
(2013) 08 BOM CK 0207
In the Bombay High Court
Case No : Criminal Appeal No. 22 of 2013

Ramnivas

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Motor Vehicles Act, 1988 — Section 185, 185[b]
Penal Code, 1860 (IPC) — Section 279, 299, 300, 304, 304A

Citation : (2013) 5 ABR 1147 : (2013) 4 BomCR(Cri) 393

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : R.V. Gore, for the Appellant; P.P. More, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The appeal is filed against the judgment and order of Sessions Case No. 01 of 2012, which was pending in the Court of Assistant Sessions Judge, Jalna.

The appellant is convicted of the offence punishable u/s 304-Part II of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 5,000/- with a default clause. He is also convicted and sentenced for the offences punishable under Sections 279, 337, 338 of the Indian Penal Code and also u/s 185[b] of the Motor Vehicles Act.

Both the sides are heard. Learned counsel for the appellant has filed notes of arguments also.

2. The facts leading to institution of the appeal, in short, can be stated as follows:-

The incident took place on 25th July, 2011, at about 03.45 p.m. There was a procession called "Dindi" of more than 400 devotees who were proceeding to

Lalwadi from Ambad side. On the way, around 150 members of "Dindi" took a brief halt near the construction site of temple of Gajanan Maharaj. The other members were proceeding towards Lalwadi. The temple is situated by the side of Parner-Lalwadi road. The members of "Dindi" were taking rest and they were sitting by the side of this road. The accused was driving Container Truck bearing No. HR-38-N.4729. This vehicle came from Ambad side with high speed. It left road and entered the place where the members of "Dindi" were taking rest. The vehicle virtually crushed so many members of Dindi and seven such devotees died on the spot. The injured were shifted to the hospital, but five injured succumbed to the injuries in the hospital. The accused did not stop the vehicle after giving dash to so many members of "Dindi" and the Container proceeded to Lalwadi side.

3. Shri Dobhal, A.S.I. was attached to Ambad Police Station. He was on Bandobast duty alongwith the staff and he was in the company of "Dindi". One constable from his staff was injured in the aforesaid incident. Shri Dobhal took steps like contacting Ambad Police Station, patrolling staff and highway squad. He gave chase to the aforesaid Container on a motorcycle. After crossing distance about 10 k.m., he noticed that the vehicle was intercepted by some persons. He noticed that the accused was already taken in custody by a police Officer. He and his staff shifted the injured to the hospital and he gave report in Ambad Police Station.

4. The accused came to be arrested. There was smell of alcohol to the mouth of the accused. He was examined medically and his blood sample was collected on the night between 25th and 26th July, 2011. Doctor found that the accused was under influence of liquor. In due course of time, the report of Chemical Analyzer in respect of blood sample of the accused was received and it was confirmed that the accused had consumed liquor.

5. Shri Jaybhave [PW 12] made investigation of the case. He recorded statements of injured witnesses. He prepared panchnamas of the spots where the Tanker had given dash to the members of "Dindi", where the Container had given dash to one motorcycle and of the spot where the Container was intercepted. The vehicle was got examined through office of Road Traffic Officer. No technical fault like break failure was noticed. The record like postmortem reports, injury certificates came to be collected. The map of the scene of offence was got prepared. The charge-sheet came to be filed for the aforesaid offences and also for the offence punishable u/s 427 of the Indian Penal Code. The accused is acquitted of the offence punishable u/s 427 of the Indian Penal Code.

6. In the trial Court, the prosecution examined many injured witnesses. The Medical Officer is examined to prove that the accused was under influence of liquor. The Road Traffic Officer is examined to show that there was no mechanical fault in the vehicle involved in the accident. The spot panchnama is proved and also the map of scene of offence is proved. The accused took the defence of total denial. However, in the statement u/s 313 of Code of Criminal Procedure, the

accused contended that he was driving the Container with slow speed.

