

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA No.D-1199-DB of 2014 (O&M)
Date of Decision: 23.07.2015.

Madan Lal Appellant.

Versus

State of Punjab and others Respondents.

CORAM: HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MR. JUSTICE GURMIT RAM

Present: Mr. Sandeep Arora, Advocate, for the appellant.

S.S. SARON, J.

The present appeal has been filed by Madan Lal, father of the deceased - Aman Kumar, against the acquittal of Rishu and Pawan Kumar (respondents No. 2 and 3) by the learned Additional Sessions Judge, Pathankot, in pursuance of his impugned judgment and order dated 20.05.2014, in case FIR No. 117 dated 25.10.2008 registered at Police Station Division No.1, Pathankot, for the offence punishable under Section 304 of the Indian Penal Code ('IPC' - for short).

Information was received by way of a medical slip by SI Bharat Bhushan (PW3) at Police Station Division No. 1, Pathankot, on 24.10.2008, regarding the death of Aman Kumar son of the appellant - Madan Lal. SI Bharat Bhushan along with HC Balwinder Pal reached Civil Hospital, Pathankot. The dead body of Aman Kumar was lying in the mortuary. No one, however, met the police officials as none was there. A report in this regard was recorded in the Daily Diary Register (DDR). SI Bharat Bhushan along with other police officials again went to Civil Hospital, Pathankot, on the next day i.e. 25.10.2008. He met Mukesh Kumar - complainant as also the father and maternal uncle of the deceased - Aman Kumar namely Madan Lal and Deepak Kumar.

The statement of Mukesh Kumar - complainant was recorded. He stated that he was a resident of Model Town, Pathankot and plied an auto-rickshaw. Aman Kumar (deceased in the case) son of Madan Lal, resident of Shastri Nagar, Pathankot, with whom he was well acquainted also used to ply an auto-rickshaw in Pathankot. On many occasions, there were brawls between those plying auto-rickshaws and the drivers who plied tempos for carrying passengers. A day earlier to his making the statement, i.e. on 24.10.2008 at about 08:00 p.m., the complainant with his three-wheeler was standing outside bus stand Pathankot waiting for passengers. In the meantime, Aman Kumar (deceased) also came there with his three-wheeler. A tempo vehicle was parked before them on the road in front of the bus stand. It had registration No. PBG-9895.

Vijay Kumar @ Sunny (who has been convicted) son of Ramesh Chander, resident of Amroodan Diya Jhugian, driver of that tempo was calling out for carrying passengers in his tempo. His brother - Rishu (respondent No. 2) and another person Pawan Kumar (respondent No. 3), who was earlier known to the complainant, were also standing there. At that time, Aman (deceased) informed Vijay Kumar (convict) that it was not for tempo vehicles at that time to pick commuters and he should not lift them and whatever passengers he had in his tempo, he should take them and move. Vijay Kumar (convict) left the place with his tempo and he uttered abusive words. Behind Vijay Kumar, Rishu (respondent No. 2) and Pawan Kumar (respondent No. 3) also boarded the tempo and they hurled abuses at the three-wheeler drivers. Aman (deceased) then chased the tempo and got on to the iron foot rest on the driver side of the tempo of accused Vijay Kumar (convict). The complainant - Mukesh Kumar also chased the tempo on his three-wheeler. Narinder alias Deepu, a resident of Amroodan Diya Jhungian, was with him in his three-wheeler. Within their

sight, the tempo driver - Vijay Kumar pushed Aman (deceased) and he fell down and the rear wheel of the tempo went over him. Due to the fall, he suffered injuries on his head and other parts of his body, besides, he became unconscious. The tempo driver along with the tempo fled away from the spot. At that time, Naresh Kumar son of Girdhari Lal came at the spot. They arranged a vehicle and brought Aman to Civil Hospital, Pathankot. The doctor at the hospital after examining Aman declared him dead.

The tempo driver - Vijay Kumar alias Sunny son of Ramesh Chander, resident of Amroodan Diya Jhungian, along with his brother - Rishu (respondent No. 2) as also Pawan Kumar (respondent No. 3) in collusion with each other, it was alleged, pushed Aman from a running tempo as a result of which he fell and the rear wheel of the tempo went over him. Aman suffered injuries on his head and other parts of the body due to the fall on the road and he died. Action was asked to be taken against the culprits. During the night after Aman had died, they all went to their houses. Then, the complainant came to the Civil Hospital on 25.10.2008 where relatives of Aman were present. The police met him at the hospital and recorded his statement. Legal action was asked to be taken. The statement was signed by Mukesh Kumar (complainant) and attested by SI Bharat Bhushan, Police Station Division No.1, Pathankot, on 25.10.2008.

