

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 7 OF 2013

STATE

(Through P.I. Bicholim
Police Station, Bicholim, Goa.

.... Appellant

V/s

Shivanand Bishirotti,
S/o Hanumantappa,
35 years, Male, Indian,
Hindu, Driver,
R/o Bharatnagar IIrd
Class H. No. 62,
C/o Baswani, Madawali,
Belgaum, Native of Nerulkatti,
Tal. Dharwad,
Post Garag – Karnataka State

.... Respondent

Shri Mahesh Amonkar, Additional Public Prosecutor for the
Appellant.

Shri Arun Bras De Sa with Shri Siddesh Shet, Advocates for the
Respondent.

CORAM : C.V. BHADANG, J.

DATED : 30th JUNE, 2015

JUDGMENT :

By this appeal, the State is challenging the acquittal of
the respondent, from an offence punishable under Sections 279,
304-A of the Indian Penal Code (I.P.C., for short).

2. The facts necessary for the disposal of the appeal may be stated thus:

That the incident in question had occurred on 28.11.2004 at about 6:15 a.m. at Sastiwado, Bicholim, in front of the house of one Karapurkar. It is stated that now deceased, Dwarkanath Sirsat was going for a morning walk, when a truck bearing registration no. KA-22-C-8292 came from behind and gave a dash to Dwarkanath Sirsat, in which he sustained grievous injury. According to the prosecution, the deceased as well as the offending truck were proceeding from Assonora to Bicholim and it is claimed that the truck had gone to the right side and had given a dash to the deceased. The truck went ahead and stopped. The driver saw behind and on seeing that the deceased was lying on the road, fled away. Further, according to the prosecution, the accident was witnessed by PW-6, Deepak Shetkar and PW-7, Shambu Khanekar. It is stated that PW-7, Shambu Khanekar was proceeding on a scooter, whereas PW-6, Deepak Shetkar was a pillion rider on the said scooter and were behind the said truck. Both, PW-6, Deepak Shetkar and PW-7, Shambu Khanekar had witnessed the

occurrence of the accident and had noticed the registration number of the truck. It was claimed that these two witnesses had an occasion to see the driver, when the driver momentarily looked back, saw the deceased lying and fled away. It appears that the information about the accident was given by PW-7 Shambu Khanekar to Bicholim Police Station, where PW-12, Prakash Sinari, Head Constable, was Station House Officer. PW-12, Prakash Sinari, Head Constable gave information about the accident to Sanquelim and Keri outposts and requested them to detain the said vehicle, if found. He registered a M.V. Case No. 142/2004 and informed PW-14, P.S.I., Neenad Deulkar about the same. He then proceeded to the spot of the accident and drew a spot panchanama (Exhibit- 37). It appears that the vehicle being truck bearing registration no. KA-22-C-8292 was intercepted and detained at Keri outpost. According to the prosecution, the truck at the relevant time was driven by the respondent. It appears that the information about the accident also reached PW-1, Yogesh Sirsat, son of the deceased, who alongwith his sister, Dr. Anita Sirsat rushed to Primary Health Centre, Bicholim, where the deceased was taken. It was advised that the deceased be taken to G.M.C., Bambolim. According to

the prosecution, while the deceased was being carried from Primary Health Centre, Bicholim to G.M.C., Bambolim, the deceased narrated about the incident to PW-1, Yogesh Sirsat and also gave the number of the vehicle. The deceased also informed PW-1, Yogesh Sirsat that the accident is witnessed by PW-6, Deepak Shetkar and PW-7, Shambu Khanekar. The deceased was eventually declared dead on arrival at G.M.C., Bambolim. During the course of investigation, the Investigating Officer, PW-14, P.S.I., Neenad Deulkar, recorded the statements of the witnesses and on completion of investigation, a charge sheet came to be filed against the respondent.

3. It appears that substance of accusation was explained to the respondent, to which he pleaded not guilty. During the pendency of the case, an application was moved by the Police Inspector, C.I.D., Crime Branch, Dona Paula, Panaji, praying for grant of permission under Section 173(8) of the Code of Criminal Procedure, to conduct further investigation, which was allowed by order dated 21.04.2006. It appears that a supplementary charge sheet under Sections 279, 304-A of I.P.C. and Section 134(a) and (b) of the Motor Vehicles Act, 1988, was filed in the

matter. Thereafter, additional substance of accusation was explained for commission of offence under Section 134(b) of the Motor Vehicles Act, 1988.

4. At the trial, the prosecution examined as many as 17 witnesses and produced contemporary record of the investigation. The respondent did not lead any evidence.

5. The learned Magistrate, on consideration of the prosecution evidence, came to the conclusion that prosecution failed to establish its case beyond reasonable doubt. In the face of such finding, the respondent came to be acquitted. Feeling aggrieved, the State is before this Court.