7. The trial Court believed the injured witnesses and also the Medical Officer. The trial Court has held that the act of the accused was not of sheer negligence or rashness. The trial Court has held that the accused had the knowledge about the consequences, the effect of his act, and inspite of such knowledge, he drove the vehicle in excessive speed. The trial Court has held that the accused has caused the death of 12 persons and caused simple and grievous injuries to many persons.

8. In the appeal, it was mainly submitted for the appellant that there is no evidence on identification to prove that the accused was driving the Container. It was alternatively submitted that at the most the offence may fall u/s 304-A of the Indian Penal Code. Both the sides relied on some reported cases.

9. This Court has carefully gone through the record of the case. In the statement given u/s 313 of Code of Criminal Procedure [particularly answers given by the accused to question Nos. 2 and 3], the accused contended that he was driving the Container bearing No. HR-38-N-7429 slowly. The evidence of complainant Mr. Dobhal [PW 1] shows that Mr. Dobhal had an opportunity to see the accused immediately after interception of his vehicle.

10. P.W. 1 Mr. Dobhal, the A.S.I. attached to Ambad Police Station, gave report immediately after the incident. His evidence shows that P.H.C. Mr. Rupekar and Constable Mr. Dabhade were present in his staff when he was doing Bandobast duty. He was to go up to Lalwadi for discharging such duty. Similar evidence is given by the two police officers like Mr. Rupekar and Mr. Dabhade.

11. Mr. Dobhal has given evidence that at the relevant time, around 100 to 150 members of Dindi were sitting under Neem tree. Though in the report, there is no mention of Neem trees, there is other record which is being discussed later on, to show that there were atleast two Neem trees by the side of the road on the western side. He has given evidence that the Container went to that side and it gave dash to so many members of Dindi. Mr. Dobhal has deposed that the Container was being driven in high speed. He has further deposed that after giving dash to so many persons, Container proceeded ahead with speed. He has deposed that seven persons died on the spot in the incident.

12. The evidence of PW 1-Mr. Dobhal shows that he made arrangement for shifting injured persons to Government Hospital. He also took steps like giving intimation to other officers, squad etc. He has given evidence that he gave chase to the Container. He has deposed that after crossing some distance, he noticed that the aforesaid container was already intercepted and Police Inspector Mr. Dilpak had taken driver of Container in custody. His evidence shows that he had seen the driver of the Container. He has deposed that he can identify the driver. He identified appellant/accused in the Court as the same driver. First Information Report given by PW 1 at Exh. 20 is consistent with the aforesaid evidence on material points.

13. In the cross-examination of PW 1 Mr. Dobhal, it is brought on record that he was at the distance of 14 to 15 feet from the spot. The cross-examination does not show that the presence of this witness on the spot is disputed. In the cross-examination, it was suggested to this witness that the incident took place due to failure of breaks of the Container, but this suggestion is denied. The tenor of the cross-examination shows that it was not disputed that the accused/appellant was driving the Container and such incident did take place.

14. PW 3, Police Constable Mr. Dabhade has given evidence that the Container came with excessive speed, it gave dash to the members of Dindi and then proceeded ahead. He has deposed that his colleague Mr. Rupekar was injured in the incident. He has given evidence that PW 1 had given chase to the Container. His evidence shows that Container went towards the side where the members of Dindi were sitting all of a sudden. His evidence shows that he was at the distance of 100 feet from the spot. It was broad day light, and so, this distance cannot make much difference and there is no reason to have a doubt about version given by this witness. His presence on the spot is not disputed.

15. PW 8, Mr. Rupekar, another police officer has given evidence that the members of Dindi were sitting under Neem tree and there the Container gave dash to many persons. He sustained injuries in the incident. His evidence remained unshattered during his cross-examination. The suggestion is given to him to the effect that some members of Dindi were attempting to cross the road. This suggestion is denied by this witness. No support can be found in the record like spot panchnama to such suggestion.

16. PW 2, Anil was a member of Dindi. He has given evidence that the members of Dindi were sitting on side-patti, kachha side of the road. He has given evidence that Container came with high speed from Ambad side, it entered kachha portion of the road and gave dash to the members of Dindi. He has given evidence that he sustained injuries in the incident. His evidence shows that the police officers were present with Dindi for doing bandobast duty. His evidence is similar on other points to the evidence of PW 1 Mr. Dobhal. He has denied the suggestion that the members of Dindi were sitting on tar portion of the road.

