Criminal Appeal

**IN THE COURT OF THE DISTRICT & SESSIONS JUDGE**

**AT \_\_\_\_\_\_\_\_\_\_**

 Criminal Appeal No. /2010

Shri \_ \_ \_\_ \_ \_ \_\_ )

Age \_\_ years, occupation - service, )
Resident of Masjid Bunder, )

District -\_\_\_\_\_\_\_\_\_\_\_\_\_\_ )

Versus

The State of Maharashtra )

(Notice to be served on the )

District Government Pleader, )

MUMBAI 400 005 )

Appellant (Original Accused)

Respondent

(Original Complainant)

Criminal appeal u/s 374 of the code of criminal procedure 1973

MAY IT PLEASE YOUR HONOUR

(I) Brief History of the Case is as follows:

1. That the appellant was charged with and tried for the offence punishable u/s 304(A) of the Indian Penal Code and was sentenced to suffer SI for one month and also to pay a fine of Rs. 500/- I/d to suffer further SI for seven days.

2. That the said order of punishment has been passed by the Hon'ble Judicial Magistrate, First Class, Vadgaon Maval, in S.T.C.C. No. 1100/2007.

3. That the said judgment and order of punishment have been passed by the Hon'ble Trial Court on 7.3.2010.

4. That the Hon'ble Trial Court was pleased to hold the appellant guilty for the said offence u/s 304(A) of the Indian Penal Code. That the alleged incident took place in the property bearing Gat No. ……………. District MUMBAI, where the appellant was constructing a new house for the residence of his family, while the appellant himself is working in Mumbai, and he occasionally and during holidays visits his family residing at the place where he has constructed a new house.

5. That the said work of construction of the house was assigned to a contractor, and the father of the appellant; who is old enough, used to visit and supervise the construction work from time to time.

6. That the appellant being in regular service at Mumbai could not visit or supervise or look after the construction activity of the said work, and had hardly paid any attention to the same personally.

7. That the prosecution has examined in all eight witnesses, but no witness on behalf of the accused was examined, and the appellant is so unfortunate that while recording the statement of the accused u/s 313 of the Code of Criminal Procedure, despite an enquiry made by the Hon'ble Lower Court as to whether he had to examine any defence witness, the accused being totally ignorant and completely innocent did not avail of the opportunity offered to him, and therefore, no witness on his behalf or at his instance could be examined.

8. That the appellant respectfully submits that with a view to meeting the ends of justice, there should have been, at least, one witness, i.e. the father of the accused-appellant, who used to attend to and supervise the work of construction personally, should have been examined on behalf of the defence, but this did not happen, and for the same, the whole blame goes to none but the defence only.



9. That even though the said accident took place between 16.30 hours and 20.30 hours on 17.6.2007, the *panchnama* was drawn two days thereafter on 19.6.2007.

(II) BEING AGGRIEVED BY AND DISSATISFIED WITH the judgment and order, dated 7.3.2010, passed by the Hon'ble Judicial Magistrate, Vadgaon Maval, in S.T.C.C. No. 1100/2007, the present appellant prefers this memo of appeal on the following amongst the other grounds of objections thereto :

1. That the Learned Lower Court has not followed proper procedure, and this has resulted into miscarriage of justice.

2. That the orders passed by the Learned Lower Court are violative of the principles of justice, equity and good conscience.

3. That the orders passed by the Learned Lower Court are contrary to the provisions of law and the principles of natural justice.

4. That the Learned Lower Court has failed to consider the evidence on record in a judicious manner.

5. That the findings arrived at by the Learned Lower Court are not supported by the evidence on record.

6. That the necessary issues of law and the facts have not been framed and answered by the Learned Lower Court,

7. That the Learned Trial Court ought to have acquitted the accused-appellant for the benefit of doubt for the great many controversies committed in the evidence adduced by almost all the prosecution witnesses.

8. That the Hon'ble Lower Court ought to have taken into account the very fact that there was a glaring mistake on the part of the prosecution to the effect that when the said accident actually took place on 17.6.1998, in the Final Report/ Charge-sheet submitted by the Investigating Officer, Dehu Road Police Station, on 18.8.2007, the date of offence is shown to be 10.6.2007, which is totally incorrect.

9. That the Hon'ble Lower Court ought to have rightly held that it was, merely an accident, and not an offence.

10. That there was a great mistake in lodging the FIR on 8.8.2007, which should give the benefit of doubt for acquittal of the accused.

11. That the appellant respectfully submits that while framing charge, on 7.4.2001, the date of the offence is shown to be 10.6.2007.

12. That the Hon'ble Lower Court ought to have held that the evidence given by the PW No. 5, Shri MKK, who had undertaken the work of construction as a contractor, to the effect that the said water tank was covered by wooden planks and tin sheets, and as admitted by the PW No. 3, Shri GVJ, that theft is a common instance in the area, and hence, the same must have been stolen away by the thieves, leaving the water tank unprotected.

13. That it was not correct and proper on the part of the Learned Lower Court to conclude that the said water tank was uncovered, because the PW No. 3, Shri GVJ, the PW No. 5, the concerned contractor, as well as the PW No. 8, Shri DDK, supported, said and reiterated that the three sides of the tank were closed by a wall and protected by a wire fencing,-there was no access to the construction site, and the said witness, Shri Kale, also added that the accused never visited the construction site during the work, and that the plot is fenced by wire fencing.

14. That the Hon'ble Trial Court ought to have considered the fact that registering an offence against the accused-appellant was an afterthought, for, as per the version of the PW No. 7, Shri MHC, ASI, who admitted that prior to the FIR, the incident was registered as an accidental death.

