

(2003) 09 BOM CK 0118

In the Bombay High Court

Case No : Criminal Application No. 2467 of 2003

Salman Salim Khan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-09-2003

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66
Criminal Law Act, 1977 — Section 50(1)
Criminal Procedure Code, 1973 (CrPC) — Section 227, 228, 482
Motor Vehicles Act, 1988 — Section 134, 163, 181, 181(3), 185
Penal Code, 1860 (IPC) — Section 161, 279, 299, 300, 304

Citation : (2003) 09 BOM CK 0118

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Srinish Gupte, A.P. Munderai, Dipesh Mehta and S.V. Marwadi, for the Appellant; P.H. Kantharia, APP for State and Subhash Jha, for the Respondent

Final Decision : Allowed

Judgement

1. Rule. By consent returnable forthwith. Heard the learned Counsel for the parties.

2. By an order dated 9th July 2003, the matter was adjourned to 28th July 2003 and by consent of parties, the matter is being finally disposed off at the admission stage itself.

3. The brief facts which are necessary for the purpose of deciding the present application are as under:-

The applicant is arraigned as an accused in Sessions Case No. 126 of 2003. The offence was registered by Bandra police station vide C.R.326 of 2002 on 28th September 2002 u/s 304(A), 279, 337, 338, 427 of I.P.C. and Sections 134(a) and (b) read with 181, 185 of the Motor Vehicles Act 1988 on a complaint of one Ravindra Patil, Police Constable attached to the Security Department, Social Security Branch No. 1. The case of the prosecution in brief is that the applicant is

a film actor and he was provided with police security. The complainant was appointed as a security guard of the applicant. The incident in question took place on 27th September 2002. The complainant reported to duty at about 8.00 p.m. and, thereafter at, 9.30 p.m. the applicant took out his Toyota Land Cruiser car being No. MH-01-DA-32 and drove towards the hotel known as Rain. The applicant was also accompanied by a friend one Mr. Kamal. When they reached the Rain hotel, the applicant and his friend Kamal went inside and the complainant sat in the car. At about 1.30 a.m. the applicant and his friend Kamal came out of the hotel and from the said place they went to J.W. Marriot Hotel in the same car. At about 2.15 a.m. all of them left for Bandra where the applicant resides. The applicant was driving the car in a high speed and while the car was taking a right turn from St. Andrew's road, the applicant lost control of the car and it mounted on the foot path and dashed into shutter of the shop known as American Express Cleaners and as a result one person was crushed to death and four others received grievous injuries. All these four persons were sleeping on the staircase of the said shop. As a result of the accident, people gathered there and started pelting stones. The applicant and his friend ran away. The complainant told the crowd which had gathered there that he was a Police Constable and, thereafter, he went to the police station and his F.I.R. was recorded at 5.40 a.m. on 28th September 2002 and a case was registered against the applicant vide C.R.No. 326 of 2002 and he came to be arrested. However, since the offence was bailable, the applicant was enlarged on bail on 28th September 2002.

4. A Public Interest Litigation was filed on behalf of the certain citizens and during the course of hearing of the said petition a statement was made on behalf of the State that the accused will be charged u/s 304 of the I.P.C. The division bench of this Court has stated that it did not wish to express any opinion on the said aspect. In the said petition the validity of Section 304A of I.P.C. has been challenged as also the validity of Section 163(a) of Motor Vehicles Act is challenged. The said petition is still pending and is not decided. An interim order was however passed in the said petition in which directions were given to the accused to deposit an amount of Rs. 20 lakhs by order dated 7th October 2002. On the same day at about 3.00 p.m. the applicant came to be again arrested in C.R.No.326 of 2002 by the Bandra Police Station as they added provisions of Section 302(2) of the I.P.C. in the case. On 8th October 2002, the applicant was produced before the learned Magistrate who refused to grant bail to the applicant. Since the offences were triable by the court of sessions, the learned Magistrate committed the case to the Court of sessions for trial and, thereafter, bail was granted by the court of sessions on 24th October 2002.

5. On 7th March 2003, the applicant filed criminal application No. 463 of 2003 in the Court of Sessions in which he prayed that charge u/s 304 part II of the I.P.C. was not made out and hence, there was no prima facie case against him and he should be discharged, so far as the said offence is concerned. The prosecution filed the reply. The learned Sessions Judge, however, after hearing both the

sides, rejected the application of the applicant on 2nd May 2003 and framed charge also u/s 304 part II of the I.P.C. apart from the other charges which were initially levelled against the applicant.

