IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.76 OF 2023

Mr. Presenjeet Manabendra Sen .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Mr. Satyavrat Joshi a/w. Mr. Omkar Nevgi, Advocates for Applicant.
- Ms. D.S. Krishnaiyer, learned APP for State.

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CORAM : MILIND N. JADHAV, J.
DATE : JANUARY 02, 2025

JUDGMENT:

1. The present Criminal Revision Application (for short "**CRA**") challenges the twin judgments passed by Trial Court and Sessions Court. Applicant has filed the present Revision to challenge judgment dated 28.09.2021 passed by the Judicial Magistrate First Class, Pimpri, Pune (for short "**JMFC**") in Summary Criminal Case (for short "**SCC**") No.1164 of 2018 whereby Applicant is convicted under Section 279 of Indian Penal Code, 1860 (for short "**IPC**") and sentenced to suffer Rigorous Imprisonment (for short "**R.I.**") for three months alongwith payment of fine of Rs.500/-. Applicant is also convicted under Section 304-A of IPC and sentenced to suffer R.I. for six months alongwith fine of Rs.5,000/- and in default to suffer R.I. for one month. Thereafter, Applicant filed Criminal Appeal No.154 of 2021 before the Sessions

Judge, Pune which has confirmed the conviction and sentence above by its judgment dated 24.03.2023 (impugned judgment).

2. This Court (Coram: Sarang V. Kotwal, J) on 27.10.2023 passed the following order in Interim Application No.3928 of 2023 filed in present CRA:-

> "*1. This is an application for listing the Criminal Revision Application for final hearing.*
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> *2. Learned counsel for the Applicant submitted that the Applicant is a young man with good qualification. He is serving in the I.T. Sector. Because of the pending Revision Application, he is not getting a job; and these are the prime years of his career and life, therefore, it is necessary that the Revision Application is decided on merits at the earliest.*
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> *3. Considering these submissions, the Revision Application be added to the weekly final hearing board commencing from 11.12.2023. The record and proceedings be called for. Interim Application is disposed of accordingly."*

3. In view of the above, I heard the learned Advocate for the Applicant and the learned APP on 10.12.2024, when final arguments were concluded.

4. Prosecution case briefly stated is as follows:-

4.1. According to prosecution, on 17.03.2018 at about 9:00 pm, one Mr. Ramsaware Balraj Pal (PW-3) and his maternal uncle Bachhalal, both residents of Chaudhari Nagar, Bhosari, Pune were proceeding on two different bicycles from Santnagar Chowk to Godown Chowk via Spine Road. At that time, somewhere near Jai Ganesh Samrajya Chowk one i-20 car bearing No. KA-03-AE-7760

dashed the bicycle of Bachhalal Pal from behind thereby resulting in his fall on the road and he sustaining serious injuries. Prosecution case is that Applicant was driving the car. Alongwith Applicant, Mr. Shubhankar Bairani, Ms. Uttara Rashinkar and Ms. Bhumika Sharma were the other co-passengers in the car. They immediately carried Bachhalal in their car to Sant Dnyaneshwar Hospital for receiving treatment for his injuries. Bachhalal was admitted to the hospital for treatment. Ramsaware Pal informed Bachhalal's father Amrutlal about the incident. Amrutlal visited Bachhalal and met him in the hospital on 20.03.2018 after arriving from his village in District Kaushambi, Uttar Pradesh. He lodged Report against Applicant in MIDC Police Station on 20.03.2018. Initially offence was registered under Sections 279, 338 of IPC and Section 119 readwith 117 and 184 of Motor Vehicles Act, 1988 (for short "**MV Act**"). However on 20.03.2018, Bachhalal succumbed to his injuries due to which Section 304-A of IPC was added. Applicant was arrested on 20.03.2018 and subsequently released on bail. Charges were framed against Applicant below Exhibit "14" for offences punishable under the aforesaid Sections. He pleaded not guilty and came to be tried. His statement under Section 313 of Code of Criminal Procedure, 1973 (for short "**CrPC**") was recorded below Exhibit "31". His defence before the Trial Court was that he was not driving the car since the car was a hired car and at the time of incident an unknown driver was driving the car. He stated that the car

was not being driven in high speed when it dashed the bicycle of Bachhalal from behind.

