

(2024) 07 BOM CK 0025

In the Bombay High Court

Case No : Criminal Revision Application No. 376, 4168, 4169 Of 2019

Akshay S/o. Madhavrao Khandve

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 15-07-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 397, 401
Indian Penal Code, 1860 — Section 279, 304A, 337, 338
Probation of Offenders Act, 1958 — Section 4
Motor Vehicles Act, 1988 — Section 3, 4, 50(1), 177, 180, 181

Citation : (2024) 07 BOM CK 0025

Hon'ble Judges : S.G. Mehare, J

Bench : Single Bench

Advocate : V.D. Sapkal, S.R. Sapkal, P.J. Bharad

Final Decision : Partly Allowed

Judgement

S.G. Mehare, J

1. The Petitioner, who had just completed 18 years at the time of the incident, has preferred the revision against the judgment and conviction passed in S.C.C. No.6499/2013 passed by the learned Judicial Magistrate First Class, (Court No.9), Aurangabad dated 17.04.2019 and the learned Additional Sessions Judge-10, Aurangabad in Criminal Appeal No.102/2019 decided on 12.12.2019.

2. The brief facts of the case were that on 20.04.2013, the deceased was sitting on a fibre chair in front of her house. Her house was on the side of the road from Maruti Temple towards Sanjay Gandhi Market. At about 07.25 pm, the accused rode the motorbike without the registration number. He drove it rashly and negligently and dashed the deceased, who was sitting on the platform of her house. The road was 20 feet wide. The rough surface was led there in front of her house. She met with an accident. She was hospitalized. During treatment, she died. Her son/eyewitness lodged the report on 07.05.2013.

3. The Petitioner faced the trial for the offence punishable under Section 304-A of the Indian Penal Code and under Sections 3/181, 50(1)/177 and 3, 4/180 of the Motor Vehicles Act. The prosecution examined the eyewitness, spot panch, and investigation officer. The Petitioner admitted the post-mortem report. The deceased had suffered a head injury and died due to complications following the said injury.

4. The learned Judicial Magistrate First Class, appreciating the evidence and the spot of incident held the accused guilty of the above offences. The learned Additional Sessions Judge re-appreciated the evidence and maintained the judgment and order of the learned Judicial Magistrate First Class.

5. The learned senior counsel for the Petitioner has vehemently argued that the exact place of the accident was not proven. Considering the map, the incident is improbable. Referring to this map, he argued that there was nothing to believe that the Petitioner drove the vehicle rashly and negligently. Since there was a rough surface on the spot of the incident and the deceased was already suffering from some leg ailments, there was a great probability of falling down and sustaining an injury to her head. He further argued that the head injury was not caused due to the accident. The evidence of PW-4 Mandakini Mukund Atkare was relevant to believe that it was not an accidental injury but it was the injury caused due to the tap. He has referred to the post-mortem report and argued that unless the medical expert is examined, it is difficult to ascertain the exact cause of death. He argued that since the deceased was shifted from one hospital to another hospital, there was a great possibility of infection, and that may be the cause of death. He further argued that there was an inordinate delay of 17 days in lodging the F.I.R. There is a great possibility of falling the deceased as she was not able to walk without the walker. Referring to the spot of the incident, he raised the doubt on the eyewitness. He also argued that only the family members were examined as witnesses. The prosecution has skipped Independent witnesses. Hence, an adverse inference may be drawn against the prosecution. The evidence was not sufficient to prove the charges levelled against the Petitioner. In the alternative, he prayed that considering the age of the Petitioner at the time of the incident and his future, the benefit of the Probation of Offenders Act may be extended.

6. To bolster his arguments, he relied on the case of Prem Chand Vs. State of Himachal Pradesh, 2017 DGLS (SC) 1396, Vijay s/o Namdeorao Kute Vs. State of Maharashtra, 2007 BCI 391, Nithin Vs. State Rep by its Inspector of Police, Crl. R.C. No.939 of 2019 decided by the Madras High Court dated 01.02.2022 and Raghunath Pradhan Vs. State of Orissa, 2006 Cri. L.J. 3211.

7. Per contra, learned APP has argued that the doctrine of res ipsa loquitur also supports the prosecution in proving the case in addition to the direct evidence. The spot itself speaks the truth. The deceased was sitting far away from the main road. The road was wide enough. The force of the dash could be understood from the injuries sustained by the deceased. The defence was

improbable. There is no ground to disbelieve the eyewitness who was in the shop adjoining his home. Non-examination of the independent witness does not make the prosecution case fatal. The delay in lodging the F.I.R. is appropriately explained. Firstly, it was necessary to save the life of the injured. Since the complications arose in her health, she was shifted to different hospitals. The post-mortem report has been admitted to the Petitioner. Therefore, examination of the Medical Officer is not essential. There were no suggestions to the witnesses that she died of the infection caused to her due to shifting her from one hospital to another. Her leg was twisted but not fractured. Both Courts have correctly appreciated the evidence. She has further argued that the prosecution has proved the case beyond reasonable doubt. The vehicle was plied on the road without registration. This is not a fit case to extend the benefit of the Probation of Offenders Act. To bolster her arguments, she relied on the case of Nishant Harishchandra Salvi Vs. State of Maharashtra, 2018 DGLS (Bom.) 695, Thangasamy Vs. State of Tamil Nadu, 2019 DGLS (SC) 276 and Subhash Chand Vs. State of Punjab, A.I.R. 2019 SC 1133.

