IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 6TH DAY OF NOVEMBER 2024 / 15TH KARTHIKA, 1946

CRL.A NO. 267 OF 2016

AGAINST THE ORDER/JUDGMENT DATED 24.02.2016 IN SC NO.942 OF 2013 OF ADDITIONAL DISTRICT COURT KOZHIKODE-III / II ADDITIONAL MACT, KOZHIKODE

APPELLANT/ACCUSED:

SUSEELAN
AGED 39 YEARS
S/O.GANGANDHARAN, UPASANA HOUSE, MALAYIMMAL THAZHAM, KARUVISSERY, KARAPARAMBA P.O., KOZHIKODE.

NIKITA J. MENDEZ
P.M.RAFIQ(K/45/2001)
M.REVIKRISHNAN(K/1268/2004)
AJEESH K.SASI(K/166/2006)
SRUTHY N. BHAT(K/000579/2017)
RAHUL SUNIL(K/000608/2017)
SRUTHY K.K(K/117/2015)
P.VIJAYA BHANU (SR.)(K/421/1984)

RESPONDENT/COMPLAINANT & STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031

SMT.SHEEBA THOMAS, PP

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 30.10.2024, ALONG WITH CRA(V).363/2017, THE COURT ON 06.11.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 6TH DAY OF NOVEMBER 2024 / 15TH KARTHIKA, 1946

CRA(V) NO. 363 OF 2017

CRIME NO.1050/2013 OF CITY TRAFFIC POLICE STATION, KOZHIKODE

AGAINST THE ORDER/JUDGMENT DATED 24.02.2016 IN SC NO.942 OF 2013 OF ADDITIONAL DISTRICT COURT KOZHIKODE-III / II ADDITIONAL MACT, KOZHIKODE

APPELLANTS/VICTIMS:

1 NISHA.M
AGED 40 YEARS,
W/O.SHAJI KUMAR, RESIDING AT KRISHNA KRIPA(HOUSE),
VELLARI NILAM PARUMBU, KURUVATTOOR, AASHAM P.O.,
NEAR VOLOOR TEMPLE

2 ABHISHEK NARAYANAN
AGED 17 YEARS
S/O.SHAJI KUMAR, KRISHNA KRIPA(HOUSE),
VELLARI NILAM PARUMBU, KURUVATTOOR, AASHAM P.O.,
NEAR VOLOOR TEMPLE (MINOR REPRESENTED BY NEXT
FRIEND AND GUARDIAN MOTHER 1ST APPELLANT)

RESPONDENTS/COMPLAINANTS & STATE/ACCUSED:

1 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI-682031

2 SUSEELAN
AGED 40 YEARS
S/O.GANDADHARAN, UPASANA HOUSE,
MALAYIMMAL THAZHAM, KARUVISSERY,
KARAPARAMBA (PO), KOZHIKODE

VIPIN NARAYAN, PP
NIKITA J. MENDEZ
P.M.RAFIQ
M.REVIKRISHNAN
AJEESH K.SASI
SRUTHY N. BHAT
RAHUL SUNIL
SRUTHY K.K
P.VIJAYA BHANU (SR.)

THIS CRL.A BY DEFACTO COMPLAINANT/VICTIM HAVING COME UP FOR HEARING ON 30.10.2024, ALONG WITH CRL.A.267/2016, THE COURT ON 06.11.2024 DELIVERED THE FOLLOWING:

"C.R."

C.S.SUDHA, J.

Crl. Appeal No.267/2016 & Crl.Appeal (V) No.363/2017

Dated this the 6th day of November, 2024

JUDGMENT

Crl.Appeal No.267/2016 under Section 374(2) Cr.P.C. has been filed by the accused in S.C.No.942/2013 on the file of the Court of Session, Kozhikode, challenging the conviction entered and sentence passed against him for the offence punishable under Section 304 Part II IPC. Crl.Appeal (V) No.363/2017 has been filed by PWs.2 and 3, the wife and son of the deceased, aggrieved by the compensation awarded and the question of sentence awarded to the accused.

