SUPREME COURT OF INDIA

State Tr.P.S. Lodhi Colony

Vs.

Sanjeev Nanda

C.A.No.1168of 2012

(Deepak Verma, and K.S.Radhakri Shnan,J.)

03.08.2012

JUDGMENT

Deepak Verma,J.

1. Delay condoned.

2. Leave granted.

3. Arises for our consideration in this appeal is whether respondent guilty of commission of offence under section 304 part ii of the ipc) or the conviction and sentence awarded to him by the high. The solitary question that accused deserves to be held Indian penal code (for short court of Delhi, under section 304 a of the ipc should be held to be good and legally tenable.

4. On 12.04.2010, limited notice was issued to the respondent by this court, which reads as under:

> "Issue notice confining to the nature of offence". Facts shorn of unnecessary details as unfolded by prosecution are mentioned here in below:

5. On the intervening night of 9/10.01.1999, an unfortunate motor accident took place involving bmw car no.m-312lyp. At the relevant point of time, it is no more in dispute that offending vehicle bmw was being driven by respondent. As per prosecution story, the said vehicle was coming from nizamuddin side and was proceeding towards lodhi road. Just at the corner from where lodhi road starts, seven persons were standing on the road at about 4.00 a.m. in the said car, manik kapur and sidharth gupta (since discharged) were also sitting.

6. As per prosecution story, manoj malik (p.w.2) had started from his house to leave friends nasir, mehendi hasan and his friend gulab at nizamudin railway station on foot. When they reached the petrol pump of lodhi road, three police officials of checking squad, constables

rajan, ram raj and peru lal, stopped them and started checking. In the meantime, bmw car driven rashly and negligently came from nizamuddin side at a high speed and dashed violently against them. The impact was so great and severe, that they flew in the air and fell on the bonnet and wind screen of the car. Some of them rolled down and came beneath the car. On account of this, accused lost control of the vehicle which swerved to right side of the road and ultimately hit the central verge.

7. The persons who had come under the car were dragged up to that point. Manoj (p.w.2) who had fallen on the bonnet fell down at some distance but did not come under the wheels. After hitting the central verge, car finally stopped at some distance, respondent came out from the car and inspected the gruesome site. It is said that co-passenger manik kapur asked the accused to rush from the scene of occurrence. Injured persons were shouting and crying for help. But ignoring them, he drove away the car at high speed towards dayal singh college, even though there were still some persons beneath the car. In the said accident ultimately six of them were killed and manoj (p.w.2) was injured. Accused then took the car to his friend sidharth gupta's house at 50, golf links, new delhi.

8. Prosecution story further goes to show that there another accused rajeev gupta, father of sidharth gupta with the help of two servants, accused shyam and bhola washed the car and destroyed the material evidence.

9. Prosecution alleges that pw.1 hari shankar, attendant at the petrol pump saw the accident and immediately informed telephonically his employer brijesh virmani, (p.w.70) who in turn informed the pcr at no.100. On getting the necessary information, police acted with promptitude. The telephonic information was recorded as dd no. 27-a.

10. Pursuant to the information being received, si kailash chand reached the spot. By that time few pcr vans had already reached as the news about the accident was flashed. First to reach the spot was a.s.i. devendra singh (p.w.36), who carried manoj malik to the hospital. The other pcr vans took the remaining injured /deceased persons to the hospital.

11. S.i. kailash chand (p.w.58) wrote a rukka describing the scene of crime. As per his description, he had found three persons, two constables ravi raj and rajan and one person dead on the spot. He also came to know that other four injured persons were taken in another pcr van to the hospital. He found one broken number plate and other broken parts of the car. When plate was reassembled, the number read as m312lyp bmw. One black colour piece of bumper and rear view mirror were found scattered between 100 to 150 feet. Head of one person was found crushed. There were skid marks of the tyres of the vehicle on the spot for a long distance. The body of another constable namely, ram raj was found crushed and his right leg was found at a distance of 10 to 15 feet away. Abdomen of constable Rajan Kumar was

completely ripped open and blood was oozing out on the road. All the three dead bodies were sent to all India institute of medical sciences (aims) by ambulance.

12. Thus, it was clear to S.I Kailash Chand that offending vehicle was a black color bmw car having the aforesaid number plate. Looking to the nature of crime said to have been committed, he recommended registration of fir under section 338/304 ipc. The said rukka was dispatched to the police station, where formal fir was registered.

13. S.i. Jagdish Pandey (p.w.13) also reached the spot. He found a trail of oil on the road starting from the scene of offence. He, thus followed the trail and was able to reach 50 golf links. The gate of the house was closed. Jagdish p.w.13 peeped through the side hinges of the gate, and found accused Rajeev Gupta, Bhola nath and Shyam singh washing damaged black bmw car. He tried to get the gate opened, but failed. He then gave a message to sho lodhi colony, ms. Vimlesh yadav who reached there with s.i. kailash chand and the gate was then got opened. This car was not having any number plate. The broken pieces collected from the spot matched with bmw car, other parts collected from the scene fitted well, at the respective places where the car was damaged. Some blood was also noticed in the rear left wheel of the car. On enquiries being made, accused rajeev informed that car belonged to respondent sanjeev nanda, a friend of his son sidharth gupta.

14. Thereafter, s.i. ulhas giri went to the house of the accused sanjeev nanda at defence colony. He brought accused sanjeev nanda, manik kapur and sidharth gupta to 50 golf links. All the accused were sent for their medical examination. Respondent accused had sustained an injury on the lip as noticed by Dr. T.milo (p.w. 10) who had prepared the mlc. He also recorded that he was informed by head constable with regard to history of consuming alcohol previous night. He also noted that a smell of alcohol was present even though, the speech of accused sanjeev was coherent but gait unsteady. Sample of blood was taken on the same day at about 12.00 noon which was sent for medical examination and after testing, alcohol presence of 0.115% milligram per 100 milliliter was recorded. This has been proved by dr. Madhulika Sharma (p.w. 16).

15. It is pertinent to mention that no breath analyzer or alco meter was used. Prosecution has not assigned any cogent or valid reasons for this default.

16. After completion of the investigation, charge sheet was filed against the accused in the court of additional session's judge, New Delhi. Respondent was charged under sections 201, 304 (i), 308 read with 34 of the ipc. The case was registered as session's case no. 25/1999.

17. It is important to mention here that in fact, all the material witnesses had turned hostile. P.w.1 Hari Shankar, the alleged eye witness, p.w.2 Manoj malik, the injured witness turned

hostile and did not support the prosecution story. The infamous Sunil Kulkarni was examined as court witness, who alone supported the prosecution story and has been believed by the trial court as trustworthy. Trial court recorded that testimony of this witness alone as to how the accident took place is worthy of credence and the same is well corroborated by the scene of crime.

18. On conclusion of trial, after appreciating the evidence available on record, the trial court found respondent guilty of commission of offence under section 304 part ii of the ipc and awarded him a jail sentence of five years. He was acquitted of other charges. However, accused Rajeev Gupta, Shyam Singh and Bhola Nath were convicted under section 201 ipc. Rajeev Gupta was sentenced to undergo a sentence of one year and bhola nath and shyam singh to undergo a sentence of six months each.

19. Feeling aggrieved by the said judgment and order of conviction, respondent filed criminal appeal no. 807 of 2008 in the high court of Delhi at new Delhi. Co-accused, Rajeev Gupta, Bhola Nath and Shyam filed criminal appeals no. 767 of 2008 and 871 of 2008 respectively against their conviction and sentences awarded to them under section 201 of the ipc.

20. The learned single judge considered the matter at great length and thereafter found the accused Sanjeev Nanda guilty of commission of offence under section 304 a of the ipc and reduced the sentence to two years. While converting the conviction of said accused from section 304 part ii to 304 a, the high court has disbelieved the testimony of Sunil Kulkarni which was the basis for the trial court to come to a conclusion that the case fell under section 304 part ii. The high court has also held that though the act of accused amounted to rashness and negligence endangering the lives of others, since there was no intention or knowledge of causing death, no case for conviction of accused under section 304 part ii was made out.

