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

## CRIMINAL REVISION APPLICATION NO. 359 OF 2002

Shivaji Santu Zanzad .. Applicant

Versus

The State of Maharashtra .. Respondent

.....

- Mr. Ashok Tajane a/w Mr. Sanket Dhawan for Applicant
- Ms. Sangita E. Phad, APP for State

.....

CORAM : MILIND N. JADHAV, J.

DATE : NOVEMBER 14, 2024

JUDGMENT:

**1.** Present Revision Application takes exception to the judgment of Trial Court convicting and sentencing Revision Applicant for the offences punishable under Sections 279, 304(A) and 337 of the Indian Penal Code, 1860 (for short "IPC") and Appellate Court, upholding the said judgment. For the offence under Section 279 IPC Applicant is sentenced to suffer simple imprisonment of one month and pay fine of Rs. 1000/-; for the offence punishable under Section 304(A) IPC Applicant is sentenced to suffer simple imprisonment for six months and pay fine of Rs. 500/- and for offence punishable under Section 337 IPC, Applicant is sentenced to pay fine of Rs. 200/-. In default of payment of fine, Applicant is directed to suffer simple imprisonment for one month. It is directed that all sentences of imprisonment shall run concurrently.



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**2.** I have heard Mr. Tajane, learned Advocate for Applicant and Ms. Phad, learned APP for State. After hearing Mr. Tajane and learned APP, at the outset I would like to begin with the submissions made by Ms. Phad, learned APP. While relying upon certain observations of the Supreme Court in the case of **State of Punjab Vs. Saurabh Bakshi** reported in **(2015) 5 SCC 182**, she would submit that this Court cannot be oblivious to the fact that in the present case due to the act of rash and negligent driving by Applicant, it has resulted in death of an individual. She would draw my attention to the aforesaid judgment and contend that what has been observed by the Supreme Court in paragraph No. 1 of the judgment holds truth even today and therefore this Court will not shut its eyes to the same. The relevant extract in paragraph No. 1 of the said decision reads thus:-

> *". .....It is the duty of every right-thinking citizen to show veneration to law so that an orderly, civilised and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If anyone defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognises. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be*



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> *marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardozo "Justice, though due to the accused, is due to the accuser too." And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices."*

**3.** In the aforesaid backdrop what would be pertinent for me is to note the facts of the case for which the Revision Applicant has been convicted before adverting to the submissions. Date of incident is 19.04.1993. Applicant then 39 years old and with a substantial service record of being a driver was driving a PMT bus (Pune Municipal Transport) from Yerawada to Ramwadi at 7.15 a.m. in the morning. On reaching the junction of Mahendra Society on Pune-Nagar road, he dashed with a motorcycle driven by the first informant PW-3 resulting in the said motorcycle falling on the right side of the bus, damaging its headlight and kick-start and injuring PW-3 and the pillion rider namely Umeshchandra Kuswah. It is the prosecution case that after the accident police arrived at the accident spot and since both riders received injuries, they were sent to hospital in an auto rickshaw. Spot panchnama was drawn below Exh. 11. A formal complaint was registered by the Police while simultaneously sending PW-3 and Umeshchandra Kuswah to the hospital for receiving treatment. C.R. No. 192 of 1993 was lodged and investigated by Police. Both vehicles i.e. PMT bus and the two wheeler (motorcycle) were examined by RTO and RTO report below Exh. 19 of motorcycle



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No. MH-12/M-0969 and PMT bus below Exh. 20 was filed and taken on record during trial. Umeshchandra Kuswah succumbed to his injuries in the hospital after admission on the same day. Report of postmortem of deceased Umeshchandra Kuswah was taken on record below Exh.21. Charge was framed below Exh. 7 under Sections 379, 304(A) and 337 IPC where Revision Applicant pleaded not guilty.

**4.** Though this Court is aware of the fact about the extant powers of this Court under Section 397 of Cr.PC. while considering the reasons in a case where there are two concurrent decisions of the Trial Court and Appellate Court and this not being a Criminal Appeal cannot re-appreciate the entire evidence which has been placed on record but as argued by the learned Advocate as also by the learned APP, emphasis is placed for conviction on the deposition of the sole eyewitness to the accident i.e. PW-3 and therefore considering the deposition and cross-examination of PW-3 which forms the fulcrum for making the decision in the present case, after going through the same, I find that intervention of this Court is desired.

