



*CrI.M.P.No.19958 of 2023
in CrI.A.No.1633 of 2023*

THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved On 22.01.2024	Orders Pronounced On 24.01.2024
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CORAM:

THE HON'BLE MR.JUSTICE **M. NIRMAL KUMAR**

CrI.M.P.No.19958 of 2023
in
CrI.A.No.1633 of 2023

Abdul Khaiyum

... Petitioner

Vs.

State rep. by
The Inspector of Police,
D-6 Anna Square Police Station,
Traffic Investigation Wing,
Chennai.
[Crime No.117 of 2021]

... Respondent

PRAYER: Criminal Miscellaneous Petition has been filed under Section 389(1) of Cr.P.C to suspend the sentence passed against the petitioner/appellant in S.C.No.85 of 2022 dated 13.12.2023 by the learned Sessions Judge, Mahalir Neethimandram, Allikulam, Chennai and enlarge the petitioner on bail pending disposal of the appeal.



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For Petitioner : Mr.Abudukumar Rajaratnam
Senior Counsel
for Mr.V.Johnson Yuvaraj

For Respondent : Mr.S.Raja Kumar
Additional Public Prosecutor

ORDER

This Criminal Miscellaneous Petition has been filed by the petitioner, seeking suspension of sentence of imprisonment imposed by the learned Sessions Judge, Mahalir Neethimandram, Allikulam, Chennai by judgment dated 13.12.2023 made in S.C.No.85 of 2022 and enlarge the petitioner on bail pending disposal of the above appeal.

2.The petitioner/accused was convicted by the Trial Court in S.C.No.85 of 2022 for the offences under Section 185 of Motor Vehicles Act and Section 304(2) of IPC and sentenced him to undergo six months rigorous imprisonment and to pay a fine of Rs.10,000/-, in default, to undergo one month simple imprisonment for the offence under Section 185 of Motor Vehicles Act and to undergo five years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default to undergo three months simple



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imprisonment for the offence under Section 304(2) of IPC. Both the sentences to run concurrently. Against which, the present appeal is filed along with suspension of sentence.

3.The case against the petitioner is that on 21.05.2021 at about 2.15 p.m. near KMC Hospital, EVR Periyar Highway and Barnabi Road junction opposite to Punjab National Bank, the petitioner/accused had driven the car bearing registration No.TN-01-AZ-9339 in an inebriated drunken state. The petitioner/accused drove the car in a rash and negligent manner dangerous to the road users and when he was proceeding from west to east direction towards Paris Corner, he dashed against the two wheeler Honda Activa bearing registration No.TN-04-AY-2407 and caused fatal head injuries to the rider of the two wheeler Selvi.Yamuna. Thereafter, she was rushed to KMC Hospital by P.W.1 and inspite of medical treatment, on the same day at about 5.45 p.m, she succumbed to injuries at Rajiv Gandhi Government Hospital. During that period, it was Covid-19 Pandemic situation and there was restriction for movement of vehicles and persons. On receipt of the complaint, P.W.13 registered a case in Crime No.117 of



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2021 under Sections 308 and 188 IPC and Section 185 of Motor Vehicles

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Act and thereafter, P.W.15 took up further investigation, visited the scene of occurrence, recorded the statement of witnesses, prepared observation mahazar, rough sketch, enquired the Doctors who gave treatment at KMC Hospital and Rajiv Gandhi Government Hospital, conducted inquest, sent the body for Postmortem and thereafter sent the two wheeler and the car to the Motor Vehicle Inspector. The petitioner/accused was arrested and produced before P.W.7 for breath analyser test and thereafter, the petitioner was produced before P.W.10/Doctor to confirm the petitioner's consumption of alcohol by blood and urine test. P.W.12 and P.W.14 are the Scientific Officers of Forensic Department. On collecting the materials and evidences, charge sheet filed before the Trial Court.

4.Before the Trial Court, on the side of the prosecution P.W.1 to P.W.16 were examined, Ex.P1 to Ex.P23 and M.O.1 were marked. On the side of the petitioner/accused, no witnesses examined and no exhibits marked. On conclusion of the trial, the Trial Court convicted the petitioner as stated above.