2. The prosecution case is that on 06/05/2013 at 18:00 hours, the deceased Shaji Kumar was riding motorbike bearing registration No.KL-11/AN-2794 along with PWs 2 and 3,

his wife and son respectively as pillion riders along the Thadambattuthazham – Kannadikkal road, which road is lying in the east-west direction. The deceased and PWs.2 and 3 were moving from the west to east. When they reached the place by name, Kannadikkal - Policha Peedia, car bearing registration No.KL-11/R-5809 driven by the accused came from the opposite direction, that is, from east to west through the wrong side of the road and dashed against the motorbike resulting in all three of them being thrown on to the road. Shaji Kumar died on the spot. PWs 2 and 3 sustained injuries. The accused had driven the car under the influence of alcohol and through the wrong side with the full knowledge that his act was likely to cause death. Hence, as per the final report, the accused was alleged to have committed the offences punishable under Section 337, 304 Part II IPC and Section 185 of the Motor Vehicles Act, 1988 (the MV Act).

3. Based on Ext.P1(a) FIS of PW1, the Sub Inspector,

City police station, Kozhikode, recorded on 06/05/2013 at 18:30 hours, Crime No.1050/2013, that is, Ext.P1 FIR, was registered. Investigation was conducted by PW14, the then Circle Inspector, Kozhikode, who after completing the investigation filed a final report alleging the commission of offences punishable under the aforementioned Sections.

4. On appearance of the accused, the jurisdictional magistrate after complying with the necessary formalities contemplated under Section 209 Cr.P.C. committed the case to the Court of Session, Kozhikode, where the case was taken on file as S.C. No.942/2013. Thereafter, the case was made over to the Additional Session Judge-III, Kozhikode, for trial and disposal. On 19/08/2015 a charge for the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC, was framed, read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PWs.1 to 17 were examined and Exts.P1 to P15 were got marked in support of the case. After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence of the prosecution. To all the questions, the accused answered that he does not know (അറിയില്ല) and also submitted that he is innocent.

6. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral or documentary evidence was adduced by the accused.

7. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found the accused guilty of culpable homicide not amounting to murder and proceeded to sentence him to rigorous imprisonment for three years and to a fine of ₹25,000/- and in

default to imprisonment for one year under Section 304 Part II IPC. Set off under Section 428 Cr.P.C. for the period from 06/05/2013 to 09/05/2013 has been allowed. The fine amount if realized has been directed to be paid to PW2 as compensation. Aggrieved, the accused has come up in appeal.

8. It was quite persuasively, strenuously and vehemently argued by the learned senior counsel for the appellant/accused that the trial court committed a gross mistake in finding the accused guilty of culpable homicide not amounting to murder and sentencing him under Section 304 Part II IPC. In support of the argument, reference was made to the dictums in **State of Karnataka v. Satish**, (**1998)8 SCC 493,** and **Abdul Kabeer v. State of Kerala, 2020 (5) KLT 615.** It was submitted that at best only an offence punishable under Section 304A IPC (not admitted) would be made out. *Per contra*, it was submitted by the learned Public Prosecutor that there is clear evidence to attract the offences

alleged against the accused and that there is no infirmity or illegality committed by the trial court, calling for an interference by this Court.

9. Heard Adv.P.Vijaya Bhanu, the learned senior counsel assisted by Adv.Sruthy N.Bhat and Adv.Sheeba Thomas, the learned Public Prosecutor.

10. In the light of the arguments advanced, the points that need to be considered in this appeal are-

i. whether the prosecution has succeeded in establishing that the accused committed the offence of culpable homicide not amounting to murder punishable under Section 304 Part II IPC; or

ii. whether the materials on record establish an offence punishable under Section 304A IPC; or

iii. what if any, is the offence(s) made out from the evidence on record.

