

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.57 OF 2014

MR. SAGAR LOLIENKAR,
son of Vasudev Lolienkar,
resident of House No. 80,
Zambaulim, Rivona,
Sanguem, Goa.

... Appellant

Versus

THE STATE OF GOA,
Through Police Inspector
Quepem, Police Station,
Quepem, Goa.

... Respondent.

Mr. Ryan Da Piedade Menezes and Ms. Gina Almeida, Advocates for
the Appellant.

Mr. Sagar Dhargalkar, Additional Public Prosecutor for the Respondent.

Coram:- M. S. SONAK, J.

Reserved on: 4th December 2020

Pronounced on: 7th December 2020

JUDGMENT

Heard Mr. R. Menezes, learned counsel for the Appellant,
and Mr. Sagar Dhargalkar learned Additional Public Prosecutor for the
Respondent.

2. The Appellant appeals the judgment and order dated
30.09.2014 in Sessions Case No.19/2013 made by the Additional

Sessions Judge, South Goa, Margao, convicting the Appellant for offences under Sections 279, 304-A of Indian Penal Code (IPC) and under Section 3 read with Section 181 of the Motor Vehicles Act, 1988 (M.V. Act) and sentencing him with simple imprisonment of two months and fine of ₹1000/- for the offence under Section 279 of IPC; simple imprisonment for two years and fine of ₹10,000/- for the offence under Section 304-A of IPC; and to pay fine of ₹500/- or in default to undergo simple imprisonment of 10 days for the offence under Section 3 read with Section 181 of the M. V. Act.

3. The prosecution alleges that the Appellant (Accused) on 13.02.2013 at 17.45 hours while proceeding from Tilamol side to Zambaulim which is a public way drove his Wagon-R bearing registration No. GA-09-A-6921 in a rash and negligent manner and committed a culpable homicide not amounting to murder, by causing the death of Manohar Shetkar. The prosecution also alleged that the accused was driving the said Wagon-R under the influence of alcohol and without holding an effective driving licence issued by the competent authority and therefore, committed an offence under Sections 279, 304(II) of IPC and Sections 3, 181 and 185 of the M. V. Act.

4. The prosecution in all examined seven witnesses including the Investigating Officer. Thereafter, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.). Despite the opportunity, the accused neither examined

himself nor lead any defence evidence in the matter.

5. By the impugned judgment and order dated 30.09.2014, the accused came to be convicted and sentenced as aforesaid. Hence, the present appeal.

6. Mr. Menezes, learned counsel for the Appellant submits that the evidence on record does not justify any conviction or sentencing. He submits that the ocular evidence is not at all reliable and the documentary evidence to a great extent supports the defence raised by the accused.

7. Mr. Menezes submits that the testimony of Francis Fernandes, PW2 has quite correctly been discarded by the learned Sessions Judge. However, on similar grounds, even the testimony of Ramesh Shetkar, PW3, and Manjit Shetkar, PW5(2) was also required to be rejected. He submits that PW3 was not in a position to witness the impact on account of the distance at which he was traveling and the site conditions. So also if PW5(2) was standing on the footboard of the scooter driven by his father, he couldn't have witnessed the accident or commented upon the speed or rashness or negligence with which Wagon-R was being driven. Mr. Menezes submits that the learned Sessions Court erred in relying on the evidence of these two witnesses.

8. Mr. Menezes submits that at the highest there is some unreliable evidence suggesting that the Wagon-R was driven at “*high*

speed’. He submits that such evidence is not at all sufficient to establish either rashness or negligence, which are essential ingredients to have a conviction under Section 279 or 304-A of IPC. He submits that based on such vague testimony, the conviction as recorded is quite unsustainable. He relies on ***Abdul Subhan v. State (NCT of Delhi) (ILR (2006) II Delhi 882)***; ***Baburao V. Nalge v. State and Another (2015) All M.R. (Cri) 855***; ***State of Goa v. Constantio Braganza (2012 All M.R. (Cri) 2678***; ***State V. Ian Joseph Salazar (2011 BCI 84; 2012 All M.R. (Cri) 2722)***; and ***State of Karnataka v. Satish ((1998) 8 SCC 493)*** in support of his contentions.