**5.** In the above backdrop only to complete the narration and pleadings, prosecution led evidence of three witnesses. The Doctor who treated the deceased or who prepared the postmortem report is not examined. PW-1 Chandrakant Kokate was conductor of the PMT bus. His deposition has been rejected by the Courts below in view of



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the fact that he has stated that it is only when he heard the sudden noise of dash between the bus and some object that he got down from the bus and saw that two riders of motorcycle which had dashed to the bus had fallen down on the driver's side of the bus. Though his deposition on the aforesaid ground has been disbelieved and not considered by the Court, what is crucial and significant to note are his admissions in cross-examination wherein on being questioned and suggestions put to him, he answered that after delivering the tickets, he was standing in the driver's cabin and the road in front was clearly visible to him when he saw one jeep was coming from the opposite direction and most significantly the subject motorcycle in question was behind the said jeep and PW-3 who was driving the Hero Honda motorcycle overtook the jeep and cut across to the right side of the bus. In his cross-examination, he has further stated that while doing so, the motorcycle was dashed by the jeep resultantly leading to fall of the twin riders on the right side of the bus. It is significant to understand this deposition of PW-1 and his cross-examination and what the spot panchnama below Exh. 11 has stated. With the able assistance of the learned Advocates, I have seen the spot panchnama which is at Exh. 11 page Nos. 43-46 of the compilation paper book. The spot panchnama after recording details of the accident spot with respect to damage suffered by both vehicles i.e. PMT bus and Hero



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Honda motorcycle in question records that in so far as PMT bus is concerned, it received a dent and scratch on its right side due to the brushing of the Hero Honda motorcycle with the bus for which repair costs would be approximately Rs. 200/-. Similarly in so far as the Hero Honda motorcycle is concerned, the report notes damage caused to the headlight and to the kickstart of the said two wheeler motorcycle and nothing more. This is in so far as corroboration of the evidence of PW-1 is concerned which has not found favour either with the Trial Court or the Appellate Court. The evidence of PW-1 and more specifically the admissions coming from PW1 on the suggestion given by the defence clearly qualify him as eye witness to the accident because he was standing in the driver's cabin and the road in front was clearly visible at the time of the accident. One of the reason agreed by the Courts below for disbelieving and rejecting deposition of PW-1 is because he is the conductor of the bus and PMT employee and therefore, he would naturally give evidence in support of defence as an interested witness and hence his evidence has been rejected. What is crucial to note is whether the evidence and deposition given by him is of such a nature which supports the defence case as an interested witness is required to be therefore seen. No doubt in the present case death has occurred but the material on record needs to be considered in its right perspective and more specifically so when the eye witness



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account of the prosecution witness itself is disbelieved due to improper and incorrect consideration, I do not find that any of the admissions made and given by PW 1 in his cross-examination to be false since those admissions are given on the suggestions put by the defence about the happening of the accident and the precursor to the happening of accident, which was witnessed by PW-1.

**6.** PW-2 is the panch witness and the evidence of panch witness is relevant only to the extent of corroborating the evidence of prosecution which has already being dealt with by me while referring to the spot panchnama below Exh. 11 herein above.

**7.** Next we come to the star witness of the prosecution i.e. first informant PW-3 whose evidence has been considered by both the Courts below for indicting, convicting and sentencing the Applicant. His deposition is at page Nos. 49-56 of the compilation paper book and to a certain extent for the purpose of deciding the present Revision Application and in view of the submissions made across the bar by the learned Advocates while relying upon decisions of this Court as also the Supreme Court, I would like to deal with the same in detail. While referring to the relevant deposition, his examination-in-chief states that one PMT bus came from the opposite side by overtaking a truck and dashed their motorcycle. No deposition on this aspect about the bus overtaking the truck was made by PW-1.



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Thereafter he states that the bus dashed their motorcycle on its driver side and both rider and his companion fell down and injured themselves. People gathered and after police came to the accident spot, they sent both of them to Sassoon Hospital by an auto-rickshaw for receiving treatment. His other relevant deposition with respect to damage caused to the two wheeler is that because of the dash, the headlight and kick-start of the motorcycle was broken. As against this deposition, cross-examination of PW3 becomes significantly relevant because it is on the basis of this cross-examination that Applicant stands convicted. In his cross-examination, on the suggestion given to PW-3 who was driving the two wheeler vehicle about the happening of the accident, he has deposed that he saw the bus from a distance of 100 to 150 meters and a truck was ahead of the bus and while the bus was overtaking the truck it was at the distance of 50 to 60 meters from his motorcycle. He has then given a clear admission that he took his two wheeler to the left side of the road rather to the extreme left side of the road in question but did not go on the kaccha road. He has deposed that he applied the brake but his motorcycle became slow. This admission by PW-3 who is the driver of the two wheeler clearly echos the error of judgment on his part as he was driving the two wheeler and would in my opinion be a factor of contributory negligence for the alleged dash which took place on the right side of