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5.The contention of the learned senior counsel for the petitioner is that in this case, the Trial Court had not considered the fact that the rider of the two wheeler Selvi.Yamuna violated the traffic rules which is the reason for the accident. Since the said Yamuna succumbed to injuries, now the case was projected as though the petitioner is the cause for the accident. Referring to rough sketch and observatioin mahazar, he would submit that it is clear that the rider of the two wheeler cut across the road where there is no provision to enter the Barnabi road from the side of KMC Hospital, the rider ought to have gone upto EGA Theatre, take u-turn and proceeded further in EVR Periyar Highway from west to east. He would further submit that the presence of P.W.1 and P.W.2, who are the colleagues of the deceased, is highly doubtful. P.W.1 does not mention the presence of P.W.2 and states that he was standing along with one Ramky but the said Ramky was not examined as witness. P.W.2 though staes that he was along with P.W.1, but P.W.1 does not say so, both P.W.1 and P.W.2 stated that red signal was switched on, violating the signal, petitioner drove the car and caused accident. He further submitted that P.W.4/Special Sub-Inspector Of Police,



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Traffic Enforcement Wing, Kilpauk Police Station clearly states that since it was Covid-19 Pandemic situation, the signals were switched off and only amber light was blinking which is further confirmed in the rough sketch, by the Investigating Officer who records that the signals were not functioning. In such circumstances, the presence of P.W.1 and P.W.2 highly doubtful.

6.Learned senior counsel would further submit that the only other circumstance against the petitioner is that the petitioner was in a drunken state. P.W.7/Inspector of Police, Egmore Police Station on the request of P.W.13 examined the petitioner with breath analyser and the printout of breath analyser test was marked as Ex.P6 which is in a smudged stage unable to decipher any particulars. A photostat copy of breath analyser test report was marked Ex.P7 but no certificate as to whether it was verified with Ex.P6 given. Hence, from the breath analyser test nothing can be proved. He further referred to the directions of the Additional Commissioner of Police [Traffic] issued to the field formation about conducting breath analyser test, before examining a drunken person breath, normal person's breath to be taken and analysed, thereafter, drunken person breath to be



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analysed. Further, the breath analyser to be calibrated every six months but in this case there is no such procedure followed, there is nothing to show as to when was the last calibration of the breath analyser done. He would further submit that the petitioner was produced before P.W.10/Casualty Doctor attached to Rajiv Gandhi Government Hospital, who issued Ex.P10 and Ex.P11, who took the blood sample of the petitioner. P.W.14 is the Scientific Officer of Forensic Department who examined the blood samples of the petitioner sent by P.W.10. Further referring to Ex.P10 and Ex.P11 he submits that there is no presence of Ethyl Alcohol, which demolished the foundational fact of the case. He further submitted that P.W.13/Sub-Inspector of Police who visited the scene of occurrence, answered to the question put forth by the Court that there is no passage available to cut across the EVR Periyar Road from KMC Hospital which is confirmed by P.W.15/Investigating Officer. He would further submit that the Trial Court though records these shortcomings and follies, but gives its own explanation which is not proper. The learned senior counsel relied on the judgment of the Apex Court in the case of ***Baghubhai Hassanalli Karyani vs. State of Maharashtra*** reported in ***1971 (3) SCC 930***, wherein it was held that



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drunkness cannot be said to be conclusively proved unless urine or blood test carried out and merely smelling of alcohol, unsteady gait, dilation of pupils and incoherence in speech are not enough to confirm drunkness.

