

(2017) 10 BOM CK 0138
In the Bombay High Court
Case No : 519 of 2006

Bablu Alias Karim

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-10-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 304-A](#) -
Punishment for murder - Acts done by several persons in furtherance of common intention

Citation : (2017) 10 BOM CK 0138

Hon'ble Judges : R.K. Deshpande, Manish Pitale

Bench : DIVISON BENCH

Advocate : S.P. Kulkarni, V.A. Thakre

Judgement

1. The appellant has been held guilty and convicted for offence under Section 302 of the Indian Penal Code (IPC) for causing the death of one Meghraj Nakade by dashing him with his mini truck, which he was driving on 09.05.1994 on the road leading to Gadchiroli at Armori. The allegation is that the appellant along with accused No.2 Trilok came from behind in a mini truck being driven by the appellant and intentionally gave a dash from the back side to the aforesaid Meghraj Nakade, as a result of which he fell down. Thereafter, the appellant allegedly stopped the mini truck at a short distance and reversed the same to run over the said Meghraj Nakade, due to which the said victim died of serious injuries. It was alleged that the appellant has committed the aforesaid act because there was a hot exchange of words between him and the deceased on the previous day i.e. 08.05.1994, due to a dispute regarding non-payment of amount by the appellant to the deceased for purchase of 150 quintals of paddy. It was stated that the deceased was in need of the money because the marriage of his daughter was fixed for 16.05.1994 and that the appellant was not making the payment due to which the aforesaid dispute had arisen.

2. As per the prosecution there were three eyewitnesses to the aforesaid incident

i.e. PW2 Keshao Kumbhare, PW11 Vishwanath and PW12 Bakaram. PW2 Keshao Kumbhare was taking morning walk on 09.05.1994 at about 5.30 a.m. when he heard a sound of the said mini truck giving a dash to the deceased and that upon the said mini truck coming to a halt near the shop of one Salim welder, the appellant got down from the side of the driver seat and that another person alighted from the other side. PW2 saw the deceased lying face down with serious bleeding injuries on the road. According to the prosecution, PW11 Vishwanath and PW12 Bakaram were the other two eyewitnesses who had gone to the nearby field for easing themselves when the aforesaid incident took place. These two witnesses have claimed that they saw the mini truck driven by the appellant giving dash to the deceased and reversing and running over the deceased. In their evidence, it has come on record that PW11 Vishwanath was at a distance of about 80 to 90 ft. and that PW12 Bakaram was at a distance of about 125 ft. from the place of the incident. These witnesses also claimed that the appellant and accused No.2 Trilok got down from the mini truck and upon coming near the deceased, who had fallen face down on the road, stated "Mar Gaya Sala". It is relevant to mention here that PW2 Keshao, the other eyewitness, did not state about the appellant having reversed the mini truck to run over the deceased or that he and the accused no.2 got down from the mini truck to utter the aforesaid words. PW2 Keshao also did not state anything about the presence of PW11 and PW12, the other two eyewitnesses to the incident.

3. PW3 Omprakash Nakade, younger brother of the deceased submitted the complaint leading to registration of first information report (FIR). The FIR was registered under Section 304-A of the IPC against the appellant for having caused the death of the victim by rash and negligent act. The investigation was initially undertaken by PW8 Chagan Wakade, who recorded the statements of witnesses and arrested the appellant. The investigation was later handed over to the Criminal Investigation Department (CID) and the papers relating to the investigation were handed over on 23.06.1994 by PW8 Chagan Wakade to PW15 Gajanan Shinde, who took up the investigation on behalf of the CID. The said PW15 prepared the sketch of the spot of the incident on 28.06.1994.

4. Upon further investigation by PW15 Gajanan Shinde, accused No.2 Trilok was also arrested and on 07.07.1994 the said PW15 sent a letter to the Superintendent of Police, CID Crime, Nagpur Range for guidance. On 08.07.1994 the Superintendent of Police, CID Crime, sent an order to PW15 to add the offence under Section 302 of the IPC against the accused. Accordingly, on 12.12.1994 charge sheet was submitted before the Court against both the accused for offence under Section 302 read with 34 of the IPC.

5. In the trial before the Sessions Court, the prosecution examined 17 witnesses, including the aforesaid three eyewitnesses to the incident. The case of the prosecution was that there was altercation and hot exchange of words between the appellant and the deceased on 08.05.1994 due to the dispute regarding outstanding payment for purchase of paddy and that this led to the appellant

intentionally hitting the deceased in the morning on 09.05.1994 when the deceased was taking morning walk, by deliberately driving the mini truck from the tar road to the kachha road where the deceased was walking, so as to kill him.

