

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.02.2018

Pronounced on : 13.03.2018

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.22324 of 2017  
and  
Crl.M.P.Nos.13083 & 15686 of 2017

Ayshwarya

.. Petitioner

Vs.

State rep. by  
The Inspector of Police,  
Traffic Investigation-South,  
J-3, Guindy,  
Chennai-600 032.

... Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records pertaining to the records in S.C.No.77 of 2017 on the file of the learned XVIII Additional Sessions Judge, Chennai for the alleged offence under Sections 279, 304(ii) IPC and 185 of MV Act and to quash the same.

For Petitioner : Mr.B.Kumar, Sr. counsel  
for Ms.Lita Srinivasan

For Respondent : Mrs.P.Kritika Kamal,  
Govt. Advocate (Crl. Side)

O R D E R

The petitioner has been charged for the offences under Sections 279, 304(ii) IPC and 185 of the Motor Vehicles Act, 1988.

2.Heard Mr.B.Kumar, learned Senior counsel for the petitioner and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) appearing on behalf of the respondent.

3.The case of the prosecution is that on 02.07.2016 at 04.25 hours, the petitioner herein had rashly driven a car bearing registration No.TN-01-AW-1403 in a drunken state and had hit a

pedestrian who sustained grievous injuries and died on the spot. The car was secured at 05.45 hours and breath analyser test was conducted on the petitioner at 06.09 hours, whereby it was found that the alcohol content in her blood was 36mg/100 ml. Thereafter, the petitioner was taken to the Government Hospital at Saidapet at 08.00 hours and a blood sample was taken at 10.20 hours. The blood test result sent from the Forensic Science Lab proved negative. However since the breath analyser result detected alcohol content in her blood to be above 30mg/100ml, the petitioner was charged for the offences under Section 185 of the Motor Vehicles Act, 1988, along with Sections 279 and 304 (ii) of IPC.

4.Mr.B.Kumar, learned Senior counsel appearing for the petitioner, by relying upon various provisions of the Motor Vehicles Act, submitted that the procedure contemplated for taking a breath analyser test and subjecting the petitioner to a registered medical practitioner was violative of the procedure contemplated under Sections 202, 203 and 204 of the Motor Vehicles Act, 1988. By relying on Section 203 (5) of the Motor Vehicles Act, the learned Senior counsel submitted that the petitioner was not provided with an opportunity of a specimen of breath test while she was under the custody in the police station and therefore the breath analyser test report, alleged to have been taken at the scene of occurrence, cannot be given any credence. As such, in the absence of any material to support the allegation that the petitioner was under the influence of alcohol, the offences under Sections 279 and 304(ii) IPC as well as Section 185 of the Motor Vehicles Act will not be attracted. By placing strong reliance on the Forensic Science Lab report, he submitted that since the report revealed that there was no ethyl alcohol in the blood, it can only be concluded that the petitioner was not under the influence of alcohol and thereby the offence cannot be made out as against the petitioner.

5.Mrs.P.Kritika Kamal, learned Government advocate (Crl. Side) on the other hand submitted that there are ample evidences, as well as statements from the witnesses to establish that the petitioner was under the influence of alcohol when the incident occurred. The learned Government Advocate further submitted that the procedure contemplated under the Motor Vehicles Act was properly followed and that in view of the breath analyser test evidencing the alcohol in the petitioner's blood to be above 30mg/100ml, the charges are deemed to have been properly framed. She would further submit that the accident occurred at 4.25 am on 02.07.2016 and that the petitioner was arrested at 9.00 a.m. Hence, when the petitioner was in the police station, the opportunity of another breath analyser test was not required since she was not under arrest at that point of time and therefore, there is no violation of Section 203(5) of the Motor Vehicles Act. By relying on the

statement of the Security Manager of Taj Coromandal Hotel and the bill obtained from the bar therein, as well as the petitioner's mobile call data, the learned Government Advocate submitted that there were clinching evidences to establish that the petitioner was in an inebriated condition and if at all, the petitioner is of the view that the procedure under the Motor Vehicles Act has been contravened, it is always open to her to establish the same during the course of trial in view of the other incriminating evidences.