21. Other accused Rajeev Gupta, Shyam and Bhola were found guilty of commission of offence under section 201 of the ipc and were awarded six months' and three months' ri respectively. As mentioned hereinabove, they have preferred separate appeals against the said judgment and order of conviction, which were heard separately. Their appeals have been allowed and they have been acquitted of the charge under section 201 of the ipc.

22. Even though lengthy arguments have been advanced by learned additional solicitor general Mr. Harin p. Raval, to show the manner in which the investigation was conducted, suggesting many lacunae were left in the same, at the instance and behest of respondent accused, who not only happens to be a rich person but influential as well. Much was also argued assigning the reasons as to how relevant and material witnesses (p.w.1) Hari Shankar, and (p.w.2) Manoj, injured witness, had turned hostile. It was also then argued that the matter was carried to higher court against every order. Thus, respondent tried his best to see to it

that sessions trial is not concluded early. All these facts have been mentioned not only by the trial court but have been reiterated by learned single judge also.

23. In the light of this, we have heard Mr. Harin P.Raval learned additional solicitor general ably assisted by Mr. Siddharth s. Dave, advocate for appellant and Mr. Ram jethmalani learned senior counsel with Mr. S. Kapur, advocate and other advocates for the respondent and have microscopically examined the materials available on record.

24. The arguments of Mr. Raval are as follows:

> "A) Admittedly respondent was not holding any valid Indian license to drive a vehicle in india.
>
> B) As per the evidence of (p.w.10) dr. T. Milo, and (p.w.16) Dr. Madhulika, he was in an intoxicated condition, at the time of accident.
>
> C) He was driving a powerful machine like bmw in excessive speed in a rash and negligent manner and certainly beyond reasonable control over it.
>
> D) His negligence coupled with intoxication would lead to culpable homicide with knowledge.
>
> E) He knew that persons have been crushed and some of them were underneath his car, yet he continued to drive the vehicle till all the injured were disentangled from the vehicle.
>
> F) He fled away from the scene of crime, did not render any help to the injured. Not only this, he did not report the matter to the police and tried to obliterate the evidence available.
>
> G) Even if intention may not be attributed to him but at least he had knowledge of what he had done, thus ingredients mandated under section 304 part ii ipc were fully met.
>
> H) Thus, high court committed grave error in interfering with a well reasoned order of the trial court. Respondent should thus be held guilty of commission of offence undersection 304 part ii ipc and sentence be awarded accordingly."

25. We have been taken through almost the entire documentary and oral material evidence adduced by prosecution. Following authorities have been cited by the appellant to show that such type of acts would fall precisely under section 304 part ii of the ipc and not under section 304 a, as has been held by the learned single judge in the impugned order.

26. These authorities are reported as under:

> "A) State of Gujarat vs. Haidarali kalubhai1 where distinction has been drawn with regard to case falling under sections 304 a and 304 part ii of theipc. In the said judgment, proper and correct effect of sections 299 and 300 of the ipc has also been discussed. This judgment has been followed by this court in Naresh giri vs. State of m.p2.
>
> B) Kulwant rai vs. State of punjab3 highlights main and basic ingredients of section 304 part ii.
>
> C) Dalbir singh vs. State of haryana4, has been cited to show that as far back as in the year 2000, drunken driving was heavily criticized and a warning was issued to all those who may be in the habit, to be more careful and cautious. It further went on to say that no benefit to the accused found guilty, can be granted under the probation, 1958.
>
> D) State of Maharashtra vs. Salman Salim khan5 was cited to show that in identical circumstances where the accused was not holding a valid motor driving licence and was under influence of alcohol, he would be held to have committed offence under section 304 part ii of the ipc.
>
> E) the last in the series is Alister Anthony Pareira vs. State of maharashtra6 to show that this court has already taken a stern view where person involved in commission of such offence was driving a vehicle in a drunken condition and has to be dealt with severely So as to send proper and correct message to the society."

27.On the other hand, Mr. Ram jethmalani, learned senior counsel appearing for respondent/accused contended that looking to the facts and features of the case and taking into consideration the following mitigating circumstances, no case for interference is made out:

> "A) Offence was said to have been committed in the year 1999, almost 13 years back.
>
> B) Respondent was aged 21 years at that time, and was prosecuting his course in foreign country. He had come to India on a short holiday.
>
> C) He has already undergone the sentence of two years awarded by high court and only thereafter, after the period of limitation of filing the appeal had expired, he got married to his long time love, now they are blessed with a daughter.

D) His behavior and conduct in jail was extremely good, which is evident from the two affidavits filed in support of the respondent by two ngos.

E) Fact cannot be given a go-by that it was a cold wintry night of 9/10th january, 1999, thus possibility cannot be ruled out that visibility must have been poor due to fog.

F) He had neither any previous criminal record nor has been involved in any criminal activity ever since then. The case of Alister Anthony (supra) does not apply to the facts of this case.

G) It was contended that respondent has already learnt sufficient lesson at young age and no useful purpose would be served, if he is sent to jail again.

H) The victim and/or families of deceased have been paid handsome amount of compensation of rs.65 lacs, in the year 1999 itself, i.e. rs. 10 lacs each to the families of the deceased and rs.5 lacs to the injured.

I)it would not only be humiliating but great embarrassment to the respondent, if he is again sent to jail for little more period, over and above the period of two years awarded and undergone.

J) He had neither intention nor knowledge of the ultimate consequences of the offence said to have been committed. Learned senior counsel for the respondent Mr. Ram jethmalani further contended that it would not fall within the parameters of section 304 part ii, ipc. The impugned judgment and order calls for no interference. Even otherwise, looking to facts and features of the case, no case for taking any other view is made out."

28. After having critically gone through the evidence available on record, we have no doubt in our mind that accident had occurred solely and wholly on account of rash and negligent driving of bmw car by the respondent, at a high speed, who was also intoxicated at that point of time. This fact has been admitted by the respondent- accused at the appellate stage in the high court that at the relevant point of time, respondent was driving the vehicle and had caused the accident but even then, it would be only his rash and negligent act, attracting section 304a of ipc only. Even though it is difficult to come to the aforesaid conclusion, since he was in an inebriated condition. For the simple reason that he had already driven almost 16 km. from the place where he had started, to the point where he actually met with the accident without encountering any untoward incident would not go absolutely in favour of the respondent.

29. There is no evidence on record that they had consumed more liquor on their way also. No such material objects were recovered from the vehicle, to suggest that even while driving they were consuming liquor. One may fail to understand if one could drive safely for a distance of 16 kms, then whether the effect of intoxication would rise all of a sudden so as to find the respondent totally out of control. There is nothing of that sort but it cannot be denied that he must have been little tipsy because of the drinks he had consumed some time back. It is, indeed, extremely difficult to assess or judge when liquor would show its effect or would be at its peak. It varies from person to person.

30. As mentioned hereinabove, prosecution failed to use either the breath analyser or alco meter to record a definite finding in this regard. Evidence of (p.w.10) Dr. Milo and (p.w.16) dr. Madhulika shows that certain amount of alcoholic contents was still found on examination of his blood at 12.00 noon, next day.

31. It is a settled principle of law that if something is required to be done in a particular manner, then that has to be done only in that way or not, at all. In air 1936 pc 253 (2) nazir ahmad vs. King emperor, it has been held as follows:

> "The rule which applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all "

32. It has also come on record that seven persons were standing close to the middle of the road. One would not expect such a group, at least, at that place of the road, that too in the wee hours of the morning, on such a wintry night. There is every possibility of the accused failing to see them on the road. Looking to all this, it can be safely assumed that he had no intention of causing bodily injuries to them but he had certainly knowledge that causing such injuries and fleeing away from the scene of accident, may ultimately result in their deaths.