6. Being aggrieved by the said judgment and order passed by the learned Sessions Judge, framing the charge u/s 304 part II of I.P.C. the applicant has preferred this petition u/s 482 of Cr.P.C. The respondents have filed their reply to the said application. One Citizen's Organisation of Public Opinion, which claims to be a non Government Organisation which is allegedly formed in the year 1989, has filed an application for intervention in the present application and is seeking intervention in the light of the judgment of the Apex Court in the case of R. Rathinam Vs. State by DSP, District Crime Branch Madurai District, Madurai and Another, and also in the case of Manohar Lal Vs. Vinesh Anand and Others, , and has prayed that the intervener should be added as party respondent and may also be permitted to make its submissions. By an order dated 9th July 2003, this Court had directed that the said criminal application for intervention will also be heard along with main criminal application at the time of final hearing and disposal of the application.

7. I have heard Shri Shirish Gupte, the learned Counsel for the applicant. Smt. Poornima Kantharia, A.P.P. for State and Shri Subhash Jha, Counsel for the interveners. Shri Gupte, the learned Counsel for the applicant has submitted that even if the averments made in the complaint are taken at their face value, then also the offence u/s 304 part II cannot be said to have been committed by the applicant. He has further submitted that the present application u/s 482 of Cr.P.C. is maintainable and that this Court had the inherent powers to pass an order for quashing an order of the sessions court which has framed the charge in respect of an offence which is not committed by the applicant. He has submitted that the application cannot be construed to be as an excuse for running away from the trial and the applicant is ready to face trial in respect of remaining charges which are framed against him viz., for offences u/s 304(A), 279, 337, 338, 427 of I.P.C. and Section 134(a) and (b) read with 181(3) and 185 of Motor Vehicles Act. He further submitted that from the complaint which is lodged by the complainant a case at the most of rash and negligent driving, which is popularly known as hit and run case has been made out against the applicant. He further submitted that the application for intervention cannot be allowed as the intervener has no locus for intervening in the said case.

8. The learned A.P.P. for State has vehemently opposed the said submission made by the learned Counsel for the applicant. Smt. Kantharia, has submitted that the applicant was under influence of liquor and was driving an imported car at a very high speed of 110 km/hour. and that he knew the topography of the place where the incident took place and though he was forewarned by the complainant on previous occasions as also on the said occasion, the applicant chose to continue to drive the vehicle and, therefore, he had the knowledge that such an incident would happen in which lives of people would be lost. She has

submitted that with this knowledge the applicant continued to drive the car and which eventually landed up in the shop and life of one poor innocent worker who was sleeping on the stairs of the shop was lost and four others who were also sleeping there were seriously injured. She submitted that this act was an act of culpable homicide and amounting to murder and, therefore, it squarely falls within the four corners of Section 304 part II of the I.P.C. Smt. Kantharia further submitted that this Court should not interfere with the order of framing of charge which is passed by the learned Sessions Judge while exercising its power u/s 228 as the matter is to be finally decided by the sessions court and the accused had a right to make his submissions after the evidence is adduced by the parties. She further submitted that the order which is passed is interlocutory and, therefore, this Court should not interfere with the said order while exercising its jurisdiction u/s 482 of Cr.P.C.

9. Shri Jha, the learned Counsel for the interveners, on the other hand submitted that in view of the judgment of the Apex Court in the case of Rathinam (supra) the interveners have locus to intervene in the said matter. He has supported the submissions made by the learned A.P.P. for State. Shri Jha further submitted that the High Court should not ordinarily interfere with the order passed by the sessions court, unless the said order is perverse. he has submitted that the provisions of Section 299 have to be read with Section 304 part II and in the present case, the death which is caused is due to an act which was committed by the applicant who had the knowledge and, therefore, this squarely falls in the four corners of Section 299 read with Section 304 part II. He fairly conceded that though public outcry alone should not influence the decision of the court, at the same time, any alleged misuse of the power which is vested with the police also should not be the criteria for the purpose of setting aside the order of framing of charge by the sessions court. He submitted that if the case of the prosecution is taken at its face value, then the charge u/s 304 part II is made out. The learned Counsel appearing for the applicant as well as the A.P.P. for State had relied upon number of decisions of this Court as also the Apex Court on the various points submitted by them which shall be considered at the relevant stage.