11. Before I go into the facts and evidence on record, I refer to the relevant Sections of the Penal Code applicable and the precedents on the point.

> "***299. Culpable homicide*** *-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*
>
> "***304. Punishment for culpable homicide not amounting to murder****.—Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;*
>
> *or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely*

> *to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.*
>
> ***304A. Causing death by negligence**. —Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*(Emphasis supplied)

11.1. Section 304A IPC carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 IPC or murder under Section 300 IPC. If a person willfully drives a vehicle into the midst of a crowd and thereby causes death of some person, it will not be a case of mere rash and negligent driving, and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused. Section 304A IPC by its own definition totally excludes the ingredients of Section 299 or Section 300 IPC. Doing an act with

the intent to kill a person or knowledge that doing an act was likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge is the direct motivating force of the act complained of, Section 304A IPC has to make room for the graver and more serious charge of culpable homicide. (**State of Gujarat v. Haidarali Kalubhai, AIR 1976 SC 1012**).

11.2. In **Naresh Giri v. State of M.P., (2008)1 SCC 791**, it has been held that Section 304A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304A IPC applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304A IPC. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide.

11.3. "Reckless" as defined in Law Lexicon, Black Law Dictionary, 7th Edn. 1999, reads - "*Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do*". Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course, he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word "reckless" is the most appropriate. [**State Tr.P.S. Lodhi Colony, New Delhi v. Sanjeev Nanda, (2012) 8 SCC 450**].

12. Going by the allegations in the final report/chargesheet, the case on hand falls within the third limb of

Section 299 IPC. **Alister Anthony Pareira v. State of Maharashtra, (2012)2 SCC 648**, also a case of drunken driving, the Apex court after referring to several decisions dealing with the scope of Section 304 Part II and Section 304A IPC held that the question whether the knowledge of the accused who is causing death of others while driving a motor vehicle would fall within the scope of Section 304 Part II or Section 304A IPC is to be decided on the facts of each case. Where rash or negligent act is preceded with the knowledge that it is likely to cause death, the offence punishable under Section 304 Part II IPC would be attracted. In a case where negligence or rashness is the cause of death and nothing more, Section 304A IPC would be attracted. However, where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrongdoer to cause death, offence may be punishable under Section

302 IPC. (**State Tr.P.S. Lodhi Colony** (*Supra*) also).

13. Having thus reminded myself of the law on the point, I now proceed to consider the question whether the act of the accused preceded with the knowledge that his act was likely to cause death attracting the punishment contemplated under Section 304 Part II IPC. As pointed by the learned Senior counsel for the appellant/ accused and as held in **Satish** (*Supra*), there can be no doubt that vehicles are intended to be driven in speed. Merely because the vehicle is being driven at a high speed does not show that the driver was rash or negligent by itself. “High speed” or “*over speed*” as it is often referred to, is a relative term. It is for the prosecution to bring on record materials to establish as to what is meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of proving 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. In the absence of any material on record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "*res ipsa loquitur*".

14. Going by the version in the final report, there is no case that the accused was speeding. On the other hand, the specific case is that the accused in a drunken state unable to manage or control himself drove the car through the wrong side of the straight road with the knowledge that if he hits passersby or people traveling in vehicles, death would be caused. Therefore, the dictum in **Satish** (*Supra*) is not applicable to the facts of the present case.