33. It is also pertinent to mention that soon after hitting one of them, accused did not apply the brakes so as to save at least some of the lives. Since all the seven of them were standing in a group, he had not realized that impact would be so severe that they would be dragged for several feet. Possibility also cannot be ruled out that soon after hitting them, respondent, a young boy of 21 years then, might have gone into trauma and could not decide as to what to do until vehicle came to a halt. He must have then realized the blunder he committed.

34. Respondent, instead of rendering helping hand to the injured, ran away from the scene, thus adding further to the miseries of the victims. It is not a good trend to run away after causing motor road accidents. An attempt should be made to render all possible help, including medical assistance, if required. Human touch to the same has to be given.

33. An aspect which is generally lost sight of in such cases is that bodily injuries or death are as a consequence of accidents. 'Accident' has been defined by black's law dictionary as under:

"Accident: an unintended and unforeseen injurious occurrence;

Something that does not occur in the usual course of events or that could not be reasonably anticipated." Thus, it means, if the injury/death is caused by an accident, that itself cannot be attributed to an intention. If intention is proved and death is caused, then it would amount to culpable homicide.

35. It is to be noted that in Alister Anthony Pereira's case, the earlier two judgments of this court reported in state of Gujarat vs. Haiderali kalubhai7and Naresh Giri vs. State of m.p.8, both rendered by bench of two learned judges of this court, were neither cited nor have been referred to. Thus, the ratio decided of these cases has not at all been considered in alister's case.

36. In the former case, it has been held in paras 4 and 5 as under:

> "4. Section 304-a 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 299ipc or murder under section 300 ipc. If a person wilfully drives a motor vehicle into the midst of a crowd and thereby causes death to some persons, 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. The prosecution in this case wanted to establish a motive for committing the offence against the sarpanch. It was sought to be established that there was enmity between the sarpanch and the accused and his relations on account of panchayat elections. Some evidence was led in order to prove that the accused and his relations were gunning against the sarpanch for some time after the latter's election as sarpanch. Even an anonymous letter was received by the sarpanch threatening his life which was handed over to the police by the sarpanch. Both the sessions judge as well as the high court did not accept the evidence appertaining to motive. Mr. Mukherjee, therefore, rightly and very fairly did not address us with regard to that part of the case. Even so, the learned counsel submits that the act per se and the manner in which the vehicle was driven clearly brought the case under section 304 part ii ipc."

37. It is further held in the same judgment at para 10 as under:

> "10. Section 304-a, by its own definition totally excludes the ingredients of section 299 or section 300, i.p.c. Doing an act with the intent to kill a person or knowledge

that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, section 304 a has to make room for the graver and more serious charge of culpable homicide."

38. It is interesting to note that this judgment had been a sheet anchor of arguments of both the learned senior counsel appearing for parties. They have read it differently and have tried to put different interpretations to the same. In the latter case of naresh giri it has been held in the head note as under:

"section 304 a 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 304 a 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 undersection 304-a. Section 304 a 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 or murder under section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. 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. When intent or knowledge is the direct motivating force of the act, section 304 a has to make room for the graver and more serious charge of culpable homicide." We may profitably deal with definition of 'reckless' as defined in lexicon, which reads as under:-

"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. (black, 7th edn. 1999) 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."

39. For our own benefit it is appropriate to reproduce section 304 of the ipc, which reads thus:

> "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."

40. Critical and microscopic analysis thereof shows that once knowledge that it is likely to cause death is established but without any intention to cause death, then jail sentence may be for a term which may extend to 10 years or with fine or with both.

41. Now, we have to consider if it is a fit case where conviction should be altered to section 304part ii of ipc and sentence awarded should be enhanced.

42. We are of the considered view that looking to the nature and manner in which accident had taken place, it can safely be held that he had no intention to cause death but certainly had the knowledge that his act may result in death.

43. Thus, looking to the matter from all angles, we have no doubt in our mind that knowledge can still be attributed to accused sanjeev that his act might cause such bodily injuries which may, in ordinary course of nature, be sufficient to cause death but certainly he did not have any intention to cause death. He was not driving the vehicle with that intention. There is nothing to prove that he knew that a group of persons was standing on the road he was going to pass through. If that be so, there cannot be an intention to cause death or such bodily injury as is likely to cause death. Thus, in our opinion, he had committed an offence under section 304 part ii ipc. We accordingly hold so.

44. Now the greater question that arises for consideration is if sentence deserves to be suitably enhanced or the same can be maintained as awarded by the high court, the period which the respondent has already undergone.

42. To do complete justice between the parties we have to weigh aggravating and mitigating circumstances to find out on which side justice tilts more.

45. In fact, the aggravating and mitigating circumstances have been mentioned in detail in the preceding paras. We have given our serious thought to the whole matter and are of the considered opinion that mitigating circumstances as mentioned in para 26 hereinabove are

heavier than the aggravating circumstances. The balance of justice tilts more in favor of the accused.

46. In the case in hand, no useful purpose is going to be served by sending the respondent accused Sanjeev Nanda to jail once again. Even though in the facts and circumstances of the case, jail sentence awarded to him may not be just and appropriate but as mentioned hereinabove, the mitigating circumstances tilt heavily in favor of the accused.

47. In the light of the aforesaid discussion, the appeal is partly allowed. The judgment and order of conviction passed by Delhi high court is partly set aside and the order of conviction of trial court is restored and upheld. Accused is held guilty under section 304 part ii of the ipc. Looking to the facts and circumstances of the same, we deem it appropriate to maintain the sentence awarded by the high court, which he has already undergone. However, we make it clear that this has been held so, looking to very peculiar facts and features of this particular case and it may not be treated as a precedent of general proposition of law on the point, for other cases.

48. Appeal stands allowed to the aforesaid extent. Accused has already undergone the sentence awarded to him by the high court.

K. S. Radhakrishnan, J.

1. Delay condoned.

2. I had the benefit and privilege of carefully considering the judgment delivered by my esteemed brother. However, i find it difficult to agree with some of the findings and observations recorded therein, even though i agree with most of the major conclusions, however, with a caveat. I, therefore, deem it fit and proper to supplement it with few suggestions and directions.

3. Facts have been meticulously and concisely dealt with by my learned brother and i do not want to burden my judgment with those voluminous facts which find a place in the judgment of the trial court as well as the high court.

4. The controversy in this case had been considerably narrowed down since learned senior counsel appearing for the accused - sanjeev nanda admitted that it was he, who was driving the bmw car bearing registration no. M-312 lyp in the early hours of 10.01.1999, which resulted in the death of six persons, leaving another injured. Admission was made after a prolonged trial, spanning over a period of nine years, that too after the trial court, appreciating the oral and documentary evidence adduced by the prosecution and defence,

came to the conclusion that he was guilty and convicted him for the offence under section 304(ii) of the ipc and sentenced him to undergo rigorous imprisonment for five years.

5. The accident had occurred in early hours of 10.01.1999 near the car care centre, lodhi road. Charges were framed against the first accused and others on 08.04.1999. Charges under sections 338, 304 of the ipc were framed against the first accused - sanjeev nanda and another for causing death of six persons and for attempting to commit culpable homicide not amounting to murder of manoj malik. Another charge was also framed under section 201/34 against the first accused and two others for fleeing away from the spot with the intention to screen themselves from legal punishment.

6. We are in this case primarily concerned with the charge against sanjeev nanda - the first accused. Prosecution in order to establish the guilt examined 61 witnesses, of which sunil kulkarni was given up by the prosecution and was examined as a court witness. Upon completion of the prosecution evidence, accused persons were questioned and statements of the accused persons were recorded under section 313 of the cr.p.c. on the side of the accused, dw1 to dw9 were examined. Documentary evidences such as fsl report exhibited as p16/a etc. Were also produced. The trial court vide judgment dated 02.09.2008, as already stated, found the first accused guilty under section 304(ii) of the ipc and awarded the sentence of five years rigorous imprisonment.

