

(2017) 07 BOM CK 0163
In the Bombay High Court
Case No : 48 of 2016

Mr. Parshuram Nalkar, Son of Shivaji Nalkar

APPELLANT

Vs

State, Represented by the PP Panaji Goa

RESPONDENT

Date of Decision : 03-07-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 397](#) - Calling for records to exercise powers of revision
[Indian Penal Code, 1860](#), [Section 279](#),
[Section 304A](#)

Citation : (2017) 07 BOM CK 0163

Hon'ble Judges : Prithviraj K. Chavan

Bench : SINGLE BENCH

Advocate : Rajneesh Naik, S. R. Rivankar

Judgement

1. Feeling aggrieved with the conviction and sentenced passed by the learned Judicial Magistrate, First Class Margao, in Criminal Case No.335/S/2014/I which is confirmed by the Sessions Judge in Criminal Appeal No.3/2016 directing the petitioner to pay a fine of Rs.100/- for an offence punishable under Section 279 IPC and undergo simple imprisonment for 7 months with a fine of Rs.500/- for an offence punishable under Section 304-A IPC, this Revision petition has been preferred under Section 397 of Cr. P.C.

2. Prosecution case can be summarised as follows:- On the fateful day of 20.2.2014 at about 2.10 p.m deceased Khurshid Khan was proceeding on his motor bike bearing registration No.GA-08-J-8169 (for short "bike") on Ravandfond Khareband Margao road. The offending truck bearing registration No.KA-25-C-0546 was coming from the opposite direction in a high speed. There was a head on collision between the two vehicles due to which the deceased succumbed to the injuries on the spot as his motor bike was dragged by the offending truck at a distance of about 7.70 mts from the point of impact.

3. PW4 Dattaram Kalangutkar, Head Constable attached to the Margao Police

Station received a telephonic call about the accident, and, therefore, he rushed to the scene of offence. He drew a spot panchanama which is at Exh 9 colly. The statements of the witnesses came to be recorded. The dead body of the deceased was sent for autopsy. The Inspector of Motor Vehicle drew an Accident Report Form of the offending truck as well as the bike of the deceased. An FIR came to be registered by PW4 Dattaram Kalangutkar which is at Exh.C-1.

4. After investigation, a chargesheet has been filed in the Court of learned Judicial Magistrate, First Class, Margao ("JMFC" for short). After recording the plea, the petitioner was put to trial. By the impugned judgment, the learned JMFC convicted and sentenced the petitioner as above against which he preferred an appeal which came to be dismissed by the learned Sessions Judge while confirming the judgment of conviction passed by the trial Court. The petitioner has, therefore, approached this Court by way of present revision.

5. I have heard Shri R. Naik, learned Counsel appearing for the petitioner. It is argued at the bar that both the Courts below have committed gross error inasmuch as in the absence of any cogent evidence, conviction has been based only on the basis of spot panchanama. The prosecution has failed to prove the ingredients of Section 304-A IPC. It is urged by Shri R. Naik, that the accident occurred while the motorcyclist and the truck were proceeding in a opposite direction and it is only due to the loss of balance and/or error of the judgment on the part of both the bike rider and the truck driver. The evidence on record shows that the accident occurred due to the negligence of bike rider. It is also submitted by Shri R. Naik, that the learned Sessions Judge has committed an error in law and in fact to appreciate that the principle of *res ipsa loquitur* could not be applied to the case in hand.

6. Per contra, Mr. S. Rivankar, learned Public Prosecutor drew my attention to the sketch of the Scene of occurrence which indicate drag marks extending up to 7.70 mts. after the impact, which according to the learned Public Prosecutor, is evident of the fact that the truck was driven in a rash and negligent manner regardless of the fact that the road was closed from one lane and to and fro traffic was being allowed only from another lane.

7. It is an undisputed fact that the deceased Khurshid Khan succumbed to the fatal injuries in a motor accident involving the offending truck and the bike on 20.2.2014 at around 2.15 p.m in a head on collision. It is also not in dispute that one lane of the road was closed for some repairs and the traffic was allowed to continue from another lane.