15. **Abdul Kabeer** (*Supra*) was a case in which the accused drove a goods van through the wrong side of the road at a frightful speed, knocked down 21 school children from behind and thereby caused the death of 10 children and injured 11 children. He was thus alleged to have committed culpable homicide not

amounting to murder punishable under Section 304 IPC. The vehicle involved in the occurrence was free from any mechanical defects. The accused had a valid licence to drive the vehicle. The prosecution had no case that the accused was either drunk or under the influence of any intoxicating substance. The road had reasonable visibility. The road was lying in the east-west direction and the vehicle driven by the accused was moving from west to east and hence the accused was supposed to drive the vehicle through the northern side of the road. According to the learned Judge, to decide the question as to whether the case would fall within the scope of Section 304 Part II or Section 304A IPC, evidence regarding the following are necessary - (i) through which side of the road the accused was driving the van; (ii) the speed at which the accused was driving the van; (iii) how the vehicle which was supposed to move through the northern side of the road had come to the southern side of the road and (iv) the reason why the vehicle could not be stopped

by the accused even after hitting the first child. No convincing evidence was there to substantiate any of the said aspects. No evidence was let in by the prosecution to show that the accused was speeding at that time. At best what could be inferred from the evidence let in by the prosecution was that the vehicle was being driven at a considerably high speed. Relying on **Suleman Rehiman Mulani v. State of Maharashtra, AIR 1968 SC 829**, it was held that speed alone is not the criteria for deciding even rashness falling within the scope of Section 304A IPC as motor vehicles are intended to be driven in speed as well and the relationship between speed and rashness would depend upon place and time. The explanation given by the accused while questioned under Section 313 Cr.P.C. was also taken into account in which he stated that he was driving at a moderate speed through his side of the road, that is, the northern side. Through the right side of the road, that is, the southern side, children were moving in clusters. The bag of one child hit his

vehicle. To save the child, he abruptly swerved the vehicle resulting in the vehicle losing control causing the incident. Considering all the aforesaid factors, it was held that there were no materials on record to show that the accused had committed culpable homicide not amounting to murder liable to be punished under Section 304 Part II IPC.

16. The facts in the case on hand and the facts in **Abdul Kabeer** (*Supra*) are completely different. As noticed earlier, there was no case of drunken driving in **Abdul Kabeer** (*Supra*). The accused also had an explanation for going on to the wrong side of the road. In the present case, the prosecution has a definite case of drunken driving by the accused. The accused offers no explanation for going on to the wrong side of the road. There were no mechanical defects in the car driven by the accused. That being the position, the dictum in **Abdul Kabeer** (*Supra*) cannot be applied to the facts of the present case.

17. Now I will examine the evidence on record to ascertain whether the trial court was right in holding the accused guilty of culpable homicide not amounting to murder. PW1 is the first police officer who reached the place of occurrence soon after the incident. In Ext.P1(a) FIS, PW1 states that when he reached the scene of occurrence, he saw the car on the wrong side of the road and the motorbike lying nearby. A crowd had gathered there. PW1 saw that the driver of the car, that is, the accused herein was drunk. The people who had gathered had caught the accused and handed over the latter to him. He was told that Shaji Kumar had been taken to the Medical College Hospital. PW1 asked the name and details of the driver of the car and noted it down. When he spoke to the driver, he realized that the latter was drunk and unable to control or manage himself. When he examined the driver with an alcometer, the count was found to be 191. Realizing that the accused was responsible for the incident, he returned to the police station along with the accused

and registered Ext.P1 FIR.

17.1. PW1 in the box stands by his version in Ext.P1(a) FIS. He deposed that when he conducted breath analysis test of the accused, with alcometer, the reading was 191. If the reading is more than 30, it is a case of drunken driving. In the cross-examination, PW1 deposed that the scene of occurrence is not a deserted area. It was the crowd who had handed over the accused to him. The car was found on the northern side of the road. The accused was taken to the Beach hospital and a blood test conducted. PW1 identified the accused in the box.

