

Who hit and ran?

The Special Leave Petition filed by the State of Maharashtra against Bombay High Court's judgment acquitting Salman and reversing his conviction in the hit and run case of 2002 is likely to come up on 19.02.2016. Was it Salman or his driver Ashok who drove the vehicle? Was it a simple accident caused by the bursting of a tyre or was it the outcome of the car being driven by Salman in a rash and negligent manner under the influence of alcohol?

SOME UNDISPUTED FACTS:

On the intervening night of 27.09.2002 and 28.9.2002 Salman did go out in his Land Cruiser with his friend Kamal Khan and a bodyguard, Ravindra Patil. Salman did go to Rain Bar and thereafter he did visit JW Marriot where his vehicle was parked at the valet parking. When Salman came out of JW Marriot, a parking attendant gave the car back to him. Salman tipped the attendant. The attendant saw Salman sit in the driver's seat.

The vehicle met with an accident at about 2:45 AM and ran over some people sleeping on a pavement. One of them died and some of them were injured. After the accident, a mob gathered at the site. Salman fled without giving any medical aid to the injured. He went to the Police Station at 10.30 AM.

The case of the prosecution, was that Salman was driving the vehicle in a rash and negligent manner under the influence of alcohol and with the knowledge that there would be people sleeping on the pavement which was close to his residence and therefor he was liable *inter alia* for punishment under sections 304 Part II, 337 and 338 of the Indian Penal Code, 1860.

The Defence put up a case that Salman did not consume alcohol at Rain Bar and at JW Marriot and his vehicle was driven by his driver, Altaf, till the time it reached JW Marriot. Then, due to giddiness, Altaf asked another driver, Ashok, at about 1.30 AM to replace and relieve him. After informing Ashok, Altaf left and kept the key at the valet parking. Though Salman was on the driver's seat when the car was given back by the attendant, it was Ashok who drove it from JW Marriot. The accident happened because the left tyre had a puncture and that, after the accident, the left door of the vehicle got jammed, as a result of which Salman, though sitting at the seat beside the driver, had to get out of the vehicle from the driver's exit. According to the defence, the accident did not result in the death of deceased Nurulla Shaikh who was sleeping on the pavement

when the vehicle ran over him. Nurulla died when the vehicle slipped off the hook of the crane that was trying to lift it from the stairs in front of American Laundry and fell on Nurulla. One cannot help noticing too many co-incidences in the case put up by the Defence but then criminal jurisprudence is all about how well the prosecution discharges the onerous burden of establishing its case against the accused beyond all “reasonable doubts”. What seemed crystal clear to one Judge was certainly found to be doubtful by another Judge in Salman’s case.

2

WHO WAS DRIVING?

One of the setbacks for the Prosecution before the High Court was rejection of evidence of witnesses who testified that Salman was driving the vehicle. The High Court found their evidence inconsistent and based on hearsay.

However, the Sessions Court accepted the evidence of Patil and other witnesses who deposed that Salman was at the wheel. Relying on the evidence of the parking attendant that Salman tipped him, the Judge concluded that Salman would have driven off immediately. The Court also opined that if indeed the vehicle was driven by Altaf and Ashok, it would not have been parked at the valet which is meant for owner driver cars.

Ashok, the only witness for the defence, claimed during his evidence that he was driving the vehicle. Taking note of the absence of any suggestion by Salman’s lawyers to any of the witnesses about the presence and role of Ashok, the Sessions Court observed:

“...When the accused knew that the accident occurred when Ashok was driving the vehicle then it ought have been brought on record by giving suggestion or by putting the case to the prosecution witnesses. ...”

In an old English case, *Browne v. Dunn* it was held:

“ ... if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; ... that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

Thirteen years of silence of Ashok “rewarded” Salman Khan with multiple appearances in many courts. He had to fight for bail, contest the framing of charge under section 304 II before facing

the trial. Interestingly, Salman also remained silent for these thirteen years and gladly accepted the hardship of facing the court hearings and made no effort even once to curtail the proceedings by pointing out that Ashok was driving the vehicle. Even while opposing the framing of a charge under section 304 II he did not mention a word about Ashok.

WAS SALMAN DRIVING UNDER THE INFLUENCE OF ALCOHOL?

3

On this question, the High Court found that “utmost care” was not taken in extracting and testing the blood sample and “the chain of custody” which ought to be established when appreciating biological evidence was not complete.

However, the Assistant Sessions Judge found that the evidence of Salman visiting Rain Bar and JW Marriot and the evidence of the Medical Officer and the Assistant Chemical Analyser were good enough to come to the conclusion that at the “*time of driving the vehicle accused was under intoxication.*”.

WAS THE CAR BEING DRIVEN IN A RASH AND NEGLIGENT MANNER?

According to the High Court it was a simple accident caused by the bursting of the left tyre. It disbelieved the evidence of Patil who deposed that the car was being driven in a rash manner. The High Court accepted that the car went out of control after the left tyre burst, again disbelieving Patil that the tyre burst after the accident. The High Court did not consider the Session Court’s observation that even if the tyre had a puncture, it would not have caused the accident because the car had tubeless tyres which let out air slowly.

EVIDENCE OF PATIL

The High Court found the evidence of Patil to be inadmissible under section 33 of the Indian Evidence Act, 1872 during Salman’s trial before the Sessions Court *inter alia* for the offence under 304 II because Patil was examined and cross-examined only during the trial for the lesser offence of “Causing death by negligence” under Section 304A before the Metropolitan Magistrate. Notwithstanding its inadmissibility, the High Court considered Patil’s evidence and rejected it on all counts.

Let us assume that A hit B with a sword in the presence of C and caused him grievous injuries. A is tried for the offence of grievous hurt under section 323. C deposes about the circumstances and the manner in which A hits B with the sword. Thereafter, B dies as a result of the injuries. Then

prosecution charges A under 304 II where it needs to establish that A's act was done with the knowledge that it is likely to cause death (or such bodily injury as is likely to cause death) without any intention of causing death. However, the prosecution cannot find C to depose again during the trial under 304 II. Though Section 33 states that evidence of C would be "*relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states*" the effect of Bombay High Court's ruling may be that the evidence of C during the trial for the offence of grievous hurt will be irrelevant during A's trial under 304 II.

4

A CLASSIC LEGAL THRILLER

When the Supreme Court hears the case, all attention would be on whether High Court's appreciation of evidence and interpretation of section 33 of the Indian Evidence Act, 1872 calls for any interference. Notwithstanding the outcome, the death of the eye-witness bodyguard who had deposed against Salman, the inadmissibility of his evidence, testimony of the injured witnesses sleeping on the pavement, not summoning Kamal Khan who was admittedly in the car and the testimony of Ashok who remained silent for thirteen years certainly make up the ingredients of a classic legal thriller.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.