IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 144 of 2011
Date of Decision: 29.12.2023

State of H.P. ...Appellant.

Versus

Dila Ram ...Respondent.

Coram
Hon'ble Mr. Justice Rakesh Kainthla, Judge.
Whether approved for reporting?[1] Yes.

For the Appellant/State : Mr. Jitender Sharma, Additional Advocate General.

For the Respondent : Mr. J.L. Bhardwaj, Senior Advocate with Mr. Sanjay Bhardwaj, Advocate.

Rakesh Kainthla, Judge (Oral):

The present appeal is directed against the judgment dated 30.10.2010, passed by learned Judicial Magistrate, First Class, (JMFC), Kasauli, District Solan, H.P., vide which the respondent (accused before the learned Trial Court) was acquitted of the commission of offences punishable under Sections 279, 337 and 338 of IPC and Section 185 of the Motor

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Vehicles Act. (The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan against the respondent/accused before the learned Trial Court for the commission of offences punishable under Sections 279, 337 and 338 of IPC and Section 185 of the Motor Vehicles Act. It was asserted that some unknown person called the Police Station on 6.7.2006 at around 8.05 PM and said that one vehicle had turned turtle near the CHC curve. An entry (Ex.PW5/A) was recorded in the Police Station. HC Ram Lal (PW-6), C. Durga Dutt (not examined) and C. Kamal Kumar were sent to the spot for verification. Raj Kumar (PW-8) made a statement to the police that he was serving in Blue Ginger Café near CHC, Dharampur. He was standing outside the Café on 6.7.2006 at around 8.00 PM. A vehicle bearing registration No. HP-64-0725 came from Dharampur towards Kalka at a high speed. The driver turned the vehicle towards the hill and thereafter swerved the vehicle towards the other side. The vehicle turned turtle. The left arm of an occupant was crushed under the vehicle. The informant and

other persons ran to the spot and turned the vehicle. The occupant had sustained injuries on his arm. Two other persons were sitting in the vehicle but they had not sustained any injury. All of them appeared to be intoxicated. The name of the driver was found to be Dile Ram. The accident occurred due to the high speed and negligence of Dile Ram. The statement (Ex.PW-6/A) was reduced into writing and sent to the Police Station through C. Kamal Kumar for the registration of FIR. FIR (Ex.PW-6/B) was registered in the Police Station. The injured were sent to the hospital with C. Durga Dutt for their medical examination. Dr. Ambika Sood (PW-4) conducted the medical examination of Dile Ram and found that he had consumed alcohol or an alcohol-like substance. No injuries were seen on his body. A blood sample was taken but a urine sample could not be taken due to an empty bladder. MLC (Ex.PW-4/A) was issued. She also examined Govind Ram and found that he smelled of alcohol or alcohol-like substances and had not sustained any injury. A blood sample was taken and it was handed over to the police. She issued the MLC (Ex.PW-4/B). She also examined Rakesh Kumar and found that he had a crush injury on the whole of the left forearm; small lacerations were present behind the left ear. The smell of alcohol

and alcohol-like substance was present. She issued MLC (Ex.PW-4/C). Ram Lal (PW-6) conducted the investigation. The photographs of the spot (Ex.P1 to Ex.P-6), whose negatives are Ex.P7 to Ex.P12 were taken. A site plan (Ex.PW-6/C) was prepared. The vehicle bearing registration No. HP-64-0725 was seized vide seizure memo (Ex.PW-1/A). Yoginder Kumar (PW-3) conducted the mechanical examination of the vehicle and found that there was no defect in the vehicle which could have led to the accident. He issued the report (Ex.PW-3/A). Injured Rakesh Kumar was referred to PGI, Chandigarh. His case summary (Mark-A) was obtained from PGI. A report of analysis (Ex. PX) was received in which it was shown that the blood samples contained alcohol. Statements of witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and presented before the Court.

3. Learned Trial Court put the notice of accusation to the accused for the commission of offences punishable under Sections 279, 337 and 338 of IPC and Section 185 of the MV Act.

4. The prosecution examined eight witnesses to prove its case. Govind Ram (PW-1) and Rakesh Kumar (PW-2) were

the occupants of the vehicle. Yoginder Kumar (PW-3) conducted the mechanical examination of the vehicle; Dr. Ambika Sood (PW-4) conducted the medical examination of the accused and other occupants of the vehicle. Rajesh Kumar (PW-5) proved the entry in the daily diary. Ram Lal (PW-6) conducted the investigation, Ram Pratap (PW-7) is the owner of the vehicle, and Raj Kumar (PW-8) is the informant.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. No defence was sought to be adduced by the accused.

