

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 546 OF 2016

Sanjay Bhavrao @ Baburao Sapkal,

Age : 36 years, Occupation :

R/o Vasai, Tq. Sillod,

Dist. : Aurangabad.

...Appellant

Versus

The State of Maharashtra

Through, Phulambri Police Station,

Tq. Phulambri, Dist. Aurangabad.

...Respondent

.....

Mr. R. S. Deshmukh, Advocate for Appellant.

Mr. A. A. Jagatkar, A. P. P. for Respondent-State.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 10-08-2018.

PRONOUNCED ON : 21-11-2018.

JUDGMENT :

01. Present appeal has been filed under Section 374 of Cr. P. C. by original accused No. 1 challenging his conviction in Sessions Case No. 203 of 2010 by 7th Additional Sessions Judge, at Aurangabad dated 24.8.2016 for the offence punishable under Sections 279, 304 part

II, 304-A, 337, 338 and 427 of I. P. C. and under Sections 66 punishable under Section 192-A of the Motor Vehicles Act.

02. PSI Laxman Gangaram Kale was serving with Phulambri Police Station, Dist. Aurangabad. A Motor Accident Case No. 8 of 2010 was registered with his Police Station around 1 PM of 21.2.2010 and it was given to PSI Kale for enquiry. As per the information that was received in respect of the accident that there was an accident between the truck bearing No. MH 04 CU 5130 and pick up van No. MH-20 AT 3069. One Devidas Dhangare had given telephonic information regarding the said accident. PSI Kale and his team went to the spot and found that one pick up van of white colour was standing facing Aurangabad in a damaged condition. Certain persons were found in injured condition near the said pick up van. Certain persons were inside the pick up van. The truck was standing near a tree on the bandh of Dhangare which was by the side of the road. The said accident had occurred at Phulambri-Aurangabad Road. Ambulance was called and the injured persons were sent to Civil Hospital, Aurangabad. In all 31 persons were sent who had sustained injuries in the said accident. While under going treatment 8 persons expired. PSI Kale and his team executed the panchnama of

the spot. Thereafter, inquest panchnama of the dead bodies of the persons who died due to the accidental injuries was carried out. Thereafter, the dead bodies were sent for post mortem. During the enquiry, it was found by him that the accident had taken place at about 12.45 PM. Many persons than the capacity of the pick up van were occupying and pick up van was over taking the vehicle in front of his vehicle negligently and rashly by ignoring the fact that a truck was coming from opposite direction. Due to the negligence on the part of pick up van driver, the pick up van gave dash to the truck. So also, it is stated that the truck driver also in order to not to give space for over taking to the pick up van gave dash to the pick up van at the back side and therefore, he lodged a report against both the drivers. On the basis of his report, the offence vide C. R. No. 21/2010 came to be registered and investigation was under taken.

03. During the course of the investigation, statements of witnesses were recorded. Accused persons came to be arrested. The vehicles came to be seized and checked through R. T. O. Officer, post mortem notes of the 8 persons, who expired in the accident as well as medical certificates of the injured persons were collected. After the completion of the investigation, the charge-sheet was

filed before J. M. F. C., Phulambri. The learned J. M. F. C. Phulambri thereafter committed the case to the Court of Sessions.

04. After both the accused appeared before the learned Additional Sessions Judge, charge was framed at Exh. 40. The contents of the charge were read over and explained to the accused persons in vernacular. They pleaded not guilty. Trial has been conducted. After hearing both the sides, the learned Trial Court has acquitted the accused No. 2 and convicted accused No. 1. Accused No. 1 has been held guilty of committing offence punishable under Section 279 of I. P. C. and has been sentenced to suffer rigorous imprisonment for 6 months and to pay fine of Rs. 1,000/- and in default of payment of fine amount he shall suffer simple imprisonment for one month. Accused No. 1 has been further held guilty of offence punishable under Section 304 Part II of I. P. C. and has been sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 5,000/- and in default of payment of fine amount he shall suffer simple imprisonment for six months. Accused No. 1 has been further held guilty of offence punishable under Section 304-A of I. P. C. and has been sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 1,000/- and in default

