

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 80 OF 2019

Aarati Santosh Shetty

Age 41 years, Occ : Service,
R/at : A/2. Ganga Estate, Atur Park,
Sion Trombay Road, Chembur,
Mumbai – 400 071.

....Applicant
(First Informant)

V/S

1. The State Of Maharashtra
(At the instance of Mankhurd
Police Station, Mumbai).

... Respondent

Mr.Rajiv Patil, Senior Advocate i/b Shri Vishal Laxman Kolekar,
Advocate for applicant.

Shri N.B. Patil, APP for respondent-State.

Mr.Pradip Jadhav, PSI, Mankhurd Police Station present.

CORAM: N. J. JAMADAR, J.

RESERVED ON : 27th NOVEMBER 2019

PRONOUNCED ON : 30th JANUARY 2020

JUDGMENT :

1. With the consent of the learned counsel for the parties,
heard finally at the stage of admission.

2. The legality, propriety and correctness of an order, passed
by the learned Additional Sessions Judge, Greater Bombay, on an
application (Exh.4) for discharge in Sessions Case No.520 of 2013,

dated 28th November 2018, whereby the application preferred by the applicant came to be rejected and it was held that the material on record was sufficient for framing charge against accused for the offences punishable under sections 279, 338, 304(II) of Indian Penal Code, 1860 ('Penal Code').

3. The background facts leading to this application can be summarized as under :-

[a] on 1st November 2012, at about 4.30 a.m., Mohammad Raza Mohd. Hussain Sayyed (hereinafter referred to as 'the first informant'), and his parents were on their way to Navi Mumbai, in an auto-rickshaw bearing No. MH-03/AK-6245, driven by Nasir Husain Abubakar Sayyed. While they were passing the Sion-Panvel Highway, near a check post, a BMW car bearing No. MH-04/ET-6666 ('offending car') gave a violent dash to the said auto-rickshaw, from behind. The first informant, his parents and the auto-rickshaw driver were thrown out of the auto-rickshaw which turned turtle. The first informant, his parents and the auto-rickshaw driver sustained multiple injuries. The

mother of the first informant-Mrs. Mobina Jahira Hussain suffered grievous injuries. She succumbed to the injuries at KEM Hospital, Mumbai, where she was shifted.

(b) It transpired that the applicant was at the wheel of the offending car. The applicant had then consumed alcohol. The applicant drove the offending car in a very high speed and reckless manner. The offending car collided with another stationery container after knocking off the auto-rickshaw.

[c] Initially crime was registered at Mankhurd Police Station at C.R. No. 330/2012 for the offences punishable under section 279 and 338 of the Penal Code and section 185 of the Motor Vehicles Act, 1988.

[d] As Mrs. Mobina Jahira Hussain, died on account of the injuries sustained in the accident, and the quantity of alcohol in the blood of the applicant was found less than the proscribed, charge-sheet came to be lodged against the applicant for the offences

punishable under section 279, 338, 304(II) of Penal Code.

[e] After committal of the case by the jurisdictional Magistrate, the applicant preferred an application for discharge from prosecution on all counts or, in the alternative, from the offence punishable under section 304(II) of the Penal Code. By an order dated 7th October 2013, the learned Additional Sessions Judge was persuaded to reject the application holding *inter-alia* that the material on record was sufficient to frame charge against the applicant for the offences for which she has been arraigned.

[f] The said order was assailed by the applicant in Criminal Revision Application No. 447 of 2013. By judgment and order dated 3rd July 2015, this Court had set aside the aforesaid order with a direction to the learned Additional Sessions Judge to decide the prayer of the applicant afresh, after taking into consideration all the statements recorded by the police, including the

statements of Mrs. Priya @ Pooja Sudesh Shetty and Ms. Gargi Bipin Ganatra, the occupants of the offending car. In the statements recorded under section 161 of the Code of Criminal Procedure ('Code'), these two witnesses had stated that immediately before the impact a dog suddenly came across the car and the applicant, in her endeavour to save the dog, swerved the car towards left and, in the process, the car collided with the auto-rickshaw, which was plying in front of them.