6. Learned Trial Court held that Govind Ram and Rakesh Kumar (occupants of the vehicle) did not support the prosecution case and stated that they were not aware of how the accident had taken place. Ram Pratap, owner of the vehicle stated that he handed over the vehicle to Rakesh Kumar and not to the accused-Dile Ram. Raj Kumar (PW-8) also did not prove the prosecution case and stated that he was not aware how the accident had taken place. Some of the witnesses stated that the accused was driving the vehicle, whereas the owner of the vehicle stated that he had handed over the vehicle to his nephew

Rakesh Kumar. Hence, in these circumstances, the prosecution's version that the accused was driving the vehicle at the time of the accident was not believable. It was further held that as per the report of the analysis (Ex. PX), all the occupants had alcohol in their blood samples, however, it was not mentioned that they were under the influence of liquor or were intoxicated. Hence, the accused was acquitted.

7. Being aggrieved from the judgment passed by the learned Trial Court, the present appeal has been filed asserting that the learned Trial Court failed to properly appreciate the evidence. Learned Trial Court adopted unrealistic standards to evaluate the prosecution evidence. The reasoning of the learned Trial Court is manifestly unreasonable and unsustainable. It was duly proved by the report of analysis that Dile Ram had 131.9% liquor in his blood which was more than the permissible limit prescribed under Section 185 of the Motor Vehicles Act. An intoxicated person will be unable to control the vehicle and learned Trial Court erred in acquitting the accused. The witnesses had properly identified the accused. The road was wide enough to avoid the accident. The mechanical report does not show that there was some mechanical fault in the vehicle

and it could be inferred that the accident was the result of the rash and negligent act of the accused. Hence, it was prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

8. I have heard Mr Jitender Sharma, learned Additional Advocate General for the appellant-State and Mr. J.L. Bhardwaj, learned Senior Counsel assisted by Mr. Sanjay Bhardwaj, Advocate, for the respondent/accused.

9. Mr. Jitender Sharma, learned Additional Advocate General for the appellant-State submitted that the learned Trial Court erred in acquitting the accused. It was duly proved by the testimonies of eyewitnesses that the accused was driving the vehicle at the time of the accident. It was also proved by the statement of the Medical Officer and the report of analysis that the accused was intoxicated and had 131.9% alcohol in his blood which is beyond the statutory limit provided under Section 185 of the Motor Vehicles Act. Learned Trial Court failed to appreciate the evidence properly and arrived at a conclusion which could not be drawn by any reasonable person. Therefore,

he prayed that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

10. Mr. J.L. Bhardwaj, learned Senior Counsel for the accused supported the judgment passed by the learned Trial Court and submitted that there is no evidence that the blood sample remained in safe custody. The prosecution witnesses were cross-examined by learned APP, which means that they were not considered worthy of credence by the prosecution itself. Learned Trial Court was justified in discarding their testimonies. If there are two views possible on record, the Appellate Court hearing an appeal against the acquittal will not interfere with the same simply because it would have taken a different view while trying the matter on the original side. Hence, he prayed that the present appeal be dismissed.

11. I have given considerable thought to the submissions at the bar and have gone through the record carefully.

12. The present appeal has been filed against a judgment of acquittal. The Hon'ble Supreme Court laid down the parameters of deciding an appeal against acquittal in ***Jafarudheen v. State of Kerala, (2022) 8 SCC 440***, as under:-

"**<u>Scope of Appeal filed against the Acquittal:</u>**

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

13. This position was reiterated in ***Siju Kurian versus State of Karnataka 2023 online SCC 429***, wherein it was held:-

"15. One of the main contentions raised by the learned counsel appearing for the appellant is to the effect that the High Court ought not to have interdicted with the judgment of the acquittal passed by the Trial Court and only in the event of the judgment of the Trial court was riddled with perversity and the view taken by the Trial Court was not a possible view, same could have been reversed by relying upon the judgment of this Court in case of ***Murugesan V. State through the Inspector of police(2012) 10 SCC 383*** whereunder it came to be held as follows:

"**33.** The expressions "erroneous", "wrong" and "possible" are defined in the *Oxford English Dictionary* in the following terms:

"*erroneous.*— wrong; incorrect.

wrong.—(1) not correct or true, mistaken.

(2) unjust, dishonest, or immoral.

possible.—(1) capable of existing, happening, or being achieved.

(2) that may exist or happen, but that is not certain or probable."

34. It will be necessary for us to emphasize that a possible view denotes an opinion, which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion, which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations has to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court."

16. It need not be restated that it would be open for the High Court to re-apprise the evidence and conclusions drawn by the Trial Court and in the case of the judgment of the trial court being perverse that is contrary to the evidence on record, then in such circumstances the High Court would be justified in interfering with the findings of the Trial Court and/or reversing the finding of the Trial Court. In ***Gamini Bala Koteswara Rao* v. *State of Andhra Pradesh (2009) 10 SCC 636: AIR 2010 SC 589*** it has been held by this Court as under:

> **"14.** We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so.