6. I have heard Shri Amonkar, the learned Additional Public Prosecutor for the appellant and Shri De Sa, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the entire evidence and the impugned judgment.

7. It is submitted by Shri Amonkar, the learned Additional Public Prosecutor that there were three eye witnesses examined by the prosecution, namely, PW-6, Deepak Shetkar, PW-7, Shambu Khanekar and PW-13, John Gomes. It is submitted that the learned Magistrate could not have disbelieved the witnesses, particularly, when their evidence appears to be natural and one inspiring confidence. It is submitted that the evidence in such cases cannot be appreciated on mathematical precision and the same has to be appreciated on broad human probabilities. PW-13, John Gomes has stated that the accident occurred close to his house and he was curing (watering) a newly constructed shop, when he had witnessed the accident. It is submitted that the evidence of these witnesses could not have been discarded. The learned Additional Public Prosecutor has next submitted that PW-12, Head Constable, Prakash Sinari had intimated about the accident to Sanquelim and Keri outposts and the vehicle was intercepted and detained immediately thereafter. It is submitted that this will go to show that there is nexus established between the accident, the vehicle and the respondent-accused, who was found to be driving the vehicle. The learned Additional Public Prosecutor submitted that on the

following day i.e. 29.11.2004, a panchanama of the vehicle was drawn in which the right hand side, head light of the vehicle was found broken. The learned Additional Public Prosecutor was at pains to point out that PW-12, Prakash Sinari had noticed broken glass pieces at the spot, which would connect the vehicle with the accident. Insofar as the aspect of rash and negligent driving is concerned, it is submitted that the eye witnesses have specifically deposed that the vehicle had gone on the right side, giving dash to the deceased from behind and then gone to the left. It is submitted that as per the eye witness account, the deceased was walking on the right side of the katcha portion of the road and thus, the negligence of the respondent would be writ-large in the case. He therefore, submitted that the view taken by the learned Magistrate is either perverse or an impossible view. The learned Additional Public Prosecutor made a reference to the observations in paragraph 21 of the impugned judgment, while appreciating the evidence of PW-7, Shambu Khanekar. It is submitted that the observations are clearly in the nature of conjectures or surmises, when the learned Magistrate has disbelieved the evidence of PW-6, Deepak Shetkar and PW-7, Shambu Khanekar, that the driver looked back from the cabin

and then fled away. It is submitted that the observation that the driver could have stared at the rear view mirror is clearly misplaced. He therefore submitted that the judgment of acquittal needs to be set aside.

8. On the contrary, it is submitted by Shri De Sa, the learned Counsel for the respondent that the eye witness account in this case is totally improbable and untrustworthy. The learned Counsel would submit that admittedly, PW-6, Deepak Shetkar, PW-7, Shambu Khanekar and PW-13, John Gomes on their own saying were not knowing the respondent. They had allegedly a fleeting glimpse of the respondent, when it was claimed that respondent had looked back from the cabin before fleeing away. It is submitted that it was not the prosecution case, that the respondent had alighted from the truck, in which case the eye witnesses would have a better opportunity to see the respondent, so as to facilitate identification. The learned Counsel submitted that admittedly, no identification parade was conducted in this case and thus, identification of the respondent by the witnesses concerned for the first time before the Court, after lapse of four to five years is of no avail. It is submitted

that even assuming that the said truck was intercepted and detained at Keri outpost, it would not be sufficient to establish nexus between the vehicle and the respondent, in much as the identification of the respondent is not established on the basis of acceptable evidence. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Balbir Vs. Vazir and Others**, reported in **2014 ALL SCR 2520**, in order to submit that the scope of interference in an appeal of the present nature is quite limited. He submitted that in a case of acquittal, the presumption of innocence is strengthened and cannot be lightly interfered with. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **Raj Kumar Singh Vs. State of Rajasthan**, reported in **(2013) 5 SCC 722**, in order to submit that even strong suspicion, cannot take place of proof. It is submitted that view taken by the learned Magistrate on appreciation of evidence, is a plausible view, which need not be interfered with.

9. On hearing the learned Counsel for the parties and on perusal of the impugned judgment and evidence on record, I find that no case for interference is made out. The scope and ambit

of the power of this Court, while entertaining an appeal against acquittal is no longer *res intriga*. In the case of **Basappa Vs. State of Karnataka**, reported in **(2014) 5 SCC 154**, which was also, incidentally a case of prosecution under Sections 279, 304A of I.P.C., the Hon'ble Apex Court has considered the observations in its earlier judgment, in the case of **Chandrappa and others Vs. State of Karnataka**, reported in **2007 4 SCC 415**. In the case of **Chandrappa** (supra), in paragraph 42 it has been held thus:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

(1) An Appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an Appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) *Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an Appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.*

(4) An Appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the Trial Court."

