

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.41 OF 2015**

State
(Through P.I. Ponda P.S.) ...Appellant

Versus

Ambrarai Vatevati,
S/o. Pirappa Vatevati,
r/o. Near University,
Gulberga, Karnataka ...Respondent.

Shri Pravin Faldessai, Additional Public Prosecutor for the
Appellant.

Shri Arun Bras De Sa, Advocate for the Respondent.

CORAM: **BHARAT P. DESHPANDE, J.**

RESERVED ON: **10th November, 2022**

PRONOUNCED ON : **2nd December, 2022**

JUDGMENT:

This is an appeal filed by the State through Ponda Police Station thereby challenging the acquittal of the respondent dated 25/02/2011 in Criminal Case No. 61/S/2009/B for the offences punishable under Sections 279, 304-A of Indian Penal Code (I.P.C., for short) and Section 134(a) and (b) of the Motor Vehicles Act, 1988 (M.V. Act, for short).

2. Vide order dated 10/08/2015 leave to file an appeal was

granted by this Court.

3. I have heard the learned Additional Public Prosecutor Shri Pravin Faldessai for the appellant and learned Counsel Shri Arun Bras De Sa for the respondent at length.

4. In nutshell, it is the case of the prosecution that on 26/08/2008, at around 13.10 hours near Curti, Khandepar Panchayat, Ponda, the respondent/accused being the driver of a passenger bus bearing No.KA-32-F-1248 of KRTC, drove said bus under the influence of alcohol while proceeding towards Usgao and in that process dashed against one pedestrian girl namely Manju Rajput aged 10 years near Librament Bar, who was walking on the left hand side of the road, causing the death of the said girl. The respondent/accused fled away from the spot without giving any medical assistance to the injured or without giving information to the authorities about the accident. Accordingly, on the same date an FIR was registered against the respondent/accused at Ponda Police Station. He was arrested and examined by the Medical Officer. After completion of the investigation, charge sheet was filed bearing No.122 of 2009 before the learned Magistrate at Ponda on 04/07/2009. After explaining the substance of the accusation, the matter was posted for trial. In all 16

witnesses were examined by the prosecution to prove charges levelled against the accused. Accused himself stepped into the witness box as Dw1 and deposed in his defence. The learned Magistrate by the impugned order dated 25/02/2011 observed that the prosecution has failed to prove that the accused drove said bus in a rash and negligent manner or he was under the influence of alcohol. Similarly, the learned Magistrate found that the accused was unaware as to what happened to the left rear side of his bus and therefore, he did not stop his bus. Finally, the learned Magistrate concluded that the prosecution has failed to prove charges levelled against the accused beyond all reasonable doubt and that is why he was acquitted.

5. Shri Pravin Faldessai, learned Additional Public Prosecutor submitted that the prosecution examined 16 witnesses which include the eyewitness, the panch witnesses, Police Officers, Doctors, second driver and conductor of the bus involved in the accident as well as the Depot Manager of the Karnataka State Transport Corporation. From the above evidence, the prosecution has clearly established that the deceased girl was walking by the edge of the road and the accused drove his bus in a rash and negligent manner and in that process dashed against the said girl thereby causing fatal injuries. He further

submitted that the accident took place during broad daylight at 13.30hours and specifically when the school children were proceeding to their residence after school was over. He then submitted that the spot of the accident is a busy place and the accused was supposed to drive the bus carefully knowing fully well that school children were moving after school was over and that the area is a busy area. The learned Additional Public Prosecutor further submitted that the panch witnesses, eyewitnesses, and Doctors observed that the accused was under influence of alcohol as the smell of alcohol was coming from his breath. Though he admitted that the blood sample of the accused was not collected immediately and there was some delay in referring the accused for medical examination which was done around 5.30pm i.e. after 4 hours from the time of the accident, the Doctor who examined the accused found that his breath smelling of alcohol. He, therefore, submitted that the accused was under the influence of alcohol at around 1.30pm and was unable to control the vehicle which he was driving.

6. The learned Additional Public Prosecutor Mr. Faldessai then submitted that there are two eyewitnesses out of which one is brother of the deceased and both gave correct facts as to how the

accident took place. He would submit that the left rear tyre portion of the bus came in contact with the deceased due to which she was thrown by the side of the road sustaining grave injuries which were ultimately found fatal.

