

Rajshree

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**BAIL APPLICATION NO.2185 OF 2022**  
**ALONGWITH**  
**INTERIM APPLICATION NO.2716 OF 2022**  
**IN**  
**BAIL APPLICATION NO.2185 OF 2022**

Rihan Rashid Kalathil ] .. Applicant

vs.

State of Maharashtra ] .. Respondent

Senior Advocate Mr.Aabad Ponda a/w Mr.Waqar Pathan for the Applicant.

Mr.Rizwan Merchant i/b Ms.Vinita Dandekar, for the Intervener.

Ms.P.N. Dabholkar, APP for the State.

**CORAM : BHARATI DANGRE, J**  
**RESERVED ON : 24<sup>th</sup> AUGUST, 2022**  
**PRONOUNCED ON : 26<sup>th</sup> SEPTEMBER, 2022.**

**P.C.**

1] The Applicant came to be arrested on 30.03.2022 in connection with CR No.85/2022 registered with Gamdevi Police Station which initially accused him of committing offence punishable under Section 279 and 338 of the Indian Penal Code and subsequently, offence under Section 304-A, 304(ii) of the Indian Penal Code, alongwith 184, 185, 15(2)(9) and 177 of the Motor Vehicles Act came to be inserted.

2] Heard senior counsel Mr.Aabad Ponda for the Applicant, learned

counsel Mr.Rizwan Merchant for the Intervener – the mother of the deceased Aditya Desai, who succumbed to the injuries sustained to him in the accident and the learned APP Ms.P.N. Dabholkar for the State.

3] The learned senior counsel representing the Applicant would submit that the Applicant is a doctor by profession and when the alleged incident took place he was working as senior resident doctor in Sir J.J. Group of Hospital and while arguing for the Applicant, he would submit that the investigation being complete, in a case where it is not conclusively established by the prosecution whether the case would fall within the purview of Section 304A or 304(ii) of the Indian Penal Code, subject to any conditions that may be imposed upon the Applicant, he may be released on bail. He would submit that “rashness” consist of hazarding someone’s life or committing the hazardous act with “knowledge” of it being so, and that such an act may cause an injury.

The submission is, criminality lies in the recklessness or activities which lead to the culpability and he would submit that absence of rashness in the act of the Applicant do not warrant his implication under Section 304(ii) of the Indian Penal Code and at the most it would attract Section 304A of the Indian Penal Code.

4] Dealing with the accusation that the Applicant was under the

influence of liquor, the learned senior counsel would place reliance upon the FSL report, which has disclosed presence of 12 mg. of Ethyl alcohol, which is much less than permissible limit and by relying upon this report, it is submitted that the Applicant was not in such inebriated state, that he could not control his vehicle and this act by itself was responsible for the accident. By inviting my attention to the site/spot where the incident took place, by bringing on record several photographs, it is suggested that there is no divider/diversion on the road and there is a sharp turn towards right, which led to the untoward incident, which can be described as unfortunate event, for which attempt is made to fasten the criminality disproportionately.

5] Referring to the order of the Sessions Court, rejecting the bail, as sought for, the learned counsel would submit that the only apprehension that there is possibility of tampering would not justify his further detention, when the investigation is complete. Submitting that the Applicant is a doctor by profession and a meritorious student and his further studies are adversely affected, as he need to submit his thesis, but in absence of which he was not allowed to appear in his examination for Masters in Surgery (MS), would cast him with a liability of Rs.50 Lakhs, to be paid as penalty and would also affect his future prospects, is the submission. The argument is, that the Applicant may

be tried for the offence with which he is charged and may even take the consequences depending upon the outcome of the trial, but his present detention pending his trial can be avoided.

6] Per contra, Mr. Rizwan Merchant, the learned counsel for the intervenor, would lay emphasis on the unfortunate incident and the manner in which it took place, which had resulted into death of a young boy who happen to be the sole surviving member in the family.

He placed reliance upon the decision in the case of State of Maharashtra vs. Alister Anthony Pareira and he would also strenuously refer to the decision of this Court in case of ***Mr.Nikhil Wagle and others vs. State of Maharashtra & Ors. (PIL No.77/2022)***, wherein taking cognizance of the drunken driving, several directions were issued to the State and Central Government, as it was noticed that drunken driving has become a menace to the society, which result in frequent accidents and several human lives are lost and no one in the city feel safe and at times has to suffer irreparable loss, as a person driving in a drunken state is unable to co-ordinate his reflexes and poor judgment and slowing down of reflexes, at times result in serious accidents.

