

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 419 OF 2001

Madhukar Haribhau Saolunkhe .. Applicant
Versus
The State of Maharashtra .. Respondent

Mr. Sarvajit Patil I/by Mr. Sandeep S. Salunkhe for Applicant.
Ms. Sharmila S. Kaushik, APP for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 25 OCTOBER 2018.

ORAL JUDGMENT :-

1. By this Criminal Revision Application, the Applicant has challenged the judgment and order dated 05.10.1995 passed by the Judicial Magistrate First Class, Pandharpur in S.T.C. No. 558 of 1990 as well as the judgment and order dated 22.11.2001 passed by the IInd Additional Sessions Judge, Pandharpur in Criminal Appeal No. 14 of 1995.

2. The Applicant was convicted by the trial Court for commission of offence punishable under Section 279 of IPC and he was sentenced to suffer simple imprisonment for 3 months. The trial Court further convicted the Applicant for commission of offence punishable

under Section 304-A of IPC and he was sentenced to suffer simple imprisonment for 6 months. The Applicant was further convicted for the offence punishable under Section 427 of IPC and was sentenced to suffer simple imprisonment for 6 months. The Applicant was acquitted from the charges of committing offence punishable under Section 184 and 187 of the Motor Vehicle's Act. All the sentences were directed to run concurrently.

3. The Applicant had preferred Criminal Appeal No. 14 of 1995 in the Court of IInd Additional Sessions Judge at Pandharpur. The Appellate Court partly allowed the Appeal. The conviction and sentence for commission of offence punishable under Section 427 of IPC were set aside. However, the conviction and sentence for the offences punishable under Section 304-A and 279 of IPC were maintained. The Applicant has challenged both these judgments before this Court in the present Criminal Revision Application.

4. The prosecution case is that, on 12.04.1990, at about 4.00 pm, one Tipanna aged about 13 to 14 years was proceeding on a road towards his house on his bicycle. At that time, the present Applicant was driving a tractor on the same road. There were two

trolleys full of sugarcane attached to the said tractor. According to the prosecution case, the Applicant's tractor gave dash to Tipanna who was riding his bicycle, due to which, Tipanna fell down on the road and both the trolleys went over him. Tipanna died on the spot. His body was crushed to such an extent that it had almost cut into two pieces. Tipanna's brother who was working as a door-keeper at a nearby theater, rushed to the spot on hearing the commotion. He saw that his brother was lying on the road. He went to the police station and reported the matter to the police station. In the meantime, the Applicant ran away from the spot. The police registered the FIR. During the investigation, spot panchanama and inquest panchanama were conducted. The Applicant was subsequently arrested. The statement of various witnesses were recorded and the charge sheet was filed. The charges were framed under the aforementioned Sections. The trial was conducted before the Judicial Magistrate First Class, Pandharpur.

5. During the trial, the prosecution examined seven witnesses. PW-1 Suresh Dhotre, was the brother of the deceased Tipanna and had lodged the FIR, PW-2 Yellappa Bandpate, PW-4 Laxman Pawar, PW-5 Janardhan Pawar were the eye witnesses, who were present on the spot when the incident took place. PW-7 Anna Nagtilak, also claimed to be

an eye witness. However, he did not support the prosecution case. PW-3 Machindra Dhotre was father of the deceased. PW-6 Gajanan Ambike was photographer, who had taken photographs of the spot. Apart from these, the prosecution produced inquest panchanama on record which was exhibited at Exhibit-20 with consent of the defence.

6. PW-1 Suresh Dhotre, had not seen the actual incident, but the incident had occurred soon after his brother Tipanna had met him. After meeting PW-1, Tipanna was proceeding towards his house. PW-1 was working at nearby theater as a door-keeper. When he reached the spot he saw that his brother was lying on the road and the Applicant was running away from the spot. He has deposed that the tractor had two trolleys loaded with sugarcane. The FIR lodged by him is produced on record at Exhibit-16. The prosecution has not examined either the investigating officer or the police officer, who had registered the FIR. In the cross-examination his attention was brought to portion marked A, B and C of the FIR. However, since the police officers were not examined, it could not be ascertained as to whether he had actually made those statements. In any case, perusal of the FIR shows that these three portion marked A, B and C are not much of significance and make no difference to the veracity of his evidence.

7. PW-2 Yellappa Bandpate, has deposed that he was standing at the Garage owned by one Chandu Gavali at the relevant time. He was waiting there, because, he had given a wheel of his vehicle for repairing the puncture. He has deposed that, a tractor came from Sangram Theater at high speed. There were two trolleys attached to the tractor and were loaded with sugarcane. The tractor gave dash to Tipanna. He was knowing Tipanna. Tipanna was riding his bicycle. When the tractor gave dash to his bicycle, both the trolleys went over Tipanna. He has further deposed that the Applicant ran away from the spot. In his cross-examination, he has stated that Tipanna was proceeding towards his house. He was examined on the point to show that Tipanna was not going towards his house but was coming from that side. If his evidence is read, in the light of the evidence of PW-1, it is quite clear that Tipanna, after meeting his brother PW-1, was proceeding towards his house. The tractor was also travelling in the same direction and gave a dash. Therefore, there is no substance in the submission that Tipanna was coming from the opposite side and the eye witnesses could not have actually seen the incident. Apart from this aspect, there is hardly any significant cross-examination of this witness. This witness has denied the suggestions that there were ditches on the road, the deceased was trying to steal sugarcane from the trolleys and in

the process he had accidentally fallen down on the road and both the trolleys went over him.