17.2. PW2, the wife of the deceased, deposed that on the said date, she along with her husband and PW3, her son, were moving along the public road on the bike from west to east. She was a pillion rider and PW3, her son, was sitting in between her and her husband who was riding the bike. The car driven at great speed came on the wrong side and dashed against their bike. All three of them

were thrown onto the road. Her husband died on the spot. She and her son sustained grievous injuries. After some time, her son and her husband were taken to the hospital in a car. She was taken to the hospital in another car. The driver of the car after the incident came out of the car. When she questioned him, he expressed his regret at which time, his speech was slurred. There were no other vehicles on the road. According to PW2, the cause of the incident was because of the speed of the car as well as the carelessness/negligence of the driver who came on the wrong side of the road. PW2 identified the accused in the dock. In the cross-examination, PW2 deposed that she had seen the car at a distance of about 100 meters. They were moving through the side of the road. The car was coming in a zigzag manner. The car came on the extreme wrong side of the road. When she got up from the road, she saw the accused getting out of the car. She had restrained the accused for about 10 minutes. She denied the suggestion that the incident occurred due to the negligence of her

husband.

17.3. PW3, her son, also supports her version. PW3 also denied the suggestion that the negligence of his father had caused the incident.

17.4. PW4 deposed that he was working behind a godown situated by the side of the road when he heard a loud noise. He ran to the road in front of the godown. He saw a man lying on his face. His wife and child were also lying on the road. The bike was lying inside the drainage. When he asked PW2 the matter, she replied that the car had dashed against their bike. He found that the people who gathered there had restrained the driver of the car. All three injured were sent to the hospital, by which time the police arrived. PW4 identified the accused in the dock. In the cross-examination, PW4 admitted that he has no prior acquaintance with the accused. After the incident, he was seeing the accused for the first time in the court. PW4 deposed that the passersby might have also seen the incident. By seeing the

position of the car after the incident, he can say that the car was on the wrong side.

17.5. PW5 is an attestor to Ext.P5 scene mahazar.

17.6. The owner of the car who is also the brother of the accused, examined as PW6 deposed that the accused had a valid driving licence. He does not know who was driving the car on the relevant day. He admitted that his car was involved in the incident in which a man was killed. He executed Ext.P6 kychit when interim custody of the car was given by the court. The accused also uses his car. He denied having stated to the police that the incident happened while the accused was driving the vehicle. At the request of the prosecutor, PW6 was declared hostile, and the prosecutor was permitted to put questions as put in the cross-examination.

17.7. PW9, Associate Professor and Deputy Police Surgeon, Medical College Hospital, Kozhikode, deposed that on 07/05/2013, he conducted postmortem on the body of Shaji Kumar

and issued Ext.P7 report. As per Ext.P7 report, the death was due to head injury.

17.8. PW10, Assistant Professor Orthopedics, Medical College Hospital, deposed that on 06/05/2013, he had examined PW3 and had issued Ext.P8 wound certificate. On examination, he found that PW2 had an abrasion of 5x.5 cm on the right hand; a contusion on the right knee and right wrist.

17.9. PW11, Motor Vehicle Inspector, Kozhikode, deposed that on 15/05/2013, he had inspected both the vehicles involved in the incident. There were no mechanical defects on the vehicles. The accident was not due to any mechanical defects in the car. The reports issued by PW11 have been marked as Exts.P9 and P10.

17.10. PW12, Special Village Officer, Vengeri, deposed that on 07/08/2013, he had prepared Ext.P11 sketch relating to the place of occurrence. The road is lying in the east-west direction and

the place of occurrence is on the extreme northern side of the road.

17.11. PW13, Assistant Professor, Dental College, Kozhikode, deposed that on 06/05/2013, he had examined PW2 who on examination was found to have an abrasion and swelling over the right zygomatic temporal region. The wound certificate issued has been marked as Ext.P12.

17.12. PW14, the then Circle Inspector, City Traffic police station, Kozhikode, deposed that the blood and urine sample of the accused was subjected to chemical examination and Ext.P14 report obtained. As per Ext.P14, there was 99.94 mg of ethyl alcohol in 100 ml of blood and 228.12 mg of ethyl alcohol in 100 ml of urine. His investigation revealed that the accused had driven the car after consuming a considerable amount of alcohol. The accused drove the vehicle through the wrong side of the road with the full knowledge that by his act, death could be caused.