Police proceedings were recorded by SI Bharat Bhushan to the effect that he was present at the police station on 24.10.2008 that he received a medical slip No. 180 dated 24.10.2008 that Aman Kumar had died. On getting this information, SI Bharat Bhushan along with HC Balwinder Pal reached Civil Hospital for conducting investigation. The dead body of Aman was lying in the mortuary. No one was there with the dead

body and since no witness or complainant met him, he returned to the police station and recorded DDR to the said effect. Then on the next day, i.e. 25.10.2008, SI Bharat Bhushan along with other police officials reached Civil Hospital, Pathankot for conducting investigation where Mukesh Kumar (complainant) met him. The father and maternal uncle of Aman, namely, Madan Lal and Deepak Kumar son of Bishan Singh, resident of Kathua, were with him. SI Bharat Bhushan recorded the statement of Mukesh Kumar (complainant), which was read over and heard by the complainant who accepting the same to be true signed in English which was attested by SI Bharat Bhushan. From the said statement of Mukesh Kumar (complainant), a case for the commission of an offence punishable under Section 304 read with Section 34 IPC was made out.

The statement in writing for registration of a case was sent to the police station through PHG Tara Chand. An FIR was asked to be registered and its number intimated. The control-room was asked to be informed through wireless. The special reports were asked to be sent to the senior officers. SI Bharat Bhushan was busy with the investigation. At the police station, FIR No. 117 dated 25.10.2008 was registered for the offence punishable under Section 304/34 IPC by Manoj Kumar, Head-constable.

SI Bharat Bhushan (PW3) conducted investigation in the case and after recording the statement Ex. PA of the complainant and sending the same for registration of an FIR through PHG Tara Chand, the dead body was obtained and inquest proceedings Ex. PW2/A were conducted. The dead body was identified by Madan Lal, father of the deceased, and Deepak Kumar, maternal uncle of the deceased. Their statements Ex. PW2/B and Ex. PW3/D were recorded in this regard. The dead body was entrusted to HC Balwinder Singh (PW5) and HC Ashok Kumar (PW1) for getting the post mortem examination conducted for which an application Ex. PW3/F was

prepared. SI Bharat Bhushan also visited the spot where incident had occurred and he prepared site plan Ex. PW3/1 of the place of occurrence, which was identified by the complainant. Further investigation was entrusted to another police official. After post mortem examination of the dead body, the dead body was handed over by HC Ashok Kumar (PW1) to Deepak Kumar son of Bishan Singh against receipt Ex. PB. The clothes of the deceased were handed over by HC Ashok Kumar (PW1) to SI Bharat Bhushan (PW3) these included a blood stained shirt, a blood stained under shirt and one blood stained jeans/pant. These were taken in police possession vide memo Ex. PC after making a parcel of these clothes which was sealed with the seal bearing impression 'BB'. The memo was signed by HC Ashok Kumar (PW1) and HC Balwinder Pal (PW5). The parcel was deposited by the investigating officer with the MHC.

ASI Surender Kumar (PW4), being a Mechanic in the Police Department, checked the tempo No. PBG-9895. He gave his report Ex. PW4/A to the effect that he does duty of MMK Pathankot. He has ITI diploma and has passed Diesel Mechanical. He has three years' working experience as an apprentice with the Punjab Roadways. He had given mechanical test reports of about 80-85 motor vehicles. He inspected tempo No. PBG-9895 and he wrote the report in which he recorded that he had examined five parts of the tempo i.e. the hand brake and foot brake, the front head light glass, the upper head light glass, the side windows and other windows and the driver side of the tempo, which were found to be all right. The report was accordingly submitted.

After completion of the investigation, police report ('challan') dated 23.12.2008 was filed by Bikram Singh SHO, Division No. 1, Pathankot. In the police report ('challan') that was filed, Rishu and Pawan Kumar (respondents No. 2 and 3) were not sent up for trial and their

names were recorded in column No. 2 of the police report. The police report was filed only against Vijay Kumar (convict). It was, however, recorded that an enquiry was being conducted by Deputy Superintendent of Police (City) - Karamjit Singh in respect of the accused whose names were recorded in column No. 2. After inquiry regarding their involvement or innocence, proceedings would be conducted and police report ('challan') filed.

The learned Sub Divisional Judicial Magistrate, Pathankot before whom the police report ('challan') against Vijay Kumar @ Sunny was filed, on perusal of report under Section 173 of the Code of Criminal Procedure ('Cr.P.C.' - for short) and its supporting documents observed that the accused is alleged to have *prima facie* committed an offence punishable under Section 304 IPC. As the offence under Section 304 IPC was triable by the Court of Session, accordingly, vide order dated 24.01.2009, the case was committed to the Court of Sessions Judge, Gurdaspur for trial.