7. The learned Additional Public Prosecutor Mr. Faldessai then submitted that prosecution had brought convincing material to show that the accused was driving the said bus. Accused finally admitted during his defence evidence that he was driving the said bus. He then submitted that other material brought on record is sufficient to prove that bus driven by the accused was in a rash and negligent manner thereby causing death of a small girl of 10 years and that too when the accused was under influence of alcohol. He then submitted that observations and findings of the learned Magistrate are contrary to the evidence on record and hence need to be observed as perverse findings. He then submitted that the eyewitness was discarded or disbelieved without giving any cogent and convincing reason. According to Mr. Faldessai, learned Additional Public Prosecutor, the drivers of public transport vehicles which are big in size required special training. The licence issued to them is also of a special category which comes under the heavy vehicle category. Therefore, it

cannot be accepted by saying that the driver was unable to notice any incident happening on the left rear side of his bus while he was driving the said bus. He is required to be vigilant of both sides while proceeding ahead. On the above premises, he submitted that there is a need for interference with the findings of the learned trial Court by holding the accused guilty for the offences charged against him.

8. *Per contra*, the learned Counsel Shri Arun Bras De Sa forcefully submitted that powers of this Court while entertaining an appeal against acquittal are limited. He would submit that the findings of the trial Court are neither perverse nor illegal so as to interfere with it. He then claimed that Section 185 of the M.V. Act provides that the contents of the alcohol must exceed 30ml so as to consider that the person/driver is under influence of alcohol.

9. The learned Counsel Shri De Sa then submitted that accident took place on a highway and the point of impact suggests that it was on the left hand side edge. He, therefore, submitted that the girl who unfortunately succumbed to the injuries was walking on the tar road or she suddenly came on the tar road and dashed against the left rear side tyre of the bus. In such circumstances, the driver of the bus cannot be held guilty for rash and negligent driving. He would

submit that it is a pure case of accident without anyone's fault. The view taken by the learned trial Court in the impugned judgment is therefore a possible view and this Court should not replace its view in place of the view of the trial Court only because another view is possible.

10. The learned Counsel Shri De Sa then submitted that injuries on the deceased or on the head and hand which clearly suggests that she might have dashed against the body of the vehicle and then on the surface resulting in causing fatal injuries. He then submitted that there are no eyewitnesses of the actual impact between the said girl and the vehicle and both witnesses claimed to be eyewitnesses are exposed during cross-examination on this point.

11. The learned Counsel Shri De Sa then submitted that though there is observation on the breath of the accused smelling of alcohol, the doctor examining him clearly opined that the accused could take care of himself and therefore he cannot be considered as under the influence of alcohol and more particularly the offence under Section 185 of the M.V. Act. Finally, the learned Counsel Shri De Sa claimed that the findings of the learned trial Court need no interference.

12. Shri De Sa, learned Counsel for the respondent placed reliance

on the following judgments :

1. **Datar Singh v/s. The State of Punjab¹**
2. **Mohammed Aynuddin Alias Miyam V/s. State of A.P.²**
3. **Jagdish Chander v/s. State of Delhi³**
4. **Babu v/s. State of Kerala⁴**
5. **Muralidhar alias Gidda and Another v/s. State of Karnataka⁵**

13. Submissions are now fall for consideration of this Court as under:

1. Whether the findings of the learned Magistrate are perverse so as to interfere with it in an appeal filed against acquittal?

14. During the trial, the prosecution examined 16 witnesses and while arguing the matter, the learned Additional Public Prosecutor invited/pointed out various aspects stated by these witnesses while deposing before the trial Court. Pw1-Parbat Singh Bhati acted as panch witness with regard to inquest panchanama conducted on the dead body of the deceased girl, which is produced at Exh.10. Injuries

1 [(1975) 4 SCC 272]

2 [(2000) 7 SCC 72]

3 [(1973) 2 SCC 203]

4 [(2010) 9 SCC 189]

5 [(2014)5 SCC 730]

found on the person of the deceased are disclosed in the inquest panchanama. Lacerated injuries were found on the right side of the forehead. Lower lip was having a cut injury. Abrasion marks were seen on the upper side of the forearm. Abrasion marks were seen on the left knee.

