
(1980) 02 BOM CK 0022

In the Bombay High Court

Case No : Criminal Revision Application No. 503 of 1979

Yamunabai Ghandharrao Sadaphal

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 08-02-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 401(3), 540
Evidence Act, 1872 — Section 165
Motor Vehicles Act, 1939 — Section 116
Penal Code, 1860 (IPC) — Section 279, 304A, 338

Citation : (1980) 02 BOM CK 0022

Hon'ble Judges : R.S. Bhosale, J

Bench : Single Bench

Advocate : Narendra Chapalgaonkar, for the Appellant; J.A. Barday and V.T. Walawalkar and G.N. Kini, for the Respondent

Judgement

R.S. Bhosale, J.—One Yamunabai Gangadharrao Sadaphal, widow of deceased Gangadharrao, who died in an accident on 28th November, 1977, as a result of collision between a fiat Car No. MRH 9101 and a motor cycle bearing No. MXP 6048 has filed this criminal revision application against the order of acquittal passed by the learned Judicial Magistrate, First, Class, Rahuri, acquitting one Abhaya Mahabal Divekar, the original accused in the said case. The police had filed the charge-sheet on 28th February, 1978 against accused respondent No. 2. herein, for having committed offences punishable under sections 304(A), 338 and 279 of the Indian Penal code read with section 116 of the Motor Vehicles Act. It was the prosecution case in the trial Court, as is disclosed from the charge-sheet, (Exh. 1) that on 28th November, 1977, between 1.00 and 2.00 p.m., the accused had driven his fiat Car No. MRH 9101 rashly and negligently on the Nagar Road within the limits of Dhamori Shivar (about seven miles from Rahuri) and dashed against motor cycle No. MXP 6048. It was also the prosecution case against him, that as a result of such negligent and rash driving on the part of the accused, the passenger on the motor cycle, one Gangadharrao Sadaphal had

died and the two other co-passenger who were travelling along with the deceased Gangadharrao were injured and one of them viz., Bajirao Dhondiba had sustained grievous hurt.

2. From the first information report (Ex. 20) lodged by Police Head Constable Krishna Sakharam (P.W. 3) it is clear he came to know about the accident in question when he was directed by Police Jamadar Patel to register the offence and investigate the same. In the first information report, he has discerned the nature of the accident and the name of the accused as well as the name of the deceased and those of the injured witnesses. Police Head Constable Krishna Sakharam, after drawing the panchanama of the scene of the offence (Ex. 10) also held inquest panchanama (Ex. 21) in respect of the deceased, Gangadharrao. Thereafter, he got both the vehicles examined by the R.T.O. He, thereafter, filed the charge-sheet. He handed over investigation on 29th November, 1977 to Police Sub-Inspector Khurmale.

3. With the assistance of the learned Counsel for the Petitioner, Mr. Narendra Chapalgoanker and the learned Counsel. Mr. V.T Walawalkar for Respondent Divekar and the learned Public Prosecutor, J.A. Barday, I have gone through the entire record and I am constrained to observe that not only this case has not been, properly handled by the prosecuting agency but there are ground to believe that the infirmities which remained in the prosecution case are not merely accidental. It is surprising that when the offence came to be registered on 29th November, 1977 by Police Head constable Krishna Sakharam and when thereafter, panchanama of the scene of offence and inquest panchanama came to be drawn on the same day, he has not recorded the statement of the two witnesses injured in the accident. His first information report makes it clear that names of the two witnesses who were injured were known to the Police Head Constable at the time of giving his first information report on 29th November, 1977 itself. The prosecution has not explained nor has the Police Head Constable Krishna Sakharam deposed as to why the statement of the injured witnesses were not recorded earlier on 28th January, 1977. It seems from the record that these statement of the two injured persons, i.e Bajirao and Damodhar were recorded by P.S.I. Khurmale on 28th January, 1978. But this is not all. This is only the beginning of a rather systematic plan on the part of the prosecution to keep away these two important witnesses who could have thrown light on the manner of the accident that took place.

