

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL REVISION APPLICATION NO.30 OF 2019**

Mr. Mahabubli Mulla
Son of Mr. Isac Mulla,
30 years of age, married,
Resident of H.No.235/B,
Khatye Bhat, Old Goa,
Tiswadi, Goa – 403402.

.... Petitioner

V/s

State, represented by
the Public Prosecutor,
Panaji, Goa.

.... Respondents

Shri Rajneesh Naik, Advocate for the Petitioner.
Shri Mahesh Amonkar, Additional Public Prosecutor for the
Respondent.

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 15th November, 2019

Pronounced on : 28th November, 2019

JUDGMENT :

Heard. Rule. Respondent waives service. By consent,
returnable forthwith and taken up for hearing and final disposal.

2. The applicant has been convicted by the learned JMFC, Panaji
of an offences punishable under Section 279, 304-A of IPC by the
impugned judgment and order dated 27/07/2018. He is sentenced to
undergo simple imprisonment for thirty days for an offence punishable

under Section 279 of IPC. He is sentenced to undergo simple imprisonment for a period of sixty days for an offence punishable under Section 304-A of IPC. It seems that no fine is imposed.

3. An appeal preferred by the applicant bearing no.45/2019 in the Court of Additional Sessions Judge, Panaji also came to be dismissed on 09/08/2019.

4. The applicant has therefore invoked revisional jurisdiction of this Court challenging the impugned orders.

5. The prosecution case in brief is as follows:

On the fateful day of 20/11/2014, around 8.20 hours, the applicant was driving his rickshaw bearing no.GA-01-T-8906 from Old Goa to Panaji. It is alleged that the applicant was driving his rickshaw in a rash and negligent manner. When it reached near Hoble Wines at Ribander, Patto, while overtaking another vehicle he crossed the dotted central line and dashed against the motorcycle coming from opposite direction bearing registration no.GA-04-D-2417. It was an Hero Honda Passion motorbike. Police Constable Gaurish Tukaram

Gaonkar, who was driving the motorcycle unfortunately suffered serious injuries and died on his way to the Goa Medical College, Bambolim.

6. The Investigating Officer, PW9 Sagun Sawant held investigation into the crime. The Investigating Officer had recorded the statements of the witnesses, a spot panchanama as well as inquest was drawn. The dead body of the deceased was sent for autopsy. The rickshaw of the applicant was examined by the Motor Vehicle Inspector and its report was obtained. After the investigation, a charge sheet is filed in the Court of JMFC, Panaji.

7. As many as nine witnesses have been examined by the prosecution. The defence of the applicant in view of his statement under Section 313 of Cr.P.C. is simply “it is not true” to all the questions put to him. No defence evidence has been adduced on his behalf. The learned Magistrate after going through the evidence of the prosecution witnesses found that the applicant drove his rickshaw in a rash and negligent manner to the wrong side of the road thereby resulting into a violent dash to the motorbike of the deceased resulting

into his death.

8. The lower Appellate Court also while dismissing the appeal affirmed the findings given by the learned JMFC.

9. I heard Shri R. Naik, the learned Counsel for the applicant. At the outset, he vehemently argued that since the deceased was a police man and, in fact, he was rash and negligent, the Investigating Agency by dishonestly conducting the investigation, falsely implicated the applicant in this case. There is absolutely no evidence on record indicating negligence or rashness on the part of the applicant. The learned Counsel took me through the evidence of the prosecution witnesses and tried to emphasise as to how there are material inconsistencies in the testimony of the witnesses.

10. It is the contention of Shri R. Naik that the spot panchanama and the sketch depicts that the applicant was not at all negligent. It is contended that there is no eye witness to the incident. According to the Counsel, evidence of PW2 needs to be discarded as he is not a truthful witness, in the sense that he was not present on the spot at the

relevant time. He was a planted witness brought by the prosecution only to falsely implicate the applicant. The Counsel, however, does not dispute the factum of accident at the relevant time. It is contended that the accident occurred in the centre of the road and as seen from the panchanama, both vehicles were seen on the wrong side after the impact and, therefore, there is no question of application of maxim *res ipsa loquitur*. The learned Counsel, therefore, prayed for quashing the impugned judgment and order.

11. Shri Amonkar, the learned Additional Public Prosecutor, on the other hand, supported the impugned judgments by contending that the testimonies of PW2 Rupesh Raut, PW6 Ramesh Parsekar, PW7 Pandarinath Asulkar & PW8 Ashok Parab, if read conjointly would point towards the rash and negligent driving of the rickshaw by the applicant, which finds support and corroborated materially from the spot panchanama Exhibit 8 and the sketch of the map. It is submitted by Shri Amonkar that there are no omissions or contradictions on record. He drew my attention to the statement of the applicant under Section 313 of the Cr.P.C. where the applicant could have taken a stand that it was the deceased who was rash and negligent and was

responsible for his own death instead of the applicant. No such defence has been raised despite an opportunity.

12. Be that as it may. It is always for the prosecution to prove its case beyond all doubts. The prosecution cannot take any disadvantage or lacuna on the part of the defence.