The learned Additional Sessions Judge, Gurdaspur, to whom the case was assigned, framed charge against accused Vijay Kumar on 12.03.2009 for the offence punishable under Section 304 IPC.

The statement of Mukesh Kumar - complainant was partly recorded as PW1 on 27.11.2009. However, it was deferred as the tempo which was case property had not been produced. The statements of ASI Ashok Kumar and Madan Lal were recorded on 09.08.2010. The remaining statement and cross-examination of Mukesh Kumar was recorded on 26.10.2010. Then the examination-in-chief of Narinder Singh was recorded on 17.12.2010 and his cross-examination was deferred on the request of learned defence counsel. He was cross-examined on 21.12.2010. Thereafter, the statement of ASI Surinder Kumar was recorded on 19.04.2011. HC Manoj Kumar and Satpal were examined on 09.05.2012

and the case was adjourned to 06.07.2012 for examining SI Bharat Bhushan, Dr. Ravi Kumar and the remaining prosecution witnesses.

When the case was taken up on 06.07.2012, an application under Section 319 of the Code of Criminal Procedure ('Cr.P.C.' - for short) was filed for summoning Rishu and Pawan Kumar (respondents No. 2 and 3). For filing reply to the said application and for consideration, the case was adjourned to 02.08.2012. It remained pending before the learned Additional Sessions Judge, Gurdaspur. Thereafter, on the formation of District Pathankot and posting of an Additional Sessions Judge, the case was transferred to Pathankot. The learned Additional Sessions Judge, Pathankot, on the application under Section 319 Cr.P.C., passed the following order on 23.04.2013:-

"Arguments on the application under Section 319 Cr.P.C. not addressed. The perusal of the file shows that accused Rishu and Pawan have not been arrested by the police and challan has been presented without their arrest. The Illaqa Magistrate has also committed the case without procuring their presence or declaring them as proclaimed offenders. Hence, the copy of order be sent to Illaqa Magistrate dealing with the cases of Police Station Division No. 1, Pathankot, for sending the report to this court on or before 21.05.2013 whether supplementary challan has been submitted and both the accused mentioned above have been arrested or not. That court has to make the efforts for procuring the presence of the accused and submit the supplementary challan to this Court, so that the proceedings be continued. Copy of order be also sent to SHO, Police Station Division No. 1,

Pathankot, to send the investigating officer of the case SI Bharat Bhushan to explain, what efforts have been made by him to arrest the accused, namely, Rishu and Pawan as he submitted his challan without their arrest before the Ilqa Magistrate. Adjourned for 21.05.2013 for awaiting the report of Ilqa Magistrate and SHO, P.S. Division No. 1, Pathankot.”

The statement of Inspector Sukhjinder Singh, P.S. Division No. 1, Pathankot, was recorded on 21.05.2013 undertaking to produce Rishu and Pawan (respondents No. 2 and 3), who were accused in the FIR and also that the supplementary 'challan' would be submitted within fifteen days. The case was then taken up on 02.07.2013, on which date neither the supplementary 'challan' had been received, nor did Inspector Sukhjinder Singh appear to explain the reasons.ailable warrants were, therefore, issued against him. The case was then taken up on 24.07.2013, on which date, the report of learned Chief Judicial Magistrate, Pathankot was received, which was to the effect that accused Rishu and Pawan Kumar (respondents No. 2 and 3) had been declared 'proclaimed offenders' on 22.07.2013. Prior to procuring presence of Rishu and Pawan Kumar (respondents No. 2 and 3), the case was fixed for prosecution evidence. The case was, therefore, adjourned to 19.08.2013 for summoning prosecution witnesses and then adjourned to 11.09.2013. The learned Additional Public Prosecutor for the State on 11.09.2013 stated at the bar that accused Rishu and Pawan Kumar (respondents No. 2 and 3) had been arrested and papers were pending for 13.09.2013 for presentation of supplementary 'challan' before the learned Illaqa Magistrate. The case was adjourned to 21.09.2013 for awaiting supplementary 'challan' of Rishu and Pawan Kumar (respondents No. 2 and 3).