5. Mr. Joshi, learned Advocate for Applicant has taken me through the evidence and record of the case and argued at length. At the outset, he would submit that the inordinate delay of 3 days in filing the FIR after the incident is not considered by the Courts below. He would submit that though injured Bachhalal was moved to the Hospital on 17.03.2018 by Applicant and his friends accompanied by Ramsaware Pal, no complaint was however lodged by Ramsaware Pal alleged to be the eye witness to the incident. He would submit that FIR is lodged by father of Bachhalal after meeting him in hospital on 20.03.2018 who is not the eye-witness because admittedly at that time he was at his village in Uttar Pradesh. He would submit that Applicant and his friends hired the subject car alongwith driver from a rental company called A.S. Just Ride Tours and Travels Company in Pune. He would submit that it is the consistent case of Applicant before both Courts below that prosecution failed to prove that the car was hired without a driver and it is only due to this reason for which Applicant stands convicted being held to be the driver of the car. He would submit that both Courts below have relied upon the deposition of PW-1 – the representative and team leader of AS Just Rides Tours and Travels Company who has in his deposition stated that the subject car was taken on hire by the Applicant and his friends through their online

App without a driver and merely on this deposition Applicant is convicted.

5.1. He would submit that one of the occupant of the car namely Uttara Rashinkar being the eye-witness to the incident has deposed before the Trial Court that Applicant was not driving the subject car. He would submit that the RTO Report below Exhibit - "29" confirms the fact that there was a minor bump to the bumper of the car without any serious damage being inflicted thus confirming the fact that the car was not driven with high speed. He would submit that RTO Report below Exhibit – "29" confirms the fact that the car was installed with a speed governor and thus even otherwise it could not be driven at a high speed.

5.2. He would submit that considering the credentials and antecedents of the Applicant who is a highly educated young person and having no other criminal case pending against him, he ought to have been given the benefit of the provisions of the Probation of Offenders Act, 1958 as he would be ready and willing to pay heavy compensation to the relatives of the deceased. On this ground, he would also place before me the order passed in MACP Case No.306 of 2018 below Exhibit "1" dated 05.04.2024 which refers to a Mediator Report and the compromise amicably entered between the Applicant therein namely wife of deceased Bachhalal and A.S. Just Rides Tours

and Travels Company whereby on receiving Rs.20,75,000/- from Opponent No.3 namely National Insurance Company Limited, both the Opponent No.1 (present Applicant) and Opponent No.2 (A.S. Just Rides Tours and Travels Company) have been discharged in MACP Case No.306 of 2018.

5.3. He would submit that in the entire prosecution case, there is no direct evidence of linking the Applicant to the act of driving the vehicle and both Courts below have merely relied upon and accepted the version of PW-3 i.e. Ramsaware Pal claiming to be the eye-witness to the incident in convicting the Applicant. He would submit that if that be the case, then it is intriguing that Ramsaware Pal did not lodge any complaint immediately after the accident. He would submit that though in his deposition before the Court, Ramsaware Pal has stated that he was riding his bicycle behind the bicycle of the deceased Bachhalal, however the statement recorded by the police officer on the date of incident does not refer to this fact at all. His further statement that it was only after he clicked a photograph of the subject car in question the car halted is also not stated in the statement recorded by the police officer on the date of incident. He would vehemently submit that the aforesaid material improvements made by the PW-3 are clearly contradictory to his own statement recorded by the police officer on the date of incident.

