

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Appeal No. 0432 of 2016

District : Nandurbar

Gulabsing Sureshsing Sisodiya,
Age : 30 years,
Occupation : Driver,
R/o. Advas, Taluka Sarala,
District Udaipur (Rajasthan),
Also at : Kailas Dairy,
Anand Plot, Bapu Nagar,
Ahmedabad, Gujarat.

.. Appellant

versus

The State of Maharashtra
(Through Police Station,
Visarwadi,
District Nandurbar)

.. Respondent

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Mr. R.S. Shinde, Advocate, for the appellant.

*Mr. A.A. Jagatkar, Additional Public Prosecutor,
for the respondent.*

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**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 31ST OCTOBER 2018

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

01. Present appeal has been filed by the original accused, challenging his conviction in Sessions Case No. 14 of 2011 recorded by the Additional Sessions Judge, Nandurbar, on

28.04.2016, after holding him guilty of the offence punishable under Section 302 of the Indian Penal Code.

02. The prosecution has come with a case, that informant P.S.I. Latif Tadvī was attached to Highway Security Unit, Visarwadi, Taluka Navapur, District Nandurbar. He along with other police persons were present for regulating traffic on highway of Dhule to Surat near Kondaibari Ghat at about 08.00 a.m. on 07.12.2010. He received an information at about 09.45 a.m., when he along with his staff was in government vehicle, that there was traffic jam in the Ghat section. Therefore, they went there and cleared the traffic. Thereafter, they were coming towards Navapur and halted near Highway Tab Police Chowki around 10.30 a.m. They found that container truck bearing No. GJ-23/U-3703 coming from Sakri by cutting lane in the Ghat section i.e. by overtaking other trucks in high speed. They also found that the driver of the container had not put safety belt. He had also not put his *Khaki* uniform. Therefore, Police Constable Allauddin Kamroddin Kazi stopped on highway at a distance of about 150 feet west of the Chowki and gave indication of stop to the said container with an intention to check his documents. However, driver of the truck took the vehicle in very high

speed so that police person should not stop him and also to deter the police person, the container driver side gave dash to Allauddin and then the right wheel ran over the head of Allauddin. Allauddin sustained severe injuries. The vehicle did not stop at that place but went ahead. Thereafter, the police party chased the container by government vehicle. The truck was stopped near Essar petrol pump at a distance of about 10 Kms. The truck driver was escaping from the field but he was caught hold by chasing. Upon enquiry, the driver gave his name as Gulabsing Sureshsing Sisodiya i.e. the present appellant. He was taken in custody and all the police party went to spot where they found that the brain matter of Allauddin had came out of the head and he had expired. Thereafter, P.S.I. Latif Tadvil lodged first information report against the accused. On the basis of his FIR, offence vide C.R. No. 188/2010 came to be registered and further investigation was taken up.

03. During the course of investigation, inquest *panchanama* was prepared on the same day and thereafter dead body was sent for *post mortem*. Statements of witnesses were recorded. *Panchanama* of the spot was carried out immediately on the same day of the incident. The vehicle was got examined

through R.T.O. The *post mortem* report was collected. The clothes on the person of the deceased were seized under *panchanama*. After completion of the investigation, charge-sheet was filed for offences punishable under Sections 304, 333 of the Indian Penal Code and Sections 134(b), 125, 119, 132, 21(18), punishable under Section 177 of the Motor Vehicles Act.

04. After committal of the case, learned Additional Sessions Judge framed charge for the offence punishable under Section 302 of the Indian Penal Code. Contents of the charge were read over and explained to the accused in vernacular. He pleaded not guilty. Trial has been conducted. The prosecution has examined, in all, five witnesses in order to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Additional Sessions Judge, Nandurbar, has held the accused guilty of the offence punishable under Section 302 of the IPC and he has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 2,000/-, in default of payment of fine, to undergo rigorous imprisonment for six months.

05. Heard learned Advocate Mr. R.S. Shinde appearing for the appellant and learned Additional

Public Prosecutor Mr. A.A. Jagatkar for the respondent. Perused the record and proceedings.