7. Aggrieved by the judgment of the trial court, the first accused filed criminal appeal no. 807 of 2008 before the high court and the high court after examining the contentions of the parties converted the conviction from section 304(ii) to section 304a of the ipc and reduced the sentence to two years. The accused had already undergone the punishment awarded by the high court and no appeal was preferred by him against the judgment of the high court or the findings recorded by the high court. The present appeal has been preferred by the state contending that the high court has committed an error in converting the conviction from section 304(ii) to section 304a of the ipc considering the seriousness of charges proved and the gravity of the offence.

8. Shri Harin P. Raval, additional solicitor general appearing for the state, submitted that in the facts and circumstances of the case, the high court was not justified in converting the conviction from section 304(ii) to 304a of the ipc, raising various grounds. Learned asg submitted that the high court had misdirected itself in concluding that the facts of the case would not attract 304(ii) of the ipc. Shri raval submitted that it was the first accused who had driven the vehicle on a high speed after consuming liquor and that too without a licence, causing death of six persons and injuring one, leaving them unattended. Learned asg further submitted that the gravity of the offence was of such a nature that it is touching the

boundaries of section 300(4) of the ipc. Further, it was also pointed out by shri raval that the knowledge of the second degree comprehended from part-iii of section 299 of the ipc, where death is caused by the offender by an act which offender knows is likely to cause death, would be attracted. Reference was made to the judgments of this court in state of gujarat v. Haidarali kalubhai9 kulwant rai v. State of punjab state of maharashtra v. Salman salim khan & another and alister anthony pareira v. State of maharashtra Learned counsel referred to the oral and documentary evidence, the scene of crime as narrated by kailash chand, s.i. in rukka, as well as site plan and submitted that the scene of occurrence, which was horrifying, clearly indicates beyond doubt, that the accused had knowledge that the persons who were hit by the car might die but left the scene of occurrence without caring for human lives.

9. Shri raval also extensively referred to the oral and documentary evidence adduced in this case and submitted that the trial court as well as the high court had concurred in finding that it was the accused who had committed the offence over and above admission of the first accused. Prosecution case, it was pointed out, mainly rested on the oral evidence of pw1 hari shankar, an employee of petrol pump, pw2- manoj malik, injured and an employee of a hotel and pw3 - sunil kulkarni, the court witness though, given up by the prosecution. Further, shri raval submitted that the evidence of all these witnesses, though turned hostile, have to be appreciated in the light of the peculiar facts and circumstances of this case and also taking note of the admission of the first accused that it was he who had driven the vehicle on the fateful day.

10. Learned counsel also submitted that the court should appreciate the circumstance under which most of the prosecution witnesses turned hostile and the incidents which led to the judgment of this court in R.k. Anand v. Registrar, delhi high court cannot be lost sight of, which revealed the unholy alliance, then defence counsel had with the special public prosecutor for subverting the criminal trial of this case. Pw2, who got injured in the accident, turned hostile so as to subvert trial. Evidently, all these were done at the behest of the accused though the prosecution was successful in bringing home the guilt of the accused, as found by the courts below.

> “licence and that he had left the scene of occurrence without extending any helping hand to the victims either by taking them to the hospital or reporting the accident to the police at the earliest point of time. Shri raval placed considerable reliance on the evidence of pw-16 and the fsl report proved on record as exhibit 16/a and pointed out that the report indicated the presence of 0.115% alcohol in the blood sample of the accused. Shri raval submitted that the high court had correctly understood the scope and ambit of section 185 of the motor vehicles act r/w section 203 of the act and came to a correct conclusion that the presence of 0.115% alcohol was much above the limit

of 30mg prescribed under the motor vehicles act and it can definitely affect the ability to drive the vehicle in a normal manner."

11. Shri raval also submitted that the fog and lack of visibility on the site projected by the counsel for the accused was rightly rejected by the high court. Learned counsel pointed out that this argument was neither raised before the trial court nor in the grounds of appeal taken before the high court. Further, pw 15 - Dr. S.C. Gupta's report had not stated the presence of fog on the site of the accident. On the other hand, pw15 stated that the sky was clear and the mention of mist in the report was of no consequence. Shri raval submitted that the car was coming in a high speed and considering the fact that there was clear visibility, the only conclusion possible was that the accused was in a drunken state and nobody knew whether he had driven the car 16 kms prior to the accident. Shri raval, therefore submitted that the high court was not justified in holding that the offence will attract section 304a of the ipc and not 304 (ii) of the ipc.

12. Shri ram jethmalani, learned senior counsel appearing for the respondent - accused, submitted that the accused had already undergone the sentence awarded by the high court and since no sufficient grounds have been made by the prosecution to upset the conclusion reached by the high court that in the facts and circumstances of the case, the offence will fall only under section of the ipc. Learned senior counsel submitted that the accused had admitted the factum of the accident that, he was driving the vehicle on the morning hours of 10.01.1999 so as to give a quietus to the entire controversy and to purchase peace for the accused, which had undergone agony of the criminal trial for over a decade.

13. Learned senior counsel submitted, the factum of admission made by the accused in this regard cannot be put against him or prejudice the court in appreciating various contentions raised in defending his case. Shri jethmalani, learned senior counsel, submitted, though the accident had occurred in the morning hours of 10.01.1999, the trial was prolonged due to various reasons - mainly due to the lethargic attitude of the prosecution and also due to the delay in the court proceedings which cannot be put against the accused. Further, he had already undergone the sentence of two years awarded by the high court and subsequently he got married and has also been blessed with a daughter and it will be too harsh to punish him with imprisonment for a further term. was only 21 years on the date of the incident. These factors according to the learned senior counsel should weigh with the court and the appeal be not entertained. Learned senior counsel also attacked the various findings recorded by the high court and pointed out that since the accused had already undergone the punishment, no appeal was preferred in challenging those findings and in case where the state is seeking enhancement of the punishment, the accused can always raise his defence against various

grounds raised by the prosecution in the appeal, since the appeal is only the continuation of the trial.

15. Learned senior counsel pointed various instances of judicial unfairness meted out to the respondent. Reference was made to the evidence of sunil kulkarni - the court witness. Learned senior counsel pointed out free and fair trial is sine qua non of article 21 of the constitution of india, which was denied to the accused in the instant case. In support of his contention regarding unfair trial, reference was made to the judgment in jamaica (constitutional) order as referred in her bert bell v. Director of public prosecutions & anr datar singh v. State of punjab birdhichand sarda v. State of maharashtra and chandran @ surendran and anr. V. State of kerala17 Learned senior counsel also pointed out that the judgment in r.k. anand (supra) had also influenced the judicial mind, especially that of the trial judge and that the high court has rightly converted the conviction from section 304(ii) of the ipc to section 304a of the ipc and that the accused had undergone the punishment.

16. Learned senior counsel also submitted that the prosecution had committed a grave error in suppressing the pcr messages which were of great significance for the accused to prove his defence. Pw2, one of the victims of the accident who was in the jeep, also disclosed various facts which were suppressed by the prosecution. Learned senior counsel also pointed out kulkarni was a totally unreliable witness and the statements made by him were given importance by the trial court as well as the high court in reaching various conclusions against the accused.

17. Shri jethmalani submitted there is no evidence on record to prove that the accused was intoxicated in the sense in which intoxication was understood under section 85 of the ipc nor in the sense of his ability to control the motor vehicle being substantially impaired as a result of consuming alcohol as laid down by section 185(1) of the M.V. act. Further, it was also pointed that the test statutorily recognized for drunken driving is the breath analyzer test for drunken driving and the accused was not subjected to that test. Learned counsel has submitted that when a statute prescribes a particular method the prosecution has to follow that method and not any other method. Reliance was placed on the judgments of the house of lords in rowlands v. Hamilton gumbley v. Cunningham and judgments of the privy council in nazir ahmad v. Emperor state of uttar pradesh v. Singhara singh and ors21. reckless or negligent manner so as to infer that the accused was drunk. On the other hand, learned senior counsel pointed out that the accused could not have avoided the accident since policemen and others were standing on the middle of the road on a foggy day when the visibility was poor. Further, it was pointed out that the accused had driven car about 16 kms before the accident

without any untoward incident, which would indicate that, his condition was stable and he had not consumed liquor beyond the prescribed limit.