13. PW2 Rupesh Raut was the friend of the deceased Gaurish. On the day of accident, he left Panaji Police Station in his swift car No.GA-04-C-7429 and deceased Gaurish was riding passion motorbike bearing registration no.GA-04-D-2417. They were proceeding from Panaji to Valpoi. Deceased Gaurish was proceeding ahead of this witness on his motorcycle. When they reached near Hoble Wine shop, Ribander PW2 Rupesh noticed a rickshaw being driven from the extremely wrong side of the road which was proceeding from Old Goa to Panaji. The rickshaw gave a dash to the motorcycle driven by Gaurish. Due to the dash Gaurish was dragged with the motorcycle about 10 to 15 metres. As a result of the said accident, he sustained bleeding injuries. PW2 Rupesh immediately called ambulance 108. However, a PCR vehicle came at the spot and

shifted Gaurish to Bambolim. He expired on the way. During his cross-examination the defence has tried to rebut his testimony, but could not succeed in the same. It is reiterated in the cross that the panchanama was conducted in his presence. The cross further substantiates a fact that he was about 22 to 30 metres away from the motorcycle of the deceased when the accident took place. Merely because his statement was recorded on 10/12/2014 by the police would not *ipso facto* render his testimony unbelievable as this witness has no grudge against the applicant. He denied the suggestion that he is a planted witness by the police.

14. There is an omission in the sense that he did not state before the police that after the accident motorcycle was dragged at a distance of about 10 to 15 metres. However, that would not be the reason to discard his testimony all together. Sometimes witnesses have the tendency to exaggerate the facts which does not mean that the witness is liar. Except this, there is nothing in the cross of this witness in order to create any doubt about the authenticity of his testimony. One thing is clear from the evidence of this witness that the rickshaw in question was being driven towards extremely wrong side, which

indeed is an act of gross negligence on the part of the applicant.

15. PW4 Shivanand Pednekar is a Motor Vehicle Inspector, who inspected the rickshaw on 27/11/2014. It was Tata Ace Model. He found the following damages :

Front windshield glass broken, left hand side head light broken, front bumper damaged on left hand side, front show panel damaged near left hand side headlight.

16. He had also inspected the motorcycle bearing no.GA-04-D-2417 and noticed the following damages:

Front tyre was bursted and alloy wheel broken, headlight assembly broken, front show assembly damaged, leg guard bent on right hand side, handle bar bent on right hand side, meter box broken, chasis bent, observed dent on tank, both side lights broken.

17. In his cross-examination, he admits that it is more likely considering the damage to the motorcycle that the motorcycle hit the rickshaw on the wrong side. He further admits that damages to the vehicle could be possible if the vehicles are in the opposite directions. Motor Vehicle Inspector is only expected to testify about the condition of the vehicle and not as to how the accident could have occurred and the manner in which there was a collision between two vehicles. His admission as above cannot be said to be a gospel truth, especially,

when there is an account of the incident by PW2 Rupesh – an eye witness.

18. PW6 Police Constable Ramesh was on duty on Robert 9 vehicle along with PC 6488 Pandarnath Asolkar. He received a call from the PCR, Panaji informing about the accident near Ribander, Patto, near Hoble wine shop. He reached at the spot and noticed the dead body on the road and one goods carrier rickshaw and a motorcycle. The motorcycle was on the left side of the road if one faces to Panaji. The rickshaw was also facing towards Panaji. This witness had shown the point of impact, which was on the right side of the road if one faces towards Panaji. He also noticed skid marks on the road which were about 10 metres long. These 10 metres skid marks also indicate the sudden application of brakes and the speed of the vehicle with which it must have been driven by the applicant. He noticed blood stains on the road and also a helmet. There was damage to the rickshaw on the front side. He identified the applicant in the dock as the driver of the rickshaw. He admits that the motorcycle was on the wrong side of the road. Except the few suggestions there is no effective cross-examination of this witness. It is difficult to ascertain with

mathematical precision as to where after the accident the vehicles would lie. There is no straight jacket formula or standard by which one can draw a conclusion as to which of the two vehicles could lie on which side of the road. What is material here is to see whether the applicant was rash and/or negligent.

19. The testimony of this witness would not be of much help to the prosecution. However, it is pertinent to note the evidence of PW8 Ashok Parab, Head Constable attached to Old Goa Police Station who had drawn the scene of offence panchanama. He testified that the goods rickshaw was facing towards Panaji side and was on the right side of the road if one proceeds from Panaji to Old Goa. He also noticed the deceased lying on the left side of the road. The scene of offence panchanama was drawn by this witness in the presence of Prashant Gaonkar and Vithu Parab. As per this witness, the rickshaw was trying to overtake another vehicle and in that process crossed the dotted line and entered into another lane resulting into a dash to the motorcycle driven by Gaurish, who was proceeding from Panaji to Old Goa.

