is argued that having regard to the purport of section 50 of the Indian Evidence Act and, more particularly, the proviso thereof, the question of marriage, its factum and legality are the quintessence, since the alleged offence is relating to marriage; and since there is no legal evidence to establish the factum and legality of marriage between Aarti and Commander Dilip Baijal, the charge for this offence should automatically fail. In support of this submission, reliance has been placed on the decisions in *P. Satyanarayana and Another Vs. P. Mallaiah and Others*, , *Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another*, , *Smt. Priya Bala Ghosh Vs. Suresh Chandra Ghosh*, , *Brij Lal Bishnoi Vs. State and another*, . These rulings were relied to support the contention that the prosecution has to prove beyond doubt, each ingredient of this section, that there was valid marriage between the woman and another man at the relevant point of time; and the nature of evidence required for establishing the factum and legality of a valid marriage. The law on the point appears to be well settled in *Empress v. Pitambur Singh*, ILR 1880 Cal. 566. The Court observed that: "the marriage of the woman is essential element of the crime charged as the fact of illicit intercourse, and the provisions of Evidence Act (section 50) seems to point out very plainly, that where the marriage is an ingredient of the offence, as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved if the regular way." This Full Bench decision of the Calcutta High Court has been referred to and relied upon by the Apex Court in

Kanwal Ram and Others Vs. The Himachal Pradesh Admn., . On examining the abovesaid authorities, the position that emerges is that the factum and legality of marriage is the sine qua non for establishing offence punishable u/s 497 of the Indian Penal Code. Undoubtedly, the factum of marriage and its legality would mean marrying legally and validly and the expression "wife" in section 497 will have to be assigned the same meaning to mean legally and validly married wife. The essence of prosecution u/s 497 of the Indian Penal Code, is, therefore, factum as well as the legality and the validity of the marriage must be strictly proved beyond any reasonable doubt. To establish that the woman subjected to adultery was wife of a particular man, the essential ceremonies must have been performed according to Hindu rites or that "Phera" ceremony had taken place without anything more, cannot be taken to be sufficient to prove that necessary ceremonies had been performed. On the other hand, there has to be a positive evidence that marriage has been celebrated with proper ceremonies and in due form in accordance with the essential religious rites applicable to the form of marriage gone through the parties and that the marriage is a valid one according to law applicable to the parties. It will be useful to refer to the decision of the Apex Court in Bhaurao Lokhande's case (supra), which has been consistently followed in the later decisions. Admission of marriage by the accused is no evidence for the purpose of proving any adultery and that the admission of marriage by the woman herself or even the statement of her husband would also not be sufficient. It is, well settled that the Court should require some better evidence of marriage than mere statement of the complainant and the woman. This view has been taken in *Imperator v. M. Peters*, reported in 1909 Cri.L.J. 235 that mere statements by the complainant and the woman that she was married to the complainant were not sufficient to comply with the strict rule of proof even though the woman herself had given evidence and described herself as the wife of the complainant. The law is now well settled that even the statement made by the accused u/s 313 of the Criminal Procedure Code that the woman was the legally wedded wife of the complainant will be of no avail (See *Kanwal Ram and Others Vs. The Himachal Pradesh Admn.,*).

26. Having regard to this settled position of law, we are called upon to examine the rival submissions with regard to the tenability of the charge in respect of the offence punishable u/s 497 of the Indian Penal Code, in the present case. The learned Counsel for the respondents submits that the prosecution has been able to establish the factum of marriage and its validity. To buttress his argument, he placed reliance on the evidence of P.W. 2, P.W. 4 and P.W. 6. When the learned Counsel was called upon to point out the relevant portions on which reliance has been placed by the prosecution in respect of evidence regarding the factum and legality of marriage, reliance was placed on answer given by P.W. 2 to Question No. 29 and 30 during the examination-in-chief. Question No. 29 put to P.W. 2 Commander Dilip Baijal is: "Cdr Dilip Baijal please tell the Court when did you get married?". The answer offered to this question is: "I got married on 18th July, 1990 when I was the Senior Pilot of INAS 551. I got married at Lakshmi