10. In the present case, the applicant who is a well known film personality while returning home in his car could not execute the turn properly and as a result his car rammed into a shop as a result one person was crushed to death and four others were seriously injured. The crowd gathered at the scene of offence and the applicant and his friend ran away therefrom. The constable who was assigned to do the job of security man immediately went to the police station after he had pacified the crowd and lodged an F.I.R. In the first information report which is lodged on the said date, he has given the sequence of events which had transpired. In the said complaint, he has stated that after the applicant came out of the Rain hotel he had offered to drive the vehicle. However, the applicant ignored him and went to another hotel. From the said hotel it is alleged that the applicant and his friend started at about 2.30 a.m. and that the applicant was driving at a very high speed and, therefore, the complainant warned him and told

him to drive slowly. The complainants has further stated that the car was running at a speed of 90 to 110 km./hr. and when it came near St.Andrew's road and while turning on the right hand side towards hill road the driver of the vehicle viz., the applicant could not control the car because of the high speed and the car went straightaway in to the shop and as a result the people who were sleeping on the payment and on the staircase of the shop were crushed. One person died immediately and others were injured. He has stated that the said car rammed into the shop and went inside to the extent of about 3 and half feet and the front portion of the vehicle was dashed and the left hand side tire was burst. He has, therefore, stated that he has filed a complaint against the applicant for negligently driving the vehicle at a very speed in reckless and careless manner. Thereafter, the second statement of the complainant was recorded on 1st October 2002 in which he has sought to give further particulars in which he has for the first time added certain particulars and he has stated that after the applicant and his friend Kamal came out of the Rain Bar at that time he noticed from the quaint and from their talk that the applicant had consumed liquor and he has stated that when the applicant was sitting on the driver's seat he asked him whether he should drive the care. The complainant further stated that at that time the applicant just ignored the complainant and himself started the car. He has further stated that after the applicant started driving the car at a high speed, the complainant told him not to drive the car in a high speed. the complainant has further stated that, however, the applicant ignored the complainant. He has further stated that about a fortnight before the incident on two to three occasions when the applicant used to drive the vehicle in a high speed, he had told him to drive slowly. He has, thereafter, stated that when the applicant came out of the Hotel J.W.Marriot he sat on driver's seat and within a short time he started driving the vehicle at a very high speed and though the complainant told him to slow down the speed the applicant did not do so and before they reached the place where there was a right turn, the complainant cautioned the applicant to slow down the vehicle as there was a right turn. However, the applicant ignored the complainant and, thereafter, the accident took place. The learned Sessions Judge has framed a charge u/s 304 part II as also other sections of I.P.C. and Motor Vehicles Act.

11. Three questions which fall for consideration before this Court are:

- i) whether in a case where death is caused as a result of a vehicle which is driven by a person who has the knowledge that he is driving the vehicle in a rash, reckless and negligent manner, offence u/s 304 part II would be made out?
- ii) Whether in the facts and circumstances of the present case and after taking into consideration the allegations of the complainant as they are, an offence u/s 304 part II is made out by the prosecution?
- iii) whether this is a case where the High Court should interfere with the order which is passed by the sessions court, which has framed the charge as per the provisions of Cr.P.C.

12. In order to appreciate the submissions made by the rival parties, it would be appropriate to take into consideration the relevant provisions. In the instant case on 28th September 2002 an offence was registered u/s 279, 337, 338, 427 and 304A and thereafter, on 7th October 2002 offence u/s 304 part II has been added. Section 279 falls under Chapter XIV which relates to offences affecting the public health, safety, nuisance etc. Section 279 deals with rash and negligent driving or riding on a public way in a rash and negligent manner so as to endanger human life. Section 337 deals with causing hurt by an act endangering life or personal safety of others. Section 338 deals with causing grievous hurt by endangering life or personal safety of persons. Section 427 deals with mischief as a result of which damage or loss is caused and lastly Section 304 deals with causing death by any rash and negligent act, which does not amount to culpable homicide. Section 299 deals with culpable homicide. Section 304 is the section which prescribes punishment for culpable homicide which does not amount to murder and though it is not in terms is divided in part I and II, it prescribes two kinds of punishments which are applied for two different circumstances which are applied for two different circumstances and, therefore, it has been divided in part I and part II. Part I deals with an offence where there is an intention of causing death or act is done by causing bodily injury which is likely to cause death. Whereas part II deals with case where an act is done with knowledge that such an act is likely to cause death. However, there is no intention to cause death or to cause any bodily injury which is likely to cause death.