17. The Appellate Court may reverse the order of acquittal in the exercise of its powers and there is no indication in the Code of any limitation or restriction having been placed on the High Court in the exercise of its power as an Appellate court. No distinction can be drawn as regards the power of the High Court in dealing with an appeal, between an appeal from an order of acquittal and an appeal from a conviction. The Code of Criminal Procedure does not place any fetter on the exercise of the power to review at large the evidence upon which the order of acquittal was founded and to conclude that upon that evidence the order of acquittal should be reversed.

18. In the case of ***Sheo Swarup v. King Emperor AIR 1934 PC 227***, it has been held by the Privy Council as under*:*

> But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as:
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> 1) The views/opinion of the trial judge as to the credibility of the witnesses;
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> 2) The presumption of innocence in favour of the accused;

3) The right of the accused to the benefit of any doubt; and

4) The slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

19. This Court has time and again reiterated the powers of the Appellate Court while dealing with the appeal against an order of acquittal and laid down the general principles in the matter of ***Chandrappa*** **v.** ***State of Karnataka (2007) 4 SCC 415*** to the following effect:

"**42.** From the above decisions, in our considered view, the following general principles regarding the powers of the Appellate Court while dealing with an appeal against an order of acquittal emerge:

(*1*) An Appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on the exercise of such power and an Appellate court on the evidence before it may reach its own conclusion, both on questions of fact and law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an Appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an Appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

> (4) An Appellate court, however, must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
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> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate court should not disturb the finding of acquittal recorded by the trial court."

14. The present appeal has to be adjudicated in the light of the judgments of the Hon'ble Supreme Court.

15. Govind Ram (PW-1) stated that he had gone to attend the marriage of his relative on 6.7.2006. They only took food and did not consume any liquor. He, the accused and Rakesh were returning in the vehicle. The vehicle turned turtle near Dharampur Chowk. The accused was driving the vehicle. The vehicle was being driven at a slow speed. He was permitted to be cross-examined. He denied the previous statement recorded by the police. He denied that he was making a false statement to save the accused.

16. Rakesh Kumar (PW-2) also stated that he had gone to attend the marriage with his friends on 6.7.2006. His brother Govind Ram was with him. Dile Ram met him in the marriage. They took food but did not consume any liquor. They were returning after attending the marriage. He did not know what happened at Dharampur Chowk. He did know that the vehicle had turned turtle. He did not know whose negligence led to the accident. He denied portion B to B and D to D of his previous statement but admitted portion A to A and E to E of his previous statement. He denied that he was making a false statement to save the accused.

17. Raj Kumar (PW-8) stated that he was standing outside the Café when a vehicle came from Dharampur side at a high speed and turned turtle. He and other persons went to the spot and turned the vehicle. One person had sustained injuries. The police reached the spot. He made a statement to the police. He was also permitted to be cross-examined. He stated in cross-examination by learned APP that he was busy in saving the injured people and could not notice who was driving the vehicle at the time of the accident. He denied the previous statement (Ex.PW-6/A) recorded by the police.

18. It is apparent from the testimonies of these witnesses that only Govind Ram deposed that the accused was driving the vehicle at the time of the accident and other witnesses have not stated any such fact. Raj Kumar (informant) stated that he could not see the driver due to the rush of the people. The testimony of Govind Ram that the accused was driving the vehicle at the time of the accident was not challenged in the cross-examination by the defence which means that the same has been accepted as correct. It was laid down by the Hon'ble Supreme Court in ***State of Uttar Pradesh Versus Nahar Singh 1998 (3) SCC 561*** that where the testimony of a witness is not challenged in the cross-examination, the same cannot be challenged during the arguments. This position was reiterated in ***Arvind Singh Versus State of Maharashtra AIR 2020 (SC) 2451*** and it was held:

> **[57]** The House of Lords in a judgment reported as ***Browne v. Dunn 1894 6 Reports 67 (HL)*** considered the principles of appreciation of evidence. Lord Chancellor Herschell, held that it is absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness if not speaking the truth on a particular point, direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged. It was held as under:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue, but it seems to me that cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards, to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling."

[58] Lord Halsbury, in a separate but concurring opinion, held as under:

> "My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To

> my mind, nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

[59] This Court in a judgment reported as ***State of U.P. v. Nahar Singh, 1998 3 SCC 561***, quoted from Browne to hold that in the absence of cross-examination on the explanation of the delay, the evidence of PW-1 remained unchallenged and ought to have been believed by the High Court. Section 146 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. This Court held as under:-

> "13. It may be noted here that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of the delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:
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> (1) to test his veracity,
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> (2) to discover who he is and what is his position in life, or
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> (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

[60] This Court in a judgment reported as ***Muddasani Venkata Narsaiah (Dead) through LRs. v. Muddasani Sarojana, 2016 (12) SCC 288*** laid down that the party is obliged to put his case in cross-examination of witnesses of the opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely a technical one. It was held as under:

