

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRL. REV. P. NO. 61 OF 2011

Shri Akibur Rahaman

son of late Azbar Ali,
resident of Khowrabill, P.S. Kailashahar,
P.O. Irani, District : North Tripura

..... Petitioner

– Vs –

The State of Tripura

.....Respondent

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. H.K. Bhowmik, Advocate.

For the respondent : Mr. R.C. Debnath, Addl. P.P.

Date of hearing : 19.06.2015

Date of judgment & order: 31.08.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER

As the appeal filed by the petitioner under Section 374(3) of the Cr.P.C., being Criminal Appeal No.4(3) of 2011 has been dismissed by the Sessions Judge, North Tripura, Kailasahar, affirming the judgment of conviction delivered in G.R. No.430/2008 by the Chief Judicial Magistrate, North Tripura, Kailasahar and affirming the sentence for committing the offence punishable under

Section 279/337/304A of the IPC, the petitioner has filed this revision petition under Section 397 read with Section 401 of the Cr.P.C., questioning the legality and propriety of the judgment dated 08.08.2011 passed by the Sessions Judge, North Tripura, Kailasahar (now Unakoti Judicial District, Kailasahar).

2. The petitioner was convicted under Sections 279/337/304A of the IPC and sentenced to pay a fine of Rs.1,000/- for commission of offence punishable under Section 279 of the IPC, six months' rigorous imprisonment for commission of offence punishable under Section 337 of the IPC and six months rigorous imprisonment for commission of offence under Section 304A of the IPC, with direction that the sentences are to run concurrently.

3. One Randhir Das, PW-5, by filing a written ejhar on 06.11.2008 (Exbt.2) disclosed to the Officer-in-charge, Kailasahar Police Station that when his father, Kshitindra Das and another person namely Rakhal Das were returning to their house from the Kailasahar court, at a place near Kailasahar Town Kali Temple, an auto rickshaw bearing registration No.TR-02-4141, which was being driven recklessly and with high speed coming from the south to the northern direction, dashed his father and as a result his father sustained severe injuries. The other person also received injuries. His father was brought to

the hospital, where the attending Medical Officer declared him dead.

4. Based on the said written ejhar, Kailasahar P.S. Case No. 213/2008 was registered under Sections 279/337/304A of the IPC and taken up for investigation. One Bibash Ranjan Das investigated the matter and filed the chargesheet against the petitioner who had rashly driven the said auto rickshaw. The statement of accusations was read over to the petitioner under Section 279/338 and 304(A) of the IPC, but he denied the said accusations.

5. In order to substantiate the accusations, from the prosecution as many as 20 (twenty) witnesses were examined and 11(eleven) documents, Exbts.1 to 11, have been brought in the evidence whereas from the defence, no evidence except one abstract from the statement of one Dipu Sarkar, PW-7 was admitted as Exbt.A.

6. On recording the prosecution evidence, the petitioner was examined under Section 313 of the Cr.P.C. for having his response to the incriminating materials those surfaced in the evidence. Thereafter, the Chief Judicial Magistrate returned the judgment of conviction as stated.

7. Mr. H.K. Bhowmik, learned counsel appearing for the petitioner has succinctly submitted that there is no reliable

evidence of rash and negligent driving. What the witnesses have stated is that the vehicle was being driven with high speed. Even there are certain incongruities of serious nature in the statements of the witnesses who claimed either to have been present in the place of occurrence at the time of the accident or was passenger in the offending auto rickshaw. The incongruities are in respect of how the accident took place.

8. Mr. Bhowmik, learned counsel appearing for the petitioner has submitted that “speed” itself cannot constitute rash and negligence for forming an offence punishable under Sections 337/279 and 304A of the IPC. He has taken this court to the testimonies of Md. Arobur Rahaman (PW-6), Shri Dipu Sarkar (PW-7), Shri Manik Deb (PW-8), Md. Shiab Uddin (PW-15) and Sri Buddha Ghosh (PW-19). Even though those witnesses were immensely relied by the trial court and the appellate court, but their testimonies are not sufficient enough for establishing the accusation made against the petitioner. Mr. Bhowmik, learned counsel to buttress his submission, has relied on a decision of the apex court in **State of Karnataka vs. Satish** reported in **(1998) 8 SCC 493**, where the apex court has observed as under:

“Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304-A IPC after recording a finding that the respondent was driving the truck at a “high speed”. No specific finding has been recorded either by the trial court or by the first appellate court to the effect

that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitor to hold the respondent guilty.

Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitor". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The Motor Vehicle Inspector who inspected the vehicle has submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged."

[Emphasis supplied]

9. Mr. Bhowmik, learned counsel appearing for the petitioner has also placed his reliance on **Ravi Kapur vs. State of Rajasthan**, reported in **AIR 2012 SC 2986**, where the apex

court has observed that rash and negligent driving has to be examined in the light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in the light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of Section 279 IPC. That is why the legislature in their wisdom has used the words 'manner so rash or negligent as to endanger human life'. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Another parameter, eligible to be applied is of 'reasonable care' in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person to care for the pedestrian on the road and this duty attains a higher degree when the pedestrians happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the

drivers to see that their driving does not endanger the life or the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others. Still another principle that is pressed in aid by the courts in such cases is the doctrine of *res ipsa loquitor* which serves two purposes, one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other person and that in such a case, the mere fact of the accident is ex-facie demonstrative of such negligence. The other is that, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred.

In that report, the apex court has also held that the doctrine of *res ipsa loquitor* can be applied to criminal cases when accident is proved or admitted. Once accident is proved, the court by taking assistance of circumstances may apply the doctrine of *res ipsa loquitor* to establish negligence. It has been further observed that even there may be some variation in the statement of the witnesses, but if those variations are not so material to affect the prosecution case, are to be ignored.

10. Mr. Bhowmik, learned counsel has also relied on a case in **Madhusudhan Debnath vs. State of Tripura**, reported in **2012 (4) GLT 222**. The Gauhati High Court, in the said case having placed reliance on **State of Karnataka vs.**

Satish, has observed that it cannot be said that mere proof of high speed is sufficient to prove rashness and negligence to substantiate the accusation under Section 279 or 304 A of the IPC. In absence of any material on record, no presumption of rashness or negligence can be drawn by invoking the doctrines of *res ipsa loquitur*.

11. Mr. R. C. Debnath, learned Addl. Public Prosecutor appearing for the state has submitted that the prosecution has laid adequate evidence to prove the accusation beyond reasonable doubt. He has submitted that the testimonies of PW-7, Sri Dipu Sarkar, PW-8, Shri Manik Deb, PW-13, Sri Gopal Krishna Deb and PW-15, Md. Shiab Uddin, if read with the testimonies of PW-17, Shri Bibash Rn. Deb, it would be abundantly clear that the accusation of rash and negligent driving causing death of one Kshitindra Das has been well established, beyond reasonable doubt. Mr. Debnath, learned Addl. Public Prosecutor has categorically stated that it is not mere speed, but absence of reasonable care in driving the vehicle has established the accusation against the petitioner. The eye-witness has categorically stated how dangerously and recklessly the petitioner was driving the said auto rickshaw. That apart, Mr. Debnath, learned Addl. Public Prosecutor has submitted that both that courts have undertaken the fact finding and concurrently held that the petitioner has caused an act in

rashness and negligence to cause harm to the human body, meaning death of Kshitindra Das. Unless there exists gross perversity of such findings, this court in the revisional jurisdiction may not interfere with the said finding of conviction.

12. On the face of the rival contention as projected by the learned counsel for the parties, this court before weighing the correctness of the finding would make a short survey of the prosecution evidence.

13. PW-1, Sri S. Deb Roy examined one Md. Shiab Uddin (PW-15) who received three injuries on various parts of his body and he was treated in the hospital for three days. Then he was discharged from that hospital for better treatment.