Temple, Mangor Hill, Vasco-de-Gama under Hindu rites". Thereafter, reliance is placed on the noting of the trial Judge, which reads: "The learned Prosecutor tendered 4 in number photographs alongwith set of, negatives containing the negative of 4 in No. photographs. The witness has identified the photographs and the negatives. There is no objection by the learned Defending Officer. The witness while recognising these photographs has stated that these pertain to his marriage ceremony on 18th July, 1990. 4 in No. photographs alongwith a set of negatives are admitted in evidence and marked as Exhibit P5, P5(a) set of negatives. P5(b)(e) photographs." The next question No. 30 put to P.W. 2 is: "Do you recognise the lady in this photograph?" The answer given is: "Yes, her name is Aarti, daughter of Commodore R.R. Tandon". The respondents have not referred to any other portion in the examination-in-chief of P.W. 2 Commander Dilip Baijal. However, reliance has been placed on the deposition of P.W. 2, during the cross, more importantly, to question Nos. 84, 230 and 231. Question No. 84 reads thus:

"Under what circumstances did you get married to Miss Aarti Tandon?" The answer offered is: "Under Hindu rites. I was unmarried and she was also unmarried and we both decided to get married." It would be relevant to refer to question No. 85 put to this witness during the cross-examination: "Who all attended the marriage?". The answer is: "There were many Officer from INS Hansa and their wives, Pandit and two civilian witnesses too." The other relevant questions in the cross-examination of these witnesses are :

Question No. 86: "Was your father-in-law present for the marriage?".

The answer is: "No".

Question No. 87: "Why not?"

Answer: "We did not inform him at that time that we are getting married but we decided to inform him later."

Question No. 21: "Was your marriage blessed by your parents?".

Answer: "Yes subsequently."

Coming to the portion relied upon by the learned Counsel for the respondents, namely, Question No. 230 during the cross-examination. The same reads: "Please see these photographs. Are they drama photographs or some other activities." Answer: "These photographs are of our marriage on 18th July, 1990. The office copy of the letter forwarding my declaration and next of kin details by Hansa to NHQ is placed in front of the Court. I would like the Court to have a look and to tell the Court that this is not a drama."

Question No. 231: "Cdr. Baijal please tell the Court who did the Kanyadan as per these photographs in your marriage?"

Answer: "I will point out the person who has done the Kanyadan in Exhibit P-5(e). Then lady on the extreme left performed the Kanyandan."

It is relevant to point out that P.W. 2 Cdr. Dilip Baijal was re-examined by the prosecutor and one of the question relating to marriage put during the re-examination is Question No. 242, which reads thus: "Cdr Baijal you had stated during the cross-examination that your parents and the parents of your wife were not present during the wedding as they were not invited. How did they solemnise your marriage?" Answer: "The day after the marriage we informed both our parents that we were married. Around two weeks later both me and my wife went on leave and certain ceremonies were done at both our homes. The normal "shagun" were exchanged and blessings were taken from elders and relatives of the family. We returned after satisfying everybody's desires as to the solemnization of the marriage."

The respondents then relied on the evidence of P.W. 6, more particularly, on Question Nos. 605 and 606 to establish the factum of marriage and its legality. In examination-in-chief, P.W. 6 Miss Aarti Tandon Baijal was asked Question No. 605: "When did you get married?" Answer: "I got married to Cdr. D. Baijal on 18th July, 1990 by Hindu rites." The next question, namely, question No. 606 is: "Do you recognise these photographs?" Answer is: "Yes, I do. These photographs are of our marriage held at Mahalaxmi Temple Mangor Hill on 18th July, 1990, where there was Lt. Cdr. & Mrs. Chatterjee, Lt. Cdr & Mrs. Sam T. Sanuel and also 2 pandits were in attendance for the ceremony." The other portion from the evidence of this witness relied is question put to this witness during the cross-examination, being Question No. 706: "You see a lady in one of the photographs madam do you know her?" Answer: "Yes I do".

