

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

CRIMINAL REVISION APPLICATION NO.1 OF 2006

Trimbak Dagdu Jadhav,
Age : 35 years,
Occ. Driver and Agri.,
r/o. Babhaleshwar,
Tq. Rahata,
Dist. Ahmednagar

..Applicant

Vs.

The State of Maharashtra,
Through Loni (Taluka Rahata)
Police Station,
Dist. Ahmednagar

..Respondent

Mr. V.D.Sapkal, Advocate for applicant

Mr. S.D.Ghayal, APP for respondent

CORAM : R.G. AVACHAT, J.
RESERVED ON : JULY 10, 2019
PRONOUNCED ON : JULY 25, 2019

JUDGMENT :-

By this Revision Application, the applicant has questioned the correctness and legality of the judgment and order dated 19.03.2002 passed by learned

Judicial Magistrate, First Class (J.M.F.C.), Shrirampur, in S.T.C. No.1407 of 1999, confirmed by learned IInd Additional Sessions Judge, Shrirampur by the judgment and order dated 29.11.2005 in Criminal Appeal No.15 of 2002.

2. By the impugned judgment and order, the applicant herein was convicted for the offences punishable under Sections 279 and 304-A of the Indian Penal Code and sentenced to suffer simple imprisonment for the period of three months and one year, respectively. Both the sentences were directed to run concurrently.

3. The case of prosecution, in short, was that on 20.08.1999 at about 11.00 a.m., the applicant herein drove a truck bearing registration No.MH-17-C-5721 in rash and negligent manner and knocked down a school boy – Samir Shaikh, resulting in his death. The incident took place on Pravaranagar – Babhaleshwar road.

Arif Tamboli (PW 3) claimed to have witnessed the incident. He rushed the deceased to Pravaranagar Hospital and then lodged the FIR (Exh.14). The crime, therefore, came to be registered against the applicant herein. The crime was investigated and the applicant came to be proceeded against by filing charge-sheet. Learned J.M.F.C. framed the Charge. The applicant pleaded not guilty. To bring home the Charge, the prosecution examined four witnesses. On appreciation of the evidence in the case, learned J.M.F.C./Trial Court convicted and sentenced the applicant, as stated above.

4. The applicant was unsuccessful in his appeal from conviction. He is, therefore, in Revision before this Court.

5. Heard Mr.Sapkal, learned Counsel for the applicant and Mr.Ghayal, learned APP for the respondent – State.

6. Mr.Sapkal, learned Counsel for the applicant, would submit that the impugned judgment and order is illegal, as has been passed in contravention of the provisions of Section 262(2) of the Code of Criminal Procedure (Cr.P.C.). Learned Counsel meant to say that it was a summary criminal case. The applicant, therefore, could not have been sentenced to imprisonment for a term exceeding three months. As such, by sentencing the applicant to imprisonment for one year, the Trial Court exceeded its jurisdiction, rendering its judgment and order illegal one. Learned Counsel also took me through the evidence to submit that the impugned judgment and order is inconsistent therewith and therefore, is liable to be set aside.

Learned APP would, on the other hand, submit that there are concurrent findings. The evidence in the case could not be reappreciated in exercise of jurisdiction under Section 397 of the Cr.P.C. In view

of learned APP, there was an eye witness account. The applicant came with multiple defence versions. The Trial Court has rightly convicted the applicant with sound reasons. No interference with the impugned judgment and order is called for.

7. Where, conviction and punishment is supported by evidence, then there would be no scope to interfere with the impugned order. If the impugned order is found to be perverse or not borne out of evidence in the case, the Court, in exercise of its revisional jurisdiction, would be well within its jurisdiction to interfere with the impugned judgment and order.