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the bus. Once again this Court is not oblivious of the fact that one death has taken place in the present case but what is important for the Court is to decide the matters not on the basis of any emotion but on the basis of evidence before it. What is the evidence before the Court is delineated herein above. Admissions given by PW-3, the driver of two wheeler itself contradicts the case of prosecution. It is clear that both the vehicles which met with the accident did not dash head-on with each other. The deposition and cross-examination of PW-3 clearly states that he changed the trajectory of his two wheeler by going to the extreme left hand side of the road but ultimately ended up by having an impact with the PMT bus on its right side leading to a dent and scratch of the paint. The spot panchnama confirms a dent and scratch received by the PMT bus. PW-3 himself states that after this he and his pillion rider fell down from the two wheeler on the right side of the bus and no run over injury whatsoever was caused to them by the bus.

**8.** In the backdrop of the above evidence, Mr. Tajane would submit that in the present case, it was incumbent upon the prosecution to have examined eye witnesses to the accident including any of the passenger of the bus, if so required, in order to prove the prosecution case beyond all reasonable doubt. This according to him has not been done. He would next submit that according to the prosecution case



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itself when deposition and admission in cross-examination of PW-3 states that the PMT bus overtook a truck resultantly leading to the accident in question, the truck was not seized nor the truck driver was examined. That apart he would also persuade me to consider the fact that PW-1 i.e conductor of the bus has himself deposed that he while standing in the cabin of driver clearly saw the road ahead immediately before the happening of accident in question, the precursor to which was the overtaking by the two wheeler of PW-3 of a jeep. Once again prosecution has not seized the jeep nor examined the driver of the jeep. Prosecution case is not that the Applicant who was the driver of the PMT bus was driving the bus under the influence of liquor or otherwise. What is crucial to be noted is whether prosecution makes out a case of rash and negligent driving so as to attribute such negligent act to the Applicant under the provisions of Section 279 IPC. Said act of rash and negligent driving can only be established as a question of fact through the eye witness account and the evidence placed on record and in the present case, prosecution has produced before the Court two eye witness accounts namely PW-1 and PW-3. If analysis is even *prima facie* done of the deposition of PW-1 and PW-3, dichotomy is clearly evident in the present case leading to the passing of the twin impugned orders. This is supported by the fact that the twin RTO reports below Exhs. 19 and 20 of the two wheeler and PMT



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bus are accepted by the Courts below to prove the case of prosecution beyond all reasonable doubt and the act leading to the accident was on account of rash and negligent driving. One of the attributes of rash and negligent driving would also be speeding and overtaking in the facts and circumstances of the present case. Another fact is the impact of collision and dash between the two vehicles which is once again a question of fact derived from the panchnama rather the spot panchnama carried out of by the Police and the twin RTO reports. In the present case, it is absolutely clear that if the headlight and kickstart of the two wheeler were broken due to damage caused due to the impact, it is seen that the PMT bus has not suffered any damage to its front portion but has received a dent and scratch only on the right hand side which is evident from the spot panchnama. Hence the question of contributory negligence has not been considered by both the Courts below of rider of the two wheeler i.e. PW-3 while passing the twin judgments at all and this question therefore begs an answer. He would therefore urge the Court to quash and set aside the impugned judgment.

**9.** In the above backdrop and evidence Ms. Phad, learned APP would refer to and rely upon the following decisions in her reply:-

(i) ***State of Punjab Vs. Saurabh Bakshi (first supra)***[1]

1 (2015) 5 Sun 182



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(ii) ***State of Punjab Vs. Dil Bahadur***[2]