9. Mr. Menezes submits that there are serious discrepancies in the ocular evidence. He points out that some of the witnesses speak of “*skid marks*” and the others speak of “*drag marks*”. He submits that there is no clarity whether these marks were produced by scooter or Wagon-R. He submits that even the scene of offence panchanama has not been proved under law. He submits that in any case, such evidence probabalises the defence raised by and on behalf of the accused. This is more so since the accused has already been acquitted for driving Wagon-R under the influence of alcohol. He submits that in the absence of the prosecution establishing with clarity the situation in which the accident took place, no conviction is sustainable. He relies on ***Laxman S. Naik v. State of Goa (2014 All M.R. (Cri) 4806)***; ***State of Maharashtra v. Suresh V. Mule, (2017) All M.R. (Cri) 1711)***; and ***Anthony Fernandes v. State (Cri. Revision Application No.4/2012-Unreported)***.

10. Mr. Menezes submits that the prosecution examined Nisha Loleienkar, wife of the accused PW5(1) as the prosecution witness. He submits that her evidence was therefore required to be accepted in its totality. He submits that PW5(1) has deposed to scooter overtaking a parked truck and colliding head-on with the Wagon-R driven by the accused. He submits that such crucial evidence was unduly rejected by the learned Sessions Court. He submits that an accused only has to probabalise his defence and there is no requirement of establishing such defence beyond a reasonable doubt. He submits that the testimony of PW5(1) was required to be accepted in its entirety and the accused acquitted of all the charges leveled against him.

11. Mr. Menezes points out that there is evidence on record that the accused was possessing a learner's licence and his wife PW5(1) who was traveling with him at the time of the accident was possessing a regular licence to drive a vehicle of the nature of Wagon-R. He relies on *National Insurance Co. Ltd. Vs Swaran Singh and others*, (2004) 3 SCC 297 to submit that in such circumstances even the conviction under Section 181 of the M. V. Act warrants interference.

12. Finally, Mr. Menezes submits without prejudice that the sentence is unduly harsh. He points out that no reasons have been set out for awarding the maximum sentence for the offence under Section 304-A of IPC. He distinguishes the rulings in *Alister Anthony Pereira Vs State of Maharashtra*, (2012) 2 SCC 648 on several grounds but points out that despite the accused in the said matter killing almost

seven persons sleeping on the footpath, a sentence of only three years, as against the maximum permissible of 10 years was approved by the Hon'ble Supreme Court. Therefore, he submits that the sentences imposed warrant interference assuming that the conviction is liable to be maintained.

13. For all the aforesaid reasons, Mr. Menezes submits that this appeal be allowed and the conviction and sentence imposed upon the accused be set aside.

14. Mr. Dhargalkar, learned Additional Public Prosecutor submitted that there is ample evidence on record to establish that the accused was driving Wagon-R under the influence of alcohol. He submits that this Court has Suo Motu powers to go into this issue even though the State may not have appealed against the acquittal of the accused on such charges. He refers to the documentary evidence on the record as well as the testimony of Sanika S. Naik Gaonkar, PW4-Biochemist in the Pathology Department at Hospicio Hospital.

15. Mr. Dhargalkar submits that in any case the evidence on record establishes beyond reasonable doubt the rashness and negligence with which the accused drove Wagon-R on the fateful day, resulting in the death of Manohar Shetkar (deceased) who was traveling on a scooter along with his nine years old son Manjit Shetkar, PW5(2). Mr. Dhargalkar relied upon the reasonings in the impugned judgment and order in support of this contention. He relied on *Alister Anthony Pereira* (supra) in support of his contentions.

16. Mr. Dhargalkar points out that based on the learner's licence issued only on 08.02.2013, the accused drove Wagon-R on a public highway in an extremely rash and negligent manner and therefore the conviction and sentencing were justified. He refers to the evidence on record, which according to him establishes beyond reasonable doubt the rashness and negligence on the part of the accused. He submits that the sentence awarded is lenient and the accused should have been convicted under Section 304(II) of IPC.

17. Mr. Dhargalkar points out that the so-called defence raised by the accused finds no support whatsoever in the evidence on record, which includes Section 313 Criminal Procedure statement of the accused himself. He submits that the evidence of Nisha, PW5(1), on the aspect of scooterist traveling in the opposite direction or overtaking of the truck is a patently false defence not made good even as a probability. Mr. Dhargalkar, therefore, submits that there is no infirmity in the impugned judgment and order and therefore this appeal be dismissed with costs.