6. The Sessions Court found that the evidence of the three eyewitnesses proved the manner in which the incident had happened and that the intensity with which the deceased was hit by the mini truck, demonstrated that the appellant intentionally drove the mini truck into the deceased to ensure his death. But, the Sessions Court found that there was not enough evidence against the accused no.2 Trilok and accordingly, he was acquitted. The Sessions Court convicted only the appellant under Section 302 of the IPC and sentenced him to suffer imprisonment for life.

7. Mrs. S.P. Kulkarni, learned Advocate appointed on behalf of the appellant, submitted that there were glaring contradictions in the evidence of the eyewitnesses and that the presence of the appellant at the place of incident was not established by the prosecution. It was submitted that the version of the eyewitnesses was not believable and that the appellant was not present at the spot of the incident on 09.05.1994. On this basis, the learned counsel appearing for the appellant submitted that the impugned judgment and order of the Sessions Court was not sustainable and that it deserved to be set aside.

8. On the other hand, Mr. V.A. Thakre, learned Additional Public Prosecutor appearing for the respondent-State submitted that the evidence on record, particularly the versions of the eyewitnesses, proved the manner in which the incident occurred and that the appellant intentionally gave a dash to the deceased with his mini truck, thereby committing offence under Section 302 of the IPC. He prayed that the appeal be dismissed.

9. We have considered the arguments of the counsel for the parties and we have perused the record of the case. In order to examine as to the manner in which the incident took place on 09.05.1994, it is essential that the evidence of the three eyewitnesses i.e. PW2, PW11 and PW12 is examined in detail. The evidence of PW2 Kesdhao shows that he was on his morning walk when he saw the mini truck driven by the appellant giving a dash to the deceased. This witness states that the mini truck stopped at some distance and that the appellant came out of the truck from the driver seat. He further states that another person alighted from the other side of the truck but he could not see who that other person was. Thereafter PW2 gives details of the manner in which the body of the deceased was lying, face down with profuse bleeding on the road.

10. PW11 Vishwanath has stated in his evidence that he was easing himself in nearby field at a distance of about 80 to 90 ft. when he saw the incident in question. He adds that the appellant stopped the mini truck at a short distance and reversed so as to run over the deceased. He further stated that the appellant along with accused No.2 Trilok got down from the mini truck and upon coming

near the body of the deceased uttered the words "Mar Gaya Sala". A similar account of the incident is given by PW12 Bakaram who claims that he was also easing in the said field at a distance of about 125 ft. from the place of incident. These two eyewitnesses i.e. PW11 and PW12 have added a marked improvement over what has been stated by the other eyewitness PW2 Keshao. It is also relevant that PW2 Keshao has not stated anything about the presence of PW11 and PW12 near the spot of the incident. It is also relevant that the statement of PW2 Keshao was recorded by the Police on 09.05.1994 and the statements of PW11 and PW12 were recorded on 13.05.1994 and 14.05.1994. Thus, while the statement of PW2 Keshao was recorded promptly by the Police, the statements of PW11 and PW12 were recorded after four and five days of the incident by the Police. The version of PW2 Keshao on the one hand and the versions of PW11 Vishwanath and PW12 Bakaram on the other hand show contradictions and material differences.

11. In this situation, the medical evidence becomes relevant because if the versions of PW11 Vishwanath and PW12 Bakaram were a correct description of the incident, there would be injuries of tyre marks, as these witnesses had claimed that the appellant had reversed the mini truck and run over the deceased. The evidence of PW17 Dr. Vasant Pillare, the Doctor who conducted the post mortem, shows extensive external and internal injuries, including severe injuries to vital parts of the body of the deceased. But, in cross-examination the said witness stated as follows:- "It is true that all such injuries can be caused if a person falls down facing towards down side due to impact of the vehicle from the backside. From the fact that there was no crush injury and tyre marks on the dead body, in my opinion there is no possibility of deceased Meghraj being run over by the vehicle."

Thus, it is clear that there were no injuries on the body of the deceased showing that he was run over by the mini truck. This renders doubtful the versions of PW11 Vishwanath and PW12 Bakaram. Apart from this, it appears doubtful that the said witnesses would have actually seen the appellant and accused no.2 alighting from the mini truck and uttering the aforesaid words, from a distance of 90 ft. and 125 ft. On the other hand, the medical evidence appears to corroborate the version of PW2 Keshao, who has stated that the mini truck driven by the appellant gave a dash to the deceased from behind. There is no mention by the said witness regarding the appellant having reversed the truck and run over the body of the deceased.