> "15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to the factum of execution of the sale deed, PW 1 and PW 2 have not been cross-examined as to the factum of execution of the sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's version in the cross-examination of the opponent. The effect of non-cross-examination is that the statement of the witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in ***Bhoju Mandal v. Debnath Bhagat [Bhoju Mandal v. Debnath Bhagat, 1963 AIR(SC) 1906]***. This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. A party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in ***Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. 1958 AIR(P&H) 440.***
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> 16. In ***Maroti Bansi Teli v. Radhabai [Maroti Bansi Teli v. Radhabai, 1945 AIR(Nag) 60***, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established. The High Court of Calcutta in ***A.E.G. Carapiet v. A.Y. Derderian 1961 AIR(Cal) 359*** has laid down that the party is obliged to put his case in cross-examination of witnesses of the opposite party. The rule of putting one's version in cross-

> examination is one of essential justice and not merely a technical one. A Division Bench of the Nagpur High Court in ***Kuwarlal Amritlal v. Rekhlal Koduram 1950 AIR(Nag) 83*** has laid down that when attestation is not specifically challenged and the witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of the Patna High Court in ***Karnidan Sarda v. Sailaja Kanta Mitra 1940 AIR(Pat) 683*** has laid down that it cannot be too strongly emphasised that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first appellate court as to the factum of execution of the sale deed in favour of the plaintiff."

19. Ram Pratap (PW-7), the owner of the vehicle, stated that he had handed over the vehicle to Rakesh Kumar. Learned Trial Court held that his testimony falsified the prosecution's version that the accused was driving the vehicle. His statement could not have been so used by the learned Trial Court. It is apparent from the record that he had made a previous statement to the police wherein he had stated that the vehicle was being driven by Dile Ram at the time of the accident. Hence, his

testimony in the Court that Rakesh Kumar had taken the vehicle is contrary to his previous statement. He is shown to have made two inconsistent statements and his credit has been impeached under section 155 (2) of the Indian Evidence Act. It was laid down by the Hon'ble Supreme Court in ***Sat Pal vs. Delhi Administration AIR 1976 S.C. 294*** that where a witness has been thoroughly discredited by confronting him with the previous statement, his statement cannot be relied upon. However, when he is confronted with some portions of the previous statement, his credibility is shaken to that extent and the rest of the statement can be relied upon. It was observed:

> "51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court by the party calling him his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands

> squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

20. This Court has also laid down in ***Ian Stilman versus. State 2002(2) Shim. L.C. 16*** that where a witness has been cross-examined by the prosecution with the leave of the Court, his statement cannot be relied upon. It was observed:

> 12. It is now well settled that when a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution, such a witness loses credibility and cannot be relied upon by the defence. We find support for the view we have taken from the various authorities of the Apex Court. In ***Jagir Singh v. The State (Delhi Administration), AIR 1975 Supreme Court 1400***, the Apex Court observed :
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> > "It is now well settled that when a witness, who has been called by the prosecution, is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit this witness altogether and not merely to get rid of a part of his testimony".

21. Therefore, the learned Trial Court erred in relying upon his testimony to conclude that the accused was not driving the vehicle at the time of the accident.

22. No person has given any reason for the accident. It was submitted that as per the site plan, the place of incident was quite wide. Therefore, the principle of *res ipsa loquitur* can be applied. It is difficult to agree with this submission. It was laid

down by the Hon'ble Supreme Court in ***Syad Akbar v. State of Karnataka, (1980) 1 SCC 30: 1980 SCC (Cri) 59*** that the principle of *res ipsa loquitor* can be applied in a criminal case only when the facts are so startling that they speak for themselves and lead to no other inference than the negligence of the accused. The maxim cannot be applied to relieve the prosecution of its burden to prove its case beyond reasonable doubt. It was observed:

> **26.** From the above conspectus, two lines of approach in regard to the application and effect of the maxim res ipsa loquitur are discernible. According to the *first*, where the maxim applies, it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of negligence, such as, where a motor vehicle without apparent cause leaves the highway, or overturns or in fair visibility runs into an obstacle; or brushes the branches of an overhanging tree, resulting in injury, or where there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course ensue, the burden shifts or is in the first instance on the defendant to disprove his liability. Such shifting or casting of the burden on the defendant is on account of a presumption of law and fact arising against the defendant from the constituent circumstances of the accident itself, which bespeak the negligence of the defendant. This is the view taken in several decisions of English courts. [For instance, see ***Burke* v. *Manchester, Sheffield & Lincolnshire Rail Co. [(1870) 22 LJ 442]; Moore v.R. Fox & Sons [(1956) 1***

QB 596 : (1956) 1 All ER 182]. Also see paras 70, 79 and 80 of ***Halsbury's Laws of England***, Third Edn., Vol. 28, and the rulings mentioned in the footnotes thereunder.]