of payment of fine amount he shall suffer simple imprisonment for one month. Accused No. 1 has been further held guilty of offence punishable under Section 337 of I. P. C. and has been sentenced to suffer rigorous imprisonment for 6 months and to pay fine of Rs. 500/- and in default of payment of fine amount he shall suffer simple imprisonment for one month. Accused No. 1 has been further held guilty of offence punishable under Section 338 of I. P. C. and has been sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 1,000/- and in default of payment of fine amount he shall suffer simple imprisonment for one month. Accused No. 1 has been further held guilty of offence punishable under Section 427 of I. P. C. and has been sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 1,000/- and in default of payment of fine amount he shall suffer simple imprisonment for one month. Accused No. 1 has been further held guilty of offence punishable under Section 66 and 192-A of Motor Vehicle Act and has been sentenced to pay fine of Rs. 5,000/- and in default of payment of fine amount he shall suffer simple imprisonment for one month. Hence, accused No. 1 has filed this appeal.

05. Heard learned Advocate Mr. R. S. Deshmukh, for

Appellant and Mr. A. A. Jagatkar, A. P. P. for Respondent-State. It has been vehemently submitted on behalf of the appellant that the learned Trial Court has not appreciated the evidence properly. Though certain passengers traveling from the pick up van were examined, but, the seat which they were occupying was in such a position that they would not have witnessed the accident. PW-1 Shivaji Sanase was unable to state how the accident took place. PW-2 Atmaram Shelke has stated that pick up van was overtaking. But, he was sitting at the back side. Therefore, it can not be stated that he had knowledge of all the circumstances. PW-3 Sominath Endole had also occupied back seat, PW-4 Ramdas Chandsurya has clearly stated that he was chatting with other relatives, that means he was not paying attention to the road. PW-5 Janabai Kale was also occupying back seat. In clear terms, she has stated that she did not see how the accident took place. PW-6 Syed Bilal was the punch witness to the spot panchnama. He has turned hostile. But, panchnama has been proved through PW-7 API Laxman Kale. The situation in the spot panchnama would clearly give an indication that the appellant had tried to avoid the accident. The pick up van was trying to overtake. The width of the road was 22 feet. There was safe distance. If at all there was an

accident, it can be said to be the error of judgment. It will not certainly amount to an offence under Section 304 Part II of I. P. C. He placed reliance on the decision in **Prabhakaran V/s State of Kerala, (2007) 14 Supreme Court Cases 269**) wherein it has been observed that "Section 304-A speaks of causing death by negligence. This Section applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This Section obviously does not apply to the cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act". He has further relied on the decision in **Alister Anthony Pareira V/s State of Maharashtra, (2012) 2 Supreme Court Cases 648**) wherein the distinction has been made in respect of offences under Sections 304-A, 304 part I and II, 279 of I. P. C. He has submitted that in fact the learned Trial Court ought not to have framed charge under Section 304 as well as for the Section 304 part II of I. P. C. it has caused prejudice to the accused. He, therefore, submitted that by any stretch of imagination the accused ought not to have been held guilty for committing offence under Section 304 part II and ought not

to have been sentenced to suffer rigorous imprisonment for 10 years. At the most taking into consideration the fact that he was driving the pick up van at the relevant time and in the said accident about 8 persons have been killed and many persons have been injured. He would have been held guilty of committing offence punishable under Section 304-A of I. P. C. and maximum sentence could have been imposed.

06. Per contra, the learned A. P. P. has vehemently submitted that the pick up van was in fact not at all allowed for transportation of human beings. More than 31 persons were injured who were sitting in the pick up van. This act itself amounts to rashness and negligence on the part of the accused. When he was taking more than 31 lives in his vehicle he ought to have exercised all the due care for their safe journey. He was trying to overtake the vehicle going ahead of him and did not even notice that another vehicle is coming from the opposite direction. Negligent overtaking would definitely have given him knowledge that he may commit accident in which the possibility of loss of life was there. Therefore, with knowledge the act has been done and therefore, learned Trial Court has rightly invoked Section 304 Part II of I. P. C. and he has been rightly convicted. The

learned A. P. P. relied on the reasons given by the learned Additional Sessions Judge in support of his contention.