13. On the perusal of the said section it is clear that Sections 279 and 304A specifically deal with cases where an act is committed as a result of rash and negligent driving where in the first case u/s 279, the said act endangers human life and u/s 304A death is caused as a result of the act which is rash and negligent. Section 304A has been added to the I.P.C. as a result of the amendment of 1870, whereby the present section was added. Section 279 specifically deals with an act of rash and negligent driving or riding and contemplates a situation where any vehicle is driven rashly or negligently as a result of which, there is danger to human life. Section 304A on the contrary deals with all kinds of negligent acts including an act of rash and negligent driving which causes death of a person. With the advent of modern technology and use of various machines various possibilities exist which can result into death of human being if the said machine or technology or technique is carelessly handled. In all such cases though a person may not have the intention of causing death or knowledge whether such an act is likely to cause an injury which would cause death, yet he is aware about the possibility of death. Section 304 part II on the contrary deals with a much graver offence in which there is a knowledge on the part of a person who is committing an act that the said act is likely to cause an injury which is likely to cause death. Section 304 part II, therefore, is an offence which is committed when the knowledge goes beyond the act of rashness and negligence. The question which is required to be answered in this case is whether the provisions of Section 304 part II will be attracted on the

basis of the complaint which is filed as it is, without appreciating or without adding or subtracting anything from the said complaint. If any appreciation of facts is required, then this would not be an appropriate stage to decide the said issue and then the issue can only be decided after the evidence is adduced by the prosecution and final arguments are heard by the sessions court. However, if from the perusal of the complaint it transpires that from the facts, if they are taken as they stand, offence u/s 304 part II is not made out, then in that event, this Court can alter the charge which is already framed by the sessions court.

14. From the complaint which has been filed by the complainant on 28th September 2002 and further statement which is recorded on 1st October 2002, the facts as they are mentioned are as under:-

That on 27th September 2002, the applicant started from his residence at about 9.30 p.m. and reached Rain bar. Thereafter, the applicant and his friend came out of the said hotel and at about 1.30 a.m. went to nearby hotel by name J.W.Marriot and came out at 2 5 a.m. and started their way back home towards Bandra. In the subsequent statement the complainant has further stated that after the applicant came out of Rain Bar he appeared to have consumed alcohol and though the complainant offered to drive the car the applicant ignored him and drove the car himself. Thereafter, the applicant and his friend went to other hotel viz., J.W.Marriot and the applicant and his friend came out of the same at 2.15 a.m. and started driving the car in a high speed. The complainant cautioned the applicant not to drive the car in a high speed. The applicant ignored the complainant. The complainant in his second statement has also stated that about 15 days prior to the said incident on two to three occasions, the applicant had driven at a very high speed and at that time also the complainant had cautioned the applicant to drive slowly. However, the applicant did not pay any heed to the advice given by the complainant. Finally, in the second statement the complainant has stated that when they approached near St. Andrew's road the complainant warned him that they have to take right turn and the applicant should drive the car slowly. At that time also the applicant did not pay any heed and while attempting to take right turn he lost control of the car and the car rammed into the shop as a result of which one person died and four persons were injured. Initially the complaint was lodged u/s 279, 337, 338 and 304A of I.P.C. In the first statement which was lodged by the complainant he has stated that the applicant was driving the car in a rash and reckless manner and in the additional statement which is recorded he has stated that if the applicant had listened to his advice the said incident would never have happened.

15. In order to decide whether the present act as stated by the complainant would constitute an offence u/s 279, 337, 338 and 304A as initially described by the police or u/s 304 part II which was subsequently added by the police, it will be relevant to consider the meaning of the term rash, negligence and reckless. The word "RASH" is defined by Oxford, Webster and Strouds Judicial Dictionary as follows:-

OXFORD DICTIONARY

"RASH": hastily, impetuous, overbold, reckless, acting or done without due consideration.

"NEGLIGENCE": Lack of proper care or attention, carelessness, freedom from restraint or artificiality in literature of art;

"RECKLESS": lacking caution, regardless of consequence, rash, heedless of danger etc.

WEBSTER'S DICTIONARY

"RASH": acting too hastily or without due consideration; characterized by or showing too great haste or lack of consideration.

"NEGLIGENCE": The state or fact of being negligent; neglect; negligence in discharging one's responsibilities. Law: the failure to exercise that degree of care which under the circumstances, the law requires for the protection of other persons or those interests of other persons which may be injuriously affected by the want of such care.

"RECKLESS": Utterly unconcerned about the consequence of some action; without caution; careless.

