

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

CRIMINAL REVISION APPLICATION NO. 370 OF 2004

Dashrath s/o. Dagadu Ghodke,
Age: 40 years, Occu: Doctor,
R/o Pimpalgaon (Dola),
Tq. Kallam, Dist. Osmanabad.

... **Applicant**

Versus

1. The State of Maharashtra,
2. Aruna w/o. Kiran Chavan,
Age: Major, Occ: Household,
R/o: Ramnagar, Osmanabad,
Dist. Osmanabad.

... **Respondents**

Mr. V.D. Salunke, Advocate for the Applicant.
Mr. B.V. Virdhe, A.P.P. for the Respondent/State.

CORAM : MANGESH S. PATIL, J.

**DATE OF RESERVING THE JUDGMENT : 30.08.2019
DATE OF PRONOUNCING THE JUDGMENT : 13.09.2019**

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JUDGMENT:

This is a revision under Section 401 read with Section 397 of the Code of Criminal Procedure preferred by the original accused in R.C.C. No.387 of 2001 from the Court of the Chief Judicial Magistrate, Osmanabad

being aggrieved and dissatisfied by the judgment and order dated 17.10.2003 passed by the learned Chief Judicial Magistrate convicting and sentencing him for the offences punishable under Sections 304-A and 279 of the Indian Penal Code and under Sections 177 and 188 of the Motor Vehicle Act, which has been confirmed by the learned Additional Sessions Judge, Osmanabad by dismissing his Criminal Appeal No.23 of 2003 by the judgment and order dated 04.09.2004 preferred by him under Section 374 of the Code of Criminal Procedure.

2. In sum and substance the prosecution case is to the effect that the deceased was the married son of informant Vandanabai (PW-1). On 21.08.2001 he was sitting on a platform by the side of the road near the spot where pandal of Ganpati Festival was erected. She was present inside her house which was nearby. Witness Ajay (PW-4) who was running a S.T.D. booth nearby had seen the accused going in his white car and he could identify him as Dr. Ghodke. After sometime he heard a noise and rushed to the spot and noticed that the car had run over the platform and thereafter again had come down the platform and rammed under the stage of the pandal. It is only when the car was taken in the reverse direction that he saw that the deceased Kiran was seriously injured and had crushed under the car.

He could identify him as deceased Kiran as the son of an employee working in the Municipal Corporation. He saw the accused alighting from the car and fleeing from the spot in a rickshaw. Deceased Kiran was shifted to a hospital and on the next day he succumbed.

3. It is the prosecution case that apart from this witness Ajay (PW-4) even Umesh (PW-3) had witnessed the incident.

4. Vandanabai (PW-1) who was present in the house was informed by some women about the incident and therefore she rushed to the spot and saw that Kiran was lying unconscious with serious injuries. She therefore shifted him in an auto rickshaw to the Government Hospital but was declared dead.

5. On the next day Vandanabai (PW-1) lodged the F.I.R. (Exhibit-18). The offence was registered. The Inquest Panchanama (Exhibit-20) was conducted. Spot panchnama (Exhibit-19) was held in presence of Santosh (PW-2). Post Mortem Examination was conducted and the accused was arrested and in due course of time the charge-sheet was filed for the aforementioned offences.

6. The learned Chief Judicial Magistrate by the impugned judgment and order convicted and sentenced the accused which has been confirmed by the learned Additional Sessions Judge, Osmanabad in appeal as mentioned herein-above.

7. The learned advocate for the applicant vehemently submitted that both the Courts below have committed gross error in appreciating the evidence. There was no sufficient and cogent evidence to draw any inference as to firstly about identity of the accused as the driver and secondly about the exact occurrence of the accident. The observations and the conclusions of both the Courts below are clearly based on inferences which are not deducible from the material that was led before them by way of evidence. The witnesses examined by the prosecution are not reliable and still the two Courts below have blindly relied upon their testimonies. Such faulty and perverse appreciation has resulted in grave miscarriage of justice.

8. The learned advocate for the accused would further submit that the evidence on the record even if it is accepted at its face value does not conclusively demonstrate and make out the circumstances to arrive at a conclusion as to the rash and negligent driving by the accused. The two

Courts below seem to have swayed away by the version of the prosecution about the accused having fled from the spot in stead of shifting the injured to some hospital more so since he himself is a medical practitioner. Thus according to the learned advocate though it is a case of concurrent findings of facts by the two Courts below, the High Court is competent to interfere and re-appreciate the evidence since the appreciation of evidence by the two Courts is grossly perverse and arbitrary.