17.13. PW15, civil police officer of City Traffic police

station, Kozhikode, deposed that he had taken the accused for medical examination to the General Hospital and after the examination produced him before the police station. In the cross-examination, he deposed that the doctor, after drawing the blood sample of the accused gave it to him, which sample he handed over to the officer in G.D. charge. When the sample was given, it was in a cover which was tied and sealed.

17.14. PW16, Causality Medical Officer, Government General Hospital, Kozhikode, deposed that on 06/05/2013 at 08:25 p.m., she had examined the accused. The accused admitted having consumed alcohol (brandy). There was smell of alcohol in his breath. His blood and urine samples were collected for chemical analysis. According to PW16, the accused was clinically not under the influence of alcohol. She admitted having issued Ext.P15 certificate of drunkenness under Section 51 of the Kerala Police Act, 1960. PW16 was then handed over Ext.P14 chemical analysis

report. She further deposed that if a person has more than 30 mg of alcohol in 100 ml of blood, the person can normally be said to be under the influence of alcohol. As per Ext.P15, 99.94% mg of alcohol was found in 100 ml of blood. PW16 also identified the accused after varifying the identifying marks of the accused recorded in Ext.P15.

17.15. Though Ext.P14 is admissible under Section 293 Cr.P.C., the prosecutor took abundant caution and examined PW17, Chief Chemical Examiner, to prove the certificate issued by CW18, Assistant Chemical Examiner, Regional Chemical Examination Laboratory, Kozhikode. CW18 had sustained a fracture and hence was unable to appear before the trial court and so PW17, her senior officer, was examined to prove the certificate. PW17 deposed that as per Ext.P14, there was 99.94 mg of ethyl alcohol in 100 ml of blood and 228.12 mg in 100 ml of urine. If there is 30 mg or more of ethyl alcohol, it can be said to be a drunken state. If there is 100 to 150 mg

of ethyl alcohol in 100 ml of blood, then it is a case of severe drunken state. From the percentage of ethyl alcohol in the blood and urine, it is clear that the person was under the influence of alcohol. PW17 deposed that if the sample is preserved at room temperature, the alcohol content in the same would not increase. On the other hand, it would only decrease. It is not possible to ascertain the exact percentage of alcohol in blood or urine. To the question – *is a person said to have lost control of his normal faculties based on the quantity of alcohol consumed by him* to which she answered that she does not know. [ഒരാൾ കഴിച്ച മദ്യത്തിന്റെ അളവ് നോക്കിയാണോ ടിയാന്റെ normal faculties ന്റെ നിയന്ത്രണം നഷ്ടപ്പെട്ടു എന്ന പറയുന്നത് (Q). അറിയില്ല (A)]. She denied the suggestion that a person having 50 to 150 mg of ethyl alcohol in 100 ml of blood would not have any difficulty in driving.

18. It was submitted on behalf of the appellant/accused that the prosecution has no definite or consistent case. In Ext.P1(a)

FIS, there is no case that the accused was speeding. However, PW2 in the box deposed that the accused was speeding, and that the car was being driven in a zigzag manner. Therefore, the case in the FIS and the testimony is inconsistent. This argument advanced is apparently incorrect because Ext.P1(a) FIS was not given by PW2. On the other hand, it was given by PW1, the first police officer who arrived at the scene of occurrence soon after the incident. PW1 had not seen the incident. In Ext.P1(a), it is only stated that when PW1 spoke to the accused, the former realized that the latter was drunk and not in a position to manage himself. The car was also on the wrong side of the road. Hence, he concluded that the accused, unable to manage or control himself after having consumed considerable amount of alcohol drove the vehicle through the wrong side with the full knowledge of the consequences. It is true that PW2 in the box has also a case that the car was being driven in great speed. However, no evidence has been adduced by the prosecution to prove

the same. There is no such case for the prosecution in the final report also. PW2 and PW3 deposed that the car was driven by the accused in a zigzag manner. In the cross examination this testimony of the witnesses is not seen challenged. No contradictions or inconsistencies have been brought out in the testimony of PW2 or PW3.