Question No. 705: "Can you tell this Honourable Court why none of your GMC or School friends attended the marriage?"

Answer: "A wedding is always a private affair between two individuals. I do not see any reason why I needed to invite a whole lot of people to be present there."

Question No. 707: "Are you aware this lady also did the Kanyadan?"

Answer: "Yes I am aware."

No other portion from the evidence of P.W. 6 has been relied on the factum of marriage and its legality.

The only other evidence is of P.W. 4, namely, Commissioner Sanjay Gupta. During the examination-in-chief, he has asked Question No. 421:---

"Sir how do you know Mrs. Baijal?"

Answer: "I know Mrs. Baijal as Cdr. Baijal's wife since when I was officiating Cdr. (Air) they had got married."

The other question which is relied is one put during the cross-examination of P.W. 4, being Question No. 435, which reads:

"Were you in Goa when she got married?"

Answer: "I have stated that I was officiating Cdr. (Air) when they got married and this was brought to my notice on the next day of the marriage."

Besides the abovesaid ocular evidence, reliance has been placed on the photographs and negatives, which were brought on record depicting that the marriage of Miss Aarti was performed with Cdr. Dilip Baijal.

27. In the backdrop of the evidence which has become on record, we have no hesitation in concluding that the prosecution has miserably failed to establish the factum, of marriage and its legality. In this context, we may usefully refer to the first charge framed against the petitioner, wherein the expression used is ".....the lawful wife of". The term "Lawful Wife" in the charge, therefore, placed the onus on the prosecution that the factum of marriage as per the law applicable is proved beyond doubt. The Apex Court has consistently taken the view that it is the duty of the prosecution to establish the factum of marriage and its legality, namely, that the same was performed in a regular way so as to visit the accused with penal consequences. Even by applying liberal standards, the evidence which has come on record, cannot be said to be legal evidence to establish the factum of marriage and its legality. The Apex Court, in the case of, Priya Bala Gosh (supra) after referring to a catena of decisions held that the prosecution has to establish that the essential ceremonies for a valid marriage have been performed. In the examination-in-chief, neither P.W. 2 nor P.W. 6 have deposed about the ceremonies that were to be performed to constitute a valid marriage and that they had actually performed the same in the manner required by custom governing the community to which the parties belonged. On the other hand, the evidence with regard to the factum of marriage and its legality brought on record by the prosecution in a very casual manner. Thus, there is no legal evidence about the essential ceremonies of marriage or that they were actually performed and the marriage was a valid marriage. It is not possible for this Court to rely on the answers given by these witnesses during the cross-examination. The prosecution cannot succeed by the weakness in the defence of the accused. The prosecution should stand or fall on its own evidence. What is relevant to note is that the photographs and negatives have been brought on record, but neither the photographer has been examined nor any other person/persons who were stated to be present during the ceremony have been examined and more so, the priest who has performed the marriage has not been examined to establish the factum of marriage and its validity. Whereas, the evidence of P.W. 2 and P.W. 6 is no legal evidence to record a finding on the factum of marriage and its legality. In the circumstances, the petitioner is right in contending that since the first ingredient of offence punishable u/s 497 has not been established, for want of legal evidence, the charge with regard to the said offence should necessarily fail.