27. According to the other line of approach, res ipsa loquitur is not a special rule of substantive law; functionally, it is only an aid in the evaluation of evidence, "an application of the general method of inferring one or more facts in issue from circumstances proved in evidence". In this view, the maxim res ipsa loquitur does not require the raising of any presumption of law which *must* shift the onus on the defendant. It only, when applied appropriately, allows the drawing of a *permissive* inference of fact, as distinguished from a *mandatory* presumption properly so-called, having regard to the totality of the circumstances and probabilities of the case. Res Ipsa is only a means of estimating logical probability from the circumstances of the accident. Looking at from this angle, the phrase (as Lord Justice Kennedy put it [***Russel v. London & South Western Railway Co, (1908) 24 TLR 548]***) only means, "that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence .... It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of".

19. As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is in such cases that the maxim res ipsa loquitur may apply if

the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But, according to some decisions, satisfaction of this condition alone is not sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being offsprings of negligence, are furnished by cases, such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle; one car ramming another from behind, or even a head-on collision on the wrong side of the road. (See per Lord Normand in ***Barkway v. South Wales Transport Co. [(1950) 1 All ER 392, 399]; Cream v. Smith [(1961) 8 AER 349]; Richley v. Faull [(1965) 1 WLR 1454 : (1965) 3 All ER 109]***)

20. Thus, for the application of the maxim res ipsa loquitur "no less important a requirement is that the res must not only bespeak negligence, but pin it on the defendant".

21. It is now to be seen, how does res ipsa loquitur fit in with the conceptual pattern of the Indian Evidence Act. Under the Act, the general rule is that the burden of proving negligence as the cause of the accident lies on the party who alleges it. But that party can take advantage of presumptions which may be available to him, to lighten that burden. Presumptions are of three types:

(*i*) Permissive presumptions or presumptions of fact.

(*ii*) Compelling presumptions or presumptions of law (rebuttable).

(*iii*) Irrebuttable presumption of law or conclusive proof.

Classes (*i*), (*ii*) and (*iii*) are indicated in clauses (1), (2) and (3) respectively, of Section 4, Evidence Act. "Presumptions of fact" are inferences of certain fact patterns drawn from the experience and observation of the common course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society and the ordinary course of human affairs. Section 114 is a general section dealing with presumptions of this kind. It is not obligatory for the Court to draw a presumption of fact. In respect of such presumptions, the Act allows the judge discretion in each case to decide whether the fact which under Section 114 may be presumed has been proved by virtue of that presumption.

28. In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by a negligent or rash act. The primary reasons for the non-application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be

presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of the negligence of somebody. Secondly, there is a marked difference as to the *effect* of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in ***Andrews v. Director of Public Prosecutions [(1937) 2 All ER 552: 1937 AC 576]***, "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case".

29. However, shorn of its doctrinaire features, understood in the broad, general sense, as by the other line of decisions, only as a convenient ratiocinative aid in the assessment of evidence, in drawing permissive inferences under Section 114 of the Evidence Act, from the circumstances of the particular case, including the constituent circumstances of the accident, established in evidence, with a view to come to a conclusion at the time of judgment, whether or not, in favour of the alleged negligence (among other ingredients of the offence with which the accused stands charged), such a high degree of probability, as distinguished from a mere possibility has been established which will convince reasonable men with regard to the existence of that fact beyond

> reasonable doubt. Such harnessed, functional use of the maxim will not conflict with the provisions and the principles of the Evidence Act relating to the burden of proof and other cognate matters peculiar to criminal jurisprudence.
>
> **30.** Such simplified and pragmatic application of the notion of res ipsa loquitur, as a part of the general mode of inferring a fact in issue from another circumstantial fact, is subject to all the principles, the satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. These are: *Firstly*, all the circumstances, including the objective circumstances constituting the accident, from which the inference of guilt is to be drawn, must be firmly established. *Secondly*, those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused. *Thirdly*, the circumstances shown make a chain so complete that they cannot reasonably raise any other hypothesis save that of the accused's guilt. That is to say, they should be incompatible with his innocence, and inferentially exclude all reasonable doubt about his guilt.

23. The site plan shows that there was a curve and it was not a case of a wide straight road. The vehicle had also not left the road but had turned turtle. Hence, by merely turning the turtle, the inference of negligence cannot be drawn in the present case and the learned Trial Court had rightly held that there was no satisfactory evidence of negligence.