By placing reliance upon the material compiled in the charge-sheet, Mr. Merchant would vehemently submit that the present case

clearly reveal that the Applicant had consumed liquor and it had adversely affected his capacity to exercise control over the vehicle and in the drunken state he was not capable of understanding the consequences of his acts, which was result of slowing down of his reflexes and distortion of vision, it had become impossible for him to judge accurately, his position as well as the position of the motorcycle which the deceased was driving. The submission is the alcohol consumption had impaired his consciousness and made him drive recklessly, right in the middle of the road, unmindful that he would dash on a vehicle coming from opposite direction. Apart from this, it is submitted that the Applicant himself is a Doctor and expected to be a responsible citizen, who should value life.

7] The learned APP join Mr.Merchant in his submission and by referring to the statements of witnesses viz Dr.Ramsha Shabbir Ahmad Ansari, Dr.Mimoni Rakesh Kumbhare and Dr.Juveria Ansari who were present in the car, when the accident took place, she would submit that the Applicant lost control over the vehicle and he was driving on the wrong side, when the deceased riding his motorcycle was not noticed by him and having consumed alcohol his reflexes were impaired. She would rely upon an important circumstance, that the Applicant alongwith his friends had consumed liquor in a restaurant at Kala

Ghoda, Fort and the bill of the said restaurant is placed on record to show huge quantity of alcohol being consumed. Ms.Dabholkar would submit that alcohol examination test report reveal presence of 12 mg. of ethyl alcohol in his blood. Relying upon the mechanical inspection report of the vehicle, which the Applicant was driving and by relying upon the photographs of the HeroHonda motorcycle which the deceased was driving, she had made a sincere attempt to bring on record the impact of the collision, which resulted in the deceased deceased being thrown from the flyover and his resultant death by Polytrauma.

The learned APP would assertively submit that the case of the Applicant would squarely fall within Part II of Section 304 of the IPC, which prescribe punishment for culpable homicide not amounting to murder. She would place reliance upon the decision of the Apex Court in the case of ***State vs. Sanjiv Nanda (2012)8 SCC 450*** and also upon the decision of the Apex Court in the case of ***Alister Anthony Pareira vs. State of Maharashtra 2012 (2) SCC 648***.

Considering the seriousness of the offence and penalty which is likely to be imposed upon the Applicant after trying him, the learned APP would submit that it is not a fit case where the Applicant deserve his release on bail.

8] The moot question that arises and warrant consideration by me, is whether the prosecution is justified in bringing the case within Part II of Section 304 of the Indian Penal Code or whether the circumstances narrated would lead to an offence punishable under Section 304A of the Indian Penal Code.

Section 304A of the Indian Penal Code, carves out a specific offence where death is caused by a rash or negligent act and that does not amount to culpable homicide under Section 299 or murder under Section 300 of the Indian Penal Code. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death of some persons, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide.

Section 304 of the Indian Penal Code by its own definition totally excludes the ingredients of Section 299 or 300 of the IPC. Doing an act with an intention to kill a person or knowledge that doing of an act was likely to cause a person's death, are essential ingredients of offence of culpable homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304A has to make room for the graver and more serious charge of culpable homicide.

9] The case of the prosecution, as compiled in the charge-sheet

could be discerned from the statements of several witnesses, some of whom are the eye witnesses. Police personnel, Mr.Sachin Ugale lodged a report on 28.03.2022, reporting about the injuries sustained by the victim Aditya Desai, who was riding on his motorcycle from Kemps corner bridge towards Babulnath temple and the Applicant was driving the car and coming from the opposite direction. The prosecution allege that the Applicant was driving his vehicle, after consuming liquor and since he was not into his senses, he was driving it in the other lane, and had knowledge that such a negligent act would cause destruction of life and he is accused of negligent and rash driving and responsible for causing serious injuries to the person riding on the motorcycle. The prosecution allege that this rash and negligent driving of the Applicant resulted in collision and the injured fell down off the bridge and sustained severe injuries. He was admitted to J.J. Hospital by the Applicant and his friends, however, he succumbed to the injuries.