17. The other members of Dindi, PW 4 Amol, PW 5 Vinod, PW 6 Govinda and PW 7 Dinesh have given similar evidence. They were injured in the incident and their injury certificates are on record. Their presence on the spot is not disputed by the defence.

18. PW 9 Ram was not sitting at the aforesaid point. He was proceeding towards Lalwadi on motorcycle. He has given evidence that at the distance of 5 to 6 k.m. from aforesaid spot, Container gave dash to his motorcycle from back side. He has given evidence that he sustained injuries in the said accident and the motorcycle was damaged. There is injury certificate in respect of this witness also and nothing could be elicited during cross-examination of this witness, which can be used in favour of the accused.

19. Thus, the evidence of aforesaid eye witnesses shows that the Container was being driven with high speed and as it went towards side-patti of the road, the incident took place. The evidence is also sufficient to prove that at the distance of 5 to 6 k.m. from the first point, the Container had given dash to motorcycle of PW 9. Their evidence shows that the driver of Container did not stop the vehicle after giving dash to so many persons. The evidence of PW 1 and other circumstances already discussed above are sufficient to prove that it is the accused who was driving the Container at the relevant time.

20. In the evidence of PW 10-Dattatraya, spot panchnama, which is at Exh. 68, is proved. His evidence shows that the width of the road was atleast 25 feet. His evidence shows that they visited three spots and they came to be described in the panchnama. His evidence shows that on the second spot, the motorcycle of PW 9-Ram was lying. His evidence shows that on the third spot, there was a Container, which was in burnt condition. It appears that the mob become unruly and it set fire to Container and other vehicles including vehicle of police. This evidence shows that when the panchnama was prepared, the road at the first spot had become wet due to rain.

21. The spot panchnama [Exh. 68] was prepared on 26th July, 2011 between 06.00 p.m. and 07.15 p.m. The discussion already made shows that the incident took place at about 03.45 p.m. of 25th July, 2011. In view of this circumstance and when there is no other evidence, it can be said that at the time of incident, there was no rain. Even on 26th July, 2011, blood was noticed by panchas on the spot. It can be said that the rain was not heavy. There were no marks of tyres of Container at all three places. So many stones which were probably pelted by the members of unruly mob were present on the first spot. Thus, the spot panchnama [Exh. 68] is consistent with the evidence of eye witnesses. PW 12 Mr. Jaybhaye made the investigation of the case and his evidence on the spot panchnama and other circumstances is similar.

22. PW 11 Vithal, Revenue Circle Inspector prepared two maps of the sites where the incident took place. They are at Exh. 73 and 74. He has deposed that the incident took place by the side of tar road. His evidence and the maps show that the total width of the road was around 50 to 60 feet. Though this part is not consistent with the evidence given by the panch witness, it can be inferred that tar road had sufficient width. The evidence does not show that any other vehicle was coming from opposite direction, and so, this discrepancy need not be given much weight. The maps show that there were two Neem trees by the side of the road and the spot of incident is shown near the trees. The second map is in respect of the site where dash was given to motorcycle by the Container. This spot was also situated on extreme left side of the road.

23. The evidence of the witnesses and aforesaid record show that the Container crossed the distance of 6 k.m. from the first spot and then it gave dash to the motorcycle. The Container was intercepted at the distance of 10 k.m. from the first spot. There were no marks on the road showing that the accused/appellant

had attempted to stop the Container at any of the two spots where Container gave dash to the members of Dindi and to a motorcycle.

24. The evidence of PW 13-Gopal, Deputy Road Traffic Officer, Jalna, shows that he examined the Container to ascertain as to whether there was any mechanical fault. He has deposed that he did not find any mechanical fault like failure of breaks. His evidence shows that there was no possibility of development of such fault in said vehicle. The certificate given by this witness is at Exh. 80 and it is consistent with the oral evidence.