STROUD'S JUDICIAL DICTIONARY

"RECKLESSLY": (Road Traffic Act, 1972 (c.20) Section 1, 2 substituted by Criminal Law Act, 1977 (c.45) Section 50(1). The test to be applied is that to be "reckless", a person must be driving knowing that there is a risk that a serious accident may result if he drives in a certain way, but drives in that way nevertheless, *R.v.Clancy* [1979] R.T.R. 312; *R.v.Davis* [1979] R.T.R. 316; *R.v.Wheeler*, January 25, 1978, Newport Crown Ct. There has to be an objective judgment as to whether the driving occurred in the face of obvious and material dangers which a competent and careful driver should have observed, appreciated and quarreled against *Allan v. Patterson* [1980] R.T.R. 97. In *R.v.Murphy* 1980 Q.B. 434 the Court of Appeal laid down the test for determining whether a motorist is guilty of driving recklessly within the meaning of these sections. A motorist is guilty of driving "recklessly" if he deliberately disregards the obligation to drive with due care and attention, or is indifferent as to whether or not he does so, and thereby creates a risk of an accident which a motorist driving with care and attention would not create. Whether a motorist achieves the standard of driving which a prudent and careful driver would observe is a question for the jury bearing in mind all the circumstances and, particularly, the risk of accident. But in *R.v.Lawrence* [1982] A.C. 510 the House of Lords criticised this test as being incorrect in some respects and decided that *Mets Rex* is involved in the offence of reckless driving, and that the mental element is that, before adopting a manner of driving which in fact involves an obvious and serious risk to others, the driver fails to give any thought to that possibility or,

having thought of it, and recognised the risk, decides to take it. Retaliation against the bad and ill mannered driving of another person is no defence. (Jarvis v. Norris 1980 R.T.R. 424.

16. If we consider the scheme of Chapter XIV we find that it relates to offences relating to public health. The crucial offences are described in chapter XVI which speak about offences affecting human body in which 304A has been added subsequently which covers cases where death is caused as a result of rash and negligent act. Section 299 however, deals with an offence which is punishable either for committing murder as defined u/s 300 or culpable homicide not amounting to murder which is punishable u/s 304 part II.

17. From the perusal of the provisions mentioned hereinabove, it is apparent that Section 304A carves out a specific offence where death is caused by doing rash or negligent act and that act does not amount to culpable homicide u/s 299. Section 304A in view of this definition excludes ingredients of Section 299. In the light of the above provisions, the facts of the present case will have to be examined. The submissions of the learned Counsel for the applicant will have to be accepted. Shri Gupte the learned Counsel for applicant has relied upon number of judgments of the Apex Court wherein it has been held as to which acts would constitute an offence u/s 304A of the I.P.C. He has also relied upon judgment in the case of State of Gujarat Vs. Haidarali Kalubhai, . In the said case the facts were that the accused who did not possess licence drove a truck in an open field near highway, with headlights on in full speed, was unable to control the vehicle while taking a turn to get into a kaccha road. In the process he hit a cot at the turning point. The deceased was resting on the cot outside a hotel adjoining the open field. The impact threw the deceased out of the cot resulting in injuries which ultimately led to his death. Two constables who were also resting on a cot near the cot of the deceased, jumped from the cot and escaped. The deceased could not do so in spite of being alerted by constable. The Apex Court in para 10 and 11 observed as follows:-

10. Section 304A by its own definition totally excludes the ingredients of Section 299 or Section 300, I.P.C. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304A has to make room for the graver and more serious charge of culpable homicide. Does this happen in this case?

11. The tangential track of the speeding truck coming in contact with the corner of the steel cot throwing it over the wooden cot and thereby throwing the deceased out of it resulting in fatal injuries, would not reveal the accused's intention or any deliberate act with the requisite knowledge for an offence of culpable homicide. The facts and circumstances disclosed in this case fit in more reasonably with the theory of loss of control by the accused of the vehicle in high speed trying to take a turn for the kutchra road.