The incident is alleged to have taken place at 1.55 a.m. on 28.03.2022. The prosecution has included the spot panchanama in the charge-sheet, to describe the location, where the accident occurred. The spot panchanama record the actual location as well as the condition of the silver colour Maruti Suzuki vehicle which was driven by the Applicant and also the status of the HeroHonda motorcycle driven by the deceased. In order to demonstrate the impact of rash

driving of the motorcar, there is also mention of signs of tyre brake on the spot, three meter in length. The CCTV Footage has also been collated and compiled in the charge-sheet, which record a footage of one person falling off the bridge at 01.42.07 and he being carried from the spot in a white Maruti car between 1.50.00 to 1.52.40. Prior to this, the footage also record one white colour silver car proceeding towards Kemps Corner at 1.41.37.

The statement of one Premshankar Tiwari, security guard attached to a building at Kemps Corner is also recorded, who has specifically stated that he could hear a big bang sound at 1.45 a.m., while he was on duty and he noticed one person falling from the bridge in front of Shobha Asher Showroom and the person was wearing a helmet, which he was unable to remove.

10] The charge-sheet has included statements of four doctors who were accompanying the Applicant in the car, which is responsible for causing the accident.

The statements of doctors compiled in the charge-sheet unequivocally narrate the incident dated 27.03.2022, wherein it is stated that five of the doctors decided to have dinner together and the Applicant alongwith Dr.Yogesh Chavan reached the Caffé at 10.15 p.m. Three other Doctors were waiting there for them and they all entertained themselves for 2-3 hours. After dinner, they decided to

have a joy ride/drive at Marine Drive chowpaty and further decided to proceed towards Bandra Sea Link.

The version of the witnesses is, at about 1.40-45, the car driven by the Applicant arrived at Kemps Corner via Babulnath Temple and since there no divider, the Applicant was driving his car in the middle of the road, as the road was free with no vehicles being plied. At that very moment one motorcycle was seen coming from the opposite direction and in order to save the driver of the motorcycle, the Applicant drove his car towards his right side and applied brake, but at that very same time, the driver of the motorcycle also took his bike towards left side, which resulted in immediate collision. As soon as the motorcycle was hit by the car, its driver dashed on the right side of the car and fell down from the bridge.

Dr.Yogesh one of the witness immediately got down from the bridge, followed by his other friends and reached the place where the injured was lying. They removed his helmet and since they were doctors, examined him. He was found to be conscious, but was unable to speak. The Applicant himself was present there and he reached the bridge for getting the vehicle to carry the injured to the hospital. No taxi stopped and thereafter, one motorcar arrived and the injured was taken to JJ Hospital. The version of all the witnesses corroborate each other.

11] The condition of the two vehicles can also be ascertained from the mechanical inspection report and it has been assessed as under :

Mechanical Inspection Report (Car)

- 1] Windshield glass cracked at right side.
- 2] Bonnet sheet metal crushed inside due to impact.
- 3] Front bumper broken apart.
- 4] Front-most side cross-member of frame bent inside due to impact.
- 5] Radiator and front show damaged.

Mechanical Inspection report (HeroHonda)

- 1] Front wheel rim bent and spokes crushed.
- 2] Front side telescopic shockabsorber bent backward due to impact,
- 3] Steering handle bent, front brake lever bent.
- 4] Front both side indicators, head light assembly, dome totally damaged.
- 5] Electrical wiring destroyed.
- 6] Front Mudguard bent backward.
- 7] Fuel tank damaged.

12] The Applicant was arrested and his blood sample was forwarded for analysis, which analysed that his blood contained 0.012 % w/v of ethyl alcohol (twelve miligram). The report is also compiled in the charge-sheet.

The postmortem report in Column No.17 refer to several injuries in the form of abrasion, contusion and puncture wounds. The cause of death has been ascertained as Polytrauma.

13] "The issue of bail is one of liberty, justice, public safety and

burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process.”

The above words of Justice Krishna Iyer in *Gudikanti Narasimhulu and Ors. vs. Public Prosecutor, High Court of Andhra Pradesh*, AIR 1978 SC 429 continue to guide the Courts dealing with bail applications till date.

14] The above said judicial approach was carried further in the case of *Sanjay Chandra and other vs. C.B.I.*, 2012(1) SCC 40, where the following observations were made by the highest Court of this Country.

*“The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purpose of bail in a criminal case is to relieve the accused of imprisonment, to relieve the state of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance whenever his presence is required.”*

Liberty is to be secured through the process of law, while keeping in mind the interest of the accused, the victim, who has lost his life and his near and dear ones, who feel helpless and believe that there is no justice to them and collective interest of the community, which eventually is not compelled to indulge in private retribution.

15] The law in regard to grant or refusal of bail by this time is well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, detail examination of evidence, elaborate documentation of merits of the case need not be undertaken, there is a need to indicate the reasons for prima-facie concluding why the bail is being granted, particularly when accused is charged of having committed serious offence.

