

**(2015) 09 BOM CK 0152**

**In the Bombay High Court**

**Case No :** Criminal Appeal No. 489/2012 and Criminal Appeal No. 509/2013

Hitendra and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

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**Date of Decision :** 10-09-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313, 452, 457

Motor Vehicles Act, 1988 — Section 181, 184, 185

Penal Code, 1860 (IPC) — Section 304-II, 338, 427

**Citation :** (2015) 09 BOM CK 0152

**Hon'ble Judges :** V.M. Deshpande, J.

**Bench :** Single Bench

**Advocate :** S.A. Mohta, Advocate, for the Appellant; S.S. Doifode, A.P.P., for the Respondent

**Final Decision :** Dismissed

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**Judgement**

V.M. Deshpande, J.—These two appeals can be disposed of by common judgment since they arise out of the judgment and order passed by the learned Ad hoc Additional Sessions Judge, Nagpur dated 09.10.2012 in Sessions Trial No. 257/2012.

2. Appellant-Deepak s/o Naresh Gedam in Criminal Appeal No. 509/2013 is challenging his conviction for the offence punishable under Section 304-II of the IPC and consequent sentence to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 5,000/-, in default to suffer rigorous imprisonment for six months. He is also questioning the correctness of his conviction for the offence punishable under Section 338 of the IPC and the sufferance by way of sentence for rigorous imprisonment for two years and payment of fine of Rs. 1,000/-, in default to suffer simple imprisonment for two months. He is also convicted for an offence under Section 427 of the IPC and sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for seven days. The appellant is also challenging his

conviction for an offence punishable under Section 181 of the Motor Vehicle Act and sentence to suffer simple imprisonment for three months and to pay a fine of Rs. 500/-, in default to suffer simple imprisonment for 15 days. The appellant is also assailing his conviction for an offence punishable under Section 184 of the Motor Vehicle Act and sentence to suffer simple imprisonment for six months and to pay a fine of Rs. 1000/-, in default to suffer simple imprisonment for one month. The appellant is also challenging his conviction for an offence punishable under Section 185 of the Motor Vehicle Act and sentence to suffer simple imprisonment for six months and to pay a fine of Rs. 2000/-, in default to suffer simple imprisonment for two months.

The learned Judge directed that the substantive sentence shall run concurrently.

3. The appellant-Hitendra Ukey in Criminal Appeal no. 489/2012 is challenging the order of confiscation and auctioning of the vehicle in question and distribution of the sale proceeds amongst the heirs of the deceased.

4. The question, that is posed by the learned counsel for the appellant-Hitendra in Criminal Appeal No. 509/2013 before this Court is that though Deepak Gedam was apprehended on the spot itself after crushing three persons; Dilip Jankar, Sunilkumar Gajbhiye and Viju Jadhav to their death and the seriously injuring the victims Pramod Ukey, Ajay Thool and Rajat Sahu, it is not established by the prosecution that at the relevant time, it is only the appellant-Deepak, who was driving the killer vehicle, Matadoor bearing registration No.MH-31/ DS-2472.

5. The appellnat Deepak Gedam was charged in Sessions Trial No. 257/12 on 16.07.2012 that on 15.02.2012 at about 20.10 p.m. at Mekosabaugh bridge area, that he drove Matadoor No.MH-31/ DS-2472 under the influence of intoxication, which ultimately resulted into the death of three persons and causing grievous hurt to another three one.

6. The FIR (Exh.-56) was lodged by G.N. Khandate (PW5) on 15.02.2012. He was on duty as Day Officer from 9.00 a.m. to 9.00 p.m. at Police Station, Jaripatka. At about 8.10 p.m. a phone call was received in the Police Station that an accident has taken place at Mekosabaugh over bridge. He, therefore, immediately rushed to the spot along with his staff. That time, he noticed one Mataroor bearing no. MH-31/ DS-2472 standing on the wrong side. He also noticed one motorbike of Hero Honda was crushed in and was around the tyre of the said Matadoor. They also noticed one moped lying near about 10 ft. away from the said Matadoor. He also noticed two other Activa vehicles at 15 ft. away from the backside of the Madatoor. During enquiry, it was revealed to him that the Matadoor driver came in breakneck speed and gave a dash to various vehicles resulting into death and injuries. It was also revealed to him that the injured were carried to the hospital. It was also revealed to him that the mob gave a good thrashing to the driver of the Matadoor and he was also asked to sit in the Matadoor itself. Thereafter, Ganesh Khandate (PW5) apprehended the appellant-Deepak Gedam from the Matadoor and he was referred for medical

examination to the Mayo Hospital.

Thereafter, Ganesh Khandate (P5) proceeded to the Mayo Hospital for recording statement of the injured. There it was revealed to him that out of the three persons brought there, two were already dead and one is in serious condition. He also got the knowledge that some injured went to Shantivan Hospital for their treatment and, therefore, he went to the said hospital and recorded statements of the injured.