15. Pw3-Dr. Pannag S. Kumar was examined to prove postmortem examination report. The memo of autopsy at Exh.19 was produced through this witness and injuries as well as opinion with regard to cause of death are brought on record. Pw3-Dr Kumar opined that cause of death was due to damage to the head and brain as a result of blunt force impact with any object or surface. Interestingly the cross-examination of Dr. Kumar reveals several important aspects. Such material needs to be noted for the purpose of understanding the questions put to this witness and hence reads thus:

“To the suggestion whether injuries can be caused if a person while running hits stationed vehicle, I say that in the instant case, the injuries are caused to high velocity impact and the deceased being a child and considering the speed of a child, the injuries are not likely to be sustained, if a child while running hits a moving vehicle. To the suggestion whether injuries to the face can be caused if a child falls from a height and hits a rough surface, I say

that in such an event, injury No.1 is possible, but all the injuries collectively are not possible and such injuries are likely only in an M.V. accident. It is not true to suggest that all the injuries mentioned by me in page 3 of the report can be caused if a child falls from a height of 2 to 5 mts. on a hard and rough surface. I say so, as injury No.11 requires a friction with hard and rough surface as it is a graze abrasion which cannot be caused due to a mere fall."

16. From the above material placed on record, it is clear that cause of death is clearly proved as due to damage to head and brain as a result of blunt force impact with the object and surface. Such injuries as per the deposition of Pw3-Dr. Pannag S. Kumar, were due to coming in contact with a moving vehicle and specifically caused due to a high velocity impact. It is further proved that death of the said child is homicidal.

17. The prosecution is therefore required to prove that death of the said child was due to rash and negligent driving of the bus by the accused as there is sufficient material on record to show that the deceased sustained grievous/fatal injuries when she was hit by the bus driven by the accused.

18. Pw2-Praveen Gad, the panch witness for the scene of accident panchanama produced at Exh.14 deposed that on 26/08/2008 he acted as a panch witness in connection with the vehicular accident and the spot was shown by one Sandip Parkar-Pw7. At the spot, he saw one bag and slippers. At a distance of around 150 mtrs. from the point of impact as shown in the sketch, he saw a stationary bus bearing No.KA-32-F-1248 facing towards Usgao. Measurements at the spot were taken by the police in his presence and the width of the tar road was 5.80mts with a divider strip in the middle. The exact spot of the accident was on the left hand side of the road while proceeding from Ponda to Usgao. He observed blood stains on the spot. He also observed blood stains on the left rear tyre of the bus. There were scratches on the left side of the bus and body of the bus was slightly damaged above the left rear tyre.

19. During cross-examination it has been brought on record that Sandip Parkar-Pw7 told him that accident had taken place. It is also brought on record that there is a curve to the road ahead of the accident spot towards Usgao side. Further, it has been brought on record that there is a primary school near the said turn/curve.

He thereafter disclosed the distances from the accident spot to the Panchayat building, the road leading towards Keriyeem. He further deposed that there is a kaccha road on both sides of the said tar road having a width of 1.5 feet on the right hand. Rest of the cross-examination is only suggestions that he has denied.

20. The scene of accident panchanama at Exh.14 along with the sketch is therefore proved through Pw2 - Praveen and his testimony is found to be cogent and convincing wherein he gives specific measurements and also the position of the bus from the spot of impact. Cross-examination further confirms what he has deposed in the chief-examination. This witness is found to be trustworthy and reliable. It is necessary to note here that Pw2-Praveen refers to the presence of one Sandip Parkar-Pw7 who told the panchas about the spot of impact.

21. Sandip Parkar-Pw7 examined by the prosecution as an eyewitness. He deposed that on 26/08/2008 he was standing by the side of his house at around 1.10pm. At that time he saw ST bus proceeding from Ponda to Usgao and at the same time two students were walking on the left hand side of the road proceeding towards

Usgao. Said bus dashed the girl student and proceeded further. He even deposed that on seeing such a dash, he immediately started his scooter and followed the said bus. After reaching some distance, he noticed that the bus was stopped by some people. Therefore he stopped his scooter and went near the bus. The driver alighted from the cabin of the bus. He along with other people then brought the driver to the spot. He identified the accused as a driver of the said bus bearing No.KA-32-F-1248.

22. Pw7-Sandip Parkar then deposed that the injured girl was wearing a school uniform of white colour shirt and blue skirt. He identified the clothes of the deceased as M.O. Nos.4 and 6 when shown to him in the Court. He also identified the shirt and pant which the accused was wearing as M.O. Nos. 2 and 3.

23. During cross-examination, Pw7- Sandip Parkar stated that his house is by the side of Ponda to Usgao road near Opa road. The accident occurred at a distance of 10-12 mtrs from where he was standing. He could see vehicular traffic on the road on both sides. He admits that the spot of the accident is on the road which is a busy road. He saw some school children walking by the side of the

road since 1.00pm. He admits that there was constant flow of vehicular traffic from 1.00p.m. to 1.15 p.m. He then deposed that the bus was being driven in fast speed in a rough manner. He was unable to disclose the speed of the said bus. He then admits that there is a curve on the road which is at a distance of around 20 to 30 meters from the spot of accident towards Ponda side. However, he clarifies that the road is in a straight line at the spot where the accident occurred. He then stated that the primary school is at a distance of 150 meters from the spot of accident and it is opposite to Bank of Mysore, Khandepar.