7.The learned Additional Public Prosecutor filed a counter affidavit and submitted that in this case the ECG Technician Selvi.Yamuna who was working during the Covid-19 Pandemic period in KMC Hospital after completion of her duty was proceeding in her two wheeler to her house, when she crossed the Barnabi road junction, the petitioner under the influence of alcohol had driven the car in a rash and negligent manner and dashed against the two wheeler causing fatal head injuries to the said Yamuna. P.W.1 and P.W.2, Technicians present in the scene of occurrence, immediately took the injured to KMC Hospital where she was admitted and for further treatment, she was sent to Rajiv Gandhi Government Hospital where she succumbed to injuries. Her death intimation was informed and on the complaint, the Traffic Investigation Team reached the scene of occurrence, examined the witnesses, prepared observation mahazar and rough sketch. In the meanwhile, the petitioner was found stranded in a



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punctured car near Gengureddy Road subway. The Police found him in an
inebriated condition, breath analyser test conducted, the smell of alcohol and
his eyes were in a congested condition recorded and thereafter, he was
produced before the Doctor who took blood samples and urine samples. But
since the examination of the same was done few days later, the alcohol
content evaporated. Taking advantage of the same, now the petitioner
projects that there was no consumption of alcohol. The scientific evidence
and the Doctor evidence confirm that the petitioner was in a drunken state,
further the Motor Vehicle Inspector had clearly stated that the burst of the
tyre could be only due to high speed and rash and negligent driving. He
further submitted that the condition of the signals are discussed by the Trial
Court and had rightly rejected the contention of the petitioner. Further, the
Trial Court by a well reasoned judgment had convicted the petitioner and
hence, prayed for dismissal of the petition.

8.Considering the submissions made and on perusal of the materials,



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it is seen that the accident had occurred during Covid-19 Pandemic situation where there was restricted traffic and during that period, all the signals were switched off and only amber lights were blinking in most of the places. P.W.4/Special Sub-Inspector of Police attached to Kilpauk Traffic Enforcement Police confirms the same, which is recorded in the observation mahazar and rough sketch and confirmed by P.W.13. It is seen that P.W.1 does not mention about P.W.2 but he mentions about one Ramky, who is not examined. P.W.2 though states about P.W.1 but P.W.1 does not confirm the same. Further, both P.W.1 and P.W.2 were categorical that red signal was on and they were waiting for the signal, but the petitioner overshot the red signal and caused accident. In view of the contra evidence, the presence of P.W.1 and P.W.2 in the scene of occurrence is highly doubtful. P.W.3 states that only after hearing the noise, he looked at the place of occurrence and not seen the accident. Further, the other witnesses are only hearsay witnesses. As regards the petitioner consuming alcohol, the breath analyser test is not a conclusive proof as the original Ex.P6 is not decipherable and Ex.P7/photostat copy cannot be said to be a true copy. P.W.10/Doctor who took the blood sample and P.W.14/Scientific Officer



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confirms that there is no presence of Ethyl Alcohol, hence, the petitioner was in a drunken state not proved. Further, from the rough sketch and from the evidence of P.W.13 and P.W.15, it is seen that rider of the two wheeler cut across the road and the place of accident is 5 meters from the middle of the median, hence the contributory negligence cannot be ruled out. These factors have to be considered in the appeal. Hence, this Court is inclined to suspend the Substantive Sentence of Imprisonment alone till the disposal of the appeal.

9. Accordingly, the Substantive Sentence of Imprisonment imposed on the petitioner is suspended till the disposal of the appeal and the petitioner is ordered to be enlarged on bail, on condition that he shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned VI Metropolitan Magistrate, Egmore, Chennai.

10. Further, the petitioner shall appear before the Trial Court on the



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first working day once in three months at 10.30 a.m. until the disposal of the appeal and if he is not able to appear before the Trial Court on that day, he shall make arrangements to file an application under Section 317 Cr.P.C. and shall appear before the Trial Court on any other day in lieu of the date of his absence as directed by the Trial Court.

11. Accordingly, this Miscellaneous Petition is ordered.

24.01.2024

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To

- 1.The Inspector of Police,
D-6 Anna Square Police Station,
Traffic Investigation Wing,
Chennai.
- 2.The Sessions Judge,
Mahalir Neethimandram,
Allikulam, Chennai
- 3.The Superintendent,
Central Prison,
Puzhal, Chennai
- 4.The Public Prosecutor,
High Court, Madras.



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M. NIRMAL KUMAR, J.

cse

Pre-delivery order made in

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