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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Revision Application No. 363 of 2024

Sambhaji Bhagwan Bade ... Applicant
V/s.
The State of Maharashtra ... Respondent.

Mr. Vikrant Khare a/w. Mr. Siddharth Gharat a/w. Mr. Pratik Sabrad a/w. Ms. Trushna Shah	Advocate for the applicant.
Mr. H.J. Dedhia	APP for Respondent No.1 -State.

CORAM : S.M. MODAK, J

DATE : 27 September 2024.

ORAL JUDGMENT :

Heard learned counsel for the applicant-convicted accused and learned APP appearing for the State.

2. I have heard this revision at length on various dates. In fact it was heard finally and not on suspension of sentence, however, when it was noticed that certain questions were not put to the applicant in a 313 statement on the basis of evidence of PW No.1 and PW No.5, sentence is suspended on 22 August 2024. The applicant was asked to remain present in the Court. He remained present on 23 September 2024.
3. It is true that Hon'ble Supreme Court has clarified that if there

is some lacuna in 313 statement, the appellate Court can certainly put questions. I find such lacuna and hence questions were put on 23 September 2024.

4. At that time, issue was raised on behalf of the applicant about delay. Just because the matter is pending in various courts, it does not mean that lacuna cannot be cured. During the submissions, the learned Advocate Khare has taken the following points:

(i) On the basis of evidence of five witnesses, it cannot be said that identity of the driver being the present applicant is established.

(ii) There were break marks noticed in spot panchnama. It indicates that driver of the tempo has applied the brake.

(iii) None of the passengers from the tempo were examined.

He relied upon following judgments:-

(i) *Nanjundappa & anr. Vs/ The State of Karnataka*¹

(ii) *Syad Akbar v/s. State of Karnataka*²

(iii) *State of Maharashtra v/s. Shaikh Jabbarlal Mohamad*³

1 2022 LiveLaw (SC) 489

2 (1980) 1 SCC 30

3 2020 SCC Online Bom 385

5. This Court, however, relied upon the few of the judgments on 23 September 2024. They are on the point of lacuna in 313 statement. I have not gone into those judgments because now the questions are already put to the applicant.

6. The learned APP made the following submissions:-

(i) The act of driving the tempo was not denied anywhere before the trial Court.

(ii) The applicant was also injured in that accident and he has admitted his medical certificate. Apart from that, he also admitted other certificates of the occupants of the tempo. According to him the evidence of PW No.1 and PW No.4 and Investigating Officer is sufficient. According to him one pedestrian by name Kashinath and one of his bullock has died so also one occupant of the tempo has also died.

Scope of Revision

7. It is true that there is difference between the revision and an appeal. In appeal, re-appreciation of evidence is permissible. It cannot be done in the revisional jurisdiction. Reason is simple. Accused already gets two opportunities to agitate his grievance. If such opportunity is made available in revision also, there will not be any end to the litigation. This is the scheme approved by the legislature. What is illegality in the findings needs to be seen.

8. If the trial Court on the basis of proved facts have concluded about guilt of the accused, however, those proved facts are not sufficient to infer about the guilt, it can be said that the finding is perverse. The trial Court considered the following facts:-

Eye witness account

- a) The evidence of PW no.1 Devram N. Patil on the date of incident i.e. on 8 October 2011 is that he was about to go to his village by auto rickshaw. He got down from rickshaw because there was a traffic. Mr. Panurang Gosavi Thakur-PW No.4 was accompanying him.
 - b) Deceased Kashinath was walking on the road along with his two bullocks.
 - c) At that time one tempo came in high speed and gave dash to one bullock and Kashinath. They sustained injuries and died.
 - d) The tempo never stopped there. It gave dash to banian tree. Five to six persons being occupants of the tempo sustained injuries.
 - e) Their certificates are admitted. One occupant of the tempo also died.
9. The contention is raised that this witness has not identified the

applicant. This objection is dis-allowed. Ultimately, the revisional Court has to consider what was defence taken before the trial Court. Just because applicant is represented by an Advocate and just because he can raise any issue, it does not mean that it can be accepted. I have called the record. What transpires is that on 23 October 2012 the accused was not present in the Court. He applied for exemption. It was granted subject to not disputing the identity, however, this can be over-looked. If we see the provisions of Section 317 of Code of Criminal Procedure personal attendance of the accused can be dispensed with, if he is represented by a pleader. The trial Court exempted him subject to not disputing the identity. Hence, the contention of not proving the identity is rejected.