19. The fact that the accused was on the wrong side is not seen disputed in the cross-examination of the prosecution witnesses. It is true that the testimony of the attester to the scene mahazar is not satisfactory. But PW12, the Special Village Officer, has prepared Ext.P11 plan which indicates the place of occurrence. PW12 has not been cross-examined by the accused. Hence Ext.P11 site plan stands proved. The road at the place of occurrence is lying in the east-west direction having a width of 5.65 meters. The road margin on either side of the road has a width of 2.60 cm. The deceased along with PWs 2 and 3 were moving from the west to east

and the accused from east to west. Therefore, the right side of the accused is the southern side of the road. The materials on record show that the bike was found in the drainage on the northern side of the road indicating thereby that the rider of the bike was on the right side. The position of the car driven by the accused was found on the northern extremity of the road and adjacent to the road margin on the northern side of the road which is apparently the wrong side of the accused. No explanation whatsoever has been given by the accused as to how and why he went to the northern extremity of the road. He has no case that he applied sudden brake to avoid hitting somebody or that the deceased had come on the wrong side and to prevent dashing against his motorbike he had swerved the car to the right side or the northern side of the road. As noticed earlier, the accused has not denied any of the incriminating circumstances spoken to by the witnesses when the same was put to him when he was questioned under Section 313 Cr.P.C. On the other hand, he only pleaded

ignorance. The testimony of PW12 and Ext.P11 have also not been disputed or discredited. Therefore, the scene of occurrence is proved by Ext.P11 which clearly substantiates the prosecution case that the accused was on the wrong side of the road.

20. Now, coming to the identity of the accused. The testimony of PWs.1 to 3 clearly establishes the identity of the driver, that is, the accused in this case. It is true that the witnesses had no prior acquaintance with the accused. But it was not a fleeting glance that the witnesses had of the accused. The witnesses had sufficient time to notice him. It is true that no Test Identification Parade (TIP) was conducted. It would have been ideal had the police done so. But merely because TIP is not conducted, is no ground to disbelieve or throw out the prosecution case. The testimony of PWs.1 to 3 regarding the identity of the accused is not seen challenged at all. There is not even a suggestion seen put to PWs.2 and 3 that it was not the accused who was driving the vehicle at the relevant time.

Therefore, the evidence on record clearly shows that it was the accused who was in fact driving the car at the relevant time.

21. It was further argued that there is no satisfactory evidence of drunkenness of the accused. The evidence does not show that the sample reached the laboratory in tamper proof condition. This argument also is not correct in the light of the materials on record. PW15 to whom the doctor had handed over the sample, has testified that the sample packet was tied and sealed. Ext.P14 report says that the seal on the sample packet was found intact. Nothing has been brought out to discredit this evidence brought on record. The relevant provisions in the MV Act are-

> *"S.185.* ***Driving by a drunken person or by a person under the influence of drugs. -*** *Whoever, while driving, or attempting to drive, a motor vehicle, -*
>
> *(a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or in any test including a laboratory test, or*
>
> *(b) is under the influence of a drug to such an extent as to*

be incapable of exercising proper control over the vehicle,

shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine of ten thousand rupees, or with both; and for a second or subsequent offence, with imprisonment for a term which extend to two years, or with fine of fifteen thousand rupees, or with both.

Explanation.- For the purposes of this section, the expression "drug" means any intoxicant other than alcohol, natural or synthetic, or any natural material or any salt, or preparation of such substance or material as may be notified by the Central Government under this Act and includes a narcotic drug and psychotropic substance as defined in clause (xiv) and clause (xxiii) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).