These facts and circumstances of each case will govern the exercise of judicial discretion in granting bail. The overriding considerations in granting bail are nature and gravity of the circumstances in which the offence is committed; the position and status of the accused with reference to the victim and the witnesses; likelihood of the accused fleeing from justice; of repeating offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as its investigation and other relevant grounds and circumstances; reasonable possibility of securing presence of the accused at the trial and the interest of the public, which are some of the relevant grounds which deserve focus, while the application is being considered.

16] On perusal of the charge-sheet, the prosecution has charged the Applicant for the offences under Section 304A as well as 304(ii) of the IPC alongwith other connected sections. It will be ultimately for the Court to frame the charge in alternative or charge him for either of the offences.

The prosecution alleges that the Applicant was driving his car under the influence of liquor and therefore he lost control over the vehicle, which was the prime cause for the accident. The case of the prosecution which surfaces through the statements of witnesses, is that the Applicant suddenly took a turn to his left and the prosecution allege that this act, is clearly reflective of his impaired reflexes. By relying upon the statements of the co-passengers in the car, it is sought to be concluded that the Applicant moved his car to the right side and even the driver of the motorcycle also turned to his left, which resulted in crash.

17] On reading the statements of witnesses, prima-facie it cannot be inferred that this act of the Applicant was result of his impaired reflexes. None of the witness has stated that the Applicant was driving in rash manner or he was over speeding. The witnesses in sync with one another categorically state that it was at around 1.40-45 when there was not much traffic on the road and there was no divider on the bridge

and, therefore, the Applicant was driving his car right in the middle of the road. They have also stated that he kept his car in the middle and was taken by surprise when he noticed a motorcycle approaching towards him and in order to avoid a crash, he applied brakes and took his car on the right side but to his misfortune, at that very moment, the driver of the motorcycle also took turn to his left and this resulted in collision of the two vehicles.

The above narration of the witnesses prima-facie reflect the conscious sense of the Applicant, who made an attempt to avoid the head on collision, instead of establishing the prosecution case that the alcohol had disturbed his metabolism.

Whether alcohol contained in the blood of the Applicant is the cause of this swift action, is a matter of evidence. No doubt when a person consumes alcohol it may have the effect on his reflexes, but full effects of liquor would depend upon the amount consumed, the rate of consumption, gender, body weight and whether drink has been consumed on empty stomach or full stomach and dependent upon this, the after effect of intoxication will have to be judged. Same quantity of drinks may not necessarily produce similar effect in each individual and it may vary and depend upon the person's size, metabolism, ethnicity and other factors. Study on this subject reveal that the time from consumption of drink would result into status of intoxication and it is

also possible for a habitual drunkard to develop tolerance and he may not reveal symptoms arising out of intoxication as against those who do not drink often. True it is that heavy alcohol consumption comes with huge range of risk and that is why while making drunken driving as offence under the Motor Vehicle Act, Section 185 of the Act has described the acceptable level of alcohol in the blood detected in test by breath analyser and driving by drunken person under the influence of drugs/liquor is made punishable, if the alcohol level in blood exceeds 30 mg/per 100 ml.

In the present case, report of analysis clearly reveal that level of alcohol in the blood of the Applicant is below the said limit. The burden would again lie on the prosecution to demonstrate, why the particular level was noticed, on account of time lapse when the samples were derived.

18] The prosecution has attributed knowledge to the Applicant, in a case where he is charged of rash and negligent driving. It is to be borne in mind that there may be several circumstances of culpability coupled with attending circumstances indicating additional conduct, act, omission or commission on part of the offender pre and post accident.

19] While dealing with the scope and meaning of the word

'knowledge' appearing in Section 304(II) of IPC as well as the attributability of knowledge to the accused, the Bombay High Court in the ***State of Maharashtra vs. Alister Anthony Pareira***, has recorded that by getting drunk and under the influence of liquor, using a big stone or other weapon for giving blow on the head of person resulting in death would amount to an act done with knowledge that act is likely to cause death. Merely because an automatic car or scooter is involved, would not by itself take the offence outside the scope of Section 304(II) of the IPC and the Court ultimately has to examine each facet in the light of the evidence led by the prosecution and the links, if any, provided by the accused himself in his statement under Section 313 of the Cr.P.C.

The intention and knowledge are two factors which have to be gathered from the facts and circumstances of each case. The question is not whether the accused intended to cause serious injury or trouble, but whether he intended to inflict injury that is found to be present.