24. It was submitted that the vehicle was being driven at a high speed which shows the negligence of the accused. This is

not acceptable. No witness has stated on oath that the vehicle was being driven at a high speed. Hence, this fact is not established. In any case, it was laid down by the Hon'ble Supreme Court in ***Mohanta Lal vs. State of West Bengal 1968 ACJ 124*** that the use of the term 'high speed' by a witness amounts to nothing unless it has to be elicited from the witness what is understood by the term 'high speed'. It was observed:

> "Further, no attempt was made to find out what this witness understood by high speed. To one man speed of even 10 or 20 miles per hour may appear to be high, while to another even a speed of 25 or 30 miles per hour may appear to be reasonable speed. On the evidence in this case, therefore, it could not be held that the appellant was driving the bus at a speed which would justify holding that he was driving the bus rashly and negligently. The evidence of the two conductors indicates that he tried to stop the bus by applying the brakes; yet, Gopinath dey was struck by the bus, though not: from the front side of the bus as he did not fall in front of the bus but fell sideways near the corner of the two roads. It is quite possible that he carelessly tried to run across the road, dashed into the bus and was thrown back by the moving bus, with the result that he received the injuries that resulted in his death."

26. This position was reiterated in ***State of Karnataka vs. Satish 1998 (8) SCC 493*** *and* it was held:

> "Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even

> approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur".”

26. This Court also held in ***State of H.P. Vs. Madan Lal Latest H.L.J. (2) 925*** that speed alone is not a criterion for judging rashness or negligence. It was observed:-

> “It may be pointed out that speed alone is not a criterion to decide rashness or negligence on the part of a driver. The deciding factor, however, is the situation in which the accident occurs.”

27. This position was reiterated in ***State of H.P. Vs. Parmodh Singh Latest HLJ(2) 1360*** wherein it was held:-

> “Thus negligent or rash driving of the vehicle has to be proved by the prosecution during the trial which cannot be automatically presumed even on the basis of the doctrine of res-ipsa-loquitur. Mere driving of a vehicle at a high speed or slow speed does not lead to an inference that negligent or rash driving had caused the accident resulting in injuries to the complainant. In fact, speed is no criterion to establish the fact of rash and negligent driving of a vehicle. It is only rash and negligent act as its

> ingredients, to which the prosecution has failed to prove in the instant case."

28. Thus, the accused cannot be held liable based on high speed alone without any further evidence that the accused was in breach of his duty to take care which he had failed to do.

29. A heavy reliance was placed upon the report of the FSL (Ex. PX), in which it was mentioned that 131.9 mg% alcohol was present in the blood sample of the accused to submit that this proved a violation of Section 185 of the Motor Vehicle Act. Mr. J.L. Bhardwaj, learned Senior Counsel submitted that this report is of no help to the prosecution in the absence of the link evidence. There is a force in the submission of learned Senior Counsel.

30. In the present case, the injured were sent with C. Durga Dutt for the medical examination. C. Durga Dutt was not examined. The MHC to whom the sample was handed over was also not examined. As per the report (Ex. PX), the samples were brought by C. Krishan Dutt. He was also not examined. Therefore, there is no evidence of completing the chain of custody. It has been stated in ***Analysis of Evidence*** (Second edition Terence Anderson, David Schum, and William Twining

Cambridge University Press) that before the reliance can be placed on the tangible evidence, the link evidence has to be led to establish that there was no tampering with the same. It has been stated at page 64:

> "There are three major sources of ancillary evidence that may call into question the authenticity of tangible evidence. The first involves evidence that has been deliberately contrived in order to mislead others such as a forged document. Errors in recording, transmitting, or processing evidence is the second source. Tangible evidence may pass through many hands before it is offered at trial. The opportunities for processing or handling errors of various kinds increase with the number of hands a tangible item passes through. Blood samples may be mislabeled or even substituted one for another. That is the reason for the requirement that there should be evidence establishing the chain of custody from the time the evidence was discovered (the bloody glove) or generated (an entry into a business record) until the time the evidence is presented at trial. If we do not know all of the links in a chain of custody, we cannot vouch for the authenticity of a tangible item. Finally, the witness whose testimony is offered to establish the authenticity of an item may be mistaken or untruthful."

31. It was laid down by this Court in ***Kishan Chand & Another Vs. State 2009 (2) HLJ 925*** that where the person depositing the case property had not stated anything about the deposit of the sample seal, the abstract of Malkhana Register was not placed on record and the person carrying the case property did not say anything about the carrying of sample seal,

link evidence is missing. The endorsement made by CTL Kandaghat in these circumstances that seal impressions were compared with the sample seal will lose their significance. It was observed:-