4. As stated earlier, the charge-sheet came to be filed on 28th February, 1978 and the Learned trial Magistrate framed the charges on 17th March, 1978. After framing the charge, the accused pleaded not guilty and the learned Magistrate fixed the next day for examination of witnesses. In order to find out whether the learned Assistant Public Prosecutor has made any effort to get summonses served on these two important witnesses. I have scrutinised the entire record and after going through it, I am constrained to observe that the Learned Assistant Public Prosecutor had not discharged his duties properly. He knew that

these two witnesses were the important witnesses who ought to have been examined during trial, if not at the initial stage of the proceedings. Unfortunately, after examining carefully the entire record of the case, a conclusion is irresistible that the prosecution has made no effort to bring these two witnesses before the Court. The prosecution has not made any effort whatsoever to have summonses served on these two important witnesses. In this context, the *roznama* and the application on the record make an interesting reading. After the charge was framed on 17th March, 1978, the learned Magistrate seems to have vaguely ordered ""summoned to issue"" on 9th May, 1978. Again, on 15th May, 1978, he has further orders ""summonses to issue."" I both of these endorsements, it is not clear as to which of the prosecution witnesses were to be served with summonses. The prosecutor also does not seem to have made any application on the record asking summonses to be served on these two witnesses specifically. In absence of any indication otherwise, it is to be presumed that these endorsement ""summonses to issue"" mean , summonses against all the witnesses mentioned in the charge-sheet. Then again, I find that on 16th October, 1978, one witnesses was examined. On the same day, he filed an application to the effect that on witness was examined and other witnesses were not present. He does not say that these two witnesses who were eye-witnesses, to the incident were served with summonses and that those summonses were returned unserved. There is vague endorsement on 14th November, 1978 that the witnesses" summonses were received unserved and further requesting for mote time. It may be observed that this endorsement by the learned trial Magistrate is meaningless, because it witnesses" summonses were received unserved, the summonses would have indicated to which witnesses summonses were attempted to be served. In absence of such documentary evidence on the record, the endorsement to the effect that summonses received unserved is misleading. On 26th December, 1978, again there is a vague endorsement ""issue summonses"". Again, on 5th February, 1979, there is another endorsement witnesses" summonses returned unserved issue summonses"".

5. I am doubtful about these two endorsements, dated 14th November, 1978 and 5th February, 1979 as to whether these two witnesses were ever attempted to be served with summonses at all. There are two indications in the record itself, for reaching this conclusion that if summonses were attempted to be served they would have been returned unserved.

6. These summonses will be returned with such endorsement and would be part of the record. Normally, there is also report of the police constable, if efforts were made to serve summonses to witnesses, to the effect that witnesses were wither not found or summonses could not be served and secondly, that if the summonses were sent by registered A.D. and if the witnesses were not served, then the registered packers would have been received back and would also be part of the record. In fact, there is one registered packet addressed to one of the witnesses who was to be examined as panch witness and registered packet was returned as he could not be served. Further on 15th June, 1978, witnesses"

summonses were issued to four witnesses viz.

1. P.S.I of Rahuri Police Station, V.M. Khurmale, who took over investigation on 29th November, 1977;
2. Krishna Sakharam, who was examines as P.W. 3;
3. Sayyad Hamid, P.W. 2; and
4. Sakharam Shankar, P.W. 1.

These summonses were served on these persons and the original summonses are on the record.

7. Therefore, of the summonses were duly served on the two injured persons, the original copies of the summonses would have been on the record. In absence of any such Indication of either copy of the summons or registered packet being on the record, it is difficult to hold that summonses were ever issued to the two important witnesses who were injured in the accident. What is more important is that P.S.I. Khurmale, who has recorded statements of the witnesses has not entered into the witness box. Then, on 19th March, 1979, Sayyad Hamid (P.W. 2) was examined as panch witness. On the same day, (P.W. 3) Police Head Constable Krishna Sakharam was examined and application was made by the prosecutor that two witnesses were examined, summonses were issued to other witnesses but they do not appear to be present. He has not attach with his application a copy of the summons with endorsement of the constable that witness could not be traced or could not be served. Whenever witness is served with a summons by a by a registered post, there is an endorsement on the summons to that effect pages 29 and 31 of the record show that summonses were served to witnesses who were examined as panch witnesses. These witnesses have signed in token of having received summonses. Therefore, the other documents on the record indicate that whenever a witness was served with summons, copies of summonses were returned and they become part of the record of the case.