"Knowledge" as contrasted with "Intention" signify a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. "Intention" is a conscious state, in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. Section 304(II) of the IPC require that if an act is done

with knowledge that it is likely to cause death, it is punishable under that provision. Culpable homicide not amounting to murder is the essential ingredient of a charge under Section 304 Part (II). Under Section 299, culpable homicide is causing death by doing an 'act', with an intention of causing death as well as knowledge that it is likely to cause death. The entire emphasis is on the expression 'act' and 'knowledge'. If the offender has knowledge that his acts in normal course are likely to culminate in commission of an act which is prohibited in law, the knowledge would be attributable to him, provided there is direct and/or circumstantial evidence in that regard. Comprehension of a reasonable person with ordinary prudence who could speculate the result of his acts or omission, is a relevant consideration for the Court to arrive at a conclusion when he is tried for having possessed the knowledge of such events or extent thereof. The presence of knowledge will ultimately surface during the course of trial.

Knowledge cannot be construed in abstract and would have to be determined by applying a norm of normal behaviour and whether the person can perceive by his senses, the consequences of his acts, omissions or an overtact.

20] In the wake of above, though the learned counsel Mr. Merchant

has focused on the gravity of the accusations, in my considered opinion, the knowledge attributed by the prosecution that the act of the Applicant would result in death of the deceased , will be determined at the time of trial. .

In the wake of material compiled in the charge-sheet, and since I have perused the charge sheet which has included the entire material collected against the present Applicant and the prosecution is ready to charge him for the offence under Section 304(II) of the Indian Penal Code, the question arises, as to whether his further incarceration is necessary. The maximum punishment which the Applicant would face on being convicted under Section 304 Part II of the IPC is, imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

However, on the investigation being completed, in my considered opinion, further incarceration is unnecessary. Deprivation of his liberty cannot be considered as punishment, unless the prosecution successfully establish his guilt. His incarceration may be justified to ensure that he shall not avoid the trial, when called upon. Personal liberty is precious to an individual and it should be curtailed only when it become imperative, depending upon the facts of the case. A balance is required to be maintained between the personal liberty of an accused and the right of police to investigate. It has to dovetail two conflicting

demands; on one hand the requirement of society for being shielded from the hazardous of being exposed to the misadventure of a person alleged to have committed a crime and on the other, the basic canon of criminal jurisprudence, the presumption of innocence of the accused till he is found guilty. Basic rule of criminal system being bail is the rule and jail is an exception. Punishment begins after conviction and every man is deemed to be innocent until duly tried and pronounced guilty.

21] Considering the fact that the Applicant is a Doctor by profession and has roots in the society, in any case, he is not required to be further incarcerated, since it is not the case of the prosecution that he is at flight risk or he is likely to tamper with the case of the prosecution, I am inclined to restore his liberty to him, till he faces the trial for the charges levelled against him.

It is also sought to be canvassed, that the Applicant has to appear for examination and keeping him incarcerated will serve no purpose. The prosecution has not expressed any apprehension that he will be a danger to the society or hamper the interest of the victim and his family.

The observations made above are prima facie in nature and limited for the purpose of determination of the present Application and the learned Judge trying the Applicant for the offences, with which he is

charged, shall not in any manner be influenced by the above order.

Hence, the following order :

**ORDER**

- (a) Application is allowed.
- (b) Applicant – Rihan Rashid Kalathil shall be enlarged on bail in connection with C.R.No.85 of 2022 registered at Gamdevi Police Station on furnishing P.R. bond to the extent of Rs.50,000/- with one or two sureties of the like amount, out of which one surety shall be from the State of Maharashtra.
- (c) The Applicant shall be released on cash bail of Rs.50,000/- for a period of four weeks in lieu of sureties. During the said period the applicant shall arrange for the sureties.
- (d) The Applicant shall continue to reside in the State of Maharashtra and shall not leave the State without prior permission of the court.
- (e) If the Applicant possess the Passport, he shall surrender the same before the Investigating Officer within a period of one week of his release.
- (f) The applicant shall mark his attendance to the concerned Police Station on first day of every month between 4.00 p.m. to 6.00 p.m. , till framing of charge.
- (g) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer and should not tamper with evidence.

- (h) The Applicant shall regularly attend trial, on every date, unless exempted.
- (i) The Applicant shall furnish his residential address and contact number to the Investigating Officer and shall keep him updated of any change.
- (j) I/A is also disposed off.

**[BHARATI DANGRE, J]**