> "6. It is incumbent on the prosecution to prove that the accused were in possession of an incriminating article or an offensive material before they are convicted for keeping in possession the contraband or the offensive material. Right from its recovery and taking samples, the link evidence until the samples are analyzed in the laboratory should be complete. In case of breach of link evidence, it gives rise to a reasonable doubt that the samples tampered with the benefit of which goes to the accused.
>
> 7. In the instant case PW-6 A.S.I. Churamani however, did not state about the deposit of the case property in the Malkhana. But, PW-5 MHC Hukam Singh stated that on 19.6.2000 A.S.I. Churamani had deposited the case property sealed with seal impression 'N' in the Malkhana with him. But he nowhere stated that the sample of the seal was also deposited with him in the Malkhana. Even the extract of the Malkhana Register was not placed and proved on record. Thus it cannot be said that the sample of the seal was also deposited in the Malkhana with him along with the case property.
>
> Even PW-2 constable Rajinder Kumar also did not say about handing over the sample of the seal to him when he had taken the samples for examination to C.T.L. Kandaghat. The copy of R.C. No.55/2000 vide which he took the sample for analysis has also not been placed and proved on record. Had it been there, it could have thrown some light on this aspect of the matter whether the sample of the seal was also entrusted to him which was further handed over by him to the person who received

the samples in the laboratory, for its comparison with the seal found on samples sent for analysis.

8. The lithographic impression on the report Ext. PW-4/A, of course, shows that seals on the samples were found intact and unbroken and tallied with the impression seal sent separately, but it loses its importance in view of the fact that no witness has stated to have either deposited the sample seal along with case property in the Malkhana or ending it separately to the Laboratory when the samples were taken for analysis. Then how the sample of the seal could be available in the Laboratory for its comparison. The lithographic stamp is mechanically put on the report.

9. Further, the case of the prosecution is that the seal after its use was given to PW-1 Ravinder Kumar but he did not say that the seal was ever entrusted to him. Thus where is the seal used on the samples, is not known Therefore, in these circumstances a substantial doubt has arisen and the prosecution could not exclude the possibility of tampering with the samples.

Thus, the link evidence in the instant case is found missing. There is no evidence on record regarding the entrustment of seal and no entry in the R.C. and Malkhana register, therefore, reasonable doubt is cast on the probity of the prosecution case, which fact was lost sight by the courts below. Therefore, in these circumstances, the benefit of the doubt should have been given to the petitioners."

32. This position was reiterated in ***State of H.P. Vs. Rakesh Kumar 2018 (1) HLJ 73***wherein it was held:-

"7. Interestingly, there is no mention, if any, regarding the handing over of the seal by this witness to CTL Kandaghat, for comparison. It has come in his statement that he had taken samples but he has not stated that a specimen seal was also given to him for depositing in CTL

> Kandaghat. Samples were sent to CTL Kandaghat through Jai Singh (PW- 6), who simply deposed that he had sent samples through PW-5 DurgaDutt. Interestingly, he nowhere stated that the specimen seal impression was also sent separately for chemical analysis.
>
> 18. True it is, that reports of CTL, Ext. PW-7/G to Ext. PW-7/K show that the specimen seal impression was allegedly separately sent, tallied with the seal impressions on the samples, however, link evidence is missing as to how the specimen seal impression reached the chemical analyst. Similarly, it emerges from the record that there is no mention if any in the Challan with regard to sending of specimen seal to CTL Kandaghat. This certainly creates doubt with regard to the genuineness of the prosecution case.
>
> 19. This court in a case titled ***State of H.P. vs. Pankaj Sood, Latest HLJ 2009 (HP) 727*** has held that in such a case, by no stretch of the imagination, it can be presumed that the samples were sent along with the sample seal for comparison and it was held that the prosecution case was doubtful on this count. It was further held by this Court in the aforesaid case that the prosecution is obliged to prove that the article recovered from the possession of the accused is contraband within the meaning of the Act. For that right from the time of recovery till the examination of the samples, the link is required to be completely proved. Seals used on the samples must be intact and unbroken and the said seals should tally with the sample of the seal taken separately at the time of sampling by the Investigating Officer to overrule every possibility of tampering with the contents of the samples."

33. Similar is the judgment in ***Jagdev Singh v. State of H.P., 2015 SCC OnLine HP 2520*** wherein it was observed:

> **36.** Thus there is no link evidence establishing the factum of receipt of the sample from the doctor till such time it was handed over to the police official who got it deposited

> in the laboratory. Whether it was kept in safe custody and not tampered with, remains unproven on record.
>
> **37.** The SHO/Investigating Officer has not deposed that the sample was deposited in the police station. Where was the sample kept between the 13th and 17th June 2009 remains unexplained on record. Also, seal-H with which the alleged sample was sealed has not been produced in Court. Crucially and significantly even the Road Certificate has not been produced on record which would have only thrown light as to with whom and where the sample was kept at the police station.
>
> **38.** No doubt MLC (Ext.PW-6/G) records the sample to be that of Jagdev (accused), but then the Doctor does not specifically state that the sample was sealed. All that he states is that the sample was handed over to the police in a sealed bag. But then who sealed the same and with which seal, he does not state and Constable Roshan Lal (PW-5) is also silent about the same. In fact, he is silent about the seal impression. As already observed, ASI Om Prakash and HC Nup Ram are silent with regard to the sample, much less sealing thereof. It is in this backdrop, that it was necessary for the prosecution to have produced the original seal or impression thereof, with which the sample was sealed, for it cannot be said with certainty that the sample was not tampered with.