8. In this context, it is inconceivable that of the summonses were served on two injured persons, Bajirao and Damodhar, copies of the same would not be on the record. It is further inconceivable that if they were served they would not have come to the Court to give evidence because according to the prosecution, Bajirao had sustained a grievous hurt and he would have certainly deposed the manner in which the accident took place as a result of which deceased Gangadharrao had also died. A systematic attempt seems to have been made, if one reads between the lines of the roznama, to keep back these two persons from the Court. It is surprising that the Learned Assistant Public Prosecutor chose to examine the panch as the first witness and did not care to have the summonses served on the two important injured witnesses. It is further strange that the Police Sub-Inspector who investigated the case from 29th November, 1977, in spite of having received summons, did not think it fit to enter the witness box. There is

no explanation as to why statement of these two injured persons came to be recorded as late as on 28th January, 1979 when most of the investigation was completed on 28th November, 1971 itself. It is not the case witnesses were not available. It is evident from the first information report of Police Head Constable Krishna Sakharam that these two witnesses were injured and that they could be available with ordinary effort on the part of the Police Head Constable. It is not clear as to why P.S.I. Khurmale after having taken over investigation from H.C Krishna Sakharam from 29th November, 1977 did not record statements of two injured persons, Bajirao and Damodhar, till 28th January, 1979. If all these facts are carefully considered, I cannot help observing that neither investigation nor conduct of the prosecuting agency is above suspicion. In a case where a person has lost his life as a result of an accident and one person has sustained a grievous hurt and the third is injured, the police officer, P.S.I. Khurmale has committed a serious omission on his part in discharge of his duties in recording the statements of these persons so late and also in not giving evidence in the trial Court. No explanation is coming from the prosecution side and this must be viewed seriously. The conduct of the Assistant Public Prosecutor in not making a specific application for summonses to be served on these two persons must also be viewed seriously. He ought to have known that the evidence of eye-witnesses was of vital importance and he should have chosen to examine these two persons first. He does not seem to have made any serious effort to have served summonses on these two important witnesses. In fact, it seems to me that instead of making an effort to examine them, effort has been made not to examine these two injured persons. This is highly improper on the part of the Assistant Public Prosecutor, in-charge of this prosecution.

9. The fact that the police officer, P.S.I. Khurmale and the Assistant Public Prosecutor did not perform their duties properly did not mean that the Learned Magistrate should have been an idle spectator and should have gone on making vague enforcements ""issue summonses"". The Learned Magistrate should have observed that it was a case where evidence of two persons who were injured were not recorded and instead of inquiring with the prosecutor, the Learned Magistrate seems to have gone on issuing vague orders "issue summonses"". He ought to have found out as to why these witnesses were not summoned. In any case, the Learned Magistrate was not powerless. He had sufficient power under the provisions of the Code of Criminal Procedure to summon material witnesses and examine, if their evidence appeared to be essential to the just decision of the case.

10. Section 311 of the Code of Criminal Procedure reads as follows :---

"" Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or recall and re-examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if this evidence appears to it

to be essential to the just decision part of the case""

(Emphases supplied).

11. The second part of this section is mandatory and compels the Court to take any of the steps mentioned in, if the evidence of such witnesses appears to be essential to the just decision of the case. There is also no limitation at what the Court can examine such witnesses. He can examine such a witness any stage before pronouncing his judgment.

12. In the context of the circumstances narrated above. It is difficult to see how the Learned Magistrate could have come to any other conclusion that to hold that the evidence of these two witnesses was absolutely necessary for the just decision of the case.

13. Provisions of section 311 of the Code of Criminal Procedure 1973 are on pari materia with provisions of section 540 of the Code of Criminal Procedure 1898. This section has been interpreted by the Supreme Court more than once but a decision to the point and relevant to the facts of this case is reported in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, where the Supreme Court has held as follows :---

""Section 540 Criminal Procedure Code and section 165 Evidence Act, between them confer a wide discretion on the Court to act as the exigencies of justice require. Section 540 is intended to be wide as the repeated use of the word "any" throughout its length clearly indicates.....and the other aspect namely of the power of the Court which is to be exercised to reach a just decision. This power is exercisable at any time and the Code of Criminal procedure clearly shows this"".