5.4. He would submit that though it is an unfortunate situation that an individual's life has been lost in the accident but in order to apply the charge under Section 279 of IPC readwith Section 304-A of IPC and the provisions of MV Act, nowhere from the prosecution evidence, it has been proved that the subject car was driven by Applicant, that it was driven at a high speed or rashly or negligently thereby leading to the dash given to the bicycle of Bachhalal. He would strongly submit that since PW-3 – Ramsaware Pal is a directly interested witness of the deceased, his testimony is replete with improvements and contradictions and it ought not to have been accepted by both Courts below. He would try to drive home the point that in case the subject car was driven rashly or negligently by its driver who would have actually been at fault, Ramsaware Pal - PW-3 would have lodged the complaint on the date of the incident itself. He would submit that PW-3 is an interested witness being the nephew of the deceased Bachhalal and therefore merely relying on his deposition and completely disregarding deposition of the other prosecution witnesses is not a proper appreciation of evidence in the facts of the present case and hence the impugned judgments are *prima facie* perverse and deserve to be interfered with.

5.5. He would question the delay in filing the FIR since prosecution has not provided any explanation for the delay. He would submit that Amrutlal (PW-4) - father of deceased Bachhalal has lodged

the FIR merely on hearsay about the occurrence of the accident. He would submit that in this context, Exhibit - “29” which is the Report of RTO assumes significance in as much as on the impact to the bicycle of Bachhalal, it records that the subject car was fitted with a speed governor and most importantly after the accident / incident none of the airbags got inflated / opened due to impact and they were intact which fact has been given a complete go-by by both Courts below. He would thereafter draw my attention to the said Report which states that there is no major damage caused to the bumper of the subject car, except a few scratches and most glaring fact that prosecution has not produced panchnama of the subject bicycle of Bachhalal after the accident.

5.6. He would thus submit that on all the above counts, prosecution has not produced cogent and relevant evidence on record so as to prove its case beyond all reasonable doubts for conviction of Applicant and the aforesaid issues leave many questions unanswered. He would submit that the facts of the case though have been examined the same have not been appreciated correctly. He would draw my attention to the deposition of PW-5 - co-passenger of the subject car and eye-witness to the incident and would submit that she was sitting inside the car at the time of accident and witnessed what happened first-hand with her own eyes. He would submit that she has specifically stated that the subject car was taking a U-turn to return

when the alleged incident took place and stated that the accident spot was a busy and congested area where the incident took place.

5.7. He would submit that in order to convict a person for rash and negligent driving under Section 279 of IPC, prosecution is required to prove with certainty that the vehicle was driven by him in the first place in such a rash and negligent manner that it would endanger human life or is likely to cause hurt or injury to anybody. He would submit that save and except, PW-5 who was one of the co-occupant and passenger in the subject car at the time of incident, no other eye-witness or any other independent eye-witness has been examined. He would submit that the spot panchnama below Exhibit-"27" clearly records that the accident spot did not show any sign of the subject car being driven rashly or negligently or with high speed. He would submit that conviction of the Applicant in this case has clearly been driven by human emotions in view of Bachhalal succumbing to his injuries three days after the incident while undergoing treatment and on the basis of the deposition of PW - 3 i.e. Ramsaware Pal (nephew of deceased) whose evidence is filled with improvements and material contradictions.

5.8. On the basis of the above, he would submit that the prosecution case, the complaint, the charge-sheet if read together would undoubtedly show that prosecution evidence is not adequate

enough to prove the guilt of Applicant and the fact that Applicant was driving the car which met with the accident and the demise of Bachhalal. He would submit that prosecution has miserably failed to prove its case beyond all reasonable doubts on the ground of the subject car being driven rashly and negligently also. Hence, he would submit that both the impugned judgments passed by the Trial Court and upheld by the Sessions Judge deserve to be quashed and set aside in the interest of justice considering the peculiar facts and evidence in the present case.

6. ***PER CONTRA***, Dr. Krishnaiyer, learned APP would submit that there is a distinction about the occurrence of the incident and the involvement of the subject car driven by the Applicant. She would submit that prosecution has led evidence of two key witnesses namely PW-1 namely Khnaderao Adappa Shirole, the representative of A.S. Just Rides Tours and Travels Company who has deposed that Applicant hired the subject car for undertaking a one day outing to Bhimashankar from Pune alongwith three friends who accompanied him and were very much present in the car when the accident occurred and thereafter kept on extending the return time of the car upto 40 hours repeatedly on the Company's online App. She would submit that this deposition proves that Applicant was the driver of the car and hence the judgment passed by the Trial Court and upheld by the Sessions Court may not be interfered with.