8. PW-3 Machindra Dhotre, father of the deceased had not seen the incident and his evidence does not make any difference to the case.

9. PW-4, Laxman Pawar was standing with PW-2 at the shop of Chandu Gavali. He has deposed about the incident in the same manner as is deposed by PW-2. He added that the deceased was proceeding from Sangram Theater and that he was having a bulb in his hand. He has deposed that the tractor was proceeding in the same direction. He was cross-examined on the similar lines as the PW-2. PW-4 has deposed in his cross-examination that Tipanna was keeping his left side on the road.

10. PW-5 Janardhan Pawar was another eye witness, he was present at Vishwas Steel Works. He was present with PW-4, when the incident took place. His deposition is more or less similar to PW-2 and PW-4. He has also stated that Tipanna was carrying a bulb in his hand. PW-6 was a photographer, who had taken photographs of the spot of

incident. Those photographs were shown to him and he identified those photographs.

11. PW-7 Anna Nagtilak was examined by the prosecution as one of the eye witnesses. However, this witness did not support the prosecution and was declared hostile. According to this witness, he was traveling with the Applicant in the same tractor. He has deposed that the Applicant was driving the tractor and this witness was sitting at the cleaner side of the tractor. He has deposed that one boy was riding a bicycle and there was another person sitting on the same bicycle. According to him, when the boy tried to snatch sugarcane from the tractor, he fell down. When the prosecutor cross-examined him, questions was put to him by the prosecutor and he was asked as to whether the applicant had driven the tractor negligently, due to which, a dash was given to the deceased. To this question, the witness did not give any answer. Significantly, he did not give any answer in favour of the Applicant. Importantly, he has deposed that he was cousin of the Applicant.

12. Considering the entire evidence on record, as well as the defence raised by the Applicant, the trial Court convicted and sentenced

the Applicant as mentioned earlier. The Appellate Court modified the judgment and order of the trial Court to some extent and acquitted the Applicant from the charges of commission of offence under Section 427 of IPC. According to the learned Appellate Judge, the basic ingredient of mens-rea i.e. the intention behind causing mischief as mentioned under Section 427 of IPC was not made out. The rest of the conviction was maintained.

13. I have heard Shri. Sarvajit Patil for the Applicant and Ms. S.S. Kaushik, APP for the State of Maharashtra. Mr. Patil submitted that there are material contradictions in the evidence of the eye witnesses and both the Courts below did not take them into consideration. He submitted that it was the case of accident and no offence under Section 304-A and 279 of IPC was made out. He submitted that there was no reason to discard the evidence of PW-7 though he was cousin of Applicant. He further submitted that non examination of the investigating officer has caused prejudice to the accused.

14. As mentioned earlier, there are three eye witnesses to the incident, i.e. PW-2, PW-4 and PW-5. Their versions are consistent. Shri. Sarvajit Patil tried to submit that there is material contradiction in

their evidence because in the statement of PW-2 and PW-4 there are indications that Tipanna was coming from the opposite direction and was not going the same direction as that of the tractor of the Applicant. As discussed earlier, this submission has to be read in the light of the evidence of PW-1. PW-1 has deposed that Tipanna had met him at Sargam Theater, a few moments before the incident. Tipanna was proceeding towards his house from the Theater, at that time incident had taken place. PW-1 had immediately rushed to the spot where he saw that Tipanna was lying on the spot and accused was running away from the spot. PW-2, PW-4 and PW-5 have explained that they were present at the spot. PW-2 had given a wheel for repairing the puncture and PW-4 was with him. Thus, they corroborated each other. PW-5 has also explained as to how he was present at the spot.

15. I do not find any material discrepancies or contradictions in their evidence. The Applicant himself has not denied that the incident had taken place and that he was driving the tractor. He has raised a specific defence that the deceased had tried to steal sugarcane from the trolleys and in the process he fell down and suffered injuries in an accident. This defence is not acceptable in the background of the deposition of the eye witnesses. The eye witnesses have also added that

the deceased was carrying a bulb in his hand. In that situation, it is difficult to believe that the deceased tried to steal sugarcane with his other hand and at the same time was riding his bicycle. There is no reason to find fault with both the Courts below in their appreciation of the evidence. Both the Courts below have rightly rejected the evidence of PW-7, as well as the defence taken by the Applicant.

16. After taking into account all these aspects, I find that the findings of both the Courts below are correct. The Appellate Court has modified the trial Court's order to some extent and has acquitted the Applicant from the offence punishable under Section 427 of IPC.

17. In view of the above discussion, I am not inclined to interfere with the findings recorded by the Appellate Court. Both the Courts below have given sufficient reasons for fixing the quantum of the sentence to the Applicant. I find no reason to interfere in their discretion. Leniency is already shown to the Applicant. Before parting with the judgment, it is necessary to mention that neither of the Courts below has given set off to the Applicant for the period during which he was in custody. Section 428 of Cr.P.C. provides for granting set off to such an accused. The present Applicant also deserves the benefit of this

provision.

18. Hence the following order :

The Criminal Revision Application is dismissed with the clarification that the Applicant shall be entitled to the benefit of the set off under Section 428 of Code of Criminal Procedure, 1973.

(SARANG V. KOTWAL, J.)