6.I have given careful consideration to the submissions made by the respective counsels.

7.The fatal accident occurred on 02.07.2016 and the sequence of events of the petitioner's movements, as per the prosecution case, is extracted as hereunder:-

As per the FIR, the fatal accident occurred on 02.07.2016 at 04.25 hours on Tharamani-Rajiv Gandhi Salai, Chennai. The breath analyser test was conducted at 06.09 hours evidencing alcohol content as 36 mg/100 ml in the blood. The petitioner was then taken to the Government Hospital at Saidapet at 8.00 hours and thereafter she was arrested at 9.00 hours and subsequently sent to the learned XVIII Metropolitan Magistrate, Saidapet, Chennai as evidenced in the arrest report dated 02.07.2016.

8.On an understanding of the sequence of the timings from the accident to the arrest, it is seen that immediately after the accident, the petitioner was subjected to a breath analyser test and thereafter sent to the Government Hospital for the Forensic Lab Test and then she came to be arrested.

9.From the learned Senior counsel's arguments, a suggestion has been made that the procedure contemplated under the MV Act to constitute an offence under Section 185 has not been adopted. In order to ascertain as to whether the procedure has been contrary or not, it would be appropriate to have a glance at the procedure required under the said Act. The relevant provisions of the Motor Vehicles Act, 1988 for the purpose of facts to this case are as follows:

"185. Driving by a drunken person or by a person under the influence of drugs:

Whoever, while driving, or attempting to drive, a motor vehicle,-- (a) has, in his blood, alcohol exceeding 30mg/100ml of blood detected in a test by a breath analyser, or (b) is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and

for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

202. Power to arrest without warrant:

(1) A police officer in uniform may arrest without warrant any person who in his presence commits an offence punishable under section 184 or section 185 or section 197:

Provided that any person so arrested in connection with an offence punishable under section 185 shall, within two hours of his arrest, be subjected to a medical examination referred to in sections 203 and 204 by a registered medical practitioner failing which he shall be released from custody.

[(2) A police officer in uniform may arrest without warrant:-- any person, who has committed an offence under this Act, if such person refuses to give his name and address]

(3) A police officer arresting without warrant the driver of a motor vehicle shall if the circumstances so require take or cause to be taken any steps he may consider proper for the temporary disposal of the vehicle.

203. Breath tests:

(1) A police officer in uniform or an officer of a motor vehicle department, as may be authorised in this behalf by the department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if the police officer has any reasonable cause to suspect him of having committed an offence punishable under section 185:

Provided that requirement for breath test shall be made (unless it is made) as soon as reasonably practicable after the commission of such offence.

(2) If a motor vehicle is involved in an accident in a public place and a police officer in uniform has any reasonable cause to suspect that the person who was driving the motor vehicle at the time of the accident, had alcohol in his blood or that he was driving under the influence of a drug referred to in section 185 he may require the person so driving the motor vehicle, to provide a specimen of his breath for a breath

test:--

(a) in the case of a person who is at a hospital as an indoor patient, at the hospital,

(b) in the case of any other person, either at or near the place where the requirement is made, or, if the police officer thinks fit, at a police station specified by the police officer:

Provided that a person shall not be required to provide such a specimen while at a hospital as an indoor patient if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient.

(3) If it appears to a police officer in uniform, in consequence of a breath test carried out by him on any person under sub-section (1) or sub-section (2), that the device by means of which the test has been carried out indicates the presence of alcohol in the person's blood, the police officer may arrest that person without warrant except while that the person is at a hospital as an indoor patient.

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood, the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

(5) A person arrested under this section shall while at a police station, be given an opportunity to provide a specimen of breath for a breath test there. (6) The results of a breath test made in pursuance of the provisions of this section shall be admissible in evidence.