The supplementary 'challan' was filed in the Court of learned Chief Judicial Magistrate, Pathankot, on 13.09.2013. Learned Additional Public Prosecutor for the State submitted at the bar that the trial of co-accused Vijay Kumar was pending in the Court of learned Additional Sessions Judge, Pathankot, for 21.09.2013. The supplementary 'challan' was accordingly forwarded to the Court of learned Additional Sessions Judge, Pathankot for 19.09.2013. It was received in the Court of learned Additional Sessions Judge, Pathankot, on 19.09.2013, the same was ordered to be put up on 19.09.2013 by tagging it with the main file which was pending for 21.09.2013. Then on the main file, it was recorded that the supplementary 'challan' against Rishu and Pawan Kumar (respondents No. 2 and 3) had been received and the same had been tagged with the main file. The case was adjourned to 21.09.2013 for consideration on framing of charges.

The learned Additional Sessions Judge, Pathankot, finding a *prima facie* case against accused Vijay Kumar, who had already been sent up for trial, as also Rishu and Pawan Kumar (respondents No. 2 and 3), framed charge against them on 21.09.2013 for the commission of offence punishable under Section 304 read with Section 34 IPC. It was alleged that the accused on 24.10.2008 at about 08:00 p.m. in the area of Police Station Division No. 1, Pathankot, committed culpable homicide not amounting to murder of Aman Kumar with common intention and thereby committed an offence punishable under Section 304 read with Section 34 IPC. The accused were directed to be tried for the said charge. The contents of the charge were read over and explained to the accused in simple Punjabi. The accused heard and understood the charge. They pleaded not guilty and claimed trial.

The prosecution, in order to establish its case, again examined Mukesh Kumar - complainant (PW1) on 09.01.2014. He stated that on 24.10.2008 at about 8:00 p.m., he was standing outside the Bus Stand, Pathankot and waiting for passengers. There was another three-wheeler (tempo) ahead of his three-wheeler. The driver of that three-wheeler (tempo), namely, Vijay Kumar (convict) was calling passengers. In the meantime, Aman (deceased) came there on foot and at that time his three-wheeler was just away from that place. Aman (deceased) stated to Vijay Kumar (convict) that it was not the time for taking (lifting) passengers for three-wheelers (tempos) and let him take the passengers. On this point, they started quarrelling with each other. The tempo bearing No.PBG-9895 belonging to Vijay Kumar (convict) was standing there. Vijay Kumar (convict) proceeded towards the 'Kath' bridge on his three-wheeler (tempo) with passengers. Accused Rishu and Pawan Kumar (respondents No. 2 and 3) also followed that three-wheeler and hanged on to it. They started hurling abuses to Vijay Kumar (sic. Aman). Aman (deceased) stood on the foot rest of that three-wheeler (tempo). Mukesh Kumar (PW1) accompanied by Narinder Singh, a friend of Aman, also sat in the three-wheeler with him and they followed the three-wheeler (tempo) of Vijay Kumar (convict). When the three-wheeler (tempo) of accused Vijay Kumar (convict) was just away from Parag Hotel, then accused Vijay Kumar (convict) kicked Aman (deceased) and he fell down and struck against the divider on the road and again fell on the road. At that time, the rear wheel of the three-wheeler (tempo) of Vijay Kumar (convict) ran over Aman (deceased). The accused then ran away with his three-wheeler (tempo). Mukesh Kumar (PW1) saw the occurrence and he along with Narinder took Aman (deceased) to the Civil Hospital in an injured condition in his three-wheeler. The doctor there declared him dead. Mukesh Kumar (PW1) was cross-examined.

Narinder Singh (PW7), initially deposed as PW4 on 17.12.2010 and he was cross-examined on 21.12.2010. After Rishu and Pawan Kumar (respondents No. 2 and 3) were sent up for trial, he was examined again examined as PW7 on 21.04.2014. Narinder Singh was with the complainant - Mukesh and had along with him followed the tempo of Vijay Kumar (convict). He stated that on 24.10.2008 at about 08:00 p.m., he was present at the bus stand as he was driving an auto-rickshaw for his livelihood. He knew Aman (deceased) as he was also an auto-rickshaw driver. He was waiting for passengers and Mukesh Kumar - complainant was also with him who was also an auto-rickshaw driver and was waiting for passengers for his auto-rickshaw. He (PW7) saw Vijay Kumar (convict) calling passengers for his tempo No. PBG-9895. At this, Aman (deceased) told Vijay Kumar (convict) that the time for his tempo was over and advised him to take the passengers already sitting in his tempo. Vijay Kumar (convict) then started his tempo by hurling filthy abuses on the auto-rickshaw driver went away. Rishu and Pawan Kumar (respondents No. 2 and 3) were with Vijay Kumar (convict) at that time. A man climbed the tempo of Vijay Kumar (convict) and Rishu and Pawan Kumar (respondents No. 2 and 3) also climbed the tempo. He and Mukesh Kumar - complainant followed them in the auto-rickshaw. They found that the accused were having an altercation with Aman (deceased). The accused Vijay Kumar (convict) pushed Aman (deceased) from the tempo due to which he fell down and the rear wheel of the tempo ran over him. He suffered grievous injuries and later died. He (PW7) and Mukesh - complainant took Aman (deceased) to Civil Hospital, Pathankot where the doctor declared him dead. Aman died due to the grievous injuries suffered by him at the hands of the accused by intentionally pushing him. In cross-examination, Narinder