19. Learned senior counsel also submitted that the evidence of pw 15 - dr. S.c. gupta was also not properly appreciated by the courts below, so also the evidence tendered on the presence of fog. The presence of fog, according to the learned senior counsel, clearly restricted the visibility and the entire fault cannot be put on the accused. Reference was also made to the evidence of pw2 on the presence of fog on the morning of 10.01.1999. On the plea of excessive speed, learned senior counsel submitted, assuming it was so, that itself would not establish that the accused was negligent or rash, at the most, there was gross negligence. Reference was made to the judgment of this court in state of karnataka v. Satish [(1998) 8 scc 493].

20. Learned senior counsel submitted, in the facts and circumstances of the case, no knowledge could be attributed to the accused since there was nothing to show that the accused had the intention to commit the offence, nor any knowledge can be attributed to him and even if it is assumed that he was negligent or rash, only section 304a of the ipc would apply and not 304(ii) of the ipc. The judgment of this court in alister anthony pareira (supra), according to learned senior counsel, requires reconsideration. Learned senior counsel also submitted that the judgment of this court in haidarali kalubhai (supra) would not apply to the facts of this case.

21. We may at the outset point out that both the trial court and high court, on appreciation of oral and documentary evidence, came to the clear finding that it was the accused who had driven the bmw car at the early hours of 10.01.1999 - the day on which six human lives were lost due to the rash and negligent act of the first accused, leaving another person injured. The facts and circumstances of the case according to the trial court, as already indicated, would attract conviction under section 304(ii) of the ipc but the high court converted the same to section 304a of the ipc, the correctness of which is the main issue that falls for consideration. We have to first examine whether any prejudice had been caused to the first accused due to the alleged unfair and delayed trial as contended and who was primarily instrumental for the delay in completion of the trial and also whether any injustice had been caused to the accused due to the alleged judicial unfairness.

22. The incident had occurred on 10.01.1999 and charge-sheet against the accused was filed on 08.04.1999. Sixty one witnesses were examined on the side of the prosecution and nine witnesses were examined on the side of the defence and a large number of documents were produced including expert evidence before the trial court and the court finally rendered its judgment on 02.09.2008. When the trial was on, the part played by Sunil kulkarni, one of the

eye witnesses, who later turned hostile and the unholy alliance he had with the defence counsel etc. Were also adversely commented upon by this court in R.k. anand case (supra). The operative portion of which reads as follows:

> "before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this court. At the root of this odious affair is the way the bmw trial was allowed to be constantly interfered with till it almost became directionless." Further, the court held as follows:
>
> "Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of the people."

23. We do not want to delve much into the background facts in r.k. anand (supra) any further, but only to put a question, but for the accused for whose benefit the entire drama was played by anand and sunil kulkarni. We have referred to the above judgment since an argument was raised by shri ram jethmalani on the right of the accused for speedy trial and on judicial unfairness. Had the first accused been honest enough and wanted early disposal of the trial, he would have come out with the truth at the earliest opportunity. Only after a protracted trial that too after examining sixty one witnesses and producing and proving a host of documents and after having been found guilty and convicted under section 304(ii) of the ipc and sentenced to five years rigorous imprisonment, wisdom dawned on the accused, that too, at the appellate stage. Learned senior counsel for the accused before the high court then submitted that to narrow down the controversy, the accused is admitting the factum of the accident and that he was driving the bmw on the fateful morning of 10.01.1999. The high court recorded the same as follows:

> "As already noticed, to narrow down the controversy, mr. Ram jethmalani very fairly conceded at the threshold of the arguments that he would proceed in the matter by admitting the factum of the accident and the appellant being on the driver seat on the fateful morning of 10th january, 1999, when the horrifying incident had taken place. This admission on the part of the counsel for the appellant would mean that the appellant gives up his right to challenge the findings of the lower court so far as the factum of accident by the appellant while driving bmw car bearing registration no. M312lyp resulted in death of six persons and injury to one person on the morning of 10th january, 1999 near car care centre petrol pump at lodhi road is concerned, despite

the fact that several contentions have been raised by the appellant denying his involvement in the accident in the grounds of appeal."

24. Shri ram jethmalani, as already pointed out, submitted that the first accused was seriously prejudiced due to the unfair and delayed trial, which was also commented upon by the high court which reads as follows:

"In any event of the matter, the appellant himself must share the burden of causing delay in the matter as with a view to hoodwink the prosecution and to escape from the clutches of law, he denied the factum of accident. It is only at the stage of final arguments before the trial court and in appeal, the appellant turned hostile to accept occurrence of the said horrifying accident while driving bmw car bearing registration no. M-312-lyp. Certainly, a lot of time could have been saved had the accused been honest from day one and admitted his guilt."

25. Accused, though did not file any appeal against those findings, we heard his senior counsel at length on all points and we do not find any illegality in the reasoning of the trial court as well as the high court which we fully concur with. Learned senior counsel, however, after admitting the factum of the accident and that it was the accused, who was driving the car on the fateful day, causing death of persons, pointed out various factors which according to the counsel had contributed to the accident and hence no further enhancement of sentence is warranted. Drunken driving

26. Learned senior counsel, appearing for the accused, as already pointed, has stated that there was nothing on record to prove that the first accused was intoxicated in the sense in which it is understood under section 85 of the ipc nor in the sense that his ability to control the motor vehicle had been substantially impaired as a result of consumption of alcohol as laid down bysection 185 of the m.v. act. Further, it was also stated that the first accused had driven the vehicle about 16 kms prior to the accident. If he was in a drunken state, he could not have driven the car for that much of distance. Further, it was also pointed out that the procedure laid down under section 185 of the m.v. act was not followed. Consequently, learned senior counsel pointed out that the courts have committed an error in holding that he was under the influence of liquor when the accident had happened. In our view, both the courts below have rightly rejected those contentions raised by learned senior counsel. The scope of section 185 is not what the senior counsel submits. section 185 of the m.v. act is extracted herein below: "section 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

(b)Is under this 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 which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both. Explanation. -for the purposes of this section, the drug or drugs specified by the central government in this behalf, by notification in the official gazette, shall be deemed to render a person incapable of exercising proper control over a motor vehicle."

27. Section 203 of the my act deals with breath tests. The relevant portion for our purpose is given below:

"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 undersection 185: xxxxxxxxx

(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.xxx xxx xxx xxx xxx xxx"

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 section 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."

28. The accused, in this case, escaped from the scene of occurrence, therefore, he could not be subjected to breath analyzer test instantaneously, or take or provide specimen of his breath for a breath test or a specimen of his blood for a laboratory test. Cumulative effect of the provisions, referred to the above, would indicate that the breath analyzer test has a different purpose and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle.

29. The expressions "while driving" and "attempting to drive" in the above sections have a meaning "in present". In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A breath analyzer test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyzer test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyzer test instantaneously. All the same, the first accused was taken to aims hospital at 12.29 pm on 10.01.1999 when his blood sample was taken by dr. Madulika Sharma, senior scientific officer (pw16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as pw16/a was duly proved by the doctor. Over and above in her cross-examination, she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving. Further, the accused was also examined on the morning of 10.01.1999 by Dr. T. Milo - pw10, senior resident, department of forensic medicine, aims, New Delhi and reported as follows:

"On examination, he was conscious, oriented, alert and co- operative. Eyes were congested, pupils were bilaterally dilated. The speech was coherent and gait unsteady. Smell of alcohol was present."

30. Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the courts below. Judgments referred to by the council that if a particular procedure has been prescribed under sections 185 and 203, then that procedure has to be followed, has no application to the facts of this case. Judgments rendered by the house of lords were related to the provision of road safety act, 1967, road traffic act, 1972 etc. In u.k. and are not applicable to the facts of this case.