06. It has been vehemently argued on behalf of the appellant, that the trial court has not appreciated the evidence properly. No doubt, the appellant has admitted the inquest *panchanama* as well as the *post mortem* report. As per the *post mortem* report, probable cause of death was '*haemorrhagic shock due to intracranial bleeding due to head injury*'. Deceased Allauddin had received several injuries. Further, seizure of the truck showed that the flesh particles were found on the right side tyre of the truck. The defence that was taken by the accused before the trial court was that the accident had already taken place because of an unknown vehicle but since the police person had expired, police falsely implicated the present accused in order to show that they have taken action against somebody. However, testimony of alleged eye witnesses would show that there are contradictions in the story told by them with that of the documentary evidence on which the prosecution intended to rely. Almost all eye witnesses have stated that they were present at the spot to clear the traffic. They also say that they had seen the container coming in high speed by overtaking the other trucks. The wording used is

that he was coming by cutting lane. If their testimony is to be believed, then it does not match with the contents of the spot *panchanama*. The spot *panchanama* shows that the spot of impact was at a distance of 02 feet from south towards north on tar road. The width of the tar road was 20 feet. The side margin was 05 feet on each side of the road. The container driven by the appellant was coming from east to west. Therefore, if it is to be believed that he was coming by cutting the lane, then that side would be the northern side and not the southern side. Another fact that has not been explained by the eye witnesses is that, as to why the deceased was standing at a distance of 150 feet away from Chowki. He could have waited to stop accused in front of the Police Chowki. Therefore, the reason for the deceased to be at the place which was found to be 02 feet from the southern side appears to be not for the reason, the eye witnesses intended to. All of them have stated that the police party chased the accused at a distance of about 10 Kms. The first and the foremost fact that is required to be considered is that all of them have stated that there was traffic jam. Under such circumstance, whether it was possible for the accused to get such a high speed and then whether it was possible for him to go at a distance of about 10 Kms. when the traffic was jam.

There was no question of any kind of enmity between the accused and the deceased. Under such circumstance, it cannot be inferred that the accused had the intention to kill deceased. By some stretch of imagination, if it is to be connected, then accused would have been liable for the accident but in that case, the case would have fallen under Section 304A of the IPC which is an independent section. Section 304A of the IPC cannot be said to be a lesser offence to Section 302 of the IPC, under which, the accused can be convicted. Further, in order to bring it under Section 304A of the IPC, what was required to be proved by the prosecution, that the accused was rash or negligent in driving his vehicle. The evidence from that angle has not been brought on record. Therefore, when there is lack of appreciation of evidence and it has resulted in erroneous conviction, it deserves to be set aside.

07. Per contra, learned Additional Public Prosecutor submitted that all the prosecution witnesses who were on duty at the relevant time, have categorically stated that the deceased Allauddin was doing his duty and he was indicating accused to stop his vehicle. The only possibility was that, the accused wanted to avoid the police enquiry or action and, therefore, in order to avoid

it, he drove his vehicle in high speed and then gave dash to the deceased. Accused had the knowledge that if he drives his vehicle in uncontrolled speed, then somebody may lose his life. So, when there is knowledge attributable to the act, it would certainly be a murder. The *post mortem* report clearly says that Allauddin died due to head injury. Therefore, his death was homicidal in nature. The spot *panchanama* is proved. So also, other documents have been proved on record. Therefore, the learned trial court has rightly convicted the accused.

08. It is to be noted that PW 01 P.S.I. Latif Tadvī is the informant. He has stated that he and his staff went to Kondaibari Ghat around 09.45 a.m. They cleared the traffic at about 10.30 a.m. and then reached to Highway Tab Police Chowki. Thereafter, they noticed that the container bearing No. GJ-23/U-3703 was coming from Sakri side in high speed by cutting lane. Driver was not wearing uniform and he had not put seat belt and Allauddin was trying to stop the container. Driver of the container, while in high speed, went on the person of Allauddin. The right side wheel of the container had caused head injury to deceased. Thus, he stick to the contents of his FIR. Unfortunately, his cross examination is not happy.

Except denials, there is almost nothing. His testimony is supported by the testimony of PW 02 P.S.I. Bapu Kedar and PW 03 Dashrath Salunkhe, driver of the police vehicle. All of them have categorically stated that the container was coming by cutting lane. That means, he was overtaking the trucks.

09. The *panchanama* of the spot, Exhibit 49, is proved by PW 04 Suresh Gavit. Only formal questions have been asked to this witness in his cross. The spot *panchanama* is also proved through the Investigation Officer PW 05 P.I. Ashok Devre. The contents of the spot *panchanama* are very much important. The width of the tar road was 20 feet. It had side margins on both sides admeasuring 05 feet which was a *kaccha* road. If we consider the map as well as the contents of the *panchanama*, it reveals that the spot of impact was 02 feet from south to north because it is specifically mentioned that from the spot, northern edge is at a distance of about 18 feet. Admittedly, the container was coming from east and was going towards west. That means, the northern half would be the strip from which he could have been said to be overtaking. None of the witnesses have stated that after the act of overtaking was completed, Allauddin had taken his container towards his left side and,