204. Laboratory test:

(1) A person, who has been arrested under section 203 may, while at a police station, be required by a police officer to provide to such registered medical practitioner as may be produced by such police officer, a specimen of his blood for a Laboratory test,--

(a) it appears to the police officer that the device, by means of which breath test was taken in relation to such person, indicates the presence of alcohol in the blood of such person, or

(b) such person, when given the opportunity to submit to a breath test, has refused, omitted or failed to do so:

Provided that where the person required to provide such specimen is a female and the registered medical practitioner produced by such police officer is a male medical practitioner, the specimen shall be taken only in the presence of a female, whether a medical practitioner or not.

(2) A person while at a hospital as an indoor patient may be required by a police officer to provide at the hospital a specimen of his blood for a laboratory test:--

(a) if it appears to the police officer that the device by means of which test is carried out in relation to the breath of such person indicates the presence of alcohol in the blood of such person, or

(b) if the person having been required, whether at the hospital or elsewhere, to provide a specimen of breath for a breath test, has refused, omitted or failed to do so and a police officer has reasonable cause to suspect him of having alcohol in his blood:

Provided that a person shall not be required to provide a specimen of his blood for a laboratory test under this sub-section if the registered medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement or objects to the provision of such specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient. (3) The results of a laboratory test made in pursuance of this section shall be admissible in evidence."

10. Section 185 of the Motor Vehicles Act, 1988 provides punishments for driving and attempting to drive a motor vehicle under the influence of alcohol. Whenever a police officer suspects a person, driving a motor vehicle or attempting to drive a motor vehicle, of having consumed alcohol, may as soon as reasonably practicable, subject such a person to undergo a breath analyser test at or near the place where the suspicion occurs. To subject such a person for a breath analyser test, an accident need not have necessarily occurred. What needs to be ascertained in the breath analyser test is as to whether the contents of the alcohol in the suspect's blood is over and above 30mg/100ml. On the breath analyser report revealing the alcohol content be over and above 30 mg/100 ml and when the police

officer is of the view that the suspect has committed an offence under Section 184 or 185 or 197 of MV Act, he may arrest the suspect without a warrant. On such arrest, it is mandatory that the suspect be subjected to a medical examination by a registered medical practitioner, within two hours of his arrest as per Section 202(i) of the MV Act. However, in case, the suspect is arrested and retained at the police station, he is required to be given an opportunity of providing another breath analyser test at the police station as contemplated under Section 203(5) of MV Act and in case, the earlier breath analyser test indicates the presence of alcohol in the blood or the breath test was refused or omitted, the suspect should be subjected to a laboratory test of a specimen of his blood under Section 204(i) of the Motor Vehicle Act.

11. The learned Government Advocate made further submission that the consequence of not subjecting the suspect to a medical examination within two hours of the arrest cannot be said to be an infirmity that requires quashing of the proceedings since, even assuming such a medical examination had not been done within 2 hours after the arrest, it would entitle for release from custody only. By relying on the judgment of the Hon'ble Supreme Court in *May George V. Special Tahsildar and others* reported in 2010 (13) SCC 98, the learned Government Advocate submitted that the intention of the legislature was that the medical examination referred to under Section 202 is only directory in nature. The relevant portion of the observation of the Hon'ble Supreme Court is as follows:

"25. The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.

12.I am not in agreement with the submission made by the learned Government Advocate. Section 202 deals with the powers of a police officer to arrest without a warrant. What is required to be done by the police officer after the arrest is set out in the proviso to Section 202(1) of MV Act. The consequence of not referring the suspect for medical examination within 2 hours would result in releasing him from custody. It cannot be said that the provision to subject a detainee to a medical examination is only directory in nature. The word used in the proviso to Section 202(1) of MV Act is "shall" and in no event can this procedure of subjecting the arrested person for a medical examination be taken as an option for a police officer to conduct or not to conduct medical examination on the suspect. The language used in Section 204 of MV Act will also be deemed to be a mandatory procedure required by a police officer to provide a medical practitioner for taking specimen of the blood of a suspect for a laboratory test, in circumstances, when the presence of alcohol is seen in the blood of a suspect or when the suspect refuses a breath test or the breath test has not taken place. A co-joint reading of Sections 202, 203, 204 of MV Act could only indicate that whenever a person is arrested on the ground of drunken driving, he has to be mandatorily subjected to a medical examination referred to in Section 203 and 204 in the MV Act to a registered medical practitioner therein, in view of the proviso to Section 202(1) of the M.V. Act.