8. In reply, learned senior counsel for the Petitioner would submit that the compensation under the Motors Vehicle Act has already been granted to the dependents of the deceased. The case is improbable. The case laws relied upon by the learned APP are not relevant to prove the case.

9. This is a revision under Section 397 r/w 401 of the Criminal Procedure Code. The revisional jurisdiction under this provision is limited. To invoke the jurisdiction under these provisions, the convict should satisfy the Court that there are glaring defects in the procedure or manifest error on the point of law, and consequently, there has been a flagrant miscarriage of justice. The erroneous finding of the Trial Court would not justify setting aside the order of acquittal. The scope of revisional jurisdiction of the High Court does not extend to the re-appreciation of evidence. Under revisional jurisdiction, the revisional Court has limited power to examine the legality and the propriety of the order impugned before it. In the exercise of revisional jurisdiction, the Court can interfere with the findings if the same are contrary to material available on record and otherwise perverse. So, the burden was on the Petitioner to satisfy the Court that the findings were contrary to the material available on record and otherwise perverse.

10. Two Courts have concurrently held that the Petitioner was driving the offending vehicle rashly and negligently. Both courts have considered oral and documentary evidence. The appreciation of evidence by both Courts clearly established that the incident happened when the deceased was sitting in front of her house on a fibre chair. Due to the accident, she suffered an injury from the impact of a tap, which was on the spot of the incident. The offending vehicle was recovered from the spot of the incident. There was nothing before the Court to believe that the Petitioner was falsely implicated in the crime. The injuries were caused to the deceased due to the accident. There was no probability to believe

the defence that she suffered injuries by falling on the rough surface. The prosecution has a concrete case that she was sitting in front of her house. It was not disputed that the son of the deceased had a shop adjoining the house. There was no material to believe the defence that he couldn't witness the incident. The daughter-in-law of the deceased also immediately came out of the house after the incident on hearing noise and noticed that the offending vehicle dashed her. She sustained the injuries, and the offending vehicle without a registration number was lying on the spot of the incident. Both Courts have considered the spot of the incident. It was a wide road, and after the road, there was some open space without fencing and the deceased was sitting near the platform adjoining the house.

11. Though it has been tried to raise serious doubt about the cause of death, the post-mortem report was admitted. Therefore, the Court is of the view that in these peculiar facts and circumstances of the case, non-examination of the Medical Officer is not fatal to the prosecution. The facts have been proved and correctly appreciated that since there were complications in her health, she was shifted from one hospital to another. The post-mortem report mentions the specific cause of death. The prosecution proved beyond reasonable doubt that the deceased died of the injuries sustained in the motor vehicular accident. The explanation for the delay in lodging the report was probable. Examining both judgments, the Court is of the view that they have correctly held that the ingredients of Section 304-A have been proved. The doctrine of *res ipsa loquitur* also supports the prosecution. None of the judgments impugned before the Court appears perverse, illegal or improper. The sentences imposed upon the Petitioner were also proportionate and just.

12. The question is, Could the benefit under Section 4 of the Probation of Offenders Act be extended to the Petitioner? The Hon'ble Apex Court, in the case of *Prem Chand supra* extended the benefit of the Probation Act to the convict for the offences punishable under Sections 279, 337 and 338 of the I.P.C., holding that the accused was first time offender and had no antecedents. In the case of *Raghunath Pradhan (supra)*, the Orisa High Court extended the benefit of Section 4 of the Probation of Offenders Act for the offence punishable under Sections 279, 304-A of the Indian Penal Code. The facts of the case were that the old lady was slightly hard of hearing. She was proceeding on her left side, and the bus dashed against her from behind. The driver of the bus blew the horn only from a little distance. After the horn was blown, the victim went to the extreme left side, being more conscious of coming to the bus from her backside. Even then, the accident happened. The driver of the offending vehicle was a young man and only bread winner of his family. Under these premises, the Hon'ble Supreme Court extended the benefit of Section 4 of the Probation of Offenders Act.

13. In the case of *Vijay Namdeorao Kute (supra)*, this Court dealt with the issue of an application under Section 4 of the Probation of Offenders Act in favour of the accused held guilty for the offence punishable under Section 304-A of the

Indian Penal Code. In that case, the case of Aitha Chander Rao Vs. State of A.P., 1981 SCC 637, was relied on, in which it was held that the offence under Section 304-A of the Indian Penal Code comes within the purview of the provisions under the Probation of Offenders Act and the benefit was accordingly extended.