Singh (PW7) *inter alia* deposed that co-accused, namely, Rishu and Pawan Kumar (respondents No. 2 and 3) were standing on the tempo.

The role of kicking and pushing Aman (deceased) due to which he fell down and the rear wheel of the tempo ran over him and later he died, is attributed to Vijay Kumar (convict). Insofar as Rishu and Pawan Kumar (respondents No.2 and 3) are concerned, as per the statement Ex. PA of the complainant - Mukesh Kumar as also his statement in Court while appearing as PW1, besides, the statement of Narinder Singh (PW7), Rishu and Pawan Kumar (respondents No. 2 and 3) were standing on the tempo of Vijay Kumar (convict).

The learned trial Court observed that Rishu and Pawan (respondents No. 2 and 3) were accompanying Vijay Kumar (convict). After exchange of hot words with Aman Kumar (deceased), accused Vijay Kumar started his tempo and his co-accused Rishu and Pawan (respondents No. 2 and 3) boarded it. They hurled abuses to the drivers of the three-wheelers, i.e. the complainant side. Such conduct of the accused forced Aman (deceased) to follow them and he climbed on the side step of the tempo. It was noticed that there was no direct confrontation between deceased Aman and co-accused Rishu and Pawan Kumar (respondents No. 2 and 3) and the said fact was admitted by Mukesh Kumar (PW1) in his cross examination.

After perusing the entire evidence and hearing learned counsel for the appellant, it is quite evident that the incident had occurred as there was a dispute between the auto-rickshaw and tempo drivers for picking passengers from outside the bus stand at Pathankot. Aman (deceased) had objected to Vijay Kumar (convict) picking up passengers at that time. Therefore, he asked him to leave the place with the passengers he already had picked up and were seated in his tempo. Vijay Kumar (convict) though left the place, but he hurled abuses on the auto-rickshaw drivers. Rishu and

Pawan Kumar (respondents No. 2 and 3) by climbing on the tempo of Vijay Kumar (convict) boarded it. In view of the abuses which Vijay Kumar (convict) hurled, Aman (deceased) chased the tempo and managed to get on to the foot rest on the driver side. Vijay Kumar (convict) kicked him and he fell on the ground. At that time, the rear wheel of the tempo ran over his body. He suffered injuries by the fall and also by the rear wheel running over his body.

In the entire incident, no overt act is attributed to Rishu and Pawan Kumar (respondents No. 2 and 3) against whom the appeal against acquittal has been filed. Besides, the incident had occurred all of a sudden when abuses were hurled by Vijay Kumar (convict) on objection raised by Aman and other auto-rickshaw drivers for picking passengers by the tempo drivers at that time. Therefore, there was indeed no prior planning or *mens rea* on the part of Rishu and Pawan Kumar (respondents No. 2 and 3) to cause any harm to Aman (deceased) except that they may have hurled abuses at the auto-rickshaw drivers. Vijay Kumar (convict) has been convicted by the learned Additional Sessions Judge, Pathankot, for the offence punishable under Section 304 Part-II IPC. He has been sentenced to undergo rigorous imprisonment for seven years; besides, pay a fine of Rs. One lac and in default of payment thereof, undergo further rigorous imprisonment for one year.

Insofar as Rishu and Pawan Kumar (respondents No. 2 and 3) are concerned, the learned trial Court held them to be entitled to be given the benefit of doubt, which in the facts and circumstances cannot be faulted. Besides, the learned trial Court having taken a possible view is not liable to be interfered with merely because another view may be possible. There is no infirmity with the judgment and order of the learned trial Court

insofar as Rishu and Pawan Kumar (respondents No. 2 and 3) are concerned.

Therefore, we find no merit in the appeal and the same is accordingly dismissed. It is, however, made clear that nothing stated or expressed herein shall be construed as an expression of opinion on merits insofar as the appeal, if any, filed by Vijay Kumar (convict) against his conviction and sentence is concerned.

(S.S. SARON)
JUDGE

(GURMIT RAM)
JUDGE

23.07.2015
A. Kaundal