13.The time limit for taking a breath test under Section 203 of MV Act has not been specified. The breath analyser test is required to be taken as soon as reasonably practicable after the accident. In case, an arrest is made for commission of an offence under the provisions of this Act, it is mandatory to subject the suspect for a medical examination within two hours of the arrest.

14.In the instant case, the accident is said to have occurred at 04.25 hours and the breath analyser test was conducted at 06.09 hours which can be termed as a reasonable interval of time. The breath analyser test that was conducted on the petitioner is also in conformity with the procedure contemplated under Section 203(2)(b) of the MV Act. The report incidentally reveals the content of the alcohol in the petitioner's blood to be at 36mg/100 ml and the offence under Section 185 of MV Act is clearly attracted.

15.The learned Senior counsel by relying on Section 203(5) of MV Act submitted that the procedure of taking a breath analyser test has been contravened. Section 203(5) of MV Act offers further opportunity to a person who has been arrested under Section 203 of MV Act and detained in the police station

for providing a specimen of blood for a breath test at the police station. On the facts of these case, it is seen that the arrest came to be made at 9.00 hours even prior to that the petitioner was referred to the Government Hospital at Saidapet and examined by a registered medical practitioner at 8.00 hours itself. Since the petitioner was taken to custody only at 9.00 hours, it cannot be said that the procedure contemplated under Section 203(5) of MV Act has been violated. By relying on the Forensic Science Lab report dated 06.07.2016, the learned Senior counsel submitted that since the result of the Forensic Science Laboratory test revealed the absence of ethyl alcohol in the petitioner's blood, the petitioner must be given the benefit of the said report and consequently should be deemed to have not consumed alcohol at the time when the accident took place. The accident occurred at 04.05 hours and the blood sample seems to have been taken only at 10.20 hours and handed over to the Forensic Lab after two days. Though there is no reasoning or justification on the part of the Investigating Officer as to why there was delay in taking the blood sample, it cannot be said that there was a procedural irregularity in drawing the sample and thereby come to the conclusion by the petitioner was not under the influence of alcohol. As seen above, the accident had occurred at 04.25 hours and the blood sample was taken only after about 6 hours. The case of the prosecution is that the petitioner had consumed alcohol at 3.36 a.m., and if the version of the prosecution is presumed to be correct, then the blood sample drawn was almost after 7 hours.

16.The learned Government Advocate submitted that apart from the Forensic Lab report there are other incriminating materials collected during the course of investigation which reveals that the petitioner was under the influence of alcohol at the time of the accident. The petitioner's mobile phone call data records shows the presence of the petitioner at Taj Coromandel Hotel at 01:28:44 hours on 02.07.2016. The petitioner's car had entered as per the vehicle entry register at Taj Coromandel Hotel, the petitioner had entered the hotel premises at 01.35 hours on 02.07.2016. The Security Manager of Taj Coromandel Hotel in his statement recorded under Section 161(3) Cr.P.C. had also stated that the petitioner had entered the bar at 01.35 hours and left the bar at 03.45 hours on 02.07.2016. There was a bar bill for Rs.1664.63 paid by the petitioner using her visa card at 03:36:37 a.m. on 02.07.2016 for purchase of three pegs of a branded alcohol. In view of these incriminating evidences, the learned Government Advocate submitted that the reliance need not be only on the Forensic Lab report and that the petitioner should be subjected to trial to prove her innocence.

17.The learned Senior counsel for the petitioner by relying on the judgment in Jagdev Singh Vs. State of Himachal Pradesh reported in 2015 SCC OnLine HP 2520 and submitted that when the

breath analyser device estimates the presence of alcohol through a breath test but they by no means completely dispense with the requirement of blood examination in certain cases. I do not wish to go into such a finding of the learned Single Judge of the Himachal Pradesh High Court in view of my earlier finding that there are other materials which may implicate the petitioner for having driven the car in a drunken state which aspect requires to be established during the course of trial.