34. This Court had also dealt with this aspect in ***Jagdev Singh v. State of H.P., 2015 SCC OnLine HP 2520*** and it was held that where the chain of custody was not complete, the reliance cannot be placed upon the result of the analysis to hold that accused was driving the vehicle in a state of intoxication. It was observed:-

29. Be that as it may, the factum of intoxication has to be proved by the prosecution by leading scientific evidence.

30. Now Dr. Vivek Anand (PW-6) states that on 12.6.2009 at about 10.45 p.m., he examined accused Jagdev Singh, who was smelling of alcohol from his mouth. The accused was afebrile, semi-conscious and not responding to verbal commands. His blood sample was drawn and handed over to the police in a sealed pack. Evidently, the accused also sustained serious injuries in the accident. With regard to his oral observation of the accused smelling of alcohol from mouth, the witness admits that such smell subsists even after a person comes out of state of intoxication. He admits it to be correct that certain substances like acetone, ether, tar and aldehyde present in the blood are likely to be determined as alcohol. He further admits it to be correct that due to trauma caused by the accident, the injured could have become semi-conscious. On the basis of the report (Ext. PW-13/F) of the chemical examiner, the Doctor opined that the quantity of alcohol found in the blood was 279.72 mg%. It is this report which is the subject matter of scrutiny.

31. Dr. Vivek Anand further states that he handed over the blood sample of the accused to the police. But to whom? and which one of them is present in the hospital, he does not state.

32. ASI Om Prakash (PW-13) does not state that he either received the sample or handled the same. HC Nup Ram (PW-16) who conducted the investigation is also silent on this aspect.

33. Constable Bharat Bhushan (PW-8) states that on 16.6.2009, HC Nup Ram handed one sealed parcel, sealed with a seal bearing impression-H along with Road Certificate No. 71/09 which he deposited at the State Forensic Science Laboratory, Junga on 17.6.2009. But such a version is not corroborated by HC Nup Ram.

34. Constable Roshan Lal (PW-5) states that on 13.6.2009 he received the blood sample of accused Jagdev from the Medical Officer, SJVNL. Jhakhari. He wants the Court to believe that the blood sample was deposited in the Police Station, Jhakhari.

35. Now, undisputedly the MHC has not been examined in Court nor has the Malkhana Register produced or proven on record to establish the factum of its deposit in safe custody. ASI Om Parkash and HC Nup Ram are conspicuously silent on this aspect. When did Constable Roshan Lal hand over the sample and to whom he does not state. Also who received the sample in the police station, the prosecution is absolutely silent on this aspect.

36. Thus there is no link evidence establishing the factum of receipt of the sample from the doctor till such time it was handed over to the police official who got it deposited in the laboratory. Whether it was kept in safe custody and not tampered with, remains unproven on record.

37. The SHO/Investigating Officer have not deposed that the sample was deposited in the police station. Where was the sample kept between the 13th and 17th June 2009 remains unexplained on record. Also, seal-H with which the alleged sample was sealed has not been produced in Court. Crucially and significantly even the Road Certificate has not been produced on record which would have only thrown light as to with whom and where the sample was kept at the police station.

38. No doubt MLC (Ext.PW-6/G) records the sample to be that of Jagdev (accused), but then the Doctor does not specifically state that the sample was sealed. All that he states is that the sample was handed over to the police in a sealed bag. But then who sealed the same and with which seal, he does not state and Constable Roshan Lal (PW-5) is also silent about the same. In fact, he is silent about the seal impression. As already observed, ASI Om Prakash and HC Nup Ram are silent with regard to the sample, much less sealing thereof. It is in this backdrop,

> it was necessary for the prosecution to have produced the original seal or impression thereof, with which the sample was sealed, for it cannot be said with certainty that the sample was not tampered with.
>
> **39.** Thus, findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of the testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof has resulted into a grave miscarriage of justice, inasmuch as the accused stands wrongly convicted for some of the charged offences.

35. Therefore, it was essential for the prosecution to lead the evidence regarding the chain of custody before it could rely upon the report of analysis. In the present case, such evidence is missing. Therefore, the sample analyzed in the laboratory cannot be connected to the sample taken in the hospital and the finding of the learned Trial Court that it was not proved that the accused was driving the vehicle with alcohol in his blood in excess of the prescribed limit has to be upheld.

36. Therefore, the learned Trial Court had taken a reasonable view and this Court will not interfere with the probable view taken by the learned Trial Court while hearing an appeal against the acquittal unless there is some perversity in the judgment. Such perversity has not been shown and no

interference is required with the judgment of the learned Trial Court.

37. No other point was urged.

Final order

38. In view of the above, the present appeal fails and the same is dismissed.

(Rakesh Kainthla)
Judge

29th December, 2023
(Chander)