8. Section 2(w) of Cr.P.C. defines "summons-case" to mean a case relating to an offence, and not being a warrant-case. Section 2(x) defines "warrant-case" to mean a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Thus,

Cr.P.C. recognises two kinds of cases: namely, summons case and warrant case. The case the applicant has faced, is a summons case. It is a common knowledge that in the State of Maharashtra, the summons cases, on filing of the charge-sheets, are registered with the concerned Courts as summary trial case. Registration as summary trial case (S.T.C.), it appears, impliedly, suggests that the Magistrates are supposed to try them as per the procedure contained in Chapter XXI of Cr.P.C., which speaks of summary trial. Section 262(2) of Cr.P.C. states that no sentence of imprisonment with a term exceeding three months, shall be passed in the case of any conviction under Chapter XXI of Cr.P.C.

9. Section 260 of Cr.P.C. reads thus:-

"260. Power to try summarily.- (1)
Notwithstanding anything contained in this Code -
(a) any Chief Judicial Magistrate;
(b) any Metropolitan Magistrate;
(c) any Magistrate of the first class

specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences-

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii)

to

(ix)

Section 260(2) of Cr.P.C. empowers the Magistrate to try the case in any other manner provided by the Cr.P.C., meaning thereby the Magistrate may apply the procedure meant for trial of summons case contained in Chapter XX of Cr.P.C. The provision states, when, in summary trial, it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by Cr.P.C. Section 259 of Cr.P.C. empowers the Court to convert

a summons case into a warrant case. It means that the Court can try a summons case as per the procedure prescribed for trial of a warrant case by the Magistrate.

As seen above [Section 260(c)], the Magistrate of First Class needs to be specifically empowered by the High Court with the powers to try a case summarily.

10. With the assistance of learned APP, the entire Record and Proceedings of the case in hand is examined. Admittedly, the case was registered as a summary trial case. The record indicates the Trial Court to have framed Charge and tried the case in accordance with the procedure meant for trial of a warrant case. One does not come across the order with a reason as to why the Trial Court tried the case as a warrant trial case. There is also nothing to indicate, whether the Trial Court had not been conferred with the powers to try summarily. Since the record indicates the case to have been tried as a

warrant case, the Trial Court might have felt to have been justified in imposing the sentence for a term exceeding three months. If, on examination of the evidence in the case, it is found that the offences are made out, then this Court could well be within its powers to reduce the term of sentence of the period exceeding three months, so as to bring it in terms of Section 262(2) of Cr.P.C. On this score alone, the applicant would not be justified to claim setting aside of the order of conviction and resultant sentence in its entirety.

11. The facts in the case of **Nanalal Harishankar Vs. State of Gujarat, 1969 Cri.L.J. 389**, cited by learned Counsel for the applicant, are quite different. The Magistrate, who tried the case summarily, was competent to try so and the accused was convicted for offences and sentenced of four months R.I. with fine of Rs.500/-. The Court held it to be illegal as contravening the provisions of Section 262 (2) of Cr.P.C.

The facts in the case on hand indicate that though the case was registered as a summary trial case, the trial Court, from its beginning, applied the procedure meant for trial of a warrant case.

12. In my view, since there was no reason forthcoming to indicate, as to why the Trial Court tried the case as a warrant trial case, great prejudice and discrimination is caused to the applicant so far as the term of sentence is concerned. It is reiterated that the fact that all summons cases are registered as summary trial cases, the Magistrate appears to have been expected to try such cases summarily. When one of such cases is singled out without assigning any reason and is tried as a warrant trial case and if the accused therein is convicted and sentenced for a term more than three months, he has every justifiable reason to contend to have been discriminated. Be that as it may, I do not propose to dwell at length on this issue for the

reason that the application is going to be allowed for other reasons given herein below.