9. The learned A.P.P supported the observations and conclusions in the judgments and orders of both the Courts. He submitted that on the facts which had come on the record, coupled with the principle of *res ipsa loquitur* would clearly justify conviction of the accused. The accused has come out with a bold defence of total denial. He also did not avail of the opportunity to explain as to how the accident had occurred. Such taking a false plea of total denial has been correctly resorted to by the learned Additional Sessions Judge in drawing an inference against him which cannot be assailed. In support of his version the learned A.P.P placed reliance on the decision of the Supreme Court in the case of **Ravi Kapur Vs. State of Rajasthan; (2012) 9 Supreme Court Cases 284.**

10. The accused is invoking the revisional powers vested in this Court. There is concurrent finding of facts of the two Courts below and the scope for interference with such concurrent finding of facts in this revision is very limited. Such revisional jurisdiction can only be exercised only in exceptional cases when there is a glaring defect or manifest error or perversity in appreciation of evidence which results in miscarriage of justice. Conversely if the concurrent findings of the trial Court and the Appellate Court are based on well grounded reasoning the High Court would be loath in exercising revisional jurisdiction. In the ordinary course this Court would not venture into the arena of appreciation of evidence but even after such re appreciation no interference in the concurrent findings is warranted.

11. The prosecution has examined Vandanabai (PW-1) who happens to be the informant and mother of the deceased. As is mentioned herein-above she has not herself witnessed the accident and was present in her home. It is only after the occurrence of the accident that couple of women went to her house and informed her about the incident and thereafter she reached the spot. Obviously she is not an eye witness and even her testimony falls short to assist us in ascertaining if it was a case of rash and negligence driving by the accused.

12. As far as Santosh (PW-2) is concerned he is a panch on the spot panchanama (Exhibit-19) (initially the panchanama was exhibited in his deposition as Exhibit-24 but the Rozanama reads that the learned Chief Judicial Magistrate has deleted this entry from the Rozanama apparently because the panchanama was already exhibited as Exhibit-19). He has stated that on 22.08.2001 the police conducted panchanama of the scene of the accident in his presence. He has stated that a white car was present there. The white car had climbed over the platform in front of the shop of one Gaus Shaikh and had thereafter come down and rammed beneath the stage which was erected for the Ganesh festival. Interestingly he has not stopped at that. He has further deposed that even at the time of accident he was sitting by the side of the road, deceased Kiran was sitting on the platform and was dragged under the car and died. During his cross-examination he did admit that police did not record his statement and he was narrating about the manner in which the accident had occurred for the first time during his testimony. It is not that his statement was recorded under Section 161 of the Code of Criminal Procedure by the Investigating Officer. Rather the Investigating Officer himself having not stepped into the witness box, this improvised version of Santosh (PW-2) who is in fact a panch on the spot panchanama is liable to be

discarded. Importantly, both the Courts below have not referred to his testimony to the extent of his version about occurrence of the accident by posing himself to be an eye witness.

13. The prosecution has then examined Umesh (PW-3) who was also posed to be an eye witness. However he turned hostile to the prosecution and was allowed to be cross-examined by the prosecutor. Though during his cross-examination he admitted to have gone to the spot of the accident and having noticed that a white car had climbed on the platform, importantly he has not stated to have witnessed the accident himself.

14. As has been rightly noticed by the two Courts below, the prosecution is heavily relying upon the testimony of Ajay (PW-4), who also has been posed to be an eye witness. The evidence of this witness Ajay (PW-4) therefore carries much importance and needs to be scrutinized minutely. His version is that he was present in his S.T.D. booth and the clinic of Dr. Ghodke i.e. the accused is in front of his S.T.D. booth. He saw the accused proceeding in his car bearing No. MP-09/HA-0739 and the accused himself was driving it and the car had gone towards the house of Deshmane. He then stated about having heard some noise and came out of the shop and went