Anugraha Thakur (PW6) has completed the investigation and filed the chargesheet.

7. During the course of trial, the prosecution has examined nine witnesses and also relied on various documents duly proved during the course of the trial.

After full dress trial, the learned trial court below recorded the finding of guilt against the appellant-Deepak and sentenced him as observed in the opening paragraph of the judgment. The learned Judge, after culmination of the trial, confiscated the killer vehicle and ordered for its public auction to distribute the sale proceeds to the heirs of the deceased.

8. Hitendra Ukey (PW8) is appellant in Criminal Appeal No. 489/2012. Though, this witness has not supported the prosecution, his evidence cannot be discarded as a whole. However, to the extent his evidence supports the prosecution, can be considered.

His evidence would reveal that he is the owner of the killer vehicle. The vehicle used to be driven by the driver. He has admitted in his examination in chief itself before prayer to declare him hostile that the appellant-Deepak Gedam is his driver. He also admitted that on 15.02.2015 he received a phone call that the vehicle owned by him has caused death of some persons and injured the others seriously. He also admitted that he moved an application under Section 457 of the Cr. P. C. before the learned Magistrate for releasing the vehicle on Suprutnama. The said application is at Exh.-32 on the record of the present Sessions Case. The said was pointed out him during examination in chief by the learned A.P.P. and Hitendra Ukey has admitted that he moved the said application. The said application is on affidavit. In the said application, on oath it has been stated by Hitendra Ukey that the appellant-Deepak is his driver. Thus, it is crystal clear that the appellant, even according to the owner of the vehicle, was behind the steering wheel of the guilty vehicle.

From the application Exh.-52, it appears that Hitendra (PW8) has stated that the vehicle was taken by the driver without giving any intimation to him. The said pleading in the said application is for obvious reasons. Therefore, much importance cannot be attached to the said aspect. However, it is crystal clear that on the fateful day, the appellant-Deepak Gedam was driving the guilty vehicle. In fact, he has admitted that appellant-Deepak i.e. the accused before the Court is his driver and the accused before the court used to drive his

Matadoor.

9. Ashfaq Ahmad (PW9), is Inspector in Regional Transport Office. The said prosecution witness is diploma holder in Mechanical Engineering and also Diploma in Automobile Engineering. He is attached to the Nagpur R.T.O. According to his evidence, nature of his duty is to inspect the vehicle and their fitness before the renewal as well as inspect the vehicles which met with an accident and to give a report about the mechanical fault, if any, pertains to the vehicle.

His evidence further discloses that the Nagpur R.T.O. received a requisition for inspection of the Matadoor. The said vehicle met with an accident. The requisition is at Exh.-16. Accordingly on 22.02.2012, he conducted inspection of the said Matadoor, which was standing in Jaripatka Police Station. He took inspection of the said vehicle and noticed that there was no mechanical fault, which caused the accident. He, therefore, prepared a detailed report. The same is duly proved and the said is at Exh.-43. The evidence of Ashfaq Ahmad (PW9) is not at all challenged during his cross-examination in respect of his report Exh.-43. In that view of the matter, it is undoubtedly established that the killer vehicle was not having any mechanical defect.

From the evidence of Ashfaq Ahmad (PW9), the driving license of the appellant-Deepak is proved. His licence is at Exh.-62. From the same, it is crystal clear that the driver Deepak was authorized to drive the only Light Motor Vehicle, Three Wheeler Goods Vehicles and delivery van. This prosecution witness is very specific in his evidence that appellant-Deepak was not authorised to drive Matadoor. This part of his evidence is not at all challenged by defence.

10. The evidence of Hitendra Ukey (PW8) shows that appellant-Deepak used to ply his vehicle Matador. Thus, this witness has allowed unauthorised person to ply the vehicle. In my view, the said aspect is rightly considered by the learned Judge of the Court while ordering the confiscation of the guilty vehicle.

11. Dr. Amit Dhok (PW7) was on duty as Chief Medical Officer in Indira Gandhi Government Medical College and Hospital on 15.02.2012. The Police Station Officer, Jaripatka along with requisition Exh.-37 sent the appellant-Deepak with Police Constable Nilesh for his medical examination. The appellant-Deepak was examined by Dr. Dhok (PW7). He noticed four injuries on his person. Three were in abrasion and one avulsion on right toe nail. At the time of his medical examination, Dr. Dhok noticed that the appellant-Deepak was under the influence of liquor. He noticed smell of Alcohol from his mouth. He was giving irrelevant answers to the questions put to him by Dr. Dhok, his gait was unstable, his pupils were dilated. From all these symptoms, it was opined that the appellant-Deepak was fully under the influence of Alcohol and he was under intoxication. He obtained thumb impression of appellant-Deepak at Exh.-39 since he was not even fit to sign the said document due to his alcoholic influence. The said Exh.-39 is Alcoholic Certificate, whereas Exh.-40 is Medical Certificate of Deepak

Gedam in respect of his injuries.