12. The prosecution has relied upon the evidence of PW5 Prakash, PW9 Shalikram and PW10 Govinda for proving the theory that there was altercation between the appellant and the deceased on the day previous to the date of the incident on the question of non-payment of amount by the appellant to the deceased for purchase of paddy, which led to the appellant intentionally giving a dash to the deceased with his mini truck in the morning on 09.05.1994, thereby committing an offence under Section 302 of the IPC. A perusal of the evidence of

these three witnesses shows that there was a certain hot exchange of words on the previous day between the appellant and the deceased, but the statement of PW10 Govinda was recorded by the Police on 01.07.1994, which was after a long delay. This witness claimed to be a tea seller who had gone to supply tea to the shop of the deceased, when he allegedly saw the altercation and hot exchange of words between the appellant and the deceased. The said delay in recording of the statement of PW10 Govinda renders his version unreliable. Delay in recording of statements of witnesses has been held to be fatal because it raises a doubt that the investigator has decided upon a direction of the investigation and thereupon put up witnesses to support its case. It has been held by the Hon''ble Supreme Court in the case of Shahid Khan .vs. State of Rajasthan- (2016) 4 Supreme Court Cases 96, in the context of delay of 3 days in recording statements of eyewitnesses, that such delay may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitness to be introduced. Applying the said position of law to the facts of the present case, it is clear that PW11 and PW12 are wholly unreliable witnesses.

13. Even if evidence of PW5 Prakash and PW9 Shalikram (the younger brother of the deceased) in respect of the aforesaid alleged altercation between the appellant and the deceased, is believed, all that it shows is that there was such an incident of hot exchange of words that took place between them. But, it would be stretching the said alleged incident of hot exchange of words, a bit too far by concluding that this led to the appellant intentionally giving a dash with his mini truck to the deceased on 09.05.1994. If such an incident had occurred in a short span of time from the said alleged altercation or hot exchange of words, it could have been gathered that the appellant had intentionally committed the aforesaid act. If the evidence of PW2 Keshao along with the evidence of PW17 Dr.Vasant Pillare is appreciated in this context, it appears that the said incident and the death of the victim was accidental rather than homicidal in nature.

14. The evidence of the other eyewitnesses PW11 Vishwanath and PW12 Bakaram appears to be unreliable, but, the evidence of the eyewitness PW2 Keshao appears to be truthful, giving an accurate description of the incident that occurred in the morning on 09.05.1994. Therefore, the evidence on record establishes the presence of the appellant at the spot of the incident as driving the mini truck which dashed the deceased from behind. The nature of injuries do not support the theory of the prosecution that the appellant reversed the mini truck over the body of the deceased to intentionally cause his death. The material on record points towards rash and negligent act on the part of the appellant in causing the death of the victim Megharaj Nakade.

15. Thus, the Sessions Court was not justified in holding that the appellant intentionally caused the death of the victim. The Sessions Court erred in relying upon the evidence of alleged eyewitnesses PW11 Vishwanath and PW12 Bakaram. The medical evidence on record is also not appreciated in correct

perspective by the Sessions Court. On a proper appreciation of the evidence on record, it is clear that the appellant could be held guilty only under Section 304-A of the IPC for causing the death by rash and negligent act and that the FIR initially registered under the said provision was correct.

16. Accordingly, we hold that the conviction and sentence imposed upon the appellant by the Sessions Court by the impugned judgment and order is unsustainable and we set aside the same. Instead, the appellant is held guilty for having committed offence under Section 304-A of the IPC and we sentence him to suffer imprisonment for a period of 2 (two) years.

17. The record shows that the appellant was arrested on 09.05.1994 and released on bail on 17.05.1994. Thereafter, he was again arrested on 12.09.1994 when the offence under Section 302 of the IPC was added. He was released on bail on 08.12.1994, during the pendency of the trial. Upon the Sessions Court pronouncing the impugned judgment and order on 07.08.2006, the appellant was again arrested. He filed the instant appeal before this Court, but, his bail application was rejected by this Court on 26.02.2008. The appellant challenged the said order before the Hon"ble Supreme Court and by order dated 28.08.2008 the Hon"ble Supreme Court passed an order granting bail to the appellant and he was released on 12.09.2008. Thus, during the period of investigation, trial and pendency of the instant appeal before this Court, the appellant has already undergone incarceration for a period of about 2 1/2 years. In these circumstances, while partly allowing this appeal in the above terms, we hold that the appellant has already served more than the quantum of sentence imposed by us and that therefore, he need not be taken into custody for suffering the sentence of two years imprisonment imposed by us.

18. Accordingly, the appeal is partly allowed, the impugned judgment and order of the Sessions Court is set aside and the appellant is convicted under Section 304-A of the IPC.

19. The fees of the learned counsel appointed for the appellant are quantified at Rs.5,000/- (Rs. Five Thousand only).