towards the house of Deshmane and saw that the car had climbed on the road side platform and had rammed under the stage. When the car was taken in reverse direction he saw that Kiran was trapped underneath and had sustained serious injuries. He thereafter stated that the accused then alighted from the car, boarded a rickshaw and fled and deceased Kiran was taken to a hospital. If this version which is the complete version in the examination-in-chief of Ajay (PW-4) is taken at its face value it does clearly demonstrate and prove that it was the accused who was driving the car which had met with the accident and the deceased was found trapped under it. The car was found trapped under the stage. Accepting this version as it is, it clearly shows that Ajay (PW-4) was present in his S.T.D. booth and had gone to the spot only after the accident had already taken place. In that sense, strictly speaking he cannot be said to be a witness who had himself seen occurrence of the accident. It is not his version that he had seen the accused driving the car which initially went over the platform and then crushed the deceased. Obviously he having rushed to the spot immediately after its occurrence, his version about the car having first climbed on the platform would only be his inference as to the manner in which the accident must have occurred. Such inference cannot be treated as the evidence. If such is the state of affairs,

though his testimony would be of some help to draw an inference to appreciate the manner in which the accident must have occurred, he having not stated anything about the manner of driving, the spot where deceased was Kiran sitting or was present, the manner in which the car had given dash to the deceased, which factors are very vital in ascertaining if it is the case of rash and negligent driving, it cannot be said that his inference can be taken as a gospel truth. The law requires that all these factors need to be established to enable a Court to draw an inference as to the manner in which the vehicle was being driven. The learned Additional Sessions Judge has rightly discarded the defence version that merely because this witness Ajay (PW-4) has stated that his statement was not recorded he cannot be disbelieved. However the point here is as to what extent his testimony is of help in deciding the vital factor as to if the driving was rash and negligent. Similarly even no much importance can be attached for non examination of the Investigating Officer as has been rightly discussed and decided by the learned Additional Sessions Judge.

15. The two Courts below have apparently made a mistake in appreciating the evidence of Ajay (PW-4) and partaking it to be that of an eye witness when in fact though he has reached the spot immediately and was

present nearby, it is not his version to have actually seen the collision. He was present in his S.T.D. booth and had only seen the accused driving away his car. It is thereafter that he had heard the noise and had rushed to the spot. To the extent of identification of the accused as the same driver, certainly his version is vital and cannot be assailed. Since he was knowing the accused and his surname and his occupation and had seen him driving away the car and also had seen him alighting from the car and fleeing from the spot in a rickshaw after the incident. Therefore his version that it was the accused who was driving the car which had met with the accident is certainly unassailable. However he does not come out with any other particulars as to how the accident had occurred.

16. It has been laid down in the case of **Ravi Kapur** (supra) the doctrine of *res ipsa loquitur* can also be invoked in criminal cases and in an appropriate case can be applied to draw inference against the accused who does not come forward to explain the facts and circumstances in which the accident had occurred to substantiate his version. The learned Additional Sessions Judge has also resorted to such inference by observing that the accused to have come out with some concrete version during his examination under Section 313 of the Code of Criminal Procedure. Primarily the burden is

on the prosecution to bring on record such circumstances as would *prima facie* be sufficient to draw some inference about rashness or negligence on the part of the accused.

17. It appears that based on the spot panchanama (Exhibit-19) and the version of Santosh (PW-2) it can be demonstrated that there were tyre markings on the platform stretching up to 30 feet and the front side portion of the bonnet of the car was damaged and there were white colour markings on the platform to show that in all probabilities the body of the car must have brushed it. In this regard it is important to note the following observations in the case of **Ravi Kapur** (supra) of the Supreme Court in paragraph nos. 20 to 22:

“20. In light of the above, now we have to examine if negligence in the case of an accident can be gathered from the attendant circumstances. We have already held 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 a 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 the attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owned to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as:

- *The event would not have occurred but for someone's negligence.*
- *The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.*
- *The accused was negligent and owed a duty of care towards the victim.*

21. *In Thakur Singh v. State of Punjab the petitioner drove a bus rashly and negligently with 41 passengers and while crossing a bridge, the bus fell into the nearby canal resulting in death of all the passengers. The Court applied the doctrine of res ipsa loquitur since admittedly the petitioner was driving the bus at the relevant time and it was going over the bridge when it fell down. The Court held as under: (SCC p. 209, para 4)*

“4. It is admitted that the petitioner himself was driving the vehicle at the relevant time. It is also admitted that bus was driven over a bridge and then it fell into canal. In such a situation the doctrine of res ipsa loquitur comes into

play and the burden shifts on to the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. He did not succeed in showing that the accident happened due to cause other than negligence on his part.”