17. In the facts of the present case also the complainant in his statement has stated that the accused was driving at a high speed and while trying to take a turn he lost control of the vehicle and he rammed the car into the shop and as a result one person who was sleeping on the staircase of the shop was killed and four others were gravel injured. In my view, from the statement of the complainant itself it is clear that the said act happened when the applicant was trying to take a turn at a high speed. Even if the subsequent statement of the complainant is accepted as true, that the applicant was cautioned to drive the car slowly, and in spite of that the applicant ignored the warning and as a result the accident took place even then, it cannot be said that ingredient of Section 304 part II are attracted, as the said act would clearly fall within the definition of a reckless and negligent act not done without any premeditation. In my view, the ratio laid down by the Apex Court in the case of Haidarali (supra) in para 10 would be squarely applicable to the facts of the present case. Thus, even without appreciating the evidence on merits by looking at the statement made by the complainant, who was also an eye witness to the said incident, provisions of Section 304 part II, my view are not attracted. Once the court comes to the said conclusion, then framing of a charge against a person which from the facts of the case clearly shows that the ingredients of the said offence are absent. It would clearly be illegal as framing of a charge affects a persons liberty substantially and, therefore, it is essential to consider the material available before the court before framing of the charge. The submissions made by the learned A.P.P. therefore, will have to be negatived. The submission of the learned A.P.P. that because the applicant had the knowledge of the topography of the place and also had the knowledge that because he was driving the vehicle at a high speed, it would result in an accident, the provisions of Section 304 part II are clearly applicable is not acceptable. In my view, a very fine distinction will have to be drawn regarding the knowledge of an act which results in the death of a person. In my view, if a person drives a vehicle at full speed, into the midst of the crowd and thereby causing death of a person, such an act would squarely fall within the four corners of Section 304 part II. If a person drives a vehicle on a footpath in full speed and kills the pedestrians such an act would squarely fall within four corners of Section 304 part II or for that matter if a person enters a lane knowing that there is no entry in the lane and knocks down a person it may attract the provisions of Section 304 part II. However, in the instant case, the applicant was driving his vehicle on the road and while executing a turn he lost control and his vehicle rammed into a shop and a persons sleeping on the staircase of the shop was killed and four others are injured. The statement of the complainant is self-eloquent wherein he says "while our car was coming from St. Andrew's Road and after the road was over while it was going towards Hill Road on the right side while taking a turn, because the car was in a high speed, the person driving the car viz., the applicant lost control of the car and it dashed on the shop which was situated near the junction and the person who was sleeping on the staircase of the shop was crushed to death and four others were injured." In my view, therefore, the submissions of the learned A.P.P. cannot be accepted

that this question of framing of charge u/s 304 part II will have to be decided at the stage of the final hearing and not at this stage. In this case, the offence u/s 304 part II was subsequently added after public interest litigation was filed and there was a public outcry and the State Government on its own decided to add 304 part II along with other sections. In my view, merely because there was public outcry, an offence which is a graver offence cannot and should not be added because a section of public at large feels that accused should be punished for graver offence. The learned Counsel appearing for the intervener has submitted that the applicant has been acting recklessly in the past and has also been tried for killing of a black buck which is an endangered specie and that in spite of these circumstances, he has continued to act in a reckless manner. In my view the past conduct of an accused would not be relevant for the purpose of charging him with a graver offence. The learned Counsel for the intervener fairly conceded that merely because there is a public outcry, the court should not be carried away and that should not be an additional factor which would weigh with the court while framing charge against the accused.

18. In my view, if the submissions which are made by the learned A.P.P. are accepted, then in almost all the hit and run cases charge u/s 304 part II will be framed against the accused and it can be argued that ultimately at the final hearing of the said case the accused can argue that offence u/s 304 part II cannot be framed. It is not doubt true that the punishment which is prescribed for commission of an offence u/s 304A is only two years with fine. It may appear that punishment which is prescribed for causing a death of a person is less stringent. However, it is for the Legislature to decide the term of sentence and it is the duty of the court to examine whether incident in question falls under category A or category B, without being influenced about the sentencing pattern as prescribed in the statute. In my view from the definition of the word "Rash", "Reckless" and "Negligent" as mentioned hereinabove, the present action prima facie would fall under the category of rash, reckless and negligent driving and, therefore, provisions of Section 304A and the other sections viz., Sections 279, 337, 338, 427 would be applied and not Section 304 part II. The learned Counsel for the applicant though has relied upon number of authorities wherein the Apex Court after considering the evidence on record has arrived at a conclusion that the said act falls under provisions of Section 304A I.P.C., in my view the said judgments would not be relevant for the purpose of deciding the present issue as in those cases, the Apex Court had come to the said conclusion after the evidence was adduced by the prosecution.

19. The next question which falls for consideration is whether this Court should interfere with the order framing of charge which was passed by the sessions court which has exercised its power as prescribed u/s 227 and 228 of the Cr.P.C. The relevant provisions of Cr.P.C. are reproduced herein below -

227: Discharge: If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the

accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

228: Framing of charge - (1) If, after such consideration and hearing as aforesaid the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of sessions, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused;

(c) where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

20. The learned A.P.P. for State has relied upon number of judgments of the Apex Court wherein the Apex Court has laid down as to what would be the test of prima facie case. The learned A.P.P. has relied upon a judgment in the case of State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., . In the said case in paras 31 and 32 the Apex Court has observed thus:-

"31. Let us note the meaning of the word "presume". In Black's Law Dictionary, it has been defined to mean "to believe or accept upon probable evidence". (emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming". Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony as to the truth of a fact alleged." In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at p.1007 of 1987 Edn."