14. The prosecution has strongly opposed extending the benefit of the Probation of Offenders Act to the Petitioner. She relied on the case of Nishanth Harishchandra Salvi (supra) in which the Bombay High Court held that the provisions of the Probation of Offenders Act must be applied with discretion. In that case, the case of Dalbir Singh Vs. State of Haryana, A.I.R. 2000 SC 1677 was referred to in which the Hon'ble Supreme Court had laid down the law that the benefit of the Probation of Offenders Act should not normally be avoided in respect of the offences under Section 304-A of the I.P.C. when it involves rash or negligent driving. In the case of Nishant (supra), the case of State of U.P. Vs. Kishan, 2005 Cr.L.J. 333 was also referred to, and certain observations were reproduced. The Hon'ble Supreme Court, in that case, observed that 'undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.' Referring to this judgment, the tone of the argument of the learned APP was that since the offence is serious, such type of offences are mushrooming in the society. Many innocents are losing lives. Hence, it would be inappropriate to extend the benefit of the Probation of Offenders Act to the Petitioner.

15. Further, in the case of Thangasamy (supra), which was relied upon by the learned APP, the Hon'ble Apex Court has observed referring to the case of State of Karnataka Vs. Murlidhar, (2009) 4 SCC 463 that wherein, for rash and negligent driving, the respondent caused an accident resulting in the demise of a 16-year-old boy while another person sustained grievous injuries. The Trial Court sentenced the respondent to six months imprisonment and a fine of Rs.1,000/- with a default stipulation for the offence under Section 338 I.P.C. and to rigorous imprisonment for one year with a fine of Rs.5,000/- with a default stipulation for the offence under Section 304-A I.P.C. However, the High Court waived the custodial sentence and only fines were imposed. This Court referred to the principles related to the offence under Section 304-A of I.P.C. as also the problems associated with the road traffic injuries and found absolutely no reason that the High Court waived the custodial sentence awarded to the respondent. Accordingly, the judgment of the High Court was set aside.

16. To counter the argument of the learned APP, the learned senior counsel for the Petitioner has referred to the case of Nithin (supra) in which the case of Dalbir Singh and a few other cases of granting benefit of the probation to the convict for the offence under Section 304-A has been referred to. After an

elaborate discussion, the Madras High Court extended the benefits of the Probation of Offenders Act. In that case, the case of State Vs. Sanjeev Nanda (2012) 8 SCC 450 was referred to in which six persons were killed and one was injured. The accused was punished for the offence punishable under Section 304 Part II of the Indian Penal Code. In para 22 of that judgment, it has been observed that 'there may also be situations where an offence is punishable under Section 304-A I.P.C. in an accident "where mens rea remains absent" and refusal to release a convict on probation in such a case may be too harsh an approach to take. An absolute principle of law that, in no case, falls under Section 304-A I.P.C. should a convict be released on probation cannot be laid down. This is certainly not to say that in all cases falling under Section 304-A I.P.C., the convict must be released on probation-it is only that the principles laid down in Sections 360 and. 361 of the Criminal Procedure Code and the Probation of Offenders Act should not be disregarded but should be followed and an appropriate decision, depending on the facts of the case, be taken in each case. So far as the ratio laid down in the case of Dalbir Singh (supra), it has been observed that 'that decision, in a sense, was a precursor to a stricter application by this Court of the provisions for releasing a convict on probation and went contrary to the grain of earlier decisions of this Court.'

17. Reading the above case laws, one could understand that the provisions of the Probation of Offenders Act should not be disregarded but should be followed and an appropriate decision, depending on the facts of the case, be taken in each case. There was no absolute bar extending the benefit of Section 4 of the Probation of Offenders Act to the convict who has been held guilty for the offence punishable under Section 304-A of the Indian Penal Code. The peculiar facts and circumstances of this case were that the Petitioner had just completed 18 years. He was a teenager, and in the excitement and happiness, he might have driven the new vehicle for the first time and lost control. In the ordinary course, he had no reason to take the vehicle away from the road and cause an accident. His age and the way in which the accident happened are the peculiar facts to be considered in this case. He has a bright future. He is apprehensive about the stigma of conviction that may ruin his future. The mens rea is absent in such cases. He was a first-time offender and had no antecedents. Therefore, without disregarding the Probation of Offenders Act, this Court is of the view that in the facts and circumstances of the case, it is expedient to release him on probation under Section 4 of the Probation of Offenders Act to the Petitioner. Hence, the following order :

ORDER

(i) Criminal Revision Application is partly allowed.

(ii) Petitioner, who is held guilty for the offence punishable under Section 304-A of the Indian Penal Code and Section 3/181, 50(1)/177 and 3, 4/180 of the Motor Vehicles Act is maintained.

(iii) However, instead of sentencing the Petitioner at once to any punishment, he is released on entering into a bond with one surety for one year to receive the sentence when called upon during the above period and, in the meantime, maintain peace and good behaviour.

(iv) Fine paid for the offence punishable under the provisions of the Motor Vehicles Act should be forfeited to the Government.

(v) The fine amount for the offence punishable under Section 304-A of the Indian Penal Code be paid to the legal heirs of the deceased.

(vi) The surety stands discharged, and the surety bond stands cancelled.

(vii) R and P be returned to the Trial Court.