7. I have heard Mr. Joshi, learned Advocate for Applicant and dr. Krishnaiyer, learned APP for State and with their able assistance perused the record of the case. Submissions made by the learned Advocates have received due consideration of the Court.

8. In the present case it is seen that, charge-sheet is filed below Exhibit - "1" and charge is framed below Exhibit - "14" and statement of Applicant under Section 313 of CrPC is recorded below Exhibit - "15". It is seen that prosecution has led evidence of six witnesses. PW-1 is Khanderao Adappa Shirole who has deposed on behalf of A.S. Just Ride Tours and Travels Company. He was working as Team Leader and has deposed that the Company had given the subject i-20 car on hire to the Applicant on 17.03.2018 at 8:00 am and he was supposed to return the car at 8:00 pm. He has further deposed that Applicant did not return the car at 8:00 pm and thereafter repeatedly sought extension of time to return the car for upto 40 hours on the Company's online App. He has deposed that thereafter he got suspicious and tracked the subject car and found that it was stationed in the premises of Bhosari Police Station and on inquiry found out that it had met with the accident in the present case. He has deposed that when he confronted the Applicant with the above facts he admitted to the accident having occurred. He has deposed that the car was thereafter released back to the Company after completing the formalities and preparing the inspection report. In his cross-examination, he has

deposed that he did not give the car to the Applicant personally on 17.03.2018 as also he is not a witness to the accident. He has in his cross-examination also admitted to the fact that he would not be in a position to state due to whose mistake the accident occurred. The aforesaid cross-examination of PW-1 does not highlight the fact that the car was given to the Applicant or the Applicant hired the car alongwith the driver. On this aspect the deposition of the PW-1 is completely silent. Generally cars are given on hire alongwith the driver provided by the Car Rental Company. If in a given case it is given on hire without the driver, nothing prevented PW-1 from giving such details and facts. This fact, as to whether the Company provided the driver or not is crucial. According to prosecution, there were 4 occupants / passengers in the car, but in PW-3's deposition who is the eye-witness, he has in his examination-in-chief stated that when the car halted in front, he saw 4 - 5 persons getting out of the car after the accident. Trial Court has based its decision on the sole testimony of PW-3 only. Hence, prosecution case does not delve upon the theory of the driver of the car, if so provided or not provided by the Company. No details whatsoever are given by PW-1.

9. PW-2 is Sudhakar Murlidhar Borote who is a panch witness to the spot panchnama. Though the incident occurred on 17.03.2018, the spot panchnama is carried out on 20.03.2018 i.e. 3 days after the incident. All that he has stated is that he was called to the incident /

accident spot and Ramsaware Pal shared the information of the accident with him based upon which spot panchnama is prepared and he has signed it. Insofar as these two prosecution witnesses are concerned, both of them are not eye-witnesses to the incident / accident. PW-1 has categorically admitted that he has not witnessed the accident. The testimony of these two witnesses does not come to the aid of the prosecution case. Rather deposition of PW-1 does not prove the prosecution case to the hilt that Applicant was the driver of the car.

10. In so far as PW-4 is concerned he is Amrutlal Pal (father of deceased – Bachhalal who met with the accident). Deposition of PW-4 – father of deceased and first informant is merely hearsay. He has deposed that he was informed by PW-3 about the accident having occurred on 17.03.2018 after which he came to Mumbai and met Bachhalal in the hospital on 20.03.2018 where he was undergoing treatment for injuries suffered. He has deposed that at the time of incident he was at his village in Uttar Pradesh and whatever he has deposed has been informed to him by PW-3 Ramsaware Pal. He has in his cross-examination admitted that he met Bachhalal in the hospital where he was undergoing treatment for his injuries. His testimony is also of no assistance to the prosecution case just like the testimony of PW-1 and PW-2.