32. The aforesaid shows that if on the basis of material on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

It was therefore, submitted that if there are prima facie grounds to believe that the accused might have committed an offence, then the court can frame the

charge because at the stage of framing of the charge the probative value of the material on record cannot be gone into. The learned A.P.P. has also relied upon the case of Mohd. Akbar Dar and Others Vs. State of Jammu and Kashmir and Others, wherein the Apex Court held that the High Court need not enter into meticulous consideration of evidence and material at the stage of framing of charge. The learned A.P.P. has further relied upon a judgment in the case of State of Bihar Vs. Ramesh Singh, wherein the Apex Court has laid down that test as to circumstances which the Court has to consider while framing the charge. It would be relevant to note the observations of the Apex Court made in para 4 which are as follows:-

".....An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order u/s 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one u/s 228 and not u/s 227."

5. In Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, , Shelat J., delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 "that the test was whether there were sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused." Illustratively, Shelat J., further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case."

21. The learned A.P.P. has also relied upon a judgment of the Supreme Court in the case of Jaspal Singh Vs. State of Punjab, wherein the Apex Court had come to the conclusion that an offence u/s 304 part II of the I.P.C. was made out in a case where a victim was run over by a cart driven by the accused and death was caused by rupture of bladder as a result. She has also relied upon the judgment of the Apex Court in the case of State of Gujarat Vs. Haidarali Kalubhai, wherein the Apex Court has held that when a person willfully drives a vehicle into midst of the crowd and thereby causes death of some persons it would not be a case of mere rash and negligent driving and the act would amount to culpable homicide. She has also relied upon a judgment of the Apex Court in the case of Radhey Shyam Vs. Kunj Behari and Others, wherein the powers of the High Court while

quashing the charge have been considered in para 8 and 9 and in the facts of the said case, the Apex Court has come to the conclusion that there was no warrant for the High Court to quash the charge against the respondents 1 to 3 in exercise of its powers u/s 482 of Cr.P.C.

22. There cannot be any dispute regarding ratio laid down by the Apex Court in the case of *State of Maharashtra v. Som Nath Thapa* (supra) as also *State of Bihar v. Ramesh Singh* (supra). In both these cases, the Apex Court has laid down the criteria which has to be taken into consideration while considering the question of framing of charge and the Apex Court has held that while framing a charge though there may be suspicion in the mind of court that the accused might have committed the offence, then even on the said suspicion charge has to be framed and the test which would be applicable while framing of charge and while considering and appreciating the evidence on record, at the time of final hearing of the case would be different. There cannot be any dispute regarding the said ratio settled by the Apex Court. However, in the facts and circumstances of the present case, in my view, even if the complaint of the complainant is taken as true, even then the case u/s 304 part II is not made out. In my view, the ratio of the Apex Court in the case of *Haidarali* (supra) would be clearly applicable to the facts of the present case and in such a situation this Court will have no alternative but to interfere with the order of framing of the charge passed by the sessions court and hold that the charge which is framed u/s 304 part II is not justified.

23. So far as the judgment of the Apex Court in the case of *Jaspal Singh* (supra) is concerned, in my view the ratio would not be applicable to the facts and circumstances of the case. In the said case, the accused *Jaspal Singh* drove the cart over the body of the deceased deliberately and as a result the wheels of the cart went over the abdomen of the deceased and the victim died as a result of rupture of bladder. However, before driving the cart over the victim, the accused had assaulted the victim and, thereafter, he drove the cart over him. The facts of the said case, therefore, are entirely different and there was clearly a knowledge on the part of the accused in running the cart over the abdomen of the deceased and, therefore, under those circumstances, the accused was convicted u/s 304 part II.

24. So far as the judgment in the case of *Mohd. Akbar Dar* (supra) is concerned the Apex Court has held that the High Court need not enter into meticulous consideration of evidence at the stage of framing of charge. There cannot be any dispute regarding the said ratio of the Apex Court. In the present case, by taking into consideration the case of the complainant as it is, in my view, the offence u/s 304 part II is not made out. At this stage, it would be relevant to refer to the judgment of the Apex Court in the case of *Keshub Mahindra Vs. State of M.P.*, wherein the Apex Court has quashed the charge which was framed against the accused u/s 299 and 304 part II. In the case, which is known as *Bhopal Gas Tragedy*, there was leakage of highly toxic MIC gas from the storage tank of