22. Still, in *Mohd. Aynuddin*, this Court also stated the principle: (SCC p. 74, para 8)

“8. The principle of res ipsa loquitur is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably led to the belief that in the absence of negligence the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrongdoer.”

It has also been stated that the effect of this maxim, however, depends upon the cogency of the inferences to be drawn and must, therefore, vary in each case.”

18. A careful perusal of these observations would reveal that the principle of *res ipsa loquitur* in criminal cases can be applied when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence the accident would not have occurred

and that the thing which caused injury was under the management and control of the wrongdoer. Therefore the attendant circumstances become important. As can be seen in the case of **Ravi Kapur** (supra) the bus had come to the wrong side coupled with that the other factors of the accused driver having halted the bus at a distance of 100 ft. and by parking the bus he having fled from the spot were taken in to account. Besides it was also noticed that in spite of being the owner of the bus who had taken its custody as the owner of the bus, he had taken a false defence and had refused to come with some explanation as to the manner in which the accident had taken place that the Supreme Court had found that the principle of *res ipsa loquitur* would come in aid of the prosecution.

19. In the case of **Thakur Singh Vs. State of Punjab; (2003) 9 Supreme Court Cases 208** the accused had admitted that he was driving the bus along a birdge and it had fallen into the canal. On such backdrop the doctrine of *res ipsa loquitur* was invoked and the burden was shifted to the accused to establish that the accident had not occurred because of any negligence on his part.

20. In the matter in hand, as is observed above, though there is no

evidence as to the exact manner in which the accident had occurred, there are similar attendant circumstances. The signs noticed during the spot panchanama about the car of the accused having climbed the road side platform and then it went underneath the stage and the accused having alighted the car and fled away in a rickshaw and the deceased was found trapped under the car. Once having found that these many attendant circumstances stand duly established, as is expected in the case of **Ravi Kapur** (supra), the principle of *res ipsa loquitur* can be easily invoked and the onus stood shifted to the accused who should have come out with his own explanation as to how the accident had taken place and to have brought on record the circumstances to demonstrate that it had not occurred because of any rashness or negligence on his part.

21. It is important to note that except a complete denial, the accused has not come out with any version as to the manner in which the accident had occurred. None of the prosecution witnesses have been cross-examined on his behalf to reveal even a single circumstance to draw any inference in his favour. Similarly he has also avoided to come out with even a single circumstance during his examination under Section 313 of the Code of Criminal Procedure to draw any other inference than that is deducible in the

fact circumstances and evidence on the record. The two Courts below have rightly appreciated these circumstances and have rightly convicted and sentenced the accused for having caused the death by rash and negligent driving.

22. I find no sufficient and cogent reason to interfere in the concurrent findings of facts by the two Courts below in convicting the accused.

23. However, the learned Magistrate has apart from returning conviction under the provisions of the Indian Penal Code has also convicted the accused for the violation of the provisions of Motor Vehicle Act under Section 130 and 134 (3) and by invoking the provisions of Section 177 and 188 has imposed a composite fine of Rs.500/-. The prosecution having not examined the Investigating Officer or any other Police Officer, there is no evidence to show that the accused has refused to produce the licence or certificate of registration of his car which is an offence under Section 130 of the Motor Vehicle Act and consequently he could not have been convicted for that offence. But since he had not reported the accident and had not taken any step to shift the injured who subsequently died, for medical treatment as

is required under Section 134 of the Motor Vehicle Act, his conviction for that offence is inassailable but with the little modification that the punishment therefor would be under Section 187 of the Motor Vehicle Act which provides for punishment for the offences relating to accident including the offence under Section 134 Section 181 of the Motor Vehicle Act which provides for punishment in respect of driving vehicles in contravention of Section 3 or Section 4 would not be applicable nor would Section 188 of that Act which provides for punishment for abetement of the offences punishable under Section 184, 185 and 186 would be applicable. However since fine of Rs.500/- has been imposed which is the fine within the limits provided for under Section 187 of the Motor Vehicle Act, which would be a correct section providing for punishment for the violation under Section 134 of the Motor Vehicle Act, the error committed by the learned Magistrate would not call for any interference. The learned Additional Sessions Judge has completely overlooked this defect and therefore I find it proper to clarify it at this stage.

24. In the result the revision fails and is dismissed. The accused-applicant shall surrender before the Magistrate on or before 04.10.2019.

(MANGESH S. PATIL, J.)