The learned counsel for the appellant-Deepak attacked this evidence of the prosecution on the ground that the blood and urine samples were not taken and according to him, therefore, Exh.-39 is required to be kept out of consideration while evaluating the prosecution case.

Merely because the blood or urine samples were not taken, the opinion of the Doctor in respect of alcoholic condition cannot be discarded. From the evidence of Dr. Dhok (PW7) and from the document Exh.-39, this Court is of the view that the evidence of Dr.Dhok cannot be discarded merely because the blood and urine sample was not taken as suggested by learned counsel for the appellant. Dr. Dhok was Chief Medical Officer of the IGGMC, Nagpur. In view of Exh.-39, I have no doubt in my mind that the appellant-Deepak was under the influence of alcohol and in such a condition, he drove the killer vehicle recklessly and negligently.

12. The prosecution has examined injured Rajat Sahu as PW2 whereas another injured Ajay Thool was examined as PW1. There is evidence which reveals that on the date and time of incident, the killer vehicle was coming from the opposite side with high speed. All of a sudden, the said vehicle changed its side and came from the wrong side of the road thereby started giving dash to the people as well as vehicle riders. Injuries to these two witnesses are duly proved by the prosecution. The attack on the evidence of these two witnesses by the learned counsel for the appellant is that these two witnesses having not stated that they had seen the appellant driving the vehicle.

13. Vivek (PW3) is another injured. The attack to his testimony is that, there is omission in his police statement that he has seen the driver of the Matadoor.

Vivek (PW3) has identified the driver i.e. the appellant-Deepak, in the court as a driver of the killer vehicle. The face of the appellant-Deepak must have its imprint in the mind of the said witness when he saw him driving the vehicle in the most negligent manner under the influence of liquor. The evidence of these witnesses is recorded on 12.09.2012. The incident is dated 15.02.2012. Therefore, if during this short span he is identifying the appellant as driver of the vehicle, his testimony cannot be doubted and cannot be discarded merely because there is omission in his police statement.

14. Once it is proved on record through Hitendra (PW8) that the appellant-Deepak was driving the vehicle and he was driving the Matadoor and when he was apprehended on the spot itself, in my view, the statement of learned counsel for the appellant-Deepak that his identity is not fully established and that he was a driver, cannot be accepted and the said submission is rejected.

Further, the appellant-Deepak was immediately taken to the hospital from the spot itself by the police and as per Exh.-40, Dr. Dhok noticed four injures which were fresh in nature and caused by hard and blunt object. The nature of injuries

were simple which clearly suggests that he must have received kicks and fists blows from the mob. No explanation is offered by the appellant-Deepak in respect of the injuries noticed on his person. Further, it is not even suggested to any of the prosecution witnesses during evidence or during recording his statement under Section 313 of the Cr. P. C. that some other person was driving the vehicle.

15. The drivers who drive the vehicles under intoxication are required to be dealt with iron hand. Due to their such acts of driving the vehicle with high speed under the influence of liquor or other intoxication, the life of innocent persons using the road is exposed to death.

16. Therefore, on reappreciation of the entire prosecution evidence, I see no reason to discard the finding recorded by the learned Judge of the court below holding appellant-Deepak guilty and consequent sentence.

17. Insofar as the appeal filed by the owner of the vehicle Hitendra Ukey is concerned, the learned counsel for the appellant in the said appeal submitted that no opportunity of hearing was given to the appellant.

Section 452 of Cr. P. C. deals with the disposal of property at the conclusion of the trial. Section 457 of the Code deals with the procedure by police upon seizure of the property. The said Section empowers the Magistrate to hand over the interim custody.

In the present case, it is clearly established on record that the appellant-Hitendra Ukey, though was knowing that the appellant-Deepak was not authorized to drive the vehicle like Matadoor, has allowed him to drive the same. Thus, he has allowed an unauthorized person to ply the vehicle, which ultimately resulted into deaths and injuries.

18. According to the learned counsel, opportunity of hearing was not offered to him by the learned Judge of the court below at the time of making the order of confiscation. In that behalf, it would be useful to refer sub section (1) of Section 452 of Cr. P. C.

452. Order for disposal of property at conclusion of trial.

(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitle to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

The plain reading of the said provision shows that for destruction and confiscation, hearing is not necessary.

19. In that view of the matter, I see no force in the submissions made by learned counsel for the appellant. The reappreciation of the prosecution case leads me to

pass the following order.

(i) Criminal Appeal Nos. 489/2012 and 509/2013 are dismissed.