

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 1ST DAY OF JULY 2015/10TH ASHADHA, 1937

Cr1.Rev.Pet.No. 1753 of 2006 ()

AGAINST THE JUDGMENT IN CRA 92/2000 of ADDL.DISTRICT COURT (ADHOC)-
II, PALAKKAD DATED 18-03-2006

AGAINST THE JUDGMENT IN CC 11/1998 of J.M.F.C., PATTAMBI DATED 27-03-
2000

REVISION PETITIONER/APPELLANT/ACCUSED:

M.R.THOMAS, AGED 42,
S/O.RAPPAI, KACHAPPILLI VEEDU, CHENGALLUR.P.O
PUDUKKAD, CHENGALLUR VILLAGE, THRISSUR DISTRICT.

BY ADV. SRI.K.C.ELDHIO

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA.

BY PP SMT SAREENA GEORGE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 01-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.D.RAJAN, J

.....
Crl. R.P No. 1753 of 2006
.....

Dated 1st July, 2015

ORDER

'CR'

The revisional power is conferred on the High Court with an object of general supervision of the court below in order to correct the grave failure or miscarriage of justice arising from the erroneous orders. The revision petitioner challenges the judgment of concurrent finding in Crl.A.No.92 of 2000 of the Additional Sessions Judge -II(Fast Track), Palakkad for offence under Section 279, 304 IPC on the ground that there was misreading of evidence and thereby error occurred in the judgment of the lower court. He was the accused in C.C.No.11 of 1998 of Judicial First Class Magistrate, Pattambi and convicted under Section 279 and 304A IPC, and sentenced to undergo rigorous imprisonment for six months under Section 304 A IPC and no separate sentence under Section 279 IPC. Against the conviction of the trial court accused preferred the above criminal appeal in which the conviction of the lower court is confirmed. In this context, I may observe that the revisional power is discretionary and there is no vested right of revision where as such vested right ensured in appeal.

2. The facts necessary for the indictment can be narrated as below. On 26.8.1997 at 19.45 hours, revision petitioner was driving KL15 1566 KSRTC bus in a rash and negligent manner along the Pattambi - Kulappulli public road. When the bus reached at the place of occurrence, it knocked down the deceased who was riding a bicycle with PW2 through the Pattambi- Kulappully road. The accident was due to rash and negligent driving of the bus by the revision petitioner. The Sub Inspector of Police, Pattambi registered a case and after completing investigation, he laid charge before Judicial First Class Magistrate, Pattambi.

3. To substantiate the rash and negligent act of the revision petitioner, prosecution adduced both oral and documentary evidence in the trial court. The evidence consists of oral testimony of PW1 to PW14 and documentary evidence of Ext.P1 to P10. The trial court also marked MO1 as material object. After analysing the oral and documentary evidence, the trial court convicted the revision petitioner.

4. The learned counsel appearing for the revision petitioner contended that the trial court convicted the accused without proving the identity of the driver, thereby the trial

court, made a wrong appreciation of the evidence. Moreover, there is no evidence to prove the rash and negligent driving by the revision petitioner. When there is no evidence that the revision petitioner was driving the vehicle in a rash and negligent manner so as to endanger human life, he is entitled to get the benefit of doubt. The fundamental rules in the matter of appreciation of evidence has been violated, which resulted in miscarriage of justice is a good ground for invoking revisional jurisdiction.

5. The rash and negligent driving of a vehicle on a public way to endanger human life or likely to cause hurt or injury to another person is an offence affecting the public safety is punishable under Chapter XIV of the Indian Penal Code. In negligence there is no intention for a consequence, which happens without any previous planning on the part of the person doing. In negligence, the wrong doer breaks a positive duty and in "rashness" he breaks a negative duty. Otherwise in "rashness" the person does any act which he is bound to obtain and he breaks that negative duty and "in negligence" the person who commit a wrongful act, fails to observe a positive duty and he does not advert to the act which is his

duty to do. The difference between the two has been explained by Lord Esher M.R in **Le Lievre and Dennes V.**

Gould (1989(1) QB 491). It was held as follows:-

“The question of liability for negligence cannot arise at all until it has been established that the man, who has been negligent, owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be a negligent as he pleases toward the whole world if he owes no duty to them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.

For instance, if a man is driving along a road, it is his duty not to do that, which may injure another person whom he meets on the road or his horse or his carriage. In the same way, it is the duty of a man not to do that, which will injure the house of another to which he is near. If a man is driving on Salisbury Plain and no other person is near him, he is at liberty to drive as fast or recklessly as he pleases. But if sees another carriage coming to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So too, if a man is driving along a street in a town, a similar duty-not to drive carelessly arises out of

contiguity or neighbourhood". Therefore in my opinion negligence can be fixed only when it is established that the man owed some duty failed to do that duty.

6. For ascertaining the rash and negligent driving of the revision petitioner, I have gone through the oral testimony of PW1, the occurrence witness. His evidence shows that on the date of the incident at 7.45 pm, he was proceeding along the road, the deceased was riding a bicycle with another person. When deceased reached at the place of occurrence, one bus came from rear side and dashed against the bicycle and both rider and pillion rider, fell down and sustained injuries. Analysing the evidence of this witness, it is clear that he did not see the driver of the bus and the vehicle. Even in the cross examination also, nothing has been brought out to prove the rash and negligent driving of the bus at the relevant time.

7. PW2 is an injured who travelled along with the deceased as pillion rider in the bicycle. PW2 deposed that the deceased Abdul Salam was riding the bicycle and he was a pillion rider, when he reached at the place of occurrence a KSRTC bus dashed against the bicycle, both of them fell down and sustained injuries. He did not know the reason for the

accident and the register number of the vehicle. Analysing the oral evidence of PW1 and PW2, it is found that the alleged criminal negligence of the revision petitioner was not deposed by these two witnesses. PW2 admitted that he was unable to say which portion of the bus hit against the bicycle.

8. Next, I have considered what was the cause of death, for this I have gone through the Post Mortem Certificate. PW7 conducted Post Mortem examination and issued Ext.P4 