That the Hon'ble Trial Court ought to have taken into 15. consideration that when the PW No. 6, Shri GRM, says that the incident took place on 8.8.2007, it means that such a mistake on the part of the prosecution could be accepted only with a view to giving the benefit of doubt to the accused, and not otherwise.

16. That the Hon'ble Trial Court ought to have considered that the prosecution failed to prove any offence on the part of the appellant.

17. That the Hon'ble Lower Court ought to have considered that the appellant was not responsible for the death of the deceased boy - Salman, who was found drowned in the water tank which was constructed by the contractor engaged by the appellant for the purpose of construction of a house for him.

18. That the Hon'ble Lower Court ought to have held that the drowning of the deceased boy was caused only on account of an accident for which the appellant was not at all responsible.

19. That the Hon'ble Trial Court was at an error in holding that the said offence was committed by the appellant by a rash and negligent act on his part.

20. That the Learned Lower Court was wrong to have come to a tacit conclusion that it was due to a rash and negligent act on the part of the appellant that the death of the deceased boy was caused.

21. That the Hon'ble Trial Court ought to have held that there was neither *mens rea* on the part of the appellant to cause death nor any knowledge that the act done in all probability will cause death.

22. That the Hon'ble Lower Court ought to have considered that the appellant did no act, which could be termed as a rash or negligent act and is directly the immediate cause of death of the deceased boy.

23. That the Hon'ble Trial Court also ought to have held that there was, in fact, no criminal intent on the part of the appellant, which was an essential ingredient to constitute an offence.

24. That the appellant respectfully submits for the kind and sympathetic consideration of this Hon'ble Court that there was no rash or negligent act on the part of the accused-appellant which could have been the direct or proximate cause of the death of the deceased boy.

25. That the accused-appellant respectfully submits for the favourable consideration of this Hon'ble Court that the Learned Lower Court ought to have determined that the accused cannot be held to have the knowledge that he was likely by such act to cause the actual result, but the appellant has been so unhappy that the dangerous consequences have been unfortunate.

26. That the Learned Trial Court ought to have held that the act of the accused-appellant in its nature is not at all criminal, and hence, only on that merit, the accused-appellant deserves a clear exoneration.

27. That the Hon'ble Lower Court ought to have rightly held that the section under which the accused-appellant was tried for the offence does not apply to the instant case where the death has arisen, not from the negligent or rash mode of doing the act, but from some result supervening upon the act which could not have been anticipated.

28. That this appellant fervently submits that proper care and due precaution to guard against an injury either to the public generally or to an individual in particular was taken by the appellant by putting wooden planks and tin sheets for covering the water tank, which was then dry and empty.

29. That this appellant submits that the said water tank was empty and dry, for the construction work was already stopped for want of funds as well as on account of shortage of water supply in the month of May 2007, that is the beginning of the summer season.

30. That the appellant submits and brings to the kind perusal and consideration of this Hon'ble Court the very fact that when the rainy season started only in the first week of June 2007, the said empty and dried tank was filled in with rainy water, and by the time, all the wooden planks covering the said tank were also found already removed away and stolen by the unknown persons, because the same could be very useful as firewood *which is normally used by the population residing in the nearby vicinity.*

31. That the Learned Lower Court ought to have decided that the accused -appellant had taken a sufficient precaution to prevent any untoward happening.

32. That the Hon'ble Lower Court ought to have taken into consideration the very provision of law that there must be *mens rea* in the criminal negligence also, and since the same is absent in the instant case, it cannot be termed as an offence.

33. That the appellant respectfully submits for sympathetic consideration of this Hon'ble Court that the circumstances under which the deceased boy was drowned were beyond the control of the appellant, and hence, he is not guilty of such an offence.

34. That there was a factual mistake to say that the said tank in which the deceased boy was drowned was uncovered and unprotected, for it is admitted by the witnesses that the said tank was under a stare case.

35. That the Learned Lower Court was wrong to hold that the P.W. No.l, Shri GSD, who is the father of the deceased boy, was present when the dead body was taken out.

36. That it was a totally wrong decision of the Learned Lower Court that the said water tank was uncovered and unprotected and also that even the construction site was accessible and was not fenced.

37. That the Hon'ble Trial Court erred in arriving at a tacit conclusion that it was an illegal omission on the part of the accused.

38. That even though the said accident took place between 16.30 hours and 20.30 hours on 17.6.2007, the *panchnama* was drawn two days thereafter on 19.6.2007, and hence, the Hon'ble Trial Court must have considered this issue in favour of the accused.

39. That the appellant fervently submits that he deserves kind and sympathetic consideration, and accordingly he prays for the mercy of this Hon'ble Court, at least, on humanitarian grounds.

40. That the order is dated, 7.3.2010, while its certified copy was applied for and delivered the same day, and hence, the appeal filed today is well within limitation.

41. That certified copies of the judgment and order, dated 7.3.2010. in S.T.C.C. No. 1100/2007, and the other proceedings are filed herewith.

42. That the necessary court fee is paid herewith.

43. That the appellant, therefore, prays that -

(i) For the reasons stated above and as may be argued at the time of hearing, this appeal may kindly be allowed;

(ii) The record and proceedings in S.T.C.C. No. 1100/2007 in the court of the Hon'ble Judicial Magistrate, First

Class, Vadgaon Maval, be called for;

(iii) The order under appeal be set aside and quashed, and orders deemed just and proper be kindly passed;

(iv)The appellant be kindly acquitted from the offence punishable u/s 304(A) of the Indian Penal Code 1860;