10. In the case of **Raj Kumar Singh** (supra), the Hon'ble Apex Court has held thus, in paragraph 21 of the judgment:-

"21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between

"may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

11. These are the principles which have to be kept in mind while appreciating the evidence on record, in order to find out whether the view taken by the learned Magistrate is either perverse or one which can be branded as an implausible view. This is because even if two views are equally possible and the learned Magistrate has taken one, the Appellate Court would not be justified in substituting its view on the ground that it is more plausible. It is only when the view taken by the Court below is

either perverse or an impossible view, that interference is warranted.

12. Turning to the present case, the material evidence to be seen is that of eye witnesses, PW-6, Deepak Shetkar and PW-7, Shambu Khanekar and PW-13, John Gomes. PW-6, Deepak Shetkar and PW-7, Shambu Khanekar have deposed about having witnessed the accident as they were proceeding on a scooter, behind the truck. It has come in their evidence that PW-7, Shambu Khanekar was riding the scooter and PW-6, Deepak Shetkar was a pillion rider. They saw the truck bearing registration no. KA-22-C-8292, which was proceeding ahead of them. They have then stated about one pedestrian proceeding on the right side of the road. It is then deposed that the truck had given a dash to the pedestrian from behind. The truck went ahead and stopped. The driver looked back and then fled away alongwith the vehicle. Both of them have identified the respondent before the Court.

13. PW-6, Deepak Shetkar was cross examined on certain omissions vis-a-vis, the police statements. The omissions/

improvements which have come on record of this witness are that a pedestrian was walking towards Bicholim side and the said vehicle having gone on the other side, and having dashed the pedestrian. The further omission recorded is about the pedestrian walking on the katcha road. This witness had not described the driver of the vehicle in his statement before the police. He also stated that he was not knowing the deceased. The learned Magistrate has disbelieved the evidence of PW-6, Deepak Shetkar.

14. PW-7, Shambu Khanekar apart from his statement, had Lodged a complaint at Exhibit-51. This witness was cross examined with reference to the complaint (Exhibit-51). This witness has stated that he has not stated in his report that the truck after giving dash to the deceased had gone on the left side and having stopped a little ahead, the driver having looked behind and seeing that the pedestrian was fallen, having fled away with the vehicle. This witness has also stated that he has not given the description of the respondent to the police.

15. PW-13, John Gomes has stated that the accident occurred close to his house at about 6:00 to 6:15 a.m. This witness was curing (watering) a newly constructed shop, when he saw one truck coming from Assonora to Bicholim side in a zig zag manner. He saw the deceased Dwarkanath Sirsat walking from Assonora to Bicholim and as the truck gave dash to him, the deceased fell on the right side. He stated that the truck stopped near his house and the driver looked back and this witness went inside to make a call to the police. However, when he returned back he saw that the vehicle was not there. After sometime the an ambulance reached the spot and they shifted the injured. This witness also stated that one scooter rider and a pillion rider came from behind the truck and had seen the accident. The cross examination of this witness is significant. Before adverting to the same, it would be necessary to mention that sometime in the year 2007, PW-1, Yogesh Sirsat had reported that, in fact, this was not a case of accidental death, but was a planned murder of his father, as there was some dispute between the deceased and his brother. That matter was investigated by the Crime Branch. The statement of the witnesses including PW-13, John Gomes were recorded. PW-13,

John Gomes was cross examined in relation to the statement recorded on 21.06.2007, by the Crime Branch. This witness has stated that the Crime Branch has recorded three statements. He stated that he was called by the Crime Branch on three occasions at Dona Paula. He was made to sit outside for long hours and therefore, he told lies to them. He also admitted that before he could note down the number of the vehicle, the vehicle had already disappeared from the spot. He stated that he purposely did not give the number to the police as they were repeatedly asking the same questions. He stated that he was not aware if he had stated to the police in his statement on 21.06.2007 that the vehicle had stopped near his house and the driver had looked back. He also stated that he had removed the broken glass pieces which had fallen on the road and had given them to the police. His house is at a distance of about 15 metres from the spot of the accident. It was also suggested to him that it was about 70 metres from the spot, which he denied. From the overall reading of the evidence of this witness, I find that the same does not inspire confidence.