11. Thus, we come to testimony of PW-3 and PW-5. PW-3 the sole eye-witness to the incident as per prosecution. He is the nephew of Bachhalal Pal – deceased. He has testified that he was riding his bicycle behind Bachhalal Pal. Time of accident is 9:15 pm at night. Spot panchnama below Exhibit "27" does not show whether the place had adequate light or otherwise. All that it identifies is the incident spot as Sant Dnyaneshwar Chowk. He has categorically stated Bachhalal Pal was in front and he was riding his bicycle behind him when a car suddenly dashed Bachhalal Pal from behind. This version of PW-3 is somewhat convoluted because, in that case the car would had dashed him first. However PW-3 while giving the details of the occurrence of the incident has stated that they both were riding their bicycles side by side. He has stated that on both sides of the road which was 70 feet wide, there was a divider in between and two service roads were present on either sides of the main road. He has improvised his deposition in examination-in-chief by stating that he and Bachhalal Pal were riding their bicycles side by side. If this is the eye-witness account of the prosecution's sole eye witness to the incident on the basis of which conviction is based then it leaves much to be desired. Such eye-witness account of an interested witness would clearly mean that PW-3 could not be the eye-witness to the actual incident / accident, since he was riding his bicycle side by side. This is extremely critical and crucial because in that case he cannot confirm and

corroborate about the dash given by the subject car to Bachhalal and he having seen and witnessed it and further more about who was driving the subject car. In his cross-examination, he has volunteered and deposed that the car dashed Bachhalal's bicycle from behind and he was thrown in air and fell on road injuring himself. Immediately thereafter he has stated that after the dash was given to Bachhalal, he fell down on the glass and bonnet of the car. Then he has stated that after the dash Bachhalal fell down on the road and the car stopped at some distance ahead and there were 4 to 5 passengers in the car who immediately assisted Bachhalal and took him in the same car for receiving treatment to the hospital. He has admitted the fact that when his initial statement was recorded, he has not informed the police that he had taken a photograph of the subject car after the accident / incident. He has feigned ignorance about the fact that he would not be able to answer why the said fcats are not in his statement recorded by the police. He has next stated that Bachhalal expired on 21.03.2018. Beyond the aforesaid deposition and admissions in cross-examinations, there is nothing else on record, rather brought on record by the prosecution to indict / convict the Applicant. Question before the Court is whether the aforesaid evidence would be enough to prove the prosecution case beyond all reasonable doubts and to prove the fact that the subject car was driven by the Applicant, whether it was driven rashly and negligently resulting in the accident / incident on the fateful

day, whether there was contributory negligence on the part of Bachhalal, the investigation by the Investigating Officer to find out whether the car was given on hire with or without the driver, why did prosecution not lead evidence of other 3 co-occupants / passengers in the car who may have also witnessed the accident, why no independent witness was examined who may have been an eye-witness. All the above questions in the facts and evidence of the present case seek an answer.

12. In the attending circumstances of the present case, the deposition of PW-5 - Uttara Rashinkar is extremely critical. She is the eye-witness to the accident / incident. She was a co-occupant / passenger of the subject car which collided with the bicycle of Bachhalal. Her evidence is in two parts; firstly in her examination-in-chief she has narrated the precise turn of events as they occurred and secondly her cross-examination wherein she specifically affirms those facts. She has deposed that she herself, her colleagues Bhumika, Shubhankar and Presenjeet alongwith the driver of the subject car were its occupants when the accident took place. She has deposed that after having dinner at hotel Faasos between 8:00 pm and 9:00 pm, they resumed their journey back to Pune. She has deposed that after taking a U-turn to proceed towards Pune, suddenly from left hand side of their car, Bachhalal dashed their car and was thrown on to the ground. She has deposed that the car was stopped and all its occupants

