

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.901 OF 2002

State of Maharashtra	)....Appellant
V/s.	
Pappugulam Mustak Ali Khan	)
R/at Sopargaon, Kani Rice Mill,	)
Nalasopara (West)	)....Respondent
	(Org.Accused)

Ms.Anamika Malhotra APP for appellant-State.
None for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 6.1.2020

ORAL JUDGMENT :-

1. In this appeal, prosecution has impugned an order and judgment dated 22.3.2001 by which the Court acquitted respondent of charges punishable under Section 304-A (*Causing death by negligence*), section 337 (*Causing hurt by act endangering life or personal safety of others*) and section 338 (*Causing grievous hurt by act endangering life or personal safety of others*) of the Indian Penal Code and section 184 (*Driving dangerously*) and Section 89/112 of The Motor Vehicles Act, 1988.

2. Briefly stated, it is the case of prosecution that one Mukesh Govardandas Kothari of village Sopara lodged complaint on 26.10.1995 to the Nalasopara police station reporting that his nephew Mehul Rajendra Kothari (Mehul Kothari) aged about 12 years was run over by a truck bearing registration no.MCU 372 and the said Mehul Kothari died on the spot. It is mentioned in the complaint that the truck was driven by accused. The complaint was recorded and C.R.No.I-109/95 was registered at 12.35 p.m. on 26.10.1995 by PSI Mr.Mohite. Mr.Mohite who is PW-4 took over the investigation, immediately went to the spot of accident and prepared inquest panchanama of dead body of Mehul in the presence of two panchas. It was noticed that head of the deceased was totally smashed. Spot of accident was inspected and spot panchanama was prepared. Blood stains were found on the bicycle which deceased was riding at the time of accident from near the spot of accident. The inquest panchanama was prepared from 12.45 p.m. to 1.30 p.m. and panchanama of scene of offence was prepared from 1.15 p.m. to 2.15 p.m. Dead body was sent for post mortem.

3. Statement of witnesses Dhawal Kothari PW-2 who was going with the deceased and other eye witnesses, i.e., Deepak Yashwant Raut PW-5 and one Juber Khan were recorded. Accused was

also arrested on 26.10.1995 at about 2.00 p.m. based on inquiry made and information received from the owner of the truck. Wireless message was sent to the Regional Transport Office (RTO) in order to inspect the truck. Report of RTO was received on 31.10.1995 and the relevant papers were verified and after completion of investigation, charge-sheet was sent to the Court on 20.12.1995. Charges were framed and accused pleaded not guilty and claimed to be tried.

Statement of accused was recorded under Section 313 of Cr.P.C. after the evidence of the first 4 witnesses were recorded. After the evidence of Deepak Yeshwant Raut PW-5 was recorded, fresh statement under Section 313 of Cr.P.C. came to be recorded.

4. To drive home the charge, prosecution led evidence of 5 witnesses viz., Mukesh Goverdhandas Kothari PW-1, Uncle of the deceased Mehul Kothari ; Dhawal Narendra Kothari PW-2 a cousin of the deceased Mehul Kothari, who was an eye witness ; Keshav Anant Thakur PW-3 panch witness for the spot panchanama; Investigating officer Rajendra Narayanrao Mohite PW-4; and Deepak Yashwant Raut PW-5, an eye witness.

5. Learned APP submitted that death of Mehul Kothari was caused by rash and negligent driving, is not disputed. APP also

submitted that the only subject matter of this appeal is the conclusion by the trial Court that the identity of the accused as a person who was driving the truck at the time of incident has not been established.

6. Mukesh Kothari-PW-1 was not an eye witness and he says so in his examination-in-chief and also in cross-examination but strangely, PW-1 identified accused in the Court. Dhawal Kothari-PW-2 who was an eye witness, very clearly states that he did not see the driver of the truck as he was shocked but there were two other persons, one Rikshaw driver Deepak Raut PW-5 and Juber Khan, watchman of Royal Accord Building (he was not examined) who were there at the time of the incident and who had shouted at the time of incident. Evidence of Keshav Thakur PW-3 is not relevant for the identification of accused. It is the evidence of Rajendra Mohite PW-4 and Deepak Raut PW-5 which we have to consider to decide whether the order impugned has to be interfered with. I would say that the prosecution has miserably failed to prove that it was accused who was driving the truck. PW-5 who was the eye witness, for the first time, identified accused in the Court. The date of incident as noted earlier was 26.10.1995 and the evidence of PW-5 was recorded on 26.2.2001, more than 5 years later. Admittedly, no test identification parade was conducted. This is despite the fact that PW-4 in his examination in

chief stated that on 26.10.1995 itself he went to the spot and recorded statement of PW-2, PW-5 and the Watchman of Royal Accord, Juber Khan. The watchman has not been examined. PW-4 also states on same day, i.e., 26.10.1995 he arrested accused. Despite recording statement of eye witness PW-5, prosecution does not conduct a test identification parade.