31. We are in this case not merely dealing with a traffic violation or a minor accident, but an accident where six human beings were killed. We find no relevance in the argument that the accused was coming from a distance of 16 km. Before the accident, causing no untoward incident and hence it is to be presumed that he was in a normal state of mind. First of all, that statement is not supported by evidence apart from the assertion of the accused. Assuming so, it is a weak defense; once it is proved that the person had consumed liquor beyond the prescribed limit on scientific evidence. This court in kurban Husain v. State [air 1965 sc 1616] approved the plea that simply because of the fact that no untoward incident had taken place prior to the occurrence of the accident, one cannot infer that the accused was sober and not in a drunken state. In the instant case, the presence of alcohol content was much more (i.e. 0.115%) than the permissible limit and that the accused was in an inebriated state at the time of accident due to the influence of liquor and in the accident, six human lives were lost.

32. Drunken driving has become a menace to our society. Everyday drunken driving results in accidents and several human lives are lost, pedestrians in many of our cities are not safe. Late night parties among urban elite have now become a way of life followed by drunken driving. Alcohol consumption impairs consciousness and vision and it becomes impossible to judge accurately how far away the objects are. When depth perception deteriorates, eye muscles lose their precision causing inability to focus on the objects. Further, in more unfavourable conditions like fog, mist, rain etc., whether it is night or day, it can reduce the visibility of an object to the point of being below the limit of discernibility. In short, alcohol leads to loss of coordination, poor judgment, slowing down of reflexes and distortion of vision.

33. Punishment meted out to a drunken driver, is at least a deterrent for other such persons getting away with minor punishment and fine. Such incidents are bound to increase with no safety for pedestrians on the roads. The contention raised by learned senior counsel that the accused was not under the influence of liquor or beyond the limit prescribed under the m.v. actand he was in his senses and the victims were at fault being on the middle of the road, is without any substance and only to be rejected. Fog, visibility and speed

34. Learned senior counsel, as already indicated, pointed out that the morning of 10.01.1999 was a foggy one and that disrupted the visibility. Reference was made to the report exhibited as pw15/b, that of dr. S.c. gupta director of meteorological department. Learned senior counsel pointed out that the presence of fog is a fact supported by the said report. Further, it was also pointed out that pw2 - manoj malik had also suggested the presence of fog and the absence of street light and all those factors contributed to the accident. It was pointed out by the high court that even, during the course of the arguments, there was no mention of the plea of fog nor was the ground taken in the appeal memorandum. Further, it was also pointed out

that such an argument was never raised before the trial court as well. No case was built up by the defence on the plea of fog and in our view there is no foundation for such an argument.

35. Even going by the evidence of pw15 - Dr. S.C. Gupta and also the report exhibited as pw 15/b, there is nothing to show the presence of fog on the spot of the accident. Pw15 dr. Gupta's report stated the sky was mainly clear and there was no mention of the presence of mist or fog at the spot in the report. The visibility of 100 m of clear sky was reported by pw 15 in exhibit 15/b which would demolish the theory of fog at the spot of the accident and poor visibility. In our view, there is another fallacy in that argument. Assuming that there was presence of fog, it was a duty of the accused either to stop the vehicle if the visibility was poor or he should have been more cautious and driven the vehicle carefully in a lesser speed so that it would not have blurred his vision. This never happened since the accused was in an inebriated state and the fact that six persons died practically on the spot would indicate that the vehicle was driven in a rash and negligent manner at an excessive speed. The plea of fog, even if its presence had been established, would only weaken the defence case and the trial court and the high court had rightly rejected that plea. Driving without license.

36. Learned senior counsel, appearing for the accused, submitted that the first accused knows driving, though he does not have a license duly issued by a licensing authority under the m.v. act, 1988. Learned senior counsel submitted that the accused had driven the vehicle in America and European countries and possesses a valid driving license issued by the licensing authority of a state in the United States at the relevant point of time. Learned senior counsel, therefore, pointed out that the mere fact that he was not holding a driving license would not mean that he does not know driving.

37. Learned senior counsel also submitted that there is no presumption in law that a person who has no licence does not know driving. Further, it was also pointed out that driving without a licence is an offence under m.v. act and not under the penal code, unless and until it is proved that a person was driving a vehicle in a rash and negligent manner so as to attract section 304aof the ipc. Admittedly, the first accused was not having an indian licence at the time of accident though he had produced a licence issued by the licencing authority from a state in the united states. A person who is conversant in driving a motor vehicle in the united states and european countries may not be familiar with the road conditions in india. In india, the driver is always on the defensive due to various reasons. Pedestrians in india seldom use footpaths nor respect zebra lines or traffic lights, two wheelers, auto-rickshaws, cyclists and street-vendors are common sights on indian roads.

38. A driver in Indian roads should expect the unexpected always, therefore, the plea that the accused has an American driving licence is not an answer for driving in indian roads unless it

is recognized in india or that person is having a driving licence issued by the licensing authority in india. We have to necessarily draw an inference that the accused was not conversant in driving a vehicle on the indian roads in the absence of an indian licence at the time of the accident. Therefore, the judgment of this court in Suleman Rahiman Mulani and anr. V. State of maharashtra22 that there is no presumption of law that a person who possesses only a learning licence or possesses no licence at all, does not know driving is inapplicable to the facts of this case. In any view, in the instant case, we have already found that the accused was in an inebriated state, therefore, the question whether he knew driving is not of much consequence. Duty of driver, passengers and bystanders

39. We have found on facts that the accused had never extended any helping hand to the victims lying on the road and fled from the scene. Section 134 of m.v. act, 1988 casts a duty on a driver to take reasonable steps to secure medical attention for the injured person. Section 134 of m.v. act, 1988 reads as follows:

> "134.Duty of driver in case of accident and injury to a person. - when any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall" -
>
> (a) unless it is not practicable to do so on account of mob fury or any other reason beyond his control, take all reasonable steps to secure medical attention for the injured person, by conveying him to the nearest medical practitioner or hospital, and it shall be the duty of every registered medical practitioner or the doctor on the duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities, unless the injured person or his guardian, in case he is a minor, desired otherwise;
>
> (b) Give on demand by a police officer any information required by him or, if no police officer is present, report the circumstances of the occurrence, including the circumstances, if any, or not taking reasonable steps to secure medical attention as required under clause
>
> (a) At the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence;
>
> (c) Give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely:-
>
> (i) Insurance policy number and period of its validity;

(ii)Date, time and place of accident;

(iii.) Particulars of the persons injured or killed in the accident;

(iv.) Name of the driver and the particulars of his driving licence.

Explanation. - for the purposes of this section, the expression “driver” includes the owner of the vehicle.” Section 187 of the m.v. act, 1988 provides for punishment relating to accident, which reads as follows:

“187.Punishment for offence relating to accident. - whoever fails to comply with the provisions of clause (c) of sub-Section (1) of section 132 or of section 133 or section 134 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both or, if having been previously convicted of an offence under this section, he is again convicted of an offence under this section, with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.” Of course, no proceedings were instituted against the accused in the case on hand invoking the above mentioned provisions, however, the unfortunate accident in which six persons were killed at the hands of the accused, prompted us to express our deep concern and anguish on the belief that, at least, this incident would be an eye-opener and also food for thought as to what we should do in future when such situations arise. This court inpt. Parmanand katara v. Union of india (uoi) and ors23.pointed out that it is the duty of every citizen to help a motor accident victim, more so when one is the cause of the accident, or is involved in that particular accident. Situations may be there, in a highly charged atmosphere or due to mob fury, the driver may flee from the place, if there is a real danger to his life, but he cannot shirk his responsibility of informing the police or other authorized persons or good samaritans forthwith, so that human lives could be saved. Failure to do so, may lead to serious consequences, as we see in the instant case. Passengers who are in the vehicle which met with an accident, have also a duty to arrange proper medical attention for the victims. Further they have equal responsibility to inform the police about the factum of the accident, in case of failure to do so they are aiding the crime and screening the offender from legal punishment. No legal obligation as such is cast on a bystander either under the motor vehicle act or any other legislation in india. But greater responsibility is cast on them, because they are people at the scene of the occurrence, and immediate and prompt medical attention and care may help the victims and their dear ones from unexpected catastrophe. Private hospitals and government hospitals, especially situated near the highway, where traffic is high,