13. Perusal of the impugned judgment, undoubtedly, suggest that the Trial Court was swayed by the fact that a young school boy lost his life. Most of the reasons given by the Trial Court to hold the applicant guilty could, by no stretch of imagination, be agreed with. The reasons given by the Trial Court with which I do not agree, are:-

"....On perusal of inquest panchnama, it clearly shows that the stomach of the deceased was pressed and internal intestine was came out from the anus. This fact clearly shows that the accused was rash and negligent while driving his vehicle i.e. Truck No.MH-17-C-5721. On perusal of the evidence adduced by the complainant - Asif Chandubhai Tamboli it appeared that he is smoothly corroborated the theory of prosecution and he has straightway sated on oath that the accused gave dash to the school going boy who was proceeding on bicycle and due to that dash the death was caused..... It is also true that he is the main eye-witness and the complainant in this proceeding. Therefore, merely because he had not Court summons. His evidence

should not be discarded. The another fact is that the accused has not brought on record the relationship of this witness to the deceased-Samir Mansoor Shaikh and his family. He has also not brought on record some previous enmity with him of this witness. Therefore, I come to the conclusion that the evidence adduced by this complainant is more important and corroborative and believable. Because the accused is admitting that his truck was proceeding on the day of incident on a public road and that boy caught under the wheel of that truck and most important fact is that he is not firm and confident with his defence. Now a days every one is in hurry. Therefore, such persons has not considered what he has doing. Now a days the population is increased. The number of vehicles were also increased. The roads are became busy and crowdy. Therefore, it was the duty of every human being to protect others human life. The accident are also increased now a days because every one is carrying his vehicle in rash and negligent manner without taking into consideration the road situation. Herein the case also the something was happen in respect of the deceased-Samir Mansoor Shaikh. His death is unfortunate and the accused himself was responsible for his death. Admittedly, the deceased was school going boy. The accused has finished the life of that school boy. Therefore, such persons should be punished. The punishment of this accused would be a lesson to

others to behave carefully, cautiously in the society. "

14. Admittedly, the impact took place on Pravaranagar – Babhaleshwar road on 20.08.1999 by 11.00 a.m. Unfortunately, the life of a young school boy was cut short. The law is, however, well settled that the consequence shall not be the basis for determining liability. The prosecution has to prove its case beyond all reasonable doubt. The accused may keep mum or raise multiple, even inconsistent and/or mutually exclusive defences. The record indicates that the case was based on evidence of a solitary witness, who claimed to have had witnessed the incident.

15. The evidence in the case indicates that PW 3 – Arif was resident of Pravaranagar. It is in his evidence that on the fateful day in the morning, he had come to a milk dairy on his motorcycle and was on his way back by 11.00 a.m. This fact indicates that PW 3 – Arif is a chance witness. His evidence,

therefore, ought to have been closely scrutinised by the Trial Court. The evidence of PW 3 – Arif indicates that when he reached Nehru Nagar, he saw one truck came from opposite direction in a high speed. At that time, a bullock-cart was standing facing towards Pravaranagar. The truck gave dash to Master Samir, who was proceeding on bicycle for school. The cleaner-side rear wheel of the truck ran over Samir. PW 3 – Arif identified the applicant as driver of the truck that knocked down deceased Samir.

The other two witnesses examined in the case were panch witnesses to the scene of offence panchnama. The fourth witness was the Police Officer, who recorded the FIR lodged by PW 3 – Arif.

16. It was stated in the FIR that one truck driven in speed came from Pravaranagar to Babhaleshwar. Whereas, in the evidence before the Court, the first informant (PW 3) improved his version to state the truck came in high speed. Before

the Court, the witness testified that the boy was keeping left of the road. The FIR is silent to state the same. The witness was duly confronted with his FIR. He testified to have had reported to the concerned police official. Be that as it may, omission amounting to vital contradiction in the nature of improvement in the oral evidence has come on record. PW 3 – Arif's evidence further indicates that there was one bullock-cart standing on main road. The evidence, however, is not clear as to whether, the impact took place after the truck overtook the bullock-cart or therebefore; or while the truck was over taking the same. There is evidence to indicate that Pravaranagar – Babhleshwar road happens to be busy with vehicular traffic. Pravaranagar Sugar Factory was in the nearby. PW 3 – Arif claimed ignorance, as to whether the sugar factory was open.