**9.1.** On referring to the decision in the case of *Saurabh Bakshi (first supra),* Ms. Phad would submit that time and again in various authorities, the Courts have observed that there is a constant concern of the court on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. She would submit that in the present case precious human life has been lost which cannot be ignored by Court and the same is due to the accident in question. She would submit that in such circumstances mitigating factors will have to be taken into consideration which would depend upon the facts of each case. She would submit that in motor accident cases whenever death occurs, it shatters the tranquility of the society at large and disturbs the social fabric. She would submit that in such a case this Court needs to ensure that justice is done by upholding the conviction and sentencing of the accused. I have perused the judgment in the case of *Saurabh Bakshi (first supra)* which is extensively read by Ms. Phad during making her submissions. The said decision came to be passed in the facts of that case which were entirely different from the facts in the present case. What compelled the Supreme Court to pass those directions was on the basis of the gross facts in that case. In that case in the accident which occurred many people lost their lives and

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sustained injuries due to a head on collision of two cars. One of the car was followed by a car with relatives, occupants of which witnessed the accident in front of their eyes. In that context Supreme Court while referring to several of its previous decisions in paragraph No. 12 held that in a motor accident when a number of people sustain injures and a death occurs, it creates a stir in the society; sense of fear prevails all round and the said act of negligence shatters the tranquility of the collective and disturbs the social fabric. In that regard, Supreme Court held that in the facts of that case even grant of compensation would not be an adequate solace to the person who suffered any loss or injury due to the accident and the accused would have to be therefore sentenced adequately. The facts in the present case materially defer from the facts of that case. Another significant material difference between the two cases is whether the factum of rash and negligent driving has been established in the present case since in that case it was clearly established by evidence. In that case since the factum of rash and negligent driving was clearly established the Court prevailed upon that view whereas in the present case even on the basis of the prosecution eye witnesses, the factum of rash and negligent driving by the driver of the PMT bus does not stand established at all. When such is the evidence which is *prima facie* before the Court, there is no



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reason as to why indictment, conviction and sentencing of the Applicant has to take place under Section 279 of IPC.

**9.2.** While referring to the decision in the case of *Dil Bahadur (second supra),* Ms. Phad would draw my attention to paragraph No. 5.1 of the said decision which emphasizes on the principal aim and object to punish the offender for offences committed under Sections 279 and 304 of IPC, which in my opinion would have to be invoked only if the act of the accused is negligent and rash. One of the attributes of rash and negligent driving would also be speed of the vehicle as a result of which the accident takes place. Result of the accident is delineated and considered by me herein above while looking at Exh. 11 - spot panchnama as also the two RTO reports of the vehicles involved which are exhibited in evidence, which clearly show that there are no attributes of rash and negligent driving in the present case. Recently this Court in the decision in the case of ***Shivaji Damodar Karne Vs. State of Maharashtra***[3] decided a case with identical facts. In that case, the driver of the BEST bus who was driving the bus met with an accident on a signal turning on the right side of the bus which dashed to a passerby. This act was in fact seen by the sole eye witness who was the traffic constable manning the signal. His deposition was considered by the Court where in his

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deposition he did not refer to or state about any act of rash or negligent driving on the part of the driver of the BEST bus. On the contrary in that case the spot panchnama revealed the fact that before collision, there were no brake marks on the road to opine that the driver was even speeding. A similar situation has arisen in the present case wherein the parameters of contributory negligence have been completely brushed aside by both the Courts below and this is a very glaring aspect which is required to be considered and looked into. When there was adequate material on record in the form of evidence of two prosecution witnesses i.e. PW-1 an PW-3, it is surprising that the doctrine of contributory negligence which is definitely applicable in criminal jurisprudence to establish and determine the fault of the person leading to the accident in question has not been considered at all. While referring to the decision in the case of *Shivaji Karne (third supra)* and more specifically the decision of the High Court of Himachal Pradesh in the case of ***Bhupinder Sharma Vs. State of Himachal Pradesh***[4]***,*** decision of the Rajasthan High Court in the case of ***Bagtawar Singh Vs. State of Rajasthan***[5] and the decision of the Supreme Court in the case of ***State of H.P. Vs. Parmjit Singh***[6] which have been quoted with approval by this Court, on the aspect of specific evidence being on record and not considered by the Courts below, I

4 2016 SCC OnLine HP 1762
5 2015 Cri.L.J. 2636
6 HLJ 2012 (HP) 297



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have no hesitation in deciding that in the present case, both the judgments below do not consider the aforesaid observations and findings at all and therefore the twin decisions call for interference. Both the judgments are therefore quashed and set aside resultantly setting aside the conviction and sentence imposed on the Applicant by the Trial Court and upheld by the Appellate Court. Bail bond is directed to be cancelled.

**10.** Criminal Revision Application is allowed in above terms and disposed.

[ MILIND N. JADHAV, J. ]

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