28. The learned Counsel for the respondents, however, to get over this difficulty, contends that it is not open for this Court to reappraise the evidence and go into the adequacy or inadequacy of the evidence so as to upset the finding

recorded during the Court Martial proceedings. We are conscious of the legal position that the Court cannot reappreciate the evidence to find out the adequacy or inadequacy of the evidence for interfering in writ jurisdiction. At the same time it cannot be overlooked that a judicial review of the decision arrived at in the Court Martial proceedings is not totally barred. In as much as the framers of, the constitution have not barred the remedy of writ for enforcement of right conferred on a person by Part III of the Constitution---unlike ouster of jurisdiction of the High Court under Article 227(4) of the Constitution and that of the Supreme Court under Article 136(2) of the Constitution. No doubt the provisions of the Navy Act can be traced to Article 33 of the Constitution the power of Parliament to modify the rights conferred by Part III of the Constitution as against persons or proceedings covered under the said Act, but there is nothing in the Navy Act to indicate that the Court Martial is competent to record conviction and sentence against the accused tried under the said Act even in absence of any legal evidence to bring home the guilt or opposed to the canons of criminal jurisprudence. In our view when the Court is satisfied that there is absolutely no legal evidence on record to establish the ingredient of the offence alleged against the petitioner, in such a case, the Court does not reappreciate the evidence as such, but only wades through the evidence to reassure itself that there was atleast title of legal evidence in that behalf. A fortiori, such a situation would not fall within the realm of Court, re-appreciating the evidence to find out the adequacy or, inadequacy of the evidence. If the respondents argument was to be accepted, the same is brought with the danger that the accused can be convicted of an offence even in absence of any legal evidence to prove his guilt, which approach, unquestionably, will be opposed to criminal jurisprudence and against the settled canons of law, equity and justice, albeit Rule of law. We cannot countenance such an argument, for conviction recorded on no legal evidence to establish the offence is on arrived at in excess of jurisdiction of the Court Martial. *Proprio Vigore*, such a decision would inevitably infact the established procedure of law and thus violative of Articles 14 and 21 of the Constitution of India, and also fall within the mischief of authority exercising the jurisdiction had not been vested with the jurisdiction. Finality of the conviction and sentence recorded by the Court Martial is not so sacrosanct or inviolable that it cannot be interfered even when the Court is satisfied that there is absolutely no legal evidence to establish the guilt. The principles governing criminal jurisprudence cannot be allowed to be whittled down merely because the accused was tried in Court Martial proceedings. This view is fortified by the, observations of the Apex Court in Major A Hussain's case (*supra*). The Apex Court has observed that the Court Martial discharges judicial function and to a great extent is a Court where provisions of Evidence Act are applicable and the Court Martial has also the same responsibility as any Court to protect the rights of the accused charged before it. As a necessary corollary, in our view where the Court is satisfied that there is no legal evidence to bring home the guilt, than it is the duty of the Court to interfere with the order of conviction and sentence, though recorded in Court Martial proceedings. The Court cannot remain as a silent

spectator and allow the injustice to be perpetrated by such an order especially having regard to the context of and the plentitude of the summary jurisdiction of the Court Martial and the severity of the consequences that visit the person subjected to that jurisdiction.

29. In the present case what we find is that there is absolutely no legal evidence about the factum of marriage and its legality. We have not reappreciated the evidence on record as such, but only referred to it to find out whether the prosecution had established the first ingredient, of section 497 of I.P.C. relating to the relationship of parties. The nature of proof and the burden of proof about the factum of marriage and its legality is no longer *res integra*. In the circumstances, we have no hesitation in concluding that the first ingredient of the offence punishable u/s 497 is not established and, therefore, the said charge should necessarily fail.

30. The learned Counsel for the respondents has however, relied the decision of the Apex Court in *Badri Prasad Vs. Dy. Director of Consolidation and Others*, to contend that the Court may presume about the relationship of man and woman living as husband and wife in favour of wedlock. The observations made in this decision relied upon by the respondents have been made in the facts and context of that case, whereas the consistent view taken particulars with reference to offences punishable u/s 497 of Indian Penal Code is that the factum of marriage and its legality should be established by the prosecution beyond reasonable doubt. The same cannot be therefore, presumed in such cases.