therefore, the spot of the impact is at a distance of about 02 feet from tar road from southern edge towards north and there was 18 feet space available from the spot of impact towards northern edge. If he was going from the northern strip, then by any stretch of imagination, right side front wheel would have hit Allauddin at the place of impact shown in the spot *panchanama*. One more interesting fact that is required to be seen is, the spot *panchanama* is stated to have been executed in C.R. No. 188/2010 and even the sections have been mentioned. It was executed between 12.35 to 13.05 hours on 07.12.2010. The inquest *panchanama* also contains FIR number and the sections and in the column of time, there are erasers and overwriting and it is stated to be executed between 12.00 to 12.30 hours on 07.12.2010. The FIR shows that it was registered at 11.30 a.m. as per the station diary. There was no A.D. report that was lodged. Nobody has stated the distance between Highway Police Chowki to Visarwadi Police Station.

10. The *post mortem* report shows that the dead body was received at the P.M. centre at about 12.45 p.m. Thus, within half an hour of registration of the offence, it appears that the inquest *panchanama* was executed. The dead body was sent for *post mortem* within 15 minutes and within one hour, the

spot *panchanama* was executed. All these facts are creating doubt. Merely because a police person had expired, it appears that the machinery has shown that it has acted swiftly. One cannot forget that according to the informant, accused was seen around 10.30 a.m. coming in high speed, giving dash, etc. Thereafter, as per the police story, P.S.I. Latif Tadvī and others had chased the truck for about 10 Kms. That means, after the alleged incident immediately within one hour, he has tried to show that he had lodged the report. This fact ought to have been considered by the learned trial court.

11. If we consider the probable cause of death given in *post mortem* report, it can be said that two theories are broadly possible, one is accidental death and second is homicidal death. By filing charge-sheet under Section 304 of the IPC, the prosecution intended to rule out the possibility of accidental death. It will not be out of place to mention here that, though the prosecution had filed the charge-sheet only under Section 304 IPC, etc, however, the learned Additional Sessions Judge framed the charge under Section 302 of the IPC. No specific reason has been stated as to why charge under Section 302 of the IPC has been framed. When the charge was framed for the offence punishable under Section 302

of the IPC, it was incumbent upon the prosecution altogether to rule out the possibility of the accidental death and to prove that accused had *mens rea* or had knowledge that his action would kill the deceased.

12. Any independent witness has not been examined in this case. All the eye witnesses are police persons. No doubt, their testimony cannot be in ordinary course would have been discarded on the ground that they are interested persons. Police witness is a witness on the same footing of other general witness and, therefore, his evidence is also required to be appreciated from that angle. But with the peculiar circumstance in this case, that the deceased was also a police person and most importantly, when all are saying that they were clearing the traffic, that means, there were independent witnesses who were present at that place. The Investigation Officer is not giving any reason as to why he had not recorded statement of any other independent witness. Further, it appears that the statement of the cleaner from the truck of the accused was also taken but he has not been examined by the prosecution for the reason best known to it. When all these possibilities are created, then the testimony of these police persons is required to be branded as interested witnesses.

13. It has come on record, that these police witnesses saw container coming in high speed from a distance of about 150 feet away. They had also noted that the driver had not put seat belt and he has not put his *khaki* uniform. Simple question is that, how Allauddin would not have realized that the vehicle is coming towards his person and then he should save himself. Allauddin was at that place, just to stop the vehicle of the accused as per the prosecution story. That means, he was looking towards the container. Under such circumstance, it was possible for him to take himself away from the line of the vehicle driven by accused. In spite of that, container of the accused is stated to have run over Allauddin. This theory is not digestible and cannot be said to be a natural conduct. This also gives room to infer that all the police witnesses were not giving true account of the incident. With such kind of evidence, the learned trial court ought not to have come to the conclusion that there was an intention for the accused to commit murder of Allauddin. The facts of the case were absolutely not indicating that it was homicidal death amounting to murder. Therefore, the said conclusion by the trial court is erroneous and deserves to be set aside. As aforesaid, even if for the sake of arguments it is

accepted that it was an accidental case, yet now Section 304A of the IPC cannot be said to be lesser offence to Section 302 of the IPC and, therefore, the sentence awarded to accused cannot be reduced to bring it under any lesser offence. He will have to be acquitted.

14. Hence, the following order :-

The appeal is allowed. The judgment and order of the learned Additional Sessions Judge, Nandurbar, dated 28th April 2016, delivered in Sessions Case No. 14 of 2011, is hereby quashed and set aside. The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code. He is to be released forthwith from jail. Bail bond of Rs. 15,000/- with one surety is to be obtained from him as provided in Section 437A of the Code of Criminal Procedure. Fine amount, if any, deposited by him, is to be returned to him.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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