20. This witness lodged a report against the applicant which is at Exhibit 20. In his cross-examination, several suggestions were given which are insignificant. He admits that he had not recorded in the panchanama that glass pieces or other debris was found at the place of incident. He had also not recorded that the driver of Robert staff had shown the point of impact. As a matter of fact, the evidence of this witness is restricted to only recording the scene of offence panchanama. He was not expected to investigate the matter. He admits that he had not attached the helmet nor taken photographs of the said accident. This itself cannot be said to be a lacuna in the investigation, which will not affect the otherwise believable and acceptable evidence in the form of the spot panchanama, the sketch and the testimony of PW2. It is a normal experience that in such cases no one comes forward to give the statement and, therefore, it becomes difficult for the investigating agency that despite there being many witnesses to an accident, hardly anyone comes forward to support the cause of justice.

21. PW1 Vithu Parab acted as the pancha witness. He testified and supported the testimony of PW6 Ramesh Parsekar and PW8 Ashok

Parab in material particulars. His evidence reveals that he noticed blood stains near the rickshaw. He also noticed the helmet lying little away from the rickshaw and had seen some skid marks on the road. He testified that the point of impact was on the right hand side if one proceeds towards Panaji and the same was in between right edge of the road and middle white line. From the evidence of this witness, it is apparent that the width of the road near the spot of accident was around 6 to 6.50 metres. If the rickshaw was being driven on the wrong side of the road which is bigger vehicle than the motorbike, there is every reason to believe that the applicant drove his rickshaw towards wrong side while overtaking another vehicle resulting into an accident.

22. Section 304-A IPC contemplates, that if death is caused by doing any rash or negligent act, not amounting to culpable homicide, shall be punished with imprisonment. What is required to be considered is whether the act of the applicant was either rash or negligent. There is no evidence on record, much less convincing evidence to say that the applicant was rash, nevertheless, the well corroborated testimony of the prosecution witnesses coupled with the

panchanama and the sketch and the attending circumstances, would definitely indicate the negligence on the part of the applicant, who failed to take due care and caution.

23. Turning to the scene of offence panchanama Exhibit 8, it is quite apparent that the motorcycle of the victim was lying on the road while going towards Ribander. The total width of the road as seen from the panchanama is just 6.20 metres which is too short for two vehicles to pass in a convenient manner. For doing so, it is desirable that at least a person driving a bigger vehicle should be careful enough to ensure that there is no head on collision between his vehicle and the vehicle coming from the opposite direction. The panchanama reveals that the point of impact was on the wrong side of the road going towards Panaji. If the applicant was proceeding towards Panaji there was no reason for him to swerve his rickshaw towards the extreme side of the road where the victim was driving his motorbike while coming from Panaji after his duty hours. Even if it is presumed that the victim was in a speed, and dashed against the rickshaw, it is only because the rickshaw suddenly swerved towards the right side of the road. The blood stains were noticed on the lane of the road proceeding towards

Panaji, which also substantiates the fact that the impact was on the right side of the road due to the negligence of the applicant.

24. It is not the case of the applicant that there was any mechanical defect or failure of brakes due to which he lost control. Though it is vehemently argued by Shri R. Naik that it is a case of contributory negligence, there is absolutely no whisper in the statement of the applicant under Section 313 of Cr.P.C. that the accident took place due to the negligence of the victim. It cannot be said to be a case of contributory negligence in the realm of torts and, therefore, there is no question of giving any benefit of doubt to the applicant. The sketch appended to the spot panchanama also gives an idea as to how the accident must have occurred.

25. It was the duty of the applicant to drive his rickshaw in such a manner which will not imperil the safety of the victim, who was also at the same time using the road while going towards old Goa. The relationship between the speed and rashness depends upon the place, time and manner of accident. Important criteria for deciding whether driving which leads to the accident was rash or negligent would

include not only the speed of the vehicle, but also the width of the road, density of traffic and other relevant factors. As already stated above, the applicant has totally failed to take due care and caution in view of the aforesaid circumstances.

26. The learned JMFC as well as the Lower appellate Court have correctly and properly appreciated the facts and evidence and circumstances on record to reach a proper and correct conclusion that the applicant drove his rickshaw to the extreme right by crossing the middle lane resulting into a violent dash to the victim. Grievous injuries suffered by the victim is a direct result of rash and negligent act of the applicant sans intervention of another's negligence. The applicant in this case had indeed committed breach of his duty due to omission to drive his rickshaw in a moderate speed even after noticing the victim coming from the opposite direction.

27. As a revisional Court, it would not be proper to upset the concurrent findings of facts arrived at by the Trial Court as well as the First Appellate Court. The evidence on record is quite clear, trustworthy and unimpeached. Consequently, the petition stands

dismissed in the following terms :

- (i) Rule is discharged.
- (ii) The judgment and order passed by the learned Additional Sessions Judge in Criminal Appeal No.45 of 2019 is hereby confirmed.
- (iii) The applicant shall forthwith surrender before the learned Additional Sessions Judge for undergoing sentence.
- (iv) He shall also surrender to his bail bonds.
- (v) Records and proceedings be remitted to the Sessions Court immediately.
- (vi) Authenticated copy of the judgment be issued to the applicant forthwith after payment/deposit of requisite charges for the same.

PRITHVIRAJ K. CHAVAN, J.

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