31. Although the Counsel for the petitioner has argued that the Court can take cognizance of offence punishable u/s 497 of the Indian Penal Code only upon the complaint made by the husband, which submission has been countered by the respondents by pointing out that the charge in respect of offence punishable u/s 497 has been taken cognizance of during the Court Martial on the basis of the statement of the husband of Miss Aarti, namely Cdr. Dilip Baijal. There is another point which was seniority pressed by the learned Counsel for the petitioner while assailing the finding of guilt against the petitioner with regard to offence punishable u/s 497 of Indian Penal Code. It was contended that there was no specific evidence with regard to this offence during the relevant period between 20th October, 1997 to 5th November, 1997. It was, therefore, contended that in absence of evidence for the charge that was framed against him no finding of guilt could be recorded in law. The learned Counsel for the respondents, no doubt, tried to justify that there was evidence with regard to the said period. However, on both the abovesaid point, we think that it is wholly unnecessary to examine, for the charge u/s 497 itself would fail due to want of evidence with regard to the first ingredient of the said charge.

32. While assailing the finding of guilt with regard to offences punishable under sections 452 and 325 of the Indian Penal Code, it is contended that both the offences are intricately connected in as much as if the evidence u/s 452 fails, then necessarily the charge u/s 325 would also fail. The ground on which the

same is attacked, in the first place, is that, there is unexplained delay in lodging of F.I.R. The incident in question allegedly took place in the early morning of 30th of July, 1999, whereas the F.I.R. came to be lodged on 1st of August, 1999. The only explanation offered by the complainant Cdr. Dilip Baijal is that he did visit the Police Station on 31st July, 1999, but the concerned Police Officer asked him to come on the next day and accordingly, the formal complaint came to be lodged on 1st August, 1999. However, what is contended is that the evidence that has come on record would indicate that the complainant had met his wife Mrs. Aarti in the morning of 30th of July, 1999 itself, which is culled out from the statement of the maid servant Fatima Gaffur, who has deposed before the police during the investigation that Cdr. Dilip Baijal met Miss Aarti at her residence in the morning of 30th July, 2000. Besides this, what is noticed from the evidence is Miss Aarti was taken to the hospital by Vijay Saxena, who has not been examined though his statement was recorded by Police during the investigation. When Miss Aarti was taken to the hospital, the cause of injury revealed by her was due to fall from the staircase. This is fortified from the evidence of P.W. 10. This revelation was made on 30th July, 1999. Moreover, undoubtedly, Miss Aarti talked on the telephone in the course of the day on at least 42 calls out of which 4 were outgoing calls; but she did not disclose about, the alleged incident to anyone except to Vijay Saxena. The evidence taken at its face value would also indicate that Cdr. Dilip Baijal visited his wife at around 11 p.m. on 30th July, 1999 itself. However, there is no explanation whatsoever as to why he did not rush to the Police Station on the same night even though he was apprised about the alleged incident and visited only on the next date, i.e. on 31st July, 1999. In these circumstances, the petitioner contends that the so called explanation contends by the so called explanation offered by the prosecution about the delay in lodging F.I.R. is wholly impertinent. The petitioner, therefore, contends that if the registration of F.I.R. suffer from unexplained delay, the necessarily, in law, the prosecution should fail. This submission is advanced in the context of the fact that insofar as offence u/s 452 I.P.C. is concerned, the only ocular evidence is of P.W. 6 Miss Aarti. No doubt, this is a case of direct evidence and the evidence of the victim Miss Aarti has come on record, but when there were other witnesses available to the prosecution to corroborate the direct evidence of P.W. 6, it was wholly unsafe to convict the petitioner on the basis of sole testimony of P.W. 6.