14. PW-2, Sri Pradip Tarafdar did not say anything about the accident.

15. PW-3, Shri Majid Ali scribed the ejhar. He has merely stated that he wrote the ejahar as per dictation.

16. PW-4, Sri Arun Sinha did not state anything of material importance.

17. PW-5, Sri Ranadhir Das is the son of the victim, who lodged the complaint in the police station. He has stated that when his father was coming from the Kailasahar court on 06.11.2008 at about 11.30 a.m., the offending vehicle having

registration No. TR-02-4141 hit his father from the back and as such he received serious injuries and was immediately taken to the hospital wherein he was declared dead by the attending Medical Officer of the RGM hospital, Kailasahar. At the time of accident, he was away from Kailasahar. The moment he received the information, he rushed and immediately thereafter he lodged the written complaint to the police station.

18. PW-6, Md. Arobur Rahaman is the seizure witness, but he did not support the prosecution case and seizure. As a result, he was declared hostile, but in the cross-examination what he has stated that the vehicle was being driven slowly and all on a sudden the victims being perplexed, tried to run in front of the vehicle. The driver blew the horns and when the man tried to step back, the auto rickshaw pulled the breaks. Since there was a hole in the road, the auto rickshaw fell into that and had turned turtle. PW6 has also stated that he received the injuries.

19. PW-7, Sri Dipu Sarkar has turned hostile to the prosecution case as he stated that the victim was proceeding towards the right-hand side of the road.

20. PW-8, Sri Manik Deb has stated that he was near the kalibari, when an auto bearing No.TR-02-4141 came with an excessive speed and hit the man, aged about 60/65 years from the back and subsequently the auto got over-turned on the road

and two others took the man out from beneath the auto rickshaw. By another auto rickshaw, the injured was sent to the hospital, but he expired.

21. PW-9, Sri Bhaskar Majumder did not state anything of material importance.

22. PW-10, Sri Jibesh Das was the youngest son of the victim. He was not an eye-witness and as such his statement is not required to be dealt elaborately.

23. Similarly, Sri Rama Kanta Das, PW-11 has stated that after receiving the information from the informant, he rushed to the hospital, where he saw the dead body of the victim.

24. PW-12, Dr. Keshab Sen Laskar is the Medical Officer, who was posted on the relevant time at the RGM hospital, Kailasahar, has merely stated that on the requisition of the Investigating Officer, he arranged for post-mortem examination.

25. PW-13, Sri Gopal Krishna Deb is another Medical Officer at the RGM hospital, Kailasahar. He conducted the postmortem examination and has stated that after examination he found four injuries present of the victim. There was one swelling injury over the scalp with fracture on the parietal bone of left side. Those injuries indicated application of sufficient force to cause rupture of the cerebral vessels which were found on reception of the brain. In his opinion, the death was caused

for the road traffic accident and he identified the postmortem examination report (Exbt.7).

26. PW-14, Md. Fajail Ahammed Khan has corroborated that he took both the injured persons to the RGM hospital, Kailasahar and he has stated in the trial that one of them died in the hospital.

27. PW- 15, Md. Shihab Uddin is one of the vital witnesses in this case as he was one of the passengers in the offending auto rickshaw bearing registration No.TR-02-4141. He has stated that on 06.11.2008 at around 11.45 a.m when the auto was heading towards the motor stand, Kailasahar, it dashed one man on reaching at a place near Kalibari. When the accident occurred there were three passengers in the auto rickshaw. He has further stated that:

“The auto was being driven with an excessive speed. One of the passengers also asked the auto driver to drive a bit more slowly. Just near the P.O. the auto driver attended a call on his mobile phone. A man tried to cross the road from the western side towards the east, but seeing the speed of the auto he was confused, and then again he tried to return back, but by that time the auto dashed the man and also with the passengers, fell down, as the auto overturned. I also received injury on my chest and one of my rib was also broken. Just then another auto passing by, took me and the other victim to RGM Hospital, Kailasahar. After reaching RGM Hospital, the other victim namely Khitindra Das of Kacharghat was declared dead and I was referred to a better hospital at Silchar. The accd. who drove the vehicle TR-02-4141 had been identified by me as Akibur Rahaman. The accd. today is not present

before the Ld. Court, if he was present I could have easily identified him.