18. The rival contentions now fall for determination.

19. The accused, in this matter, has not denied the factum of the accident which took place on 13.02.2013 between 05.00 to 5.30 p.m., on Tilamol Zambaulim main road, which resulted in Manohar Shetkar, the rider of the scooter expiring on the spot and his minor son Manjit who was on the footboard of the scooter, sustaining serious injuries. Even otherwise, there is overwhelming evidence on record,

both documentary as well as ocular, which establishes this fact beyond a reasonable doubt.

20. In support of this appeal, the accused has basically urged the following grounds:-

- (A) that the accused has already been acquitted of the charge of driving under the influence of alcohol;
- (B) that the accused was driving under the authority of effective licence since the accused had a learner's licence and was accompanied by his wife who had a regular licence at the time of the accident;
- (C) that there is no evidence to suggest any rashness or negligence on the part of the accused, which constitutes essential ingredients for the offence under Sections 279 and 304-A of IPC;
- (D) that the evidence of the prosecution witnesses, especially ocular evidence, is unreliable and documentary evidence supports the defence raised by the accused;
- (E) that the learned Additional Sessions Judge should have entirely relied on the evidence of Nisha, PW5(1) on the aspect of scooterist traveling in the opposite direction and attempting to overtake a parked truck, which is what caused the accident without there being any rashness or negligence on the part of the accused;
- (F) that in any case, the sentence is harsh and disproportionate.

21. Although, something can be said about the submission of Mr. Dhargalkar on the aspect of the accused driving under the influence of alcohol, such something is by no means sufficient to overturn the acquittal by the learned Additional Sessions Judge and that too in the absence of any appeal against the acquittal by the State and by simply exercising some Suo Motu jurisdiction. Therefore, it is necessary to proceed in this on the premise that the accused was not driving the Wagon-R at the time of the accident under the influence of alcohol. Nisha, wife of the accused PW5(1) has deposed that the accused, consumed alcohol after the accident at their residence i.e. after about 5.30 p.m., on 13.02.2013. Admittedly, the accused was examined by the doctor at about 2.00 a.m., on 14.02.2013. In such circumstances, the view taken by the learned Additional Sessions Judge, extending the benefit of the doubt to the accused, cannot be regarded as some implausible or perverse view.

22. On the aspect of conviction under Section 181 of the M. V. Act, reference at the outset, is necessary to the provisions in Section 3 of the M. V. Act. Sub-clause (1) of Section 3 provides that no person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle. Sub-clause (2) of Section 3 of the M. V. Act is quite important and provides that the conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

23. Mr. Menezes failed to point out any rule which authorises the accused to drive Wagon-R on a public highway, otherwise than to receive any instructions in driving, based on a learner's licence issued to him on 08.02.2013 i.e. hardly five days before the date of the accident, which resulted in the death of Manohar Shetkar at the spot. Ruling in *National Insurance Co. Ltd. Vs Swaran Singh and others* (supra) is of no assistance to the accused because the same is based on differently worded provisions in Section 149(2) of the M. V. Act which do not refer to possession of “*effective licence*”. In fact, this is the distinction brought out in paragraphs 42 to 45 of the said decision. Accordingly, there is no infirmity whatsoever, in the conviction of the accused under Section 181 of the M. V. Act. Besides, this is one of the aspects which is required to be taken into consideration while determining whether the accused acted rashly and negligently in this matter, thereby causing the death of Manohar Shetkar.

24. The rashness and negligence on the part of the accused in this matter are established beyond reasonable doubt primarily by the testimony of Ramesh Shetkar (PW3)- an eye witness, Manjit Shetkar, PW5(2), minor son of the deceased, who was standing on the footboard of the scooter at the time of the accident, scene of offence panchanama which stands proved. The testimony of Ratnakar Gaonkar (pancha) – PW1 and finally the testimony of the Investigating Officer Shamnath Gosawi (PW6) and PSI Vinayak Patil (PW7) also corroborate the direct evidence on record. The rashness and negligence are also established beyond a reasonable doubt by the documentary evidence on record

particularly on the aspect of damages to the vehicles involved and the injuries suffered by the deceased and his son Manjit. This is not a case where the evidence on record merely establishes that the accused was driving the Wagon-R at a high speed, which he undoubtedly was. This is not a case where the conviction has been recorded by the learned Additional Sessions Judge relying upon the singular circumstance of the vehicle being driven at high speed as was the situation in most of the rulings relied upon by Mr. Menezes. Rather, this is a case where the finding as to rashness and negligence is based upon several circumstances which have been conclusively proved by the prosecution.