Section 203 of the MV Act deals with breath tests. The relevant portion for our purpose is:

"203. ***Breath tests****.- (1) A police officer in uniform or an officer of the Motor Vehicles Department, as may be authorized in this behalf by that Department, may require any*

person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such police officer or officer has any reasonable cause to suspect him of having committed an offence under S.185:

xxxx xxxx xxxx

xxxx xxxx xxxx

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood, the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

xxxx xxxx xxxx

xxxx xxxx xxxx"

Section 205 deals with presumption of unfitness to drive which reads as follows:

"205. ***Presumption of unfitness to drive.-*** *In any proceeding for an offence punishable under S.185 if it is proved that the accused, when requested by a police officer at any time so to do, had refused, omitted or failed to consent to the taking of or*

> *providing a specimen of his breath for a breath test or a specimen of his blood for a laboratory test, his refusal, omission or failure may, unless reasonable cause therefor is shown, be presumed to be a circumstance supporting any evidence given on behalf of the prosecution, or rebutting any evidence given on behalf of the defence, with respect to his condition at that time*." (Emphasis supplied)

As noticed earlier, PW1 has deposed that he found the accused in a drunken state and that the accused was also not able to manage or control himself. PW2 deposed that when she spoke to the accused, his speech was slurred. The testimony of PW16 and PW17 show that the alcohol content in the blood and urine sample of the accused was quite high, that is, far exceeding 30 mg. per 100 ml. of blood, indicating thereby that he was completely drunk. Without any delay the breath analyzer test was conducted by PW1 soon after he reached the scene. The blood sample of the accused was also taken without any delay. The evidence of the experts clearly indicates the presence of alcohol in the blood of the accused beyond the permissible limit. It is proved on scientific evidence that the accused had consumed

liquor beyond the prescribed limit. The testimony of PW1 to PW3, PW16 and PW17; the unchallenged version of PW2 and PW3 that the car was being driven in a zigzag manner and the non-explanation of the accused to go to the extreme northern side of the road clearly shows that he was under the influence of alcohol unable to control himself. There were no mechanical defect(s) in the car also. The principle mentioned in **Alister Anthony Pareira** (*Supra*) indicates that the person must be presumed to have had the knowledge that, his act of driving the vehicle on the wrong side after consuming liquor beyond the permissible limit, is likely or sufficient in the ordinary course of nature to cause death of the pedestrians on the road or of persons travelling in vehicles. That being the position, it can only be held that the accused was driving the vehicle in a rash manner sufficient to attribute on him knowledge of the consequences which would bring the act within the scope of Section 304 Part II IPC. Therefore, I find no infirmity in the findings of the trial court

calling for an interference by this Court.

22. In Crl.A.(V) No.363/2017, though the appellants/PW2 and PW3, were represented by a lawyer of their choice, thereafter he relinquished the vakalath. Though sufficient time was given to the appellants to make alternate arrangements, they have not done so. When the appeal was taken up for hearing, there was no representation on their behalf. The appeal has been filed by PWs.2 and 3 aggrieved by the quantum of sentence imposed on the accused as well as the amount of compensation awarded. As per the proviso to Section 372 Cr.P.C., a victim shall have the right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. Therefore, an appeal by PW2 and PW3 aggrieved by the sentence awarded, is not maintainable as it is only the State which can file appeal against the quantum of sentence. Fine of ₹25,000/- imposed has been directed to be given to PW2 as

compensation. The appellants are aggrieved by the compensation amount awarded. It is submitted by the learned senior counsel for the accused that an amount of ₹30 lakhs has been awarded by the Motor Accident Claims Tribunal and so no further enhancement is called for. This submission on behalf of the accused is not disputed by the prosecution. Moreover, when compensation or a fine is imposed on the accused, his financial capacity to pay the same also requires to be considered. That being the position, I find no reason to enhance the amount of fine or compensation in the light of the substantive sentence awarded to him.

In these circumstances, both the appeals are dismissed.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

C.S.SUDHA
JUDGE

NP