Their Lordship have referred number of decisions in other cases but it is not necessary to refer to all those cases in this context.

14. As has been observed in the said judgment, the power under the second part of this section is in absolute terms and can be exercised by the trial Court to examine a witness and makes this duty and obligation on the part of the Court, provided the just decisions of the case demands it. If the prosecution has failed to examine the material injured witnesses, in my opinion, it was the duty of the Court to examine these two witnesses u/s 311 of the Code of Criminal Procedure because such evidence was very essential to the just and proper decision of this case. I cannot help observing that even the learned trial Magistrate has failed in his duty in not examining injured persons who were really material witnesses.

15. It is true that this is a criminal revision application and it is well settled that ordinarily in its revisional jurisdiction, the High Court should not interfere with the order of acquittal passed by the trial Court, The High Court can exercise its revision jurisdiction in an order of acquittal passed by the trial Court in exceptional circumstances to prevent gross miscarriage of justice or set right a patent wrong or error which would otherwise cause irreparable injury.

16. The Supreme Court has laid down guidelines as to when the High Court should interfere in orders of acquittal in its revisional jurisdiction in more than one decisions as in *K. Chinnaswamy Reddy Vs. State of Andhra Pradesh*, . The Supreme Court indicated some of the case in which the High Court would be justified in interfering with the finding of acquittal passed by the trial Court. It may be said that those categories mentioned by their Lordships in the said decision are merely illustrative and there may be other cases of similar nature. In this particular case, in my opinion, there is gross miscarriage of justice and it is necessary in the interest of justice to interfere with the order of acquittal passed by the trial Court because in this case, the prosecution had deliberately not produced the evidence which was not only material but vital for reaching just and proper decisions of the case. The Learned Judge also had not exercised his jurisdiction vested in him u/s 311 of the Code of Criminal Procedure to examine such material witnesses for reaching the just decision of the case. In my opinion, therefore, this is a case of exceptional nature where the High Court can justifiably interfere with the order of acquittal. I must also state that in view of the conclusions which I have reached in the above paragraphs, I have to order retrial of this case and when the case is retried, both the prosecution and defence will be entitled to produce all the evidence on which they wish to rely upon and which is material and relevant in this case. I must make it very clear that these observations do not affect merits of the case. After recording the entire evidence produce produced by the prosecution and the defence it would be open to the Learned Magistrate to decide the matter on the basis of the evidence. There is no attempt to do anything indirectly what could not be done directly u/s 401(iii). The prosecution will be entitled to examine material witnesses as also other witnesses which it has not examined. The defence will also be at liberty to bring such evidence as it will deem fit. I am expressing no opinion whatsoever on the merits of the case.

17. Before parting with the case. I am constrained once more to observe that the Assistant Public Prosecutor has not discharge his duties properly and in fact, he has made attempt either deliberately or negligently, to suppress the material evidence from the Court which has not only bearing on the case but was imperative and necessary to reach the just decision of the case. The Police Officer, P.S.I. Khurmale has also not recorded statements of the injured witnesses immediately even though he knew that they were available. Not only that, P.S.I. Khurmale did not enter into the witness box and give evidence on behalf of the prosecution.

18. A copy of this judgment should be forwarded to the Secretary to the Government of Maharashtra. Home Department and to the Inspector General of Police, Maharashtra State for proper inquiry and action as deemed fit against the Assistant Public Prosecutor who conducted the case and P.S.I Khurmale, attached to Rahuri Police Station at the relevant time.

19. In the result, the order if acquittal passed by the Learned Judicial Magistrate,

First Class, Rahuri in Criminal Case No. 60 of 1978 is set aside. The case is remanded back for retrial to the Judicial Magistrate, First Class, Rahuri according to provision of law. The prosecution will be at liberty to engage another prosecutor for conducting this case.

20. The rule, therefore, is made absolute.