25. There is no case made out to reject the testimony of Ramesh Shetkar (PW3) who was behind both Wagon-R as well as the scooter, which was traveling in one direction towards Zambaulim and therefore, had every opportunity to witness the impact. PW3 has deposed that Wagon-R was being driven in excess speed and dragged the scooter at a distance of about 20 to 30 metres from the point of impact. In the cross-examination, PW3 has deposed that Wagon-R was being driven at the speed of about 70 km per hour. Now the prosecution in this matter has proved beyond reasonable doubt the scene of offence panchanama. This panchanama/sketch very clearly indicates the skid marks up to 32 metres. This corroborates the deposition of PW3 about the scooter being dragged to a distance of 20 to 30 metres from the point of impact with Wagon-R.

26. Ratnakar Gaonkar (PW1) is a pancha witness and not an

eye witness like PW3. The fact that he has referred to the marks of the length of 32 metres as “*drag marks*” and not “*skid marks*” is hardly some serious discrepancy, to disregard the clear and cogent testimony of eye witness of PW3 or the scene of offence panchanama or the sketch of the site conditions where the accident took place. All these aspects have been proved beyond a reasonable doubt by the prosecution and all these aspects establish beyond reasonable doubt the rashness and negligence on the part of the accused.

27. Rashness and negligence are established *inter alia* from the damages to both the vehicles involved. These damages have been listed out by the learned Additional Sessions Judge in paragraph 11 of the impugned judgment and order and the same very clearly establish the magnitude of rashness with which the accused drove Wagon-R even though the accused had been issued a learner's licence hardly five days before this fateful day. The injuries suffered by the deceased and his son Manjit also point out to the rashness and negligence of the accused.

28. As noted earlier, this is not the case where the prosecution has relied only upon the circumstance of high speed with which the vehicle was driven by the accused. This is a case where the driving of the vehicle at high speed is only one of the circumstances. The scene of offence panchanama/sketch indicates that Wagon-R swayed substantially towards the right side of the road on account of impact. The skid marks traveled up to a distance of 32 metres, and is yet another circumstance which establishes rashness and negligence on the

part of the accused. The damages to the two vehicles and injuries sustained by the deceased and his son also constitute circumstances that establish rashness and negligence on the part of the accused. All these circumstances are required to be taken into consideration cumulatively and since the learned Additional Sessions Judge has taken these circumstances into account cumulatively, there is no infirmity in the findings of rashness and negligence.

29. *Abdul Subhan* (supra) is an authority for the proposition that no rashness or negligence can be inferred merely because a vehicle was being driven at a high speed. Besides, in this case, the Investigating Officer was not examined which resulted in prejudice to the accused. This ruling is not at all applicable in the present case because the finding of rashness and negligence is not based merely on the finding that the vehicle was being driven at high speed. Besides, in this case, even the Investigating Officer has been examined and there is no complaint of any prejudice involved.

30. *Baburao V. Nalge* (supra) turns on its own facts where this Court found that within a limited space, the bus couldn't have accelerated with high speed. This Court also found that the testimony of the conductor could not have been rejected merely on the ground that he was the conductor and therefore, would have supported the case of the driver/accused, irrespective of true position at the site. Again, this decision is of no assistance to the accused in the present matter.

31. In the case of *State of Goa Vs Constantio Braganza* (supra)

the prosecution had failed to establish the point of impact in the panchanama or otherwise. In these circumstances, this Court held that the reasonings of the Sessions Judge acquitting the accused cannot be held as perverse, especially considering the limited scope of appeal against the acquittal. Again, such is not a situation in the present appeal, which is not against any acquittal but the conviction recorded by the learned Additional Sessions Judge.

32. In the *State of Goa Vs Ian Joseph Salazar* (supra) again, this Court noted that none of the witnesses, including two injured witnesses, had deposed as to how and in what manner the accident occurred. The prosecution had also failed to prove the exact location of the two vehicles involved in the accident or the width of the road where the accident took place. It is in these circumstances, this Court refused to overturn the acquittal by observing that the findings of the learned Sessions Judge could not be regarded as perverse. This case also turns on its own facts and can be of no assistance to the accused in the present case where the prosecution has established the case beyond a reasonable doubt. Besides, as noted earlier, the scope of appeal against the acquittal is quite different and this Court was obliged to dismiss the appeal against the acquittal based on the premise that the view taken by the Sessions Court was plausible.