25. P.W. 14-Dr. Bhandari has given evidence that the medical examination of the accused was conducted on 26th July, 2011. The Medical Officer has deposed that there was smell of alcohol to the mouth of the accused, the speech of the accused was incoherent, his pupils were dilated and he was imbalanced. The witness has deposed that on the basis of the examination, he formed opinion that accused had consumed alcohol and the accused was under the influence of alcohol. The certificate prepared by the doctor which is at Exh. 136 is consistent with the oral evidence. He has given evidence on the collection of blood sample of the accused. This blood sample was sent to Chemical Analyzer's Office. His evidence shows that if blood is collected after 24 hours of consumption of alcohol, the extent of alcohol found in blood will considerably be less than the extent of alcohol which can be found immediately after consumption of alcohol. The report of Chemical Analyzer at Exh. 147 shows that ethyl alcohol equivalent to 69 milligrams was found in the blood of the accused. This is as against 30 milligrams per 100 milliliter of alcohol, which is provided in Section 185 of the Motor Vehicles Act, 1988, and on the basis of which, some presumption can be drawn.

26. The aforesaid evidence is believed by the trial Court. Ordinarily the appellate Court is not expected to interfere in such findings. Aforesaid evidence is sufficient to prove following things:-

- [i] That accused had consumed liquor;
- [ii] That when he was driving the Container, he was under influence of liquor;
- [iii] That he drove the vehicle with high speed when he was heavily drunk;
- [iv] That the vehicle left tar portion of the road which was having sufficient width and went to side-patti;
- [v] That the vehicle left the road even when the road was straight at that point and no vehicle was coming from opposite direction;
- [vi] That it was broad day light and it was 03.45 p.m. of 25th July, 2011 and visibility was good;
- [vii] That the vehicle gave dash to more than 35 persons, who were sitting on the side-patti of road and who were visible from long distance;

[viii] That the vehicle proceeded ahead after giving dash to the members of Dindi;

[ix] That the accused did not try to stop the vehicle after giving dash to so many persons and he had no intention to save those who were injured;

[x] That after crossing distance of 6 k.m. from the first spot, the vehicle of the accused gave dash to motorcycle from backside which was on extreme left side of the road;

[xi] That the accused did not stop the Container after giving dash to the motorcycle;

[xii] That the accused stopped the vehicle only when it was intercepted at the distance of 10 k.m. from the first spot; and

[xiii] That the accused did not try to give any report about the aforesaid incident to police.

27. Learned counsel for the appellant has taken alternative defence that the offence may be punishable u/s 304-A of the Indian Penal Code and not u/s 304, Part II of the Indian Penal Code. He relied on reported cases. In view of this alternate defence, the position of law needs to be considered and the facts and circumstances of the present case need to be considered in the light of position of law.

28. Learned counsel for the appellant placed reliance on the case reported in Mahadev Prasad Kaushik Vs. State of U.P. and Another, . In this case, the Apex Court was considering act of a doctor. Doctor had given injections to patient due to his sick condition. The facts of the reported case were altogether different. The Apex Court, however, made some propositions of law. It is laid down that when the act of the accused is not covered under Sections 299 and 300 of the Indian Penal Code, use of Section 304 of the Indian Penal Code is not possible. It is laid down that for use of Section 304 of the Indian Penal Code, either the "intention" or "knowledge" needs to be established. There cannot be any dispute over this proposition. Similar observations were made by the Apex Court in the case reported in Naresh Giri Vs. State of M.P., .

29. The facts of the case reported in 2004 [14] S.C.C. 269 [Prabhakaran v. State] show that boy of 10 years age was involved in the accident. A heavy vehicle gave dash to the boy right in the middle of the road. In view of the circumstances and facts of that case, Apex Court held that provisions of Section 304-A of the Indian Penal Code can be used and not the provisions of Section 304, Part II of the Indian Penal Code. It can be said that the facts and circumstances of each and every criminal case are always different.