8. The material witnesses examined by the prosecution are PW1 Amir Yargatti Exh. C-8 and PW3 Hyder Ali, Exh.13. PW1 Amir has acted both as a panch witness and an eye witness to the accident. The sum and substance of his testimony is that on the day of the accident he was driving his motorbike behind the deceased. The offending truck was driven on the left hand side of the right lane as left hand side lane was closed. The witness was proceeding to his house

to Monti dongor. He saw the offending truck dashing the motorcyclist due to which the motorcyclist died on the spot. The blood stains and the part of his brain was lying on the road behind the truck. There is no effective cross of this witness in the sense that a suggestion has been given that he also hails from the same locality and known to the deceased. That itself would not be sufficient to discard his testimony as his presence on the spot at the time of accident cannot be doubted as he had acted as a panch witness. It is brought out in his cross that deceased Khurshid Khan was staying 50 to 60 mts away from his house. Therefore, it was quite obvious that after the death of the deceased he remained there and had been asked by the police to act as a panch witness. True, he doesn't say in so many words as to how and in what manner the offending truck was being driven by the petitioner, nevertheless, testimony of PW3 is quite important in order to find out as to how the accident took place.

9. The testimony of PW3 Hyder Ali substantially corroborates the testimony of PW1 Amir Yargatti. The sum and substance of the testimony of PW3 Hyder Ali is that at the relevant time he noticed the offending truck being driven in a fast speed which dashed against the bike of the deceased from the front side and thereafter bike was dragged for some distance. The witness saw head of the victim sustained injuries with blood all over the road. A futile attempt has been made to rebut the testimony of the witness in cross by the defence. A few minor contradictions are brought on record which are bound to be there. It is not the case of the defence that PW3 was not at all present on the spot at the time of the accident. Rather it is elicited in the cross examination that the deceased was at a distance of 25 to 30 mts away from him when this witness was behind him in his car.

10. That apart, more important piece of evidence is in the form of spot panchanama drawn by PW4 Dattaram Kalangutkar which is proved at Exh.9. The sketch annexed with the spot panchanama clearly reveals that the offending truck after hitting the motorcyclist dragged it at a distance of 7.70mts which itself is indicative of the fact that the petitioner did not take due care and caution though he was conscious of the risk that evil consequence will follow but probably with the hope that it will not. When he could see the motorbike coming from the opposite direction coupled with the fact that single lane was allowed to use, he could have driven his truck in a moderate and slow speed and could have applied the brakes before hitting the bike.

11. No doubt, the Accident Report Form of the truck at Exh.15 shows scratch marks on the front number plate and middle of the bumper which does not automatically mean that this was because the bike hit the truck in the middle, as argued by the learned Counsel for the petitioner. The learned Counsel tried to substantiate that it is a case of contributory negligence in the realm of torts and therefore the Courts below ought to have given benefit of doubt. I am afraid, I cannot buy this argument for the simple reason that there is a specific suggestion to the prosecution witnesses by the defence that the deceased drove

his bike in a rash and negligent manner in the middle of the road and dashed against the truck.

12. The learned Counsel has placed reliance on an authority reported in 2002 STPL 8902 Karnataka, in the case of K. Srinivas Vs. State of Karnataka wherein Hon"ble Single Judge of Karnataka High Court set aside the judgment of the trial Court as well as the First Appellate Court who had convicted the petitioner under Section 279 and 304-A of IPC on the ground that the victim in that case had contributed to the negligence and without that accident could not have occurred. The ratio can be accordingly distinguished, as it is not the case at hand.

13. The learned Counsel for the petitioner submits that conviction of the petitioner can be maintained by reducing the substantive sentence to the extent already undergone by him during the course of trial. The learned Public Prosecutor, in all fairness, has no objection to this proposal.

14. It is brought to my notice by the learned Counsel for the petitioner that the petitioner is the only earning member of his family having three school-going children. Having taken into consideration the said factor and the totality of the facts, circumstances and evidence as well as the concurrent findings arrived at by the Courts below, I feel that this is a fit case in which by maintaining conviction the substantive sentence awarded to the petitioner can be altered for the period which had already been undergone by him. Petition therefore, stands disposed of in terms of the following order:- (i) Order of conviction passed by the Courts below is maintained while sentence of simple imprisonment of seven months shall stand altered to the extent of the period already undergone by the petitioner during the course of investigation and trial. Sentence of payment of fine is maintained. Petitioner shall deposit the fine amount, if not deposited earlier.

(ii) In view of the above, petition stands disposed of.