07. The fact which is not in dispute is that the present appellant original accused No. 1 was driving the pick up van on the relevant date at the relevant time. The further fact is not in dispute that there were more than 30 passengers in the said pick up van. The fact of accident is almost admitted. It is also admitted that 8 passengers who were traveling from the pick up van expired due to accidental injuries. The inquest panchnamas of dead body of those 8 persons and the post mortem reports have been admitted by the appellant. What is disputed is that he was driving the vehicle rashly and negligently and that the ingredients of offence punishable under Sections 304 part II of I. P. C. are not attracted. Therefore, with this limited issue, we are required to consider the evidence. PW-1 Shivaji, PW-2 Atmaram, PW-3 Sominath, PW-4 Ramdas, PW-5 Janabai are the eye witnesses and the injured persons who were traveling from the pick up van. All of them have stated that about 25 to 30 persons were traveling from pick up van. When they were near a petrol pump in Phulambri, one truck came from opposite side and there was dash between 2 vehicles. Almost each one of

them has stated that he / she was occupying the back seat of the van. PW-1 Shivaji in clear terms has stated in the examination-in-chief itself that he can not tell how the accident took place. Some of them have admitted in the cross-examination that they are unable to tell the manner in which the accident took place. When the fact is certain that the accident had taken place, it was necessary for the prosecution to prove that it had occurred due to the rashness and negligence on the part of accused No. 1. Now, these witnesses have stated as to what was the approximate speed of the vehicle nor even a statement has been made that the speed of their vehicle was high. No doubt, high speed of a vehicle is not the only criteria on which the rashness and negligence would depend. In order to arrive at the conclusion that the accident has taken place because of rashness and / or of negligence of a particular driver, the prosecution has to prove the surrounding circumstances, situation at the spot. Here in this case, none of these witnesses have stated what was the approximate width of the road, what was the condition of road, where exactly or even approximately their vehicle was proceeding i.e. either on the left side, middle or right side of the road. All these are the important criterias to arrive at the

conclusion regarding rashness and / or the negligence. PW-5 Janabai for the first time disclosed that the driver of their pick up van was over taking another vehicle and at that time, truck came from the opposite direction. None of the witnesses have stated that their vehicle was in the process of over taking. The prosecution has examined PW-6 Syed Noor to prove the spot panchnama. However, he has turned hostile. The other panch witnesses to the spot panchnama Mr. Sattar Abdul Pathan has not been examined by the prosecution for the best reasons known to it. The spot panchnama has been proved through PW-7 then API Mr. Kale. If we read the contents of the spot panchnama and peruse the map drawn in the panchnama, then it can be seen that the width of the road was 22 feet. It had side margins of 10 feet on each side of the road. The road was proceeding north-south. Pick up van was coming towards south. The spot which has been stated as "Ghatanasthal" i.e. the place of impact appears almost in the middle of the road. Therefore, the situation in the spot panchnama is not that much giving a clear picture as to exactly what was the spot of impact. The spot panchnama Exh. 105 shows that the spot was shown by one Devidas Dhangare. He is the adjacent field owner, who had given the information regarding the accident. On the

basis of information supplied by him the spot of impact has been fixed by the Police. In fact it was necessary for the Investigating Officer to cross check the said fact from any of the eye witnesses. The testimony of PW-8 then PI Phulambri Police Station Mr. Waghmare does not clarify that he had fixed the spot of accident and cross checked the contents of spot panchnama through an eye witness also. The fact, however, remains that there was accident in which the pick up van had collided with a truck, it will not be out of place to mention here that the accused No. 2 has been acquitted by the learned Trial Judge and the State has not preferred any kind of appeal. Definitely, the present appellant was carrying people in large number, though, he was apparently not permitted to carry so many people. He can not deny that more than 30 persons were traveling from his pick up van and 8 out of them have expired. The report of the RTO would show that there was no mechanical defect in the pick up van. Therefore, utmost care was necessary for the applicant No. 1 to drive the vehicle so that he can safely take the passengers at their destination. If we consider the situation shown in the spot panchnama, then it can be seen that after the dash, the pick up van had gone ahead and stopped on the side margin. The truck had gone at a