33. In *State of Karnataka Vs Satish* (supra) is the authority for the proposition that merely because a vehicle might have been driven at high speed is not sufficient to conclude rashness or negligence. In the

present case, the conviction is not based solely on the circumstance that the Wagon-R was driven at some high speed. There are several circumstances, which when considered cumulatively establish beyond a reasonable doubt the case of the prosecution.

34. In *Laxman S. Naik Vs State of Goa* (supra) also turns on its own facts where brake marks shown in front of the truck in the sketch were never explained by the prosecution. The decision turns on its own facts which have no comparison to the facts of the present case.

35. The decision in *State of Maharashtra Vs Suresh V. Mule* (supra) also turns on its own facts where the conviction was sought to be sustained only based on the circumstance that the vehicle in question was driven at high speed. Such is not at all the case in the present matter, where several circumstances, if taken cumulatively establish beyond a reasonable doubt the offences committed by the accused.

36. The decision in *Anthony Fernandes Vs State* (supra) also turns on its own peculiar facts which have no comparison to the facts of the present case. Here this Court noted that the defence raised on behalf of the accused was probabalised and the prosecution had failed to prove the guilt beyond a reasonable doubt.

37. The defence that the deceased tried to overtake a parked truck and in the process dashed against the Wagon-R driven by the accused, is a thoroughly false defence which has not even been probabalised in this matter. Nisha, PW5(1) the wife of the accused

introduced this defence which is backed by no other evidence on record. The accused and said Nisha, it appears, fled away from the site without offering any assistance to Manohar Shetkar or his minor son Manjit. Therefore, Nisha's statement that the parked truck went away from the spot within 5 to 10 minutes, deserves no credit whatsoever.

38. Apart from there being no corroboration whatsoever to this defence, what is clinching is that the accused himself has not stood by this specific defence in this matter. If the questions and answers at numbers 4 and 25 in Section 313 of the Criminal Procedure statement are perused, it is evident that even the accused has not stood by the patently false defence that the scooter came from the opposite direction or that the scooter was attempting to overtake some parked truck and this is what caused the accident. The accused was specifically questioned on the aspect of Wagon-R and the scooter proceeding in one direction from Tilamol to Zambaulim. Curiously, the accused answered this question as "*I do not know*". Similarly, to the specific question that the evidence on record suggested that both the vehicles were moving towards Zambaulim from Tilamol side, the accused simply stated that he was proceeding towards Zambaulim but failed to add that the scooter was not or that the scooter was proceeding in opposite direction.

39. In the aforesaid circumstances, the learned Sessions Judge was quite right in not accepting the defence raised by and on behalf of the accused. Nisha PW5(1) did not deserve any credence whatsoever on the aspect of a parked truck or scooter traveling in the opposite

direction. Even if the impact of such a patently false defence is completely excluded from consideration still the evidence on record establishes beyond reasonable doubt the offences for which the Appellant has been convicted in this matter.

40. On the aspect of sentencing, it is necessary to note that rash and negligent acts on the part of the accused resulted in the death of Manohar Shetkar, who was quite young and left behind a widow and two minor children.

41. In *Dalbir Singh Vs State of Haryana*, (2000) 5 SCC 82, the Hon'ble Supreme Court has held that bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause an accident, or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be

convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing the death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role that the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles.

42. Further, in the *State of M. P. Vs Saleem*, (2005) 5 SCC 554, the Hon'ble Supreme Court held that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and how it was executed or committed, etc.

43. The Hon'ble Supreme Court further held that the court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

44. The aforesaid decisions were cited with approval in *Alister*

Pereira (supra). Further, Mr. Menezes is not right in his submission that the Hon'ble Apex Court approved a prison term of three years in the said matter. Paragraph 97 of *Alister Pereira* (supra) indicates that the Hon'ble Apex Court felt that the sentence was too lenient but refused to interfere with the sentence only because the State had not appealed against the same. The Hon'ble Supreme Court observed that for an offence like this which has been proved against the Appellant, the sentence of three years awarded by the High Court “*is too meagre and not adequate*”. Accordingly, no case is made out to interfere with the conviction or sentence. The prosecution, in this case, has proved the guilt of the accused beyond reasonable doubt and there is no infirmity in the sentencing as well.

45. For all the aforesaid reasons, this appeal is dismissed. There shall be no order as to costs.

46. The Appellant to surrender before the learned Additional Sessions Judge on 27th January 2021 to serve the sentence. If the Appellant fails to do so, the State to take the necessary steps in the matter.

M. S. SONAK, J

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