In the cross-examination he had clarified that:

“When I boarded in the offending vehicle there were 4 passengers, one of them got down nearby the court complex. I was seated at the front side alongwith the driver. On the western side of the P.O. there is TRTC Office. On the eastern side a bit ahead is the Kalibari Kailasahar. The road from court complex to TRTC office is a two way road. If a person proceeds from the court complex to-wards Kalibari he would be taking the eastern side of the road. It is a fact that the offending vehicle was also proceeding through the eastern side of the road. It is not a fact that the offending driver did not dash the man when the man was crossing from the western side towards east direction.”

The defence could not elicit any statement from the PW-15 who witnessed the accident.

28. PW-16, Sri Bhabatosh Talukdar is the Recording Officer who identified his signature etc. which is marked as Exbt.8.

29. PW-17, Sri Bibash Rn. Das is the Investigating Officer. He has narrated how he conducted the investigation, seized the vehicle, recorded the statement of the witnesses and prepared the hand sketch map.

30. PW-18, Md. Maynah Miah is the seizure witness of the vehicle. He has stated in the cross-examination that the driver who drove the offending auto rickshaw was one Akibur

Rahaman and according to him, he fled away from the said place.

31. PW-19, Sri Buddha Ghosh is the chance witness and he did not disclose anything of material importance, whereas PW-20, Sri Narayan Ch. Saha was the Motor Vehicles Inspector who examined the offending auto rickshaw bearing No.TR-02-4141, at Kailasahar police station complex. He has given his opinion that there was no mechanical disorder in the offending vehicle and he provided the evidence in his report at Exbt.-10.

32. From appreciation of the evidence, it becomes abundantly clear that the defence did not take any stand to dispute the evidence. The defence version is divided in parts, one is that the petitioner was not driving the vehicle and even though there was speed but there was no lack of control and as such the accusation of rashness and negligence endangering human body has not been established. From meticulous appreciation of the evidence on record, what would surface is that the vehicle was not only being driven in an extreme speed and that had perplexed the victim extremely. The victim desperately tried to step back for saving him. The moment he stepped back, the vehicle hit him from the back and got turtle. The victim and another pedestrian were injured. One of the passengers, namely Md. Shiab Uddin (PW-15) as well got serious injury. The victims were treated in the hospital and the

medical reports have been placed in the evidence. As such, the death or injury has not been challenged from the defence. The auto driver who transported the victims to the hospital came to the trial and stated that he transported three injured person to the hospital and one of them had expired. Md. Shiab Uddin (PW-15) has given a vivid detail, how the accident had taken place. According to him, the vehicle was being driven in an extreme speed despite the caution sounded by one of the passengers. In the nick moment when the accident took place, the petitioner who was driving the vehicle was talking to someone over his mobile phone. This shows the absence of reasonable care for driving a vehicle on a busy street. Thus, it is not for the mere speed that the accident took place, but for absence of reasonable care, the said accident had taken place extinguishing a life on the street. Thus, this court is of the view that the finding of the conviction as returned cannot be unsettled inasmuch the unimpeachable evidence has been placed by the prosecution to show that the vehicle was being driven by extreme speed despite one of the passengers cautioned him to drive the vehicle slowly and at the time of accident the petitioner herein, who was driving the vehicle, was talking to someone by his mobile phone. Thus, the defence versions could not out-weight the evidence as led by the prosecution by making out a probable case. The version that the petitioner was not driving the vehicle was not subscribed by the eye-witnesses.

Thus, the defence lost its steam before place a probable explanation.

33. Having held so, this court confirms the judgment of conviction and order of sentence. Accordingly, the petitioner shall surrender before the trial court within 15(fifteen) days from today, else necessary coercive measures shall be taken by the trial court for enforcement of the sentence as imposed on him for committing the offence punishable under Sections 279/337/304A of the IPC in terms of the judgment and order dated 08.08.2011 delivered in Criminal Appeal No.4(3)/2011 passed by the Sessions Judge, North Tripura, Kailasahar.

34. In the result, this revision petition is dismissed.

Send down the LCRs forthwith.

JUDGE

Moumita