distance of about 150 feet and left the road, went into the field of one Ganpat towards the western side. There was damage to the extent of Rs. 30,000/- to the pick up van. Therefore, the said situation at the spot was sufficient to infer the principle of *res ipsa loquitur*. Reliance can be placed on the decision in **Ravi Kapoor V/s State of Rajasthan, (2012(8) SCJ 247 : AIR 2012 SC 2986)**, wherein it has been held that the elements of doctrine of *res ipsa loquitur* - the event would not have occurred but for someone's negligence. The evidence on record rules out the possibility that an action of the victim or some third party could be the reason behind the event. Here, the same situation arises. Further, it has been observed "We have already abused that the doctrine of *res ipsa loquitur* is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at subsequent stage where it is not clear as to how and due to whose negligence, the accident occurred. The factum of accident having been

established, the Court with the aid of proper evidence may take assistance of attendant circumstances and apply the doctrine of "*res ipsa loquitur*". Therefore, definitely the facts before this Court prove that due to the rashness and negligence on the part of appellant, the accident was caused and therefore, he has been rightly held responsible for committing offences punishable under Sections 279, 304-A of I. P. C.

08. Now, we are required to consider as to whether the offences punishable under Sections 304 Part II of I. P. C. is made out against the appellant or not. In **(2007(14) SCC 269)** (Supra) the ingredients of the offence have been clarified :

"5. Section 304-A speaks of causing death by negligence. This section applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act.

6. A negligent act is an act done without doing something which a reasonable man guided upon

those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not."

09. In **Alister Pareira's** case (Supra) when the facts disclosed therein that accused was in a drunken condition, at that time, the offence under Section 304 part II of I. P. C. was invoked. Here in this case, the prosecution has not come with the case that the appellant had consumed liquor and then he was driving the pick up van. Further reliance can be placed on **State of Gujarat V/s Haidarali Kalubhai, (AIR 1976 Supreme Court 1012)**. In this case accused had no license and he drove a truck parked in open field near high way with head lights on in full speed. Thereafter, he was unable to control the vehicle and while taking a turn to go towards kachha road, hit a cot on the turning point on which deceased was resting. Due to the injuries, the said deceased expired. Under such circumstance, it was held that the facts did not make out

a case of any willful or deliberate act on the part of the accused in order to cause death of the deceased by driving the truck in the way he did. Here also merely because the appellant had exceeded the limit of the passengers' capacity in the pick up van, it can not be said that he had the intention or even knowledge that his said act would cause death of any passenger or passengers. To that extent the finding given by the learned Trial Court is erroneous. Observation has been made by the learned Trial Court that the act of the accused falls under clause 4 of the Section 300 of the I. P. C. where the knowledge of the accused as to the probability of the death of passengers in pick up van being caused from his imminently dangerous act of driving his vehicle and with such knowledge the act has been done which caused death of 8 persons and injuries to 23 persons. Taking into consideration the difference in Section 304-A and 304 part II of I. P. C. elaborated in **Prabhakaran's** case (supra) the observations by the learned Trial Court were not proper. It was very much unfortunate that the 8 persons were required to lose their lives and 23 were injured in the said accident, but, taking into consideration the evidence on record, wherein only one witness says that the accused was in the act of overtaking, nobody else has supported her and almost none

of the eye witnesses have stated exactly in what manner the accident had taken place. Said finding of the Trial Court will have to be discarded. As regards the conviction under other Sections are concerned, it is properly awarded. Even in **Alister Pareira's** case together with Section 304-A of I. P. C. and offences under Sections 337 and 338 of I. P. C. were held to have been proved. Therefore, only the conviction awarded to the appellant under Section 304 part II of I. P. C. deserves to be set aside by allowing this appeal partly.

10. Hence, following order;

ORDER

(i)The appeal is hereby partly allowed.

(ii)The conviction awarded to the appellant in Sessions Case No. 203 of 2010 by Additional Sessions Judge-7 Aurangabad on 24.8.2016 is hereby set aside to the extent of holding him guilty of committing offences punishable under Section 304 part II of Indian Penal Code.

(iii)It is clarified that the conviction of the appellant in respect of offences punishable under Sections 279, 304-A, 337, 338 and 427 of

I. P. C. as well as Section 66 punishable
under Section 192-A of Motor Vehicles Act is
hereby maintained.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-.