got down and saw Bachhalal in an injured state. She has thereafter categorically deposed that the car driver who was driving the car ran away. She has deposed that thereafter Shubankar and Presenjeet (Applicant) helped Bachhalal and took him to a nearby hospital. She has specifically deposed that the car was hired from a tour and travels company but she did not know the name of the person driving the car. She has deposed that when the police inquired with her, subsequently she narrated the aforesaid facts and incident to the police who recorded her statement. She has specifically refuted the fact that Applicant was driving the car when the accident took place. Thereafter she has deposed that she would not be in a position to state as to why the police did not record the said fact in her statement that the Applicant was not driving the subject car. She has deposed that after Bachhalal succumbed to his injuries, she came to know that Applicant was arrested when according to her the Applicant did not commit the accident and it was committed by the driver of the hired car. Her cross-examination on the aforesaid deposition assumes significance because she has on being specifically questioned, answered that the car driver ran away after the happening of the accident. The eye-witness version of PW-5 is believable for the reason that it has gone completely unchallenged. Her deposition has not been shaken in the cross-examination despite she having been acquainted with the Applicant as they both worked for the same Company.

13. The Investigating Officer has deposed as PW-6. All that he states is that Applicant was driving the car and therefore he was arrested, when two specific prosecution witnesses have deposed about the details of the occupants of the subject car and the facts that the subject car was hired, details of occupants of subject car after occurrence of the accident, driver of the subject car running away after the occurrence of the accident, the fact that Applicant was not the driver of the car when the accident occurred, the prosecution ought to have made appropriate inquiry and investigation in this regard. There is nothing in the investigation carried out by the Investigating Officer which throws light on the aforesaid questions. In his evidence, the Investigating Officer has narrated the facts as delineated above and in his cross-examination admitted and stated that the road on which the accident occurred is a fairly wide 4 lane road which also has service roads on both sides. In his deposition in paragraph No.6 on the RTO Report below Exhibit - "29", he admits that the car was installed with a speed governor and hence it could not be driven fast. On the impact of the accident he has deposed that air bags did not inflate and most importantly impact was on the left hand side of the subject car and there were some scratched and the left hand side glass was broken. This deposition of the Investigating Officer readwith Exhibit - "29" clearly shows that the prosecution theory of impact and collision from behind of the bicycle is not correct. Therefore it is crystal clear that

PW-3 has attempted to improvise his version as observed and delineated herein above. That apart the aspect of contributory negligence on the part of Bachhalal of riding his bicycle on the road cannot be ruled out. Evidence is to the effect that the dash was not from behind but his bicycle collided the subject car from the left side. This is confirmed by the RTO Report below Exhibit - "29".

14. In this context, decision of the Supreme Court in the case of ***Prem Lal Anand & Ors. Vs. Narendra Kumar & Ors.***[1] is relevant and paragraph Nos.11 and 12 therein are reproduced herein below for immediate reference:-

> *"**11.** At this stage, it would be appropriate to consider pronouncements of this Court on contributory negligence.*
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> *11.1 In Municipal Corporation of Greater Bombay v. Laxman Iyer & Anr.1, this Court discussed the concept of negligence and its types, i.e., composite and contributory, in the following terms:-*
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> *"**6.** .... Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no*

1 Civil Appeal arising out of SLP (C) Nos.30188-30189 of 2018 decided on 07.08.2024.

> *mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act. Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of the other's negligence. … Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. …. It is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the parties as seems just and equitable."*
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> *(Emphasis supplied)*

11.2 This Court in ***Pramodkumar Rasikbhai Jhaveri v. Karamasey Kunvargi Tak & Ors.***[2] *observed:*

> ***9.*** *Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of the defendant's negligence is decided. The standard of a reasonable man is as relevant in the case of a plaintiff's contributory negligence as in the case of a defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in Astley v. Austrust Ltd. [(1999) 73 ALJR 403] is worthy of*

2 (2002) 6 SCC 455

quoting:

> *"A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property."*
>
> *(Emphasis supplied)*
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> ***12.*** *Record reveals that driver of the tractor No.UP 14-A 1933 had maintained slow speed, prompting the claimant-appellant No.1 to overtake, but, however, the driver of the another tractor bearing No.UP 14-B 9603 was rash and negligent in his act, inasmuch as, not only did he overspeed, but also came from the wrong side, resulting in the collusion."*

15. When the Investigating Officer is confronted with the fact that during investigation, occupants of the subject car had informed him that Applicant was not driving the car at the time of accident, he has simplicitor refuted the same and denied having been told about who was driving the subject car. However, he has admitted that the subject car was a hired car and therefore it was all the more important

for the prosecution to unearth the fact about who was driving the car at the time of occurrence of the accident. In view of the above, there is no material placed on record to allege rash and negligent driving of the subject car even otherwise.

16. PW-1 who is the team leader of the car rental company has not given any evidence in this regard about who was driving the car neither he has stated details about handing over of the car which was taken on hire from their company. Rather he has admitted that when the car was taken in the morning, he was not available at that time. In paragraph No.12 of his cross-examination, the Investigating Officer has referred to the fact that PW-3 - Ramsaware Pal has specifically recorded statement in his presence that after the car halted, he saw 3 boys and 2 girls coming out of the car. The car is an i20 car which was a 5 seater car having 2 bucket seats in front and one sofa seat to accommodate 3 passengers in the rear. Once this evidence of PW-3 claiming to be the eye witness of the fact relating to the occupants of the car is considered, then the 3 boys in the car would definitely be; (i) Shubhankar; (ii) Presenjeet (Applicant) and (iii) the driver of the car. The 2 girls who were occupants of the car would be (i) Uttara Rashinkar (PW-5) and (ii) Bhumika Sharma.

17. In view of the above and the specific deposition of the prosecution witness namely PW-5 who was sitting inside the car when

the accident occurred, the version narrated by PW-3 regarding 5 occupants of the car is resolved. In her deposition, PW-5 has categorically stated that the subject car was not driven by Applicant. The theory that car was driven by driver of company gains traction on account of the fact that it was a hired car, the 4 out of 5 occupants thereof are specifically identified, post the accident PW-3 saw 3 boys and 2 girls getting out of the car and most importantly the dereliction and omission of the Investigating Officer to inquire and investigate about the driver of the hired car.

18. In view of the above, I am of the opinion that the prosecution case has not been proved beyond all reasonable doubts. The fact that Applicant was driving the car has not been investigated at all. In so far as the impact of the car in the accident is concerned, record reveals that the impact of Bachhalal's cycle on the car was from the left hand side and the car did not dash the bicycle from behind. This is what is gathered from the evidence of the eye witness (PW-5) to the accident. The fact that Bachhalal's cycle impacted and hit the car on its left hand side may be due to several reasons. Degree of impact of car by a driver driving a vehicle will undoubtedly constitute contributory negligence but it will all depend upon the factual situation of each case. The spot panchnama and deposition of Investigating Officer reveals that the subject road was having 2 service roads on either sides despite which Ramsaware Pal (PW-3) and

Bachhalal chose to ride on their bicycle on the vehicular traffic road. Though they cannot be faulted for that reason, the facts leading to occurrence and happening of the accident need to be considered.

19. In view of the evidence discussed above, one question / fact clearly remains unanswered i.e. whether the car was driven by the Applicant or the driver of the hired car. The car rental company's representative PW-1 has not stated anything incriminating suggesting whether the car was given to the Applicant or driven by the Applicant neither the Investigating Officer has investigated the above fact.

20. Therefore benefit of doubt will have to be given to the Applicant since prosecution has not proved its case beyond all reasonable doubts. The impugned judgments dated 28.09.2021 and 24.03.2023 are hence not sustainable and are quashed and set aside. Resultantly, conviction and sentence of Applicant is set aside.

21. Bail bond furnished by the Applicant is directed to be cancelled.

22. With the above directions, Criminal Revision Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

AJAY TRAMBAK UGALMUGALE

Digitally signed by AJAY TRAMBAK UGALMUGALE
Date: 2025.01.02 12:05:46 +0530