7. The Apex Court in *State Vs. V.C.Shukla*¹ held that identification of a person by witness for the first time in Court without being tested by prior test identification parade is valueless. Prior to this, the Apex court in *Kanan Vs. State of Kerala*² has held that where witness identifies an accused who was not known to him in Court for the first time, his evidence is absolutely valueless unless there has been a previous test identification parade to test his powers of observation. The Court held that the idea of holding such a test identification parade under Section 9 of the Indian Evidence Act is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no test identification parade is held, then it will be wholly unsafe to rely on his bare testimony regarding identification of the accused for the first time in the Court.

1 AIR 1980 SC 1382

2 AIR 1979 SC 1127

8. Of course, in all cases it need not be fatal because test identification parade is done only for the satisfaction of the prosecution that the investigation was moving in the right direction. It is only one of the relevant factor to be taken into consideration along with the other evidence on record. If the claim of the eye witnesses that they knew the accused already is found to be true, the failure to hold test identification parade, may be inconsequential as held in ***Surendra Narain Vs. State of U.P.***³ But in the case in hand it has to be also noted that the accused was present in court when the evidence of PW-5 was recorded. The probability cannot be ruled out that the witness may have been made aware about the identity of the accused. I am making this observation because of the contradictions in the evidence of PW-4, Investigating officer. It is the case of prosecution that accused ran away from the spot. It is the case of Investigating Officer that accused was arrested on 26.10.1995, the date of the accident. Rajendra Mohite PW-4 says “the accused was arrested on the same day of accident. The accused had run away without giving accident information”. No arrest panchanama has been prepared. According to PW-4 he came to know the identity of the accused when he inquired with the owner of truck and he says he does not remember who was the owner of the truck but he came to know the name of the

3 AIR 1998 SC 192

owner after inquiry. He also says he does not remember with whom he made inquiries. The statement of the owner of the truck is also not recorded. The evidence of PW-4 is also falsified because the occasion to inquire with the owner of the truck must have arisen only after FIR was lodged but interestingly, in the FIR which is at Exh.16 the identity of the lorry driver as the accused is mentioned, which raises a suspicion of serious manipulation in recording of FIR. There is a probability that the time of recording of FIR either must be wrongly written or the description/identity of lorry driver must have been inserted later. Both the probabilities, undoubtedly, seriously shake the trustworthiness of the prosecution's case on the issue of identity of the lorry driver.

9. Moreover, Rajendra Mohite PW-4 says he gave wireless message to the RTO and the office copy is at Exh.42. Exh.42 is dated 27.10.1995 when the accident has happened on 26.10.1995 and accused was arrested at 2.00 p.m. on 26.10.1995 after the accident. Therefore, there was no way the prosecution would have known the identity of the driver when the FIR was recorded at 12.35 p.m. on 26.10.1995.

10. Exh.43 which is response from the RTO to the Investigating officer, says that they took search of the records of the vehicle on 27.10.1995 and it says the name of the owner is not available. Column 3 says “मोटर वाहन मालकांचे नाव :- उपलब्ध नव्हते”. If the RTO also did not have the name of the owner of the vehicle, which is the owner to whom the Investigating officer made inquiries and found the identity of the truck driver, itself is a mystery. In his cross-examination Rajendra Mohite PW-4 confesses that he does not remember the name of the owner of the lorry and he does not remember to whom he made the inquiry.

11. One more point which comes to my mind, is that the Investigating Officer did not consider it necessary to ask any of the witnesses who had seen the accident to give physical description of the lorry driver. None of the witnesses have given such description and the complainant was not aware of the identity of the driver and owner of the lorry. How the Investigating officer came to know that accused was the lorry driver is still a mystery to me. It is not the case of prosecution that driver came and surrendered himself. As noted earlier, no arrest panchanama has also been prepared and it is also not clear where the accused was arrested.

12. In the circumstances, the trial Court was absolutely correct in acquitting accused.

13. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court. For acquitting accused, the Trial Court observed that prosecution had failed to prove its case.

14. In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with.

15. Appeal dismissed.

(K.R.SHRIRAM,J)