

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 20 OF 2002.

Mr. Subbaya Balachanda
r/o C-15, Gajanan Society,
Gupta Marg, Mahim West,
Mumbai-16.

... Applicant.

Versus

State.

... Respondent.

Mr. S. Maneshinde with Mr. P.A. Kholkar, Advocates for
the Applicant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent
State.

Coram : P.V. HARDAS, J.

Date : 28th March 2003.

ORAL JUDGMENT.

The applicant/original accused, being aggrieved by his conviction under Sections 279, 304-A and 387 of the Indian Penal Code, has filed this revision challenging the Judgment and sentence passed by the Judicial Magistrate, First Class at Panaji, dated 8th May 2000, in Criminal Case No. 172/97/B and the Judgment in appeal passed by the IInd Additional Sessions Judge, Panaji, in Criminal Appeal No. 18 of 2000, dated 17th July 2002, confirming the conviction and sentence passed by the learned trial Court.

2. The brief facts which are necessary for the decision of this revision are stated hereunder:-

On 17th October 1997, P.W.8 Head Constable

Suresh Chodankar was informed at about 5.15 p.m. by one Alex Pires on telephone regarding the accident which had taken place on Panjim-Agacaim route. The accident was a collision between a car and a scooter. P.W.8 Head Constable Chodankar on receipt of the information registered an offence vide Crime No. 73 of 1997 and rushed to the spot of the accident. He secured the presence of the panch witnesses Joao Cardozo and P.W.3 John Fernandes and executed the scene of offence panchanama, which is at Exhibit 10. At the spot they noticed that a Maruti Esteem car bearing registration number KA-01-M-9053 was facing Panjim while a scooter, which was on the correct side of the road, was facing Margao. The registration number of the scooter was GA-02-V-9683. The injured were shifted to the Goa Medical College. Injured Sagun succumbed to his injuries. The injury certificate of injured Diago Miranda is at Exhibit 19. The accused came to be arrested on the next day of the accident, that is, on 18th October 1997. After completion of the investigation, P.W.8 Head Constable Chodankar filed the charge-sheet in the Court.

3. The substance of accusation was explained to the accused, who pleaded not guilty and claimed to be tried. The prosecution, in support of its case, examined 9 witnesses. The learned trial Court on

consideration of the evidence, adduced by the prosecution, held the applicant/accused guilty as aforestated and convicted and sentenced him to fine of Rs. 1,000/- in default three months simple imprisonment in respect of the offence under Section 279 of the Indian Penal Code, one year simple imprisonment in respect of the offence under Section 304-A of the Indian Penal Code and fine of Rs. 500/- in default one month simple imprisonment in respect of the offence punishable under Section 337 of the Indian Penal Code. The learned trial Court had directed that from out of the fine amount, the amount of Rs. 1,000/- shall be paid to the scooter driver Diago Miranda as compensation under Section 357 of the Code of Criminal Procedure.

4. The applicant/accused, being aggrieved by the conviction and sentence passed by the learned trial Court, filed Criminal Appeal No. 18 of 2000. The IInd Additional Sessions Judge, Panaji, by his Judgment, dated 17th July 2002, dismissed the appeal maintaining the conviction and sentence as passed by the learned trial Court. Hence, the present revision in this Court.

5. Mr. Maneshinde, learned counsel appearing for the applicant/accused, has urged before me that there is no evidence whatsoever to prove that the accused was driving the said Maruti Esteem car bearing registration

number KA-01-M-9053 and in the absence of any reliable evidence to this effect, the conviction and sentence of the appellant/accused for the aforesaid offences are wholly unwarranted.

6. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the State, has urged before me that the two Courts below have concurrently recorded a finding that the applicant/accused was driving the said car and, in such situation, the conviction and sentence passed on the applicant/accused are justified.

7. The learned trial Court in its Judgment at paragraph 6 had taken up whether it was proved that the accused was driving the Maruti Esteem car as a first point for determination. The learned trial Court recorded a finding that the prosecution had proved that the applicant/accused was driving the car. The learned trial Court has referred to the evidence of P.W.1 Alcandra Rodrigues, P.W.2 Diago Miranda and P.W.8 Head Constable Suresh Chodankar.

8. P.W.1 Alcandra is an eye witness to the accident. After deposing about the manner in which the accident had occurred, stated: "I will not be able to identify the person who was driving the four wheeler which was involved in the accident. I immediately left

the spot as I could not bear the sight of the injured person lying on the road."

9. P.W.2 Diago, who was driving the scooter bearing registration number GA-02-V-9683, states that the deceased Sagun Manjrekar was the pillion rider on the scooter driven by him. After deposing about the manner in which the accident occurred, P.W.2 states: "Inspite of that, the said Maruti car dashed against our scooter as a result we fell down on the road and I became unconscious." He further states: "The said Maruti car was bearing no. 9053. I am in a position to identify the driver of the said car." Since the applicant/accused had sought exemption from personal appearance, the learned trial Court recorded the following: "(Adv. for accused states the identity of the accused is not disputed)".