Panchnamas

10. **PW No.2** is one Balaji Ganpat Patil. He is a panch to the inquest panchnama on two dead bodies. **PW No.3 Ulhas Gopal Mhatre** is a spot panch. He is witness to spot panchnama and Exhibits 21 and 22. A contention is raised that there was a curve at the spot. The spot was in the limits of Umberde village, Tal. Pen. It is true that there are tyre marks on the road. It indicates that the driver has applied the brakes. In fact, tyre marks go against the driver. Why there was need to apply brakes. It indicates that he was at great speed.

11. The accused has never taken a defence that the pedestrian and

bullocks have come on the road suddenly and that is why brakes were applied. PW No.4 is Pandurang Gosavi Thakur. He has also witnessed the incident just like PW No.1, however, he was not knowing the tempo driver. PW No.5 – Phulchand Bhagwan Mendge is the investigating officer. The tempo was examined on the point of mechanical defect but due to the damage caused no opinion was given. A suggestion was given that the bullock suddenly became unmanageable and that is how the accident took place. It was denied by the investigating officer. There has to be foundation in the cross-examination of the eye witness. I find it is absent. A suggestion is given to PW No.4 that bullocks came suddenly on the road. Merely giving suggestion is not important. That defence need to be probalised. I find it is absent.

12. In case of *Shaikh Jabbarlal* (supra), the learned Judge of this court has dismissed the appeal filed by the State. It is observed that mere fast speed would not necessarily amount to rash and negligent driving. The facts are differentiable. In this case PW No.1 has deposed that the tempo driver gave a dash to Kashinath and bullock. There are two acts which are punishable under Section 304-A. It may be rash or negligent. Giving a dash to pedestrian and a bullock and then hitting a tree itself indicates that driver was in a speed and he has not take precaution while paying attention to the situation on the spot.

Findings by Courts below

13. The trial court and appellate court has discussed this evidence. The contention of non-proving of identity has to be rejected. It is for two reasons. The applicant remained absent when evidence of PW No.1 was recorded. The trial court could have adjourned the matter but even the learned Advocate for the applicant took cross-examination even though he was knowing that there was a condition not to dispute the identity. The PW No.1 has given the description of the tempo MH-43/F 187. It is the same number which is appearing in the report of examination of the tempo. Considering the circumstances, the trial proceeded. So I am not inclined to accept that ground. It cannot be said that there is any illegality.

14. A few judgments are cited on the point of applicability of *Res ipsa loquitur*. This is a principal which is applicable in the law of torts. In certain circumstances it can be made applicable in criminal trial also. In this case the proved circumstances indicate that driver was not only rash but he was negligent also. The connection in between the act of driving and death is proved. Considering the circumstances the identity of the driver being the applicant is also proved. So there is no merit in the revision.

15. The applicant has undergone some sentence. One ground is taken that due to the accident he is not in a mental condition. The trial court has already taken a lenient view. The applicant was present on the last date. I have seen his physical condition. So

leniency can be shown to him. In view of that following order is passed:

ORDER

- (i) The order of sentence imposed by the court of JMFC Pen in Regular Criminal Case No.28 of 2012 and confirmed by the Court of Additional Sessions Judge for District Raigad at Alibaug in Criminal Appeal No.60 of 2015 is modified.
- (ii) The applicant is sentenced for a period which he has already undergone. Fine will remain the same.

16. The Criminal Revision Application is disposed of. R & P be sent back.

(S.M. MODAK, J.)