(g) Pursuant to the order passed by this Court, the learned Sessions Judge heard the application afresh. The learned Sessions Judge was of the view that even after the statements of above witnesses, viz., Mrs. Priya @ Pooja Sudesh Shetty and Ms. Gargi Bipin Ganatra, are taken into account, the material on record indicates that the applicant was driving the offending car in a high speed and failed to exercise the care expected of the applicant in the circumstances of the case. The act of the applicant of driving the offending car in a high and excessive speed was found to be impregnated with

the knowledge that such high speed would lead to the death of a person, in the event a collision occurs. The learned Sessions Judge was thus persuaded to reject the application.

4. Being aggrieved by and dissatisfied with the aforesaid finding and the impugned order, the first informant has preferred this revision application.

5. I have heard Mr. Rajiv Patil, the learned Senior Advocate for the applicant and Shri N.B. Patil, the learned APP for State at some length. I have also perused the material on record, especially the report under section 173 of the Code and the documents annexed with it.

6. Mr. Patil, the learned Senior Counsel for the applicant would urge that the learned Sessions Judge committed a manifest error in recording a finding that the material on record was sufficient to make out a case for the offence punishable under section 304(II) of the Penal Code. It was submitted that the facts of the case at hand lead to no other inference than that of accident, pure and simple. The

element of knowledge of the act entailing the consequence of death is conspicuously absent, urged Mr. Patil. It was further submitted that if the statements of the two witnesses-Mrs. Priya @ Pooja Sudesh Shetty and Ms. Gargi Bipin Ganatra, who were the occupants of the car, are considered in conjunction with the statements of the occupants of the auto-rickshaw, who had no opportunity to notice the manner in which the accident occurred, except that the car gave dash to the auto-rickshaw from behind, the charge under section 304(II) of the Penal Code is firmly ruled out. Thus, the learned Senior Counsel submitted that the learned Sessions Judge was not justified in recording a finding that the material on record would support a charge for an offence punishable under section 304(II) of the Penal Code.

7. In opposition to this, the learned APP would urge that the fact that the offending car had also collided with a stationery container after knocking off the auto-rickshaw indicates the high speed with which the offending car was being driven by the applicant. Apart from the statements of the occupants of the auto-rickshaw, there are statements of the two witnesses Mr.Sonank Rajeshbhai Desai and Mr. Mukund Rajendra Singh, who have specifically stated that the offending car was being driven in an excessive speed. In these

circumstances, no fault can be found with the impugned order, urged the learned APP.

8. It may be apposite to note that there is not much controversy over the basic facts. The collision between the auto-rickshaw and the offending car is indubitable. The fact that the first informant and the other occupants of the auto-rickshaw sustained injuries on account of the collision is also indisputable. There is adequate material on record to show that Mrs. Mobina Jahira Hussain, the mother of the first informant died on account of the injuries sustained in the said accident. The identity of the applicant as the person at the wheel of the offending car is incontestable. The fact the applicant had consumed alcohol but the quantity of alcohol found in the blood of the applicant was below the proscribed limit and, thus, she was not found under the influence of liquor, at the time of occurrence, is also not much in dispute.

9. In the backdrop of the aforesaid facts, a case for prosecution of the applicant for the offence of driving the vehicle in a rash and negligent manner and causing grievous hurt, or for that matter, even the death of the mother of the first informant, therein,

has been, *prima-facie*, made out. The learned Senior Counsel, in the aforesaid circumstances, restricted the challenge to the prosecution of the applicant for the offence punishable under section 304(II) of the Penal Code. An endeavor was made to draw home the point that there was no sufficient material to warrant framing of the charge against the applicant for the offence punishable under section 304(II) of the Penal Code. To this end, the learned Senior Counsel endeavoured to urge that the learned Sessions Judge lost sight of the distinction between the offences punishable under sections 304(II) and 304A of the Penal Code.

10. To bolster up the aforesaid submission, the learned Senior Counsel placed a strong reliance upon the judgments of the Supreme Court in the cases of *Prabhakaran Vs. State of Kerala* ¹ and *State of Gujarat Vs. Haiderali Kalubhai* ². In the case of *Prabhakaran* (Supra), expounding the nature of the offence punishable under section 304A of the penal Code, the Supreme Court had observed that section 304A applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or

1 (2007) 14 SCC 269

2 (1976) 1 SCC 889

knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act.

11. In the case of *Haiderali Kalubhai* (Supra), it was observed that section 304A by its own definition totally excludes the ingredients of section 299 or section 300 IPC. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. Paragraph 10 reads as under :

“10 Section 30A, by its own definition totally excludes the ingredients of section 299 or section 300 I.P.C. Doing an act with the intent to kill a person or knowledge that doing of an act is likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge is the direct motivating force of the act complained of, s. 304A has to make room for the graver and more serious charge of culpable homicide.”

12. Banking upon the aforesaid observations, it was submitted by Mr. Patil that the prosecution case, even if taken at par, would indicate that, at the most, the applicant can be arraigned for an offence punishable under section 304A of the Penal Code. Emphasis was laid on the statements of Mrs. Priya @ Pooja Sudesh Shetty and

Ms. Gargi Bipin Ganatra, to lend support to the submission that the impact would not have occurred but for a dog abruptly crossing the road forcing the applicant to swerve the car towards her left and, in the process, collide with the auto-rickshaw.

13. Though the distinction between the offences punishable under section 304-A and 304(II) of the Penal Code has been pointed out in a number of cases, it would be advantageous to make a reference to the judgment of the Supreme Court in the case of *Alister Anthony Pereira Vs. State of Maharashtra*³. In the said case, the Supreme Court, *inter-alia*, considered the following question :

“(i) Whether indictment on the two charges, namely, the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 IPC is mutually destructive and legally impermissible? In other words, whether it is permissible to try and convict a person for the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 IPC for a single act of the same transaction?”

14. While answering the aforesaid question, the Supreme Court, in the context of rash and negligent driving on a public road with the knowledge of the dangerous character and fatal consequences, enunciated the applicability of the provisions contained

3 (2012) 2 SCC 648

in section 304(II) to such act in the following words :-

“41. Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law - in view of the provisions of the IPC - the cases which fall within last clause of Section 299 but not within clause 'fourthly' of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II IPC. Section 304A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description.

42. A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II IPC. There is no incongruity, if simultaneous with the offence under Section 304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to any person is tried for the offence under Section 338 IPC.

43. In view of the above, in our opinion there is no impediment in law for an offender being charged for the offence under Section 304 Part II IPC and also under Sections 337 and 338 IPC. The two charges under Section 304 Part II

IPC and Section 338 IPC can legally co-exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.”

(emphasis supplied)

15. The Supreme Court also adverted to the pronouncement in the case of **Prabhakaran** (Supra), and observed that it does not state in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act of the driver, the conviction can be maintained for the offence under section 304 Part II IPC even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused.

16. It was concluded that each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, section 304 Part II of IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under section 302 IPC.

17. In the backdrop of the aforesaid exposition of the legal

position, the question which crops up for consideration is whether the rash or negligent act of driving the offending car was accompanied with the knowledge that it would entail the consequence of death of occupants of the auto-rickshaw, in the event, the accident was to take place. The learned Sessions Judge gave full weight to the statements of the occupants of the car. The learned Sessions Judge was, however, of the view that though the abrupt crossing of the dog was a fact beyond the control of the applicant, yet, the applicant should have driven the car in such a speed that she could have been in a position to stop/control the same, in the event such contingency arose. Since the applicant was driving the offending car in high speed, the learned Sessions Judge attributed knowledge to the applicant that her act of driving the offending car in an uncontrollable speed was to likely to lead to death, in the event of collision with the auto-rickshaw.

18. The gravamen of indictment against the applicant and the circumstance found against the applicant by the learned Sessions Judge is that of high and excessive speed. The factors which are taken into account to draw the inference of high and excessive speed are : the nature of the impact, the claim of the witnesses that the occupants of the auto-rickshaw were thrown out of the auto-rickshaw,

the excessive damage allegedly suffered by the auto-rickshaw and the fact that the offending car collided with a stationery container after knocking off the auto-rickshaw.

19. The question which, thus, wrenches to the fore is whether this factor of excessive speed, in which the applicant was allegedly driving the offending car, is sufficient to attribute the requisite knowledge of likely consequence of death of human being to the applicant?

20. For an answer, the situation at the spot and the time of occurrence are required to be appreciated. Indisputably, both the vehicles were plying in the same direction. The collision occurred at about 4:30 a.m. It occurred on a highway. Ordinarily, the traffic at such an early hour is sparse. It is a common knowledge that at such an unearthly hour, on a highway, the vehicles ply at a considerable speed. If viewed through the prism of place, time and situation of the road, mere high speed thus may not be by itself sufficient to attribute the element of knowledge. To add to this, there are statements of witnesses, to the effect that the collision occurred as the dog abruptly crossed the road and the applicant took the car to her left to avoid

running over the dog, and in the process, lost control leading to the collision.

21. The argument that the applicant, in such a situation, ought to have driven the car in a speed which could allow her to control the car falls in the realm of ‘culpable rashness’ rather than making out a case of the knowledge that the driving of the car at such a speed would result in the death of a person, should collision occur. It could be urged that the applicant drove the car with the knowledge that it was dangerous and may cause injury. But the material on record does not justify an inference that the applicant had the knowledge that the act would result in the death of the person in the event of a collision.

22. Undoubtedly, at this stage, it is neither permissible nor possible to record a definitive finding. However, in view of the material on record, especially the intervening circumstance of a dog abruptly crossing the road, stated to by the occupants of the car, who had the opportunity to notice the manner of collision, a *prima-facie* case for charge under section 304(II) of Penal Code, does not seem to have been made out. The learned Sessions Judge, despite having given

due weight to the statements of these witnesses, ascribed reasons which reflect on the aspect of criminal negligence and rashness rather than the rashness coupled with the knowledge that the act would cause death.

23. At this juncture, a useful reference can be made to the judgment of the Supreme Court in the case of ***State of Maharashtra Vs. Salman Salim Khan & Anr.***⁴, wherein, the Supreme Court has observed that the arguments regarding the framing of a proper charge are best left to be decided by the trial court at an appropriate stage of the trial. Paragraph 4 of the judgment reads as under :

“4 The law governing the trial of criminal offences provides for alteration of charges at any stage of the proceedings depending upon the evidence adduced in the case. If the trial is being held before a Court of Magistrate it is open to that court at any stage of trial if it comes to the conclusion that the material on record indicates the commission of an offence which requires to be tried by a superior court, it can always do so by committing such case for further trial to a superior court as contemplated in the Code of Criminal Procedure (the Code). On the contrary, if the trial is being conducted in a superior court like the Sessions Court and if that court comes to the conclusion that the evidence produced in the said trial makes out a lesser offence than the

4 (2004) 1 SCC 525

one with which the accused is charged, it is always open to that court based on evidence to convict such accused for a lesser offence. Thus, arguments regarding the framing of a proper charge are best left to be decided by the trial court at an appropriate stage of the trial. Otherwise as has happened in this case proceedings get protracted by the intervention of the superior courts.”

24. Reverting to the facts of the case, in my considered opinion, it would be in the fitness of things to interfere with the impugned order to the extent the learned Sessions Judge held that the material on record is sufficient to frame a charge for the offence punishable under section 304(II) of the Penal Code as well. In view of setting aside of the said finding, the case will have to be remitted back to the court of Jurisdictional Magistrate, as section 304 Part II is the only offence exclusively triable by the Court of Session. It is, however, clarified that if the learned Magistrate, at an appropriate stage, comes to the conclusion that there is sufficient material to charge the applicant for the offence punishable under section 304 Part II or any other serious offence, the learned Magistrate may alter the charge.

25. The learned Magistrate shall, however, not be influenced

by any of the observations made by this Court, as these observations are made only for the purpose of determination of the question as to whether, at this juncture, the material on record is sufficient to warrant framing of a charge under section 304 Part II of the Penal code.

26. The conspectus of the aforesaid discussion is that the revision application deserves to be allowed. Hence, the following order :-

O R D E R

(i) The revision application stands partly allowed.

(ii) The impugned order to the extent it holds that there is sufficient material to frame charge against the applicant for the offence punishable under section 304 Part-II of the Penal Code is quashed and set aside.

(iii) The learned Additional Sessions Judge shall pass an order under section 228 (1)(a) of the Code of Criminal Procedure, 1973.

(iv) If the learned Magistrate, at an

appropriate stage, comes to the conclusion that there is sufficient material to frame a charge against the applicant for an offence punishable under section 304 Part II of the Penal Code or any other serious offence, the learned Magistrate may alter the charge.

(v) The learned Magistrate shall not be influenced by any of the observations made hereinabove, while trying the offences and/or determining the question of framing/alteration of the charge.

(vi) The revision application stands disposed of accordingly.

[N.J. JAMADAR, J.]