16. Then, we have the evidence of PW-1, Yogesh Sirsat, who has stated that on 28.11.2004, as usual his father had gone for a morning walk towards Assonora. At about 6:30 a.m., he learnt that his father had met with an accident at Sastiwado, Bicholim, near the house of one Karapurkar and his father has been shifted to Primary Health Center, Bicholim. He alongwith his sister Dr. Anita Sirsat went to the Primary Health Centre, Bicholim, from where they were advised to shift his father to G.M.C., Bambolim. The material evidence of this witness is that on their way to G.M.C., Bambolim, his father informed that he was dashed by a truck bearing registration no. KA-22-C-8292, which came from Assonora. His father also informed that Shambu Khanekar and Deepak Shetkar, who are from the same wada have witnessed the accident. On reaching G.M.C., Bambolim, his father was declared dead. This witness also lodged a complaint (Exhibit-34) of the accident on the same day at 17:05 hours, mentioning the name of the respondent, as by that time, the vehicle was intercepted. During the cross examination, this witness has stated that they had left the Primary Health Centre at about 7:00 to 7:30 a.m. and reached G.M.C., Bambolim at about 8:00 a.m. It is during the course of

this half an hours time, he states that the deceased has not only given the registration number of the vehicle, but also names of the witnesses who had allegedly witnessed the accident. It would be significant to note the manner in which the accident in question has occurred. The deceased was hit from behind when he fell on the road. PW-6, Deepak Shetkar and PW-7, Shambu Khanekar were following the truck. If the deceased was dashed from behind and had fallen down, it is inconceivable that the deceased could have noticed the registration number of the vehicle, as also the persons who have witnessed accident. It has come on record that PW-6, Deepak Shetkar and PW-7, Shambu Khanekar, were not knowing the deceased. Thus, it is highly improbable that the names of PW-6, Deepak Shetkar and PW-7, Shambu Khanekar were given by the deceased to PW-1, Yogesh Sirsat.

17. It appears that this witness had lodged another complaint of the incident, expressing suspicion that his father was murdered and it was not a case of accidental death. Significantly enough, in this complaint dated 06.07.2005, PW-1, Yogesh Sirsat has not mentioned the names of PW-6, Deepak

Shetkar and PW-7, Shambu Khanekar as eye witnesses. It was suggested to this witness that on investigation of this complaint, the C.I.D., Crime Branch had come to the conclusion that it was a false complaint, to which this witness only answered that, he suspected that his father was murdered and hence, he had lodged this complaint.

18. A brief reference to the evidence of PW-12, Head Constable, Prakash Sinari would be necessary at this stage. This witness had visited the spot and had drawn the spot panchanama. By the time, he reached the spot of accident, the deceased was already removed to the hospital. This witness has stated that he has neither noticed blood stains nor tyre marks or brake marks at the spot. The only significant thing that this witness has stated is that broken glass pieces of side light were found on the spot. This witness states that although, the broken glass pieces were mentioned in the panchanama, they were not shown in the sketch map. It was subsequently added by him, showing the broken glass pieces in the sketch map. He admitted that the signature of the panchas were not taken when additions/interpolations were made. He categorically admitted

that only after 03.03.2005, when P.S.I., Neenad Deulkar informed him about the broken glass pieces not having been shown in the panchanama, he added them in the sketch map. This witness admitted that he had not conducted the panchanama of the vehicle.

Thus, there is no evidence to connect the said broken glass pieces to that of head light/side light of the offending vehicle in question, although panchanama (Exhibit-81) only mentions that the side light cover of the vehicle was broken.

19. Even assuming for a moment that the nexus between the accident and the vehicle is established, it is difficult to see as to how the respondent can be connected with the accident. Admittedly, no official from the Keri outpost where, the vehicle was intercepted and detained been examined. Even on their own saying, PW-6, Deepak Shetkar and PW-7, Shambu Khanekar had only a short glimpse of the respondent, that too when he allegedly looked back from the cabin and then fled away. The exact distance from where this happened is not on record. Be that as it may, PW-6, Deepak Shetkar and PW-7, Shambu Khanekar and for the matter of that, PW-13, John Gomes, have

not given any description of the respondent, immediately after the accident, when their statements were recorded. In these circumstances, the identification of the respondent by these eye witnesses for the first time before the Court, after four to five years of the incident, in my considered view, is quite doubtful. The learned Magistrate has placed reliance on the decision of the Hon'ble Supreme Court, in the case of **Rabindra Kumar Pal @ Dara Singh Vs. Republic of India (AIR 2011, Supreme Court 1436)**, in order to hold that non-conduction of the identification parade in this case is fatal to the prosecution. According to the prosecution, the respondent was arrested on the same day, shortly after the accident and there is absolutely no reason for non-conduction of the identification parade. Undoubtedly, the identification before the Court is the substantive piece of evidence. However, when such an identification is by a person, who did not know the accused and particularly, when the opportunity of having seen the accused is either remote or is a fleeting glimpse, identification after lapse of four to five years would be doubtful, in the absence of test identification parade.

20. I have carefully gone through the impugned judgment of the learned Magistrate. The learned Magistrate has considered the relevant evidence and circumstances in holding that the prosecution has failed to prove the charge. The view taken by the learned Magistrate appears to be a plausible view.

21. In the result, no case for interference is made out. Accordingly, the appeal stands dismissed.

C. V. BHADANG,J

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