17. There is further evidence to indicate that the day, on which PW 3 – Arif gave evidence, he had no witness summons issued by the Court. The record

indicates that he himself appeared before the Court to give evidence. According to him, the panch witness had informed him about the date of the case. The fact that PW 3 – Arif *suo motu* appeared before the Court to give evidence, gives a reason for the applicant to contend that PW 3 – Arif was an interested witness.

18. To sum up, following factors weigh with this Court to interfere with the impugned judgment and order of conviction and sentence recorded against the applicant :-

The conviction has been based on a solitary witness, PW 3 – Arif. He appeared to give evidence in the case, when he had not been issued a summons to appear. He was a chance witness. Testimony of a chance witness, although not necessarily false, is proverbially unsafe (**Guli Chand and ors. Vs. State of Rajesthan, AIR 1974 SC 276**).

19. It is doubtful as to whether PW 3 – Arif had really witnessed the incident. There are two documents on record. Those are the office copies under the signature of the Investigating Officer. Those documents could be read in evidence as it is. The first one is the report of the impact, submitted to the Sub-Divisional Police Officer. It records that the truck gave dash to a boy coming from opposite direction. The second one is the notice given under Section 209 of the Motor Vehicles Act, 1988, to the applicant herein. The notice also records that the deceased boy was coming from opposite direction.

20. The scene of offence panchnama (Exh.17) appears to be inconsistent with the prosecution case. The panchnama records dimensions at the scene of offence. Pravaranagar – Babhaleshwar road runs South-North. Carriage width of the road is 18 feet. On either side of the road, there are side-walks of 3 feet width. The bicycle of the deceased was found

lying at a distance of 5 feet, 9 inches towards west of the road. It was found lying at roadside grass. If the boy was really coming from opposite side and was keeping left side of the road, then, as a result of the impact, his bicycle would not have found towards West side of the road. The Investigating Officer has not been examined. The same has caused prejudice to the applicant in his defence. The FIR indicates the truck came in speed. PW 3 – Arif testified that the truck was in high speed. The FIR was silent to state that the deceased boy was proceeding from the left side of the road. PW 3 – Arif improved his version to state in his evidence, that the deceased boy was keeping left side of the road. The evidence indicates that a bullock-cart was stationary on the road. The evidence is, however, silent to state as to how, the incident took place i.e. whether, the impact took place after the truck over took the bullock-cart or therebefore; or while the truck was over taking the same.

As such, close scrutiny of the evidence indicates that it is very much doubtful as to whether, PW 3 – Arif (chance witness) had really witnessed the impact.

21. The Trial Court referred to the scene of offence panchnama. It needs no mention that the principle of *res ipsa loquitur*, by itself cannot be a basis to fasten a person with criminal liability. The scene of offence panchnama was drawn three hours after the incident. Before recording conviction of a driver of vehicle, the act of rashness or negligence should be culpable.

22. The trial Court ought not to have believed and acted upon the evidence of PW 3 – Arif. The Appellate Court did not give separate reasons while upholding the judgment of the trial Court.

23. For the aforesaid reasons, the Revision Application deserves to be allowed.

24. Hence, the following order :-

- (i) Criminal Revision Application is allowed.
- (ii) The judgment and order dated 19.03.2002 passed by learned Judicial Magistrate, First Class, Shrirampur, in S.T.C. No.1407 of 1999, confirmed by learned IInd Additional Sessions Judge, Shrirampur by the judgment and order dated 29.11.2005 in Criminal Appeal No.15 of 2002, is set aside.
- (iii) The applicant is acquitted of the offences punishable under Sections 279 and 304-A of the Indian Penal Code.

[R.G. AVACHAT, J.]