18.As observed earlier, apart from the delay in drawing the blood sample, there is no procedural irregularity in subjecting the petitioner to a breath analyser test or arresting her without a warrant. Even otherwise, in view of the incriminating materials which may implicate the petitioner of having consumed liquor at Taj Coromandel hotel and thereafter driving the car under the influence of alcohol, it would be appropriate that these evidences should be put to a test under a proper trial. When there are more than one evidence which may indicate that there was a possibility for the commission of the offence, this Court by exercising its power under Section 482 of Cr.P.c., may not be justified in quashing the same.

19.The views and observations on the facts of the case have been made on the prima facie materials produced before this Court and hence, the trial Court shall not be influenced by the views expressed by this Court on the facts and shall be at liberty to independently decide the case on the evidences let in before it.

20.In the result, I do not find any merits on the facts submitted before me in the instant case. Consequently, the Criminal Original Petition stands dismissed. Connected Miscellaneous Petitions are closed.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

DP

To

1. The Inspector of Police,  
Traffic Investigation-South,  
J-3, Guindy,  
Chennai-600 032.

WEB COPY

2. The Public Prosecutor,  
High Court, Madras.

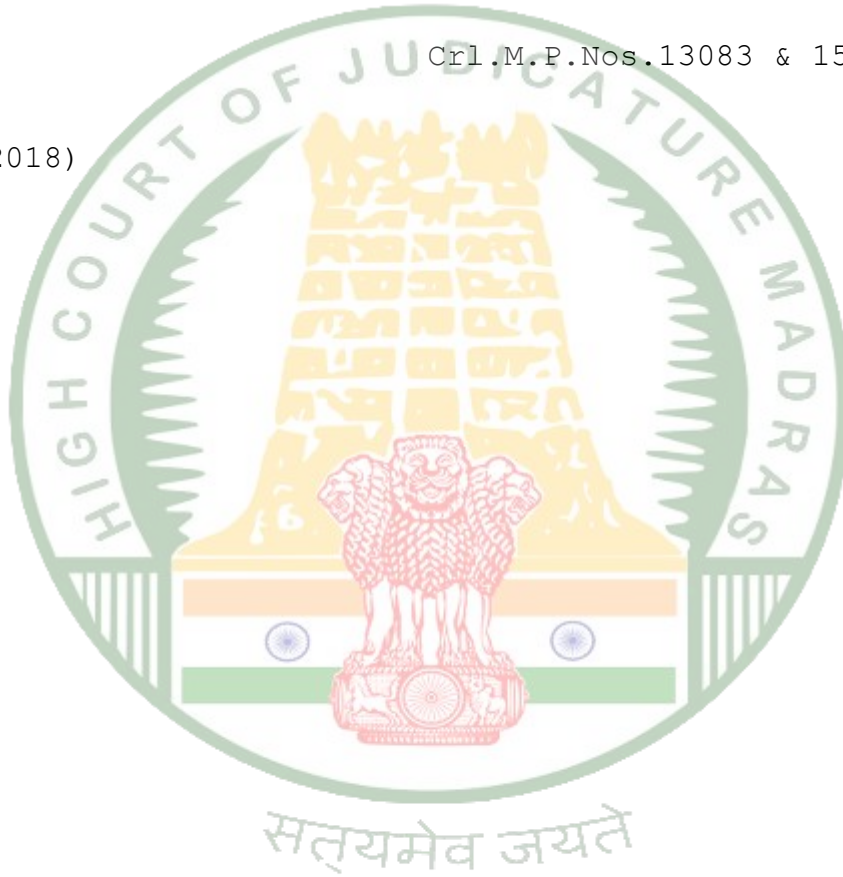
3. The Additional Sessions Judge No.XVIII,  
Chennai

+2 Ccs to M/s. Lita Srinivasan, Advocate sr 19114.

Crl.O.P.No.22324 of 2017  
and

Crl.M.P.Nos.13083 & 15686 of 2017

SS (CO)  
SP (22/03/2018)



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