In the cross-examination, in relation to the identity of the driver, P.W.2 has stated: "After the accident, I was in a conscious state and I had seen the number of the car. After that I became unconscious after seeing the injuries." He has further admitted in the cross-examination: "I can identify the accused as I had seen him for sufficient time and after the accident he came near us."

10. P.W.8 Head Constable Chodankar refers only to the fact of arresting the accused on 18th October 1997.

11. After the closure of the prosecution case, the learned trial Court examined the accused under Section 313 of the Code of Criminal Procedure. The learned trial Court posed the first question to the applicant/accused that he was the driver of the Maruti Esteem car number KA-01-M-9053 which was involved in the accident. To this question the accused replied in the negative. Immediately thereupon, the learned Prosecutor sought leave to re-examine the eye witnesses as the accused had denied that he was driving the vehicle. Accordingly, the trial Court on the statement of the accused under Section 313 of the Code of Criminal Procedure passed an Order: "P.W.1, P.W.2 and P.W.8 to be recalled."

12. P.W.1 Alcandra, who had earlier disclosed that he could not identify the driver of the four wheeler, on re-examination stated: "I had seen the accused for the first time on the day of the accident. I had seen him getting down from his vehicle after the accident so also I had seen him going near the injured persons who were lying on the road."

13. P.W.2 Diago on being recalled identified the

accused as the person who was driving the Maruti Esteem car at the time of the accident. In the cross-examination P.W.2 had admitted that he had not stated to the police that he could identify the accused.

14. P.W.8 Chodankar on being recalled states: "I arrested the accused on 18/10/97. After registering the offence I proceeded to the spot where the accused was also present". In the cross-examination P.W.8 Chodankar has admitted that no eye witnesses had given the name of the accused as the person who was driving the Maruti Esteem.

15. The learned trial Court accepted the identification made by P.W.2 Diago and at paragraph 7 held that the prosecution had proved that the accused was the driver of the Maruti Esteem car.

16. P.W.1 Alcandra has stated in his examination-in-chief itself that he was not in a position to identify the driver of the four wheeler. His subsequent identification, on being recalled by the Court, is unbelievable. No reliance whatsoever can be placed on the identification made by P.W.1 Alcandra. P.W.2 Diago has stated in his examination-in-chief that he became unconscious immediately after the accident. He clarifies this in the cross-examination that he was

conscious after the accident and had seen the number of the car and thereafter became unconscious. Thus, P.W.2 Diago does not state as to when he regained consciousness. According to him he had only noticed the number of the car and thereafter he had become unconscious. His assertion, therefore, that he had seen the accused getting out from the car and the identification of the accused as the driver of the said car really tasks human credulity for its acceptance. Some attempt ought to have been made by the prosecution, particularly when P.W.2 Diago was recalled, to clarify whether he had seen the accused and then had become unconscious. This is not the case here. P.W.2 Diago in unmistakable terms admits that he became unconscious after he had noticed the number of the car. The evidence of P.W.2 Diago in respect of the identification of the accused as the driver of the car is not established.

17. From the evidence of P.W.3 John Fernandes and the scene of offence panchanama it is clear that the Maruti Esteem car was at the scene of offence. This fact is reiterated by P.W.8 Head Constable Chodankar also. Yet, the prosecution has made no attempt to prove the ownership of the car. No documents are produced on record to establish that the car belonged to the accused. In fact, P.W.8 Head Constable Chodankar does

not even state that the accused was at the scene of offence. It is only when he was recalled that he states that the accused was at the scene of offence. The presence of the accused at the scene of offence is also borne out from the perusal of the complaint at Exhibit 20. However, mere presence of the accused at the scene of offence or his presence near the Maruti Esteem car would not be enough to establish that the applicant/accused was the driver of the said car. In the absence of any documents regarding the ownership of the car, the prosecution, in order to succeed, had to establish by cogent and reliable evidence that the accused was the driver of the said Maruti Esteem car. Proof of ownership of the car, in the peculiar facts of the case, and the presence of the accused at the scene of offence, may have raised a suspicion, in the absence of any explanation from the accused, that he was the driver of the car. In this case as pointed out by me earlier, the prosecution has made no attempt to establish who was the owner of the car. There is no cogent or reliable evidence to establish that the accused was the driver of the car. His mere presence at the scene of offence does not lead to an inference that he was the driver of the car. The learned trial Court has assumed that P.W.2 Diago, before he became unconscious, may have seen the accused. The evidence of P.W.2 Diago does not suggest that before he became

unconscious he had seen the accused. Therefore, according to me, in the absence of any material on record to establish that the accused was the driver of the car, the conviction and sentence passed against the applicant/accused is unsustainable.

18. In the result, therefore, Criminal Revision Application is allowed. The conviction and sentence passed against the applicant/accused are hereby, quashed and set aside and the applicant/accused is acquitted of the offences for which he was charged. His bail bond shall stand cancelled. Fine, if paid, be refunded to the applicant/accused.

(P.V. HARDAS)
JUDGE.

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