30. In the case reported as State Tr. P.S. Lodhi Colony New Delhi Vs. Sanjeev Nanda, , when the accused had driven a Car in a drunken condition in the early hours of the day and when the Car had entered road side huts and had caused

death of atleast six persons, the Apex Court held that the act is punishable u/s 304, Part II of the Indian Penal Code. The facts of this reported case show that the defence was taken that breath test ought to have been taken by the police. Similar defence was taken in the present case. The Apex Court laid down in the reported case that such defence is not acceptable if the accused had escaped the scene. The Apex Court has observed that when the accused manages to flee the scene of offence, the investigating agency is not expected to apply the breath analyzer test. It can be said that the facts of reported case are similar to the facts of the present case. The relevant facts and circumstances are already quoted above.

31. In view of the aforesaid alternate defence taken by the learned counsel for the appellant, the position of law can be seen to ascertain as to how the difference can be made between the act which can be punished u/s 304-A of the Indian Penal Code and the act which can be punished u/s 304, Part II of the Indian Penal Code. As already observed, for use of Section 304 of the Indian Penal Code, Sections 299 and 300 of the Indian Penal Code need to be seen. As in the present case the trial Court has convicted and sentenced the appellant for the offence punishable u/s 304, part II of the Indian Penal Code, it would be sufficient to discuss Sections 299, 304-A and 304 Part II of the Indian Penal Code.

Section 299 runs as under:-

Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 304-A runs as under:-

Causing death by negligence.-Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 304, Part II runs as under:-

Punishment for culpable homicide not amounting to murder.-Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

32. In Section 299 of the Indian Penal Code, the word "act" is used, while in Section 304A of the Indian Penal Code the words "rash or negligence act" are used. Section 304-A shows that it excludes culpable homicide. Section 299 thirdly of the Indian Penal Code shows that the requirement is proof of

"knowledge". The terms "act" and "omission" can be found in Sections 32 and 33 of the Indian Penal Code. Section 39 of the Indian Penal Code defines the term "voluntarily" and it describes the circumstances when the accused can be held guilty for the effect of his act. Section 39 of the Indian Penal Code with its illustration runs as under:-

Voluntarily"-

A person is said to cause an effect

"voluntarily" when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration-

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death, voluntarily.

33. From the definition of term "voluntarily", it can be said that if there were circumstances due to which it can be said that the accused had knowledge that he was likely to cause effect like death of some persons by his act, the Court can presume that the accused did the act voluntarily. Such presumption can be drawn from the actual knowledge, the accused possessed. However, such presumption can be rebutted by the accused by showing that there were other circumstances as against the circumstances, which can be used against him. Thus, prosecution can prove the offence described u/s 299 thirdly of the Indian Penal Code by proving the act of the accused and by proving that the act was done with the knowledge that by such act he was likely to cause the death. On the other hand, it can be said that for proving culpable homicide, as described in Section 299 thirdly of the Indian Penal Code, which is made punishable u/s 304, Part II of the Indian Penal Code, the proof of only rash or negligent act will not be sufficient. The facts and circumstances of the case can lead to inference that the accused had knowledge that by his act he was likely to cause death.

34. This Court has already quoted the relevant facts and circumstances of the case. The circumstances which are proved are sufficient to infer that the accused had "knowledge" that by such act he was likely to cause death of members of Dindi. The act of the accused did cause the death of atleast 12 persons. His act left many persons in injured condition. Some of them sustained simple injuries and some of them sustained grievous injuries. This Court has no hesitation to hold that the act of the accused/appellant is punishable u/s 304, Part II of the Indian Penal Code and also offences punishable under Sections 279, 337, 338 of the Indian Penal Code. Argument was advanced by the learned counsel for the appellant that the lenient view needs to be taken in view of family background of

the accused/appellant. This Court has given thought to such submission also. This Court has no hesitation to hold that in a case of present one, lenient view is not possible. The number of vehicles on the road has increased considerably and number of incidents involving drunken drivers has also increased. It has become necessary to deal with such accused sternly so that similar minded drivers learn lesson from it. This Court holds that interference in the decision given by the trial Court is not possible. Therefore, Criminal Appeal stands dismissed.