should be equipped with all facilities to meet with such emergency situations. Ambulance with all medical facilities including doctors and supporting staff should be ready, so that, in case of emergency, prompt and immediate medical attention could be given. In fact, this court in paschim banga khet mazdoor samiti and ors. V. State of west bengal and ors24. after referring to the report of justice lilamoy ghose, a retired judge of the calcutta high court, gave various directions to the union of india and other states to ensure immediate medical attention in such situations and to provide immediate treatment to save human lives. Law commission in its 201st report dated 31.8.2006 had also made various recommendations, but effective and proper steps are yet to be taken by union of india and also many state governments. We call for the immediate attention of the union of india and other state governments, if they have not already implemented those directions, which they may do at the earliest. Seldom, we find that the passing vehicles stop to give a helping hand to take the injured persons to the nearby hospital without waiting for the ambulance to come. Proper attention by the passing vehicles will also be of a great help and can save human lives. Many a times, bystanders keep away from the scene, perhaps not to get themselves involved in any legal or court proceedings. Good samaritans who come forward to help must be treated with respect and be assured that they will have to face no hassle and will be properly rewarded. We, therefore, direct the union of india and state governments to frame proper rules and regulations and conduct awareness programmes so that the situation like this could, to a large extent, be properly attended to and, in that process, human lives could be saved. Hostile witnesses.

40. We notice, in the instant case, the key prosecution witnesses pw1 - harishankar, pw2 - manoj malik, pw3 - sunil kulkarni turned hostile. Even though the above mentioned witnesses turned hostile and sunil kulkarni was later examined as court witness, when we read their evidence with the evidence of others as disclosed and expert evidence, the guilt of the accused had been clearly established. In r.k. anand (supra), the unholy alliance of sunil kulkarni with the defence counsel had been adversely commented upon and this court also noticed that the damage they had tried to cause was far more serious than any other prosecution witness. Witness turning hostile is a major disturbing factor faced by the criminal courts in india. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system. This court in state of u.p. v. Ramesh mishra and anr25held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the

prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In k. Anbazhagan v. Superintendent of police and anr26 this court held that if a court 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, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the high court and they found the accused guilty.

41. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This court in sidhartha vashisht @ manu sharma v. State (Nct. o Delhi)27and in zahira habibullah shaikh v. State of gujarat28 had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, section 193 of the ipc imposes punishment for giving false evidence but is seldom invoked. section 304(ii) or section 304a of the ipc

42. We may in the above background examine whether the offence falls under section 304(ii) of the ipc or section 304a of the ipc from the facts unfolded in this case. Shri raval, appearing for the state, as already indicated, argued that the facts of this case lead to the irresistible conclusion that it would fall under section 304(ii) of the ipc. Learned counsel pointed out that the accused after having noticed that the speeding car had hit several persons, left the spot without giving any medical aid or help knowing fully well that his act was likely to cause death. Learned counsel pointed out that in any view, it would at least fall under section 304(ii) of the ipc.

43. Shri ram jethmalani, on the other hand, submitted that section 304(ii), will never apply in a case of this nature, especially in the absence of any premeditation. Learned senior counsel submitted that the accused entertained no knowledge that his action was likely to cause death assuming he was rash and negligent in driving the car. Learned senior counsel pointed out that the offence of culpable homicide presupposes an intention or knowledge and the intention must be directed either deliberately to put an end to human life or to some act which to the knowledge of the accused is likely to eventuate in putting an end to human life.

Learned senior counsel submitted that the accused had no such knowledge either before or immediately after the accident.

44. First we will examine the scope of section 304a of the ipc which reads as follows:

> "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 wit imprisonment of either description for a term which may extend to two years, or with fine, or with both." On reading the above mentioned provision, the following requirements must be satisfied before applying this section:
>
> I) Death must have been caused by the accused;
>
> II) Death caused by rash or negligent act;
>
> III) Rash and negligent act must not amount to culpable homicide. Section 304a 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 not amounting to murder under section 299or murder under section 300. Section 304a excludes all the ingredients of section 299 or section 300.

45. The above mentioned section came up for consideration in haidarali kalubhai (supra) wherein this court held as follows:

> "section 304a 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 u/s 299 ipc or murder u/s 300 ipc. If a person willfully drives a motor vehicle in the midst of a crowd and thereby causes death to some persons, it will not be a cause 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."
>
> Before elaborating and examining the above principle laid down by this court, we will refer to sections, 300, 304a of the ipc. Section 299 a person commits culpable homicide if the act by which the death is caused is done (c) with the knowledge that he is likely to cause death. Section 300 except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done (4) with the knowledge that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
>
> "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."

46. Section 299 of the ipc defines culpable homicide as an act of causing death (i) with the intention of causing death; (ii) with the intention of causing some bodily injury as is likely to cause death; and (iii) with the knowledge that such act is likely to cause death. The first and second clauses of the section refer to intention apart from knowledge and the third clause refers to knowledge apart from intention. "Intention" and "knowledge" postulate the existence of positive mental attitude. The expression 'knowledge' referred to in section 299 and section 300 is the personal knowledge of the person who does the act. To make out an offence punishable under section of the ipc, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his is likely to cause death.

47. Section 304a, as already indicated, 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 not amounting to murder under section 299 or murder under section 300. The scope of the above mentioned provisions came up for consideration before this court in the judgment of Naresh giri v. State of m.p29wherein this court held as follows:

> "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 304aapplies 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."

48. In a recent judgment, in alister Anthony Pereira (supra), this court after surveying a large number of judgments on the scope of sections 304a and 304(ii) of the ipc, came to the conclusion that in a case of drunken driving resulting in the death of seven persons and causing injury to eight persons, the scope of sections 299, 300 and 304(i) and (ii) of the ipc stated to be as follows:

> "Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, section 304a may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely

to cause death, section 304 part ii Indian penal code may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under section 302 Indian penal code." On facts, the court concluded as follows:

"The facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused under section 304 partcode undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime. Seven precious human lives were lost by the act of the accused. For an offence like this which has been proved against the appellant, sentence of three years awarded by the high court is too meager and not adequate but since no appeal has been preferred by the state, we refrain from considering the matter for enhancement. By letting the appellant away on the sentence already undergone i.e. two months in a case like this, in our view, would be travesty of justice and highly unjust, unfair, improper and disproportionate to the gravity of crime. It is true that the appellant has paid compensation of rs. 8,50,000/- but no amount of compensation could relieve the family of victims from the constant agony. As a matter of fact, high court had been quite considerate and lenient in awarding to the appellant sentence of three years for an offence under section 304 part ii indian penal code where seven persons were killed."

49. In Jagriti devi v. State of Himachal Pradesh30 Wherein the bench of this court held that it is trite law that section 304 part ii comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

50. One of the earlier decisions of this court in state of Andhra Pradesh v. Rayavarapu punnayya and another31 this court succinctly examined the distinction between section 299 and section 300 of the ipc and in para 12 of the judgment and held as follows:

"In the scheme of the penal code, 'culpable homicide' is genus and 'murders' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the code practically recognizes three degrees of culpable homicide. The first is what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of section 304. Then, there is 'culpable homicide of the third

degree.' this is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of section 304."

51. Referring to Para 14 of that judgment, the court opined that the difference between clause

> "(b) Of section 299 and clause (3) of section 300 is one of the degree of probability of death resulting from the intended bodily injury. The word "likely" in clause (b) of section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury...sufficient in the ordinary course of nature to cause death" means that death will be the "most probable" result of the injury having regard to the ordinary course of nature. Ultimately, the court concluded as follows:
>
> "from the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, penal code is reached. This is [the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of murder' contained in section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of section 304, depending, respectively, on. Whether the second or the third clause of section 299 is applicable. If this question is found in the positive, but the case comes, within any of the exceptions enumerated in section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of section 304, penal code."