Bhopal Plant of Union Carbide India Ltd., resulting in enormous loss of human lives, permanent/temporary injuries or total/partial disablement as also loss of cattle lives. In the said case charges were framed against personnel of the company who were actually handling the plant i.e. Assistant Works Manager, Production Manager, Plant Superintendent, Production Assistant u/s 304 part II, 326, 324 and 429 of I.P.C. and against the Chairman/Managing Director and Vice President in charge of the plant u/s 304 part II, 326, 324, 429 read with 35 of the I.P.C. The Apex Court taxing into consideration the inherent powers of the High Court u/s 482 of Cr.P.C. by relying on the earlier decisions of the Apex Court which the Apex Court has given has in para 14 has observed as follows:-

"14. It is also well settled that while exercising jurisdiction u/s 482 Cr.P.C. when the High Court is called upon to quash the charge pursuant to which proceedings at the stage of trial are pending and even when the High Court is called upon to quash proceedings pursuant to complaint, only a prima facie appraisal of the allegations made in the complaint and the material in support thereof has to be done and the court has no jurisdiction to go into the merits of the allegations as that stage would come when the trial proceeds. In this connection we may usefully refer to a judgment rendered by a Bench of three learned Judges of this Court in the case of State of U.P. v. O.P. Sharma. Relying on earlier decisions of this Court the Bench in the aforesaid case made the following pertinent observations in paragraph 11 and 12 of the Reports (SCC pp.709-11, paras 11-12).

The question then is: Whether the High Court is right in its exercise of inherent power u/s 482 Cr.P.C.? This Court in State of H.P. v. Pirthi Chand held as under: (SCC pp.44-45, paras 12-13).

"It is thus settled law that the exercise of inherent power of the High Court is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the FIR/chargesheet/complaint. In deciding whether the case is rarest of rare cases to scuttle the prosecution in its inception, it first has to get into the grip of the matter whether the allegations constitute the offence. It must be remembered that FIR is only an initiation to move the machinery and to investigate into cognizable offence. After the investigation is conducted (sic concluded) and the charge-sheet is laid, the prosecution produces the statements of the witnesses recorded u/s 161 of the Code in support of the charge sheet. At that stage it is not the function of the court to weigh the pros and cons the prosecution case or to consider necessity of strict compliance of the provisions which are considered mandatory and its effect of non-compliance. It would be done after the trial is conclusion. The court has to prima facie consider from the averments in the charge sheet and the statements of witnesses on the record in support thereof whether court could take cognizance of the offence on that evidence and proceed further with the trial. If it reaches a conclusion that no cognizable offence is made out, no further act could be done except to quash the charge sheet. But only in exceptional cases, i.e., in rarest of rare cases of mala

fide initiation of the proceedings to wreak private vengeance process of criminal is availed of in laying a complaint or FIR itself does not disclose as all any cognizable offence -- the Court may embark upon the consideration thereof and exercise the power."

In State of Bihar v. Rajendra Agrawalla this Court observed as under:- (SCC p.166 para 5)

"It has been held by this Court in several cases that the inherent power of the court u/s 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out...."

Keeping in view of aforesaid well-settled limited jurisdiction regarding the permissible scrutiny of the prosecution case as revealed from the charge-sheet and the material supporting the same for framing charges against the present accused we will now proceed to examine the available material on record of the case which has resulted into the framing of the impugned charges against the appellant - accused."

25. The Apex Court in the said case came to the conclusion that the charge sheet framed u/s 304 part II, 326 and other sections will have to be altered and the charge u/s 304A read with 35 I.P.C. was directed to be framed.

26. In view of the ratio laid down by the said case, this Court can exercise its inherent jurisdiction u/s 482 Cr.P.C. and in a given case can quash and set aside the charge which is framed by the trial Court.

27. In the result, the Criminal Application is allowed. The order passed by the Sessions Court framing charge u/s 304 part II against the applicant is quashed and set aside. The other charges, however, will not be altered and the accused be tried as per the provisions of law by the appropriate Court for the remaining charges. The appropriate court will frame the remaining charges viz., Section 304A, 279, 357, 338, 427 of I.P.C. read with 130(1), 134 (a) and (b), 177, 181(3) of the Motor Vehicles Act as also u/s 66(1)(b) of the Bombay Prohibition Act.

28. In view of the order passed above, the intervention application does not survive and the same is disposed of accordingly.

29. This Court while allowing the petition expresses its gratitude for the able assistance provided by the learned A.P.P. Smt. Kantharia who has taken pains to

do research while assisting this Court with the numerous judgments.