33. The learned Counsel for the respondents, however, has countered the aforesaid submissions by contending that there was no delay in lodging the F.I.R. and that the time required stood explained from the evidence itself. We are, however, of the view that in the absence of proper explanation for the delay in lodging F.I.R., it would be wholly unsafe to conclude that there was legal evidence to record finding of guilt against the petitioner. The learned Counsel for the petitioner was right in placing reliance on the decision in *Marudanal Augusti Vs. State of Kerala*, which has given benefit to the accused when the delay in registering the offence was only of 29 hours, whereas in the present case, it is almost of 48 hours. The submission made on behalf of the respondents that this

Court cannot go into the said aspect of the matter, in our view, is totally misconceived. We are not analysing the sufficiency of the evidence on record, but we have scanned through the evidence only to find out as to whether there is legal evidence to record a finding as to the delay stood explained or not. We are of the view that there is absolutely no legal evidence to justify the delay; and, particularly, viewed in the backdrop of the fact that Miss Aarti had revealed about the alleged incident to Vijay Saxena, who has not been examined, nor the maid servant Miss Fatima Gaffur, who was material witness with regard to these offences, has been examined. Moreover, Miss Aarti when taken to the hospital on July 30, 1999 has revealed the cause of injury due to fall from the staircase to P.W. 10. It is only in the F.I.R. lodged on 1-8-1999 that the allegations of offence punishable under sections 452 and 325 of Indian Penal Code have been set out. What is clearly overlooked is that although Miss Aarti had talked on at least 42 calls in the course of the day on 30th July, 1999, admittedly she did not complain about the alleged incident to anyone. It is in this context that the delay in registering F.I.R. needs to be examined. What is seen is that the material on record would indicate that the petitioner was able to establish by preponderance of probabilities, that Cdr. Dilip Baijal visited Miss Arti in the morning of 30th July, 1999. At any rate, there is no dispute that Cdr. Dilip Baijal visited Miss Aarti at around 11 p.m. on 30th July, 1999. When Cdr. Dilip Baijal had visited Miss Aarti and was told about the alleged incident, it is absolutely incomprehensible as to why he did not rush to the Police Station immediately. He has not offered any explanation whatsoever for approaching the Police Station, assuming that he approached on 31st July, 1999, there is no corroboration even to this fact. What is more important, from the evidence which has come on record, the defence has succeeded by preponderance of probabilities, that it is quite possible that the cause of injuries has suddenly been changed after the said Miss Aarti was taken to the Naval Hospital and this circumstances surely remains unexplained. In view of the conflict between the evidence available till the registration of F.I.R. and the posterior medical evidence, surely the petitioner, being an accused, should get the benefit of doubt. In our view, the delay in registration of F.I.R. has remained unexplained.

34. Moreover, there is absolutely no corroboration to the sole testimony of P.W. 6 Miss Aarti in respect of offence punishable u/s 452 of Indian Penal Code. It is well settled that the Court would insist on corroboration of the testimony of a sole witness depending on the circumstances of the case. True it is that the quality and not the quantity of evidence that matters. In the present case there are more than one intrinsic circumstances to show that the prosecution version stood modulated to get the petitioner convicted. In such a situation, no conviction can be based on the testimony of sole witness. Undoubtedly, P.W. 6 Aarti Baijal is an accomplice in the crime alleged against the petitioner, being voluntary partner in the offence of adultery. It will be, therefore, wholly unsafe to record finding of guilt against the petitioner in the absence of independent corroboration of the evidence of P.W. 6.

35. In the circumstances, having regard to the totality of the circumstances into account, we find that it would be wholly unsafe to record finding of guilt against the petitioner for offences punishable under sections 452 and 325 of the Indian Penal Code. We make it clear that we haven't reappreciated the evidence as such, or made any attempt to find out sufficiency or adequacy of evidence, but on wading through the evidence we find that there is no legal evidence as referred to above and therefore this is a case where the petitioner should be given the benefit of doubt.

36. For the abovesaid reasons, the writ petition succeeds and the impugned orders dated 4th September, 2000 (Exh. P1), 8th January, 2001 (Exh. P2) and 31st January, 2001 (Exh. P2/A) are quashed and set aside. Bail bonds stand cancelled. Rule made absolute in above terms.

At this stage, Shri V.P. Thali, learned Advocate prays for stay of the operation of the order for a period of four weeks. The operation of this order is stayed till the end of July 2001.