52. The principle mentioned by this court in alister anthony pareira (supra) indicates that the person must be presumed to have had the knowledge that, his act of driving the vehicle without a licence in a high speed 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. In our view, alister anthony pareira (supra) judgment calls for no reconsideration. Assuming that Shri ram jethmalani is right in contending that while he was driving the vehicle in a drunken state, he had no intention or knowledge that his action was likely to

cause death of six human beings, in our view, at least, immediately after having hit so many human beings and the bodies scattered around, he had the knowledge that his action was likely to cause death of so many human beings, lying on the road unattended. To say, still he had no knowledge about his action is too childish which no reasonable man can accept as worthy of consideration. So far as this case is concerned, it has been brought out in evidence that the accused was in an inebriated state, after consuming excessive alcohol, he was driving the vehicle without license, in a rash and negligent manner in a high speed which resulted in the death of six persons. The accused had sufficient knowledge that his action was likely to cause death and such an action would, in the facts and circumstances of this case fall under section 304(ii) of the ipc and the trial court has rightly held so and the high court has committed an error in converting the offence to section 304a of the ipc.

53. We may now examine the mitigating and aggravating circumstances and decide as to whether the punishment awarded by the high court is commensurate with the gravity of the offence.

54. Mitigating circumstances suggested by the defence counsel are as follows:

> "I.) the accused was only 21 years on the date of the accident, later married and has a daughter;
>
> II.) Prolonged trial, judicial unfairness caused prejudice;
>
> III.) The accused has undergone sentence of two years awarded by the high court and, during that period, his conduct and behavior in the jail was appreciated;
>
> Iv.) Accident occurred on a foggy day in the early hours of morning with poor visibility;
>
> V.) The accused had no previous criminal record nor has he been involved in any criminal case subsequently;
>
> Vi.)The accused and the family members contributed and paid a compensation of 65 lacs, in total, in the year 1999 to the families of the victims;
>
> Vii.) The accused had neither the intention nor knowledge of the ultimate consequences of his action and that he was holding a driving license from the United States."

55. Following are, in our view, the aggravating circumstances unfolded in this case:

"I) Six persons died due to the rash and negligent driving of the accused and the car was driven with the knowledge that drunken driving without license is likely to cause death.

II.) Much of the delay in completing the trial could have been avoided if wisdom had dawned on the accused earlier. Only at the appellate stage the accused had admitted that it was he who was driving the vehicle on the fateful day which resulted in the death of six persons and delay in completion of the trial cannot be attributed to the prosecution as the prosecution was burdened with task of establishing the offence beyond reasonable doubt by examining sixty one witnesses and producing several documents including expert evidence.

III.) The accused did not stop the vehicle in spite of the fact that the vehicle had hit six persons and one got injured and escaped from the spot without giving any helping hand to the victims who were dying and crying for help. Human lives could have been saved, if the accused had shown some mercy.

Iv.) The accused had the knowledge that the car driven by him had hit the human beings and human bodies were scattered around and they might die, but he thought of only his safety and left the place, leaving their fate to destiny which, in our view, is not a normal human psychology and no court can give a stamp of approval to that conduct.

V.) non-reporting the crime to the police even after reaching home and failure to take any steps to provide medical help even after escaping from the site.

56. Payment of compensation to the victims or their relatives is not a mitigating circumstance; on the other hand, it is a statutory obligation. Age of 21, as such is also not a mitigating factor, in the facts of this case, since the accused is not an illiterate, poor, rustic villager but an educated urban elite, undergoing studies abroad. We have to weigh all these mitigating and aggravating circumstances while awarding the sentence.

57. We have to decide, after having found on facts, that this case would fall under section 304 part ii, what will be the appropriate sentence. Generally, the policy which the court adopts while awarding sentence is that the punishment must be appropriate and proportional to the gravity of the offence committed. Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to

protect the public from such crimes are certain factors to be considered while imposing the sentence.

58. The imposition of sentence without considering its effect on the social order in many cases is in reality a futile exercise. In our view, had the accused extended a helping hand to the victims of the accident, caused by him by making arrangements to give immediate medical attention, perhaps lives of some of the victims could have been saved. Even after committing the accident, he only thought of his safety, did not care for the victims and escaped from the site showing least concern to the human beings lying on the road with serious injuries. Conduct of the accused is highly reprehensible and cannot be countenanced, by any court of law.

59. The high court, in our view, has committed an error in converting the conviction to section 304a of the ipc from that of 304(ii) ipc and the conviction awarded calls for a re-look on the basis of the facts already discussed, otherwise this court will be setting a bad precedent and sending a wrong message to the public. After having found that the offence would fall under section ipc, not under section 304a, the following sentence awarded would meet the ends of justice, in addition to the sentence already awarded by the high court. Community service for avoiding jail sentence

60. Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community which he owes. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to him, especially in a case where because of one's action and inaction, human lives have been lost.

61. In the facts and circumstances of the case, where six human lives were lost, we feel, to adopt this method would be good for the society rather than incarcerating the convict further in jail. Further sentence of fine also would compensate at least some of the victims of such road accidents who have died, especially in hit and run cases where the owner or driver cannot be traced. We, therefore, order as follows:

> "1) accused has to pay an amount of rs.50 lakh (rupees fifty lakh) to the union of india within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. Could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept in a different head to be used for the aforesaid purpose only.

2) The accused would do community service for two years which will be arranged by the ministry of social justice and empowerment within two months. On default, he will have to undergo simple imprisonment for two years."

The appeal is allowed to the aforesaid extent and the accused is sentenced as above. (Deepakverma J. K.S. Radhakrishnan, JJ.)New Delhi, august 3, 2012 reportable in the supreme court of india criminal appellate jurisdiction criminal appeal no.1168 of 2012 [arising out of s.l.p. (crl.) No.3292 of 2010] state tr.p.s.lodhi colony ....appellant New Delhi versus Sanjeev Nanda ....respondent Order

1. Delay condoned.

2. Leave granted.

3. In the light of separate judgments pronounced by us today, the judgment and order of conviction passed by Delhi high court under section 304a of the Indian penal code (ipc) is set aside and the order of conviction of trial court under section 304 part ii of the i.p.c. is restored and upheld. However, we deem it appropriate to maintain the sentence awarded by the high court, which the accused has already undergone. 2::

4. In addition, the accused is put to the following terms:

(1) accused has to pay an amount of rs.50 lakh (rupees fifty lakh) to the union of india within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. Could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount is kept in a different head to be used for the aforesaid purpose only.

(2) The accused would do community service for two years which will be arranged by the ministry of social justice and empowerment within two months. On default, he will have to undergo simple imprisonment for two years. The appeal is accordingly allowed in terms of the judgments and this common order.

Cases Referred

[1](1976) 1 SCC 0889
[2]2008 (1) SCC 0791
[3](1981) 4 SCC 0245
[4](2000) 5 SCC0082
[5](2004) 1 SCC 0525
[6](2012) 2 SCC 0648
[7](1976) 1 SCC 0889

[8]*2008 (1) SCC0791*
[9]*(1976) 1 SCC 0889*
[10] *(1981) 4 SCC 0245*
[11]*(2004) 1 SCC 0525*
[12]*(2012) 2 SCC0648*
[13]*(2009) 8 SCC 0106*
[14]*(1985) A.C. 0937*
[15]*(1975) 4 SCC0272*
[16]*(1984) 4 SCC 0116*
[17]*1991 SUPP (1) SCC 0039*
[18]*(1971) 1 All E.R 1089*
[19]*1989) 1 All E.R 005*
[20]*AIR 1936 PC 0253*
[21]*AIR 1964 SC 0358*
[22]*AIR 1968 SC 0829*
[23]*(1989) 4 SCC0286*
[24]*(1996) 4 SCC0037*
[25]*AIR 1996 SC 2766*
[26]*AIR 2004 SC0524*
[27]*(2010) 6 SCC 0001*
[28]*AIR 2006 SC1367*
[29]*(2008) 1 SCC 0791*
[30]*(2009) 14 SCC 771*
[31](1976) 4 SCC0382