24. Pw7-Sandip then deposed during further cross-examination as under:

“I saw the bus coming and when the bus went ahead, I saw the girl fallen on the road. I could not see the exact dash. It is not true to suggest that the girl had already met with an accident and she was lying and the bus of the accused had gone by the side of the injured lying on the road.”

25. The learned Counsel Shri De Sa placed heavy reliance on the statement of Pw7 that he could not see the exact dash. It is therefore contended that Pw7 is not an eyewitness. It is a settled proposition of law that one sentence out of the entire deposition cannot be picked up in order to label the witness as not an eyewitness. The entire deposition will have to be looked into in totality in order to understand deposition. One thing needs to be noted that it was a vehicular accident wherein a bus passed by the side of a small girl child and immediately she was found fallen with injuries. So far as accident is concerned, it is not expected that the same is going to happen. The witness who was standing outside his house and at a distance of about 15 meters from the spot was not supposed to concentrate on the movement of the bus driven by the accused. Only because he claimed that he could not see the exact dash, does not label this witness as not an eyewitness for the simple reason that he has given entire history as to how said accident occurred. First of all he saw the deceased along with one more child walking by the side of the road towards Usgao. He also saw a bus driven by the accused coming from Ponda side and proceeding towards Usgao. He then saw a girl fall on the road

with bleeding injuries. Therefore, the sole statement of this witness that he could not see the exact dash cannot be labelled against him as not an eyewitness. Such an event happens in a fraction of a second and therefore it is not expected for the person standing nearby to concentrate on the movement of a particular vehicle expecting something to happen. Considering the above evidence of Pw7, it is clear that he is an eyewitness to the accident and he deposed facts which happened in his presence. Cross-examination of this witness gives more strength to his deposition in the chief-examination.

26. The second eyewitness examined by the prosecution is Pw8-Mithusingh Rajput, 10 years old student. This witness is the brother of the deceased. He along with the deceased was proceeding towards Usgao by the left hand side of the road. He deposed that after finishing school at around 1.00 pm they were proceeding towards Usgao however a bus from Karnataka State gave a dash to his sister. Said bus was proceeding from Ponda towards Usgao and it was of white and blue colour. He deposed that the bus was proceeding at a fast speed and after giving a dash to his sister, went ahead but was subsequently stopped by some people. Due to the

dash, his sister fell down and sustained a head injury. His sister was wearing a white shirt and blue skirt at the time of the accident. He identified M.O. Nos.4 and 6 as clothes of the deceased sister when shown during his deposition.

27. Cross-examination of Pw8 shows that he along with the deceased sister were not walking on the tar road, they were walking by the side of the tar road on the kaccha road. He denied the suggestion that they were walking on the road and there was very heavy vehicular traffic and due to which his sister met with an accident. He admitted that there was constant vehicular traffic on the road but voluntarily added that the accused was driving the bus in a very fast speed.

28. The deposition of Pw8, the brother of the deceased, is found to be cogent and convincing even though he was just 10 years old. However, such an accident remained in the mind of the child and it is very natural that he would recollect it while deposing before the Court. The cross-examination of this witness nowhere dent his testimony and it further supports the deposition of Pw7-Sandip who is another eyewitness of the accident.

29. Pw12- Pundalik was the passenger of the bus driven by the accused. He deposed that on that day he was proceeding towards Belgaum in the bus driven by the accused. They had a stop at Ponda bus stand for 15 minutes. Thereafter, the bus driven by the accused met with an accident at around 1.00pm. He later on came to know that one girl met with an accident. He identified the accused as the driver of the said bus.

30. Pw-13 Nyaneshwar was another passenger travelling in the bus driven by the accused. He claimed that after a brief halt in Ponda, the bus proceeded towards Belgaum and after around 15-20 minutes, the bus stopped at a place of accident he then got down and saw one small girl sustained injuries. He identified the accused as the driver of the said bus.

31. Pw15-Mallinath was a conductor on the said bus driven by the accused. He claimed that the accused was driving the bus whereas the other driver was sleeping. They reached Ponda and after some time he heard passengers inside the bus shouting that accident occurred and the bus was stopped. After the bus halted he went near the door and saw a small girl had fallen with injuries.

32. The statement of the accused under Section 313 of CrPC was recorded. While answering the questions put to him in connection with adverse evidence, he denied all the said questions by saying that "it is false" or "I do not know".

33. It is interesting to note the stand taken while answering the last question which reads thus:

"Q.80. Do you wish to say anything as regards the incriminating circumstances appearing against you in this matter?"

Ans: The accident had occurred prior to my reaching to the spot and as i saw people gathered on the road and asking for help, I stopped bus but I never gave any dash to any child, as people came with chilli powder on their hands, the persons, from the crowd, requested me to go away from the spot, when I was trying to come out of the bus to help the injured to take her to hospital"

34. The accused stepped into the witness box as Dw1. He admitted that on 26/08/2008 he was driving the bus and left Ponda bus stand at around 1.15pm. He then claimed that when the conductor of his bus whistled, he stopped the bus and there was a turnover there. At the turn, the passengers from his bus were

getting down and the conductor was paying the due amount to such passengers on account of which crowd gathered near the conductor. At that time one person came towards me and told that one person is injured and had to be taken to the hospital. He questioned the said person upon which the said person told him that his bus gave a dash to the said person. The passengers who were present started beating him and the conductor. The said conductor ran away. Thereafter somebody threw chilli powder in his eyes and then he did not know what happened. He then claimed that on that day he did not consume alcohol. However, he admits that he was first taken to I.D. Hospital, Ponda and then Asilo Hospital, Mapusa.

35. During cross-examination he admitted that he is working as a driver since the year 1984 and possessing a professional licence. He also admitted that the bus was driven by him on the road from Gulbarga to Panaji and back. He then stated that the driver alone could drive up to the distance of 200km and thereafter the second driver takes over. He specifically admits that on that day he was driving the bus from Panaji to Khandepar. He also admits that the bus takes only the main stops while plying from Panaji to Gulbarga.

He then admits that there is no stop for the bus at Khandepar. A specific question was put to him which reads along with its answer as under:

“After your bus gave dash to the girl, up to what distance did your bus travel?”

Ans. Up to 10-15 meters.”

36. The remaining cross-examination is only giving suggestions which he denied.

37. From the deposition of the accused, it is clear that he was driving the said bus from Panaji up to the stop of the accident. However, cross-examination of the prosecution witnesses and the answers given while recording the statement under Section 313 CrPC suggests otherwise. Similarly, there is no denial specific that the bus driven by the accused did not dash the child who was walking by the side of the road, though while answering question No.80 recorded under Section 313 of CrPC, the accused came with a different story. Such a story is not at all found in the deposition of the accused recorded as Dw1. This answer given by him to question No.80 as noted earlier cannot be looked into as he stepped

into the witness box and deposed on oath. However there is no whisper about the story which he had tried to put up while answering question No.80. Thus one thing is clear that the accused himself failed to justify incriminating circumstances brought against him during the prosecution evidence and gave false answers at the relevant time, which he later on admitted on oath.

38. The second aspect which the prosecution vehemently canvassed is rash and negligent driving by the accused thereby causing death of the child. Similarly, it has been claimed by the prosecution that the accused drove the said vehicle under influence of alcohol and dashed against the pedestrian girl.

39. In order to prove allegations that the accused consumed alcohol and that he was under influence of alcohol, the prosecution examined Pw4-Dr. Gajanan Naik who deposed that he examined the accused on 26/08/2008 at around 3.10pm at CHC Ponda. On examination, he found the accused was hypertensive and his deep breath was smelling of alcohol. However, clinically he was not under the influence of alcohol. He advised the police to take the accused to GMC for blood alcohol test and for treatment of

hypertension. During cross-examination Doctor admits that hypertension can be caused out of fear or threats. He admits that he did not conduct any alcohol test on the accused but only referred him to GMC.

40. Prosecution then examined Dr. Nutan Raikar who claimed that on 26/08/2008 at around 5.30pm she examined the accused at Asilo Hospital, Mapusa, who was referred from CHC Ponda. She then claimed that after clinical examination the accused was found under influence of alcohol. She, therefore, gave report which is at Exh.24. During cross-examination states that the clinical examination is based on certain tests prescribed which are mentioned in her report at Exh.24. She then claimed that the accused was under influence of alcohol which is based only on smell of mouth and the breath.

41. The medical examination of the accused for drunkenness is produced at Exh.24. At the foot of the said report, it shows that the blood sample was sent for alcohol test. The tests mentioned in Exh.24 were performed by the accused and at Sr.No.3 it is clearly opined that the accused can take care of himself. Thus even

though the accused was found under the influence of alcohol, he was capable of taking care of same.

42. Pw6-Anthony Mascarenhas who acted as panch witness at the time of arrest of the accused at the Ponda Police Station which was carried out at around 7.50pm, stated that breath of the accused was smelling of alcohol and his eyes were found red in colour. Pw7-Sandip Parkar who is eyewitness, stated in his deposition that when they were bringing the accused towards the spot and talking with him, he could smell his breath with alcohol smell.

43. Pw13- Nyaneshwar Hipperkar who was one of the passengers in the said bus also stated that the accused was drunk on that day and his mouth was smelling of alcohol. The test report of the blood collected by the Medical Officer to find out percentage of alcohol in it is not produced in evidence.

44. The learned Counsel for the respondent/accused has rightly pointed out provisions of Section 185 of the M.V. Act,1988 which are not found impleaded against the accused as a offence, though there are allegations that he was under influence of alcohol. The

provisions of Section 185 of the M.V Act are reproduced here for the sake of brevity :

“185. Driving by a drunken person or by a person under the influence of drugs- Whoever, while driving, or attempting to drive, a motor vehicle,—

[(a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser [or in any other test including a laboratory test,] or]

(b) is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine [of ten thousand rupees], or with both; and for a second or subsequent offence, [* *], with imprisonment for a term which may extend to two years, or with fine [of fifteen thousand rupees], or with both.*

[Explanation.—For the purposes of this section, the expression “drug” means any intoxicant other than alcohol, natural or synthetic, or any natural material or any salt, or preparation of such substance or material as may be notified by the Central Government under this Act and includes a narcotic drug and psychotropic substance as defined in clause (xiv) and clause (xxiii) of

Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).]”

45. Perusal of the above provision, it is clear that the person could be considered as drunken or under influence of drugs if he has in his blood, alcohol exceeding 30mg. per 100ml of blood detected in a test by a breath analyser or in any other test including a laboratory test.

46. In such circumstances, he could be punished for the first offence which may extend to six months, or with fine of ten thousand rupees or with both. First of all the accused is not charged under Section 185 of M.V. Act i.e. driving a vehicle in drunken state or under the influence of drugs. Therefore such evidence which the learned Additional Public Prosecutor was trying to point out, are not at all necessary to consider for the simple reason that no charge under Section 185 of M.V. Act was framed against the accused. Even otherwise, the blood testing report is not produced on record to show that the percentage of alcohol was about 30mg per 100ml of blood, so as to consider him in a drunken state. It is surprising that when there is no charge framed against the accused under Section 185 of the M.V. Act, such evidence was

allowed to be led. It is even further surprising that after such material was brought on record by the prosecution witnesses and even mentioned in the charge sheet, the learned Magistrate did not even bother to look into this aspect by modifying the charge by adding Section 185 of the M.V. Act.

47. In the case of **Datar Singh** (supra), it was observed by the Apex Court that mere suspicion or suspicious circumstances cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide. This proposition is a settled proposition of law and there is no dispute about it.

48. In the case of **Mohammed Aynuddin**(supra), the Apex Court observed in paragraph 7 as under:

“It is a wrong proposition that for any motor accident negligence of the driver should be presumed. An accident of such a nature as would prima facie show that it cannot be accounted to anything other than the negligence of the driver of the vehicle may create a

presumption and in such a case the driver has to explain how the accident happened without negligence on his part. Merely because a passenger fell down from the bus while boarding the bus no presumption of negligence can be drawn against the driver of the bus.”

49. In the said case a passengers, while boarding a bus, fell down therefrom as the vehicle moved forward. The driver of the said bus was found guilty of culpable negligence and was convicted under Section 304A of Indian Penal Code. The Apex Court observed in paragraphs 8 and 9 states that:

8. *The principle of res ipsa loquitor 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 lead 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.*

9. *A rash act is primarily an overhasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the*

risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution.”

50. The Apex Court then in paragraphs 10 observed that in that case the possible explanation of the driver is that he was unaware of even the possibility of the accident which happened. When he moved the vehicle forward, his focus normally would have been towards what was ahead of the vehicle. But, when he got a signal from the conductor that the bus can proceed, he is expected to start moving the vehicle.

51. In the case of **Babu**(supra), the Apex Court considered the powers of the Appellate Court while dealing with an appeal against acquittal and various earlier decisions were discussed including the decision in the case of **Chandrappa and Ors V/s. State of Karnataka**⁶, wherein the Apex Court has culled out the legal position in paragraph 42 as under:

⁶ (2007)4 SCC 415

“(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him 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, the accused having

secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

52. In the case of **Muralidhar**(supra), the Apex Court in paragraphs 10 and 11 has observed thus:

“10. Lord Russell in Sheo Swarup, highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said: [IA p.404]

“... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.”

The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in Surajpal Singh while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed: (AIR p. 54, Para 7),

“7.the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

53. As a driver of a public transport and more specifically a heavy vehicle like the State transport vehicle, is having more responsibility as his licence is a specialised licence. No doubt he carries passengers from one place to another by driving a vehicle on public road, he is duty bound to follow the rules and regulations of traffic. As a driver of a bus he ought to know that a cyclist or a pedestrian or scooterist has same right to use the said road as that of the driver of the bus. There has to be a greater degree of circumspection for a driver of a bus, than a pedestrian or a cyclist. The reasons are obvious. A pedestrian dashing against another pedestrian does not cause death nor a cyclist could cause death of a pedestrian except under exceptional circumstances. A driver who drives a bus ought to be prepared at any time for even a careless approach or use of road by a pedestrian or any motorcycle or a small vehicle. However, when the matter comes to Criminal Court, then such driver is at the initial stage considered to be innocent and entire burden is on the prosecution to prove charges levelled against him. When a Court after full-fledge trial found the accused as not guilty, he is loath to infer presumption as held in the case of **Chandrappa**(supra) as such acquittal is further reinforced his

innocence, reconfirmed and strengthened by the judgment of the trial Court. Therefore while dealing with the appeal, the Appellate Court is no doubt entitled to reverse such acquittal but only on cogent and convincing grounds holding that findings of the trial Court are perverse and against settled proposition of law.

54. Though in the present case the learned Trial Court observed that the prosecution has failed to prove the case against the accused, based on some reasoning, which are difficult to fortify for the reason that the learned trial Court unnecessarily observed that the tendency of children to walk on the road by standing side by side and the possibility of the deceased girl suddenly coming on main road by walking or being pushed by another child and then came into contact with the moving bus, as observed in paragraph no.25.

55. However to my mind investigating agency, the learned Magistrate and even the learned Public Prosecutor conducting the trial committed a glaring mistake by not framing proper charge against the accused and more specifically regarding the ingredients of Section 279 and 304A of IPC.

56. The substance of accusation framed and explained to the accused vide Exh.6 reads thus:

“ SUBSTANCE OF ACCUSATION

The Substance of accusation against you, Ambarai Vatevati is that on 96/08/2008 at 13.10 hrs. near Curti-Khandepar Panchayat, Khandepar, ponda Goa, drove bus bearing No. KA.32/F.1248 of KRTC under the influence of alcohol which was proceeding towards Usgao and gave dash to one pedestrian girl namely Manju, S/o Bagwansingh Rajput, near Librament bar, Khandepar, Ponda who was walking on the left side of the road, leading to Usgao and while taking to ID hospital she succumb to injuries in spite of having knowledge that his such act is likely to cause death and thereafter fled away from bus instead of giving medical assistance to the injured and without giving information to the concern authority.

You have, thereby committed offence punishable U/Sec. 279, 304 A IPC and 134A &-B of M.V. Act within the cognizance of this Court.

The Substance of accusation is explained to the accused in HINDI/Konkani , the language known by the accused.

You plead guilty or claim to be tried ?

I plead not guilty.

Accused

Before me,

SD/-

Dated : 06/10/2009

JMFC, 'B' Court, Ponda

57. Paragraph 16 of the charge sheet and the brief facts of the case therein clearly goes to show that same wordings from paragraph 16 of the charge sheet/final report are lifted and copied while framing substance of accusation. No doubt the Sections are mentioned in the second para of sentence of accusation as found above. However, it is paramount duty of the Magistrate to frame proper substance of accusation. If there are multiple sections against which the accused is being charged the substance of accusation must be framed independently for each Section or each offence so that the accused understand the charge levelled against him properly. In the present matter the first and foremost charge against the accused is under Section 279 of IPC which reads thus:

“279. Rash driving or riding on a public way.—Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

58. It was therefore necessary for the learned Magistrate to mention above ingredients of Section 279 of IPC while framing substance of accusation. Normally the substance ought to be that “That you accused on date, time and place mentioned above, drove vehicle on a public way in a manner so rash and negligent so as to endanger human life, or to be likely to cause hurt or injury to any other person and that thereby committed an offence punishable under Section 279 of IPC”.

59. The words as quoted above and more specifically rash and negligent while driving the vehicle on public way so as to endanger human life are must for the charge under Section 279 of IPC.

60. Second offence alleged against the accused is under Section 304A of IPC which reads as thus :

“Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished

with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

61. The substance of accusation for the above offence ought to have been “ That you accused, on or about the said date time and place, caused death of -----by doing any rash and negligent act not amounting to culpable homicide, and thereby punishable under Section 304A of IPC”.

62. The words causing death of any person by doing any rash and negligent act not amounting to culpable homicide are therefore necessarily required to be incorporated in the substance of accusation.

63. On careful perusal of the substance of accusation at Exh-6 quoted above in the present matter, it is seen that main ingredients of Section 279, 304 A IPC are clearly absent. There is no allegation against the accused that first of all he drove the bus on a public way in so rash and negligent manner so as to endanger human life. Similarly, there is no allegation in the substance of accusation that by such act of driving vehicle on a public way and in rash and negligent manner he caused death of a pedestrian girl not amount to culpable homicide.

64. By not explaining the substance of accusation in proper manner and thereby conducting the entire trial, to my mind vitiate the entire proceedings. It further shows a causal approach on the part of the learned Magistrate in framing and explaining the substance of accusation and by not incorporating the main ingredients of the offences alleged against the accused.

65. Surprisingly the charge sheet as well as substance of accusation nowhere charged the accused for the offence punishable under Section 185 of the M.V. Act but the substance of accusation shows that he drove the said bus under the influence of alcohol and

gave dash to one pedestrian girl. Admittedly such arguments were not advanced on behalf of the accused/respondent herein however record clearly goes to show that the substance of accusation and more specifically the contents therein are simply copied from paragraph 16 of the final report/charge sheet and thereby failing in its duty to apply judicial mind while framing the substance of accusation and explaining it to the accused.

66. Grounds in the memo of appeal if perused clearly show that the appellant nowhere raised the aspect of incorrect framing of substance of accusation and thereby vitiating the entire trial.

67. However, the fact remains that at no point of time any objection was raised by the accused with regard to such substance of accusation and even defence evidence was led.

68. Coming back to the facts of the matter, it is clear from the record that the girl child was on the extreme left side of the road and bus driven by the accused was also on its correct side i.e. left side of the road. All witnesses deposed that there was heavy traffic/movement of vehicles on the road from both sides. It is admitted fact that there are schools nearby the spot of accident.

Thus it is highly unacceptable that the accused was driving vehicle in very fast speed. Admittedly, it is a National Highway 4A proceedings from Ponda towards Belgaum. Even though the stretch where the accident took place is in the village and having schools around, the limit of the speed at the relevant spot was not brought on record either by the prosecution or by any other mode.

69. It is clear from the record that front portion of the bus did not dashed against the child however what was found is the left rear tyre which came in contact with the child. If the sketch is believed, spot of impact is showed on the edge of the tar road. It therefore show that the child was walking on the tar road. The front portion of the bus passed by the side of the child as there was no dash from the front side of the bus. However the child came in contact with the left rear portion near the left tyre of the bus. In such circumstances, the possibility of the child suddenly coming on the edge of the tar road from kaccha road and in that process coming in contact with the left rear portion of the bus cannot be ruled out.

70. This does not mean that the bus driver has no responsibility

towards the pedestrian and more specifically the school going children and that he cannot be considered as negligent even if such a child comes in contact with the rear portion of the bus. However, it is for the prosecution to prove specific negligence and the rashness of the accused while driving the bus. In this matter, it is not the case of the prosecution that suddenly the accused took his bus towards extreme left hand side even though the school going children were walking on the edge of the tar road. In fact the accused was driving the bus from the left hand side of the road and the middle portion line is at a distance of 2.90 meters from the left edge of the tar road. Thus it is clear that there was sufficient space for the accused to drive his bus towards Usgao side. However, in the absence of any material on record that the accused suddenly took his bus on the extreme left hand side and dashed against the pedestrian girl, it cannot be considered that such act on the part of the accused was rash and negligent thereby endangering human life or causing death by his rash and negligent act.

71. Being said so, though I am not endorsing the findings of the learned Magistrate, the fact remains that the prosecution has failed to prove beyond all reasonable doubt that the act on the part of the

accused was rash and negligent thereby causing death of the said pedestrian girl, more so when no charge/substance of accusation was framed and explained to him.

72. Having said said, the appeal fails and hence I pass following:

O R D E R

1. Appeal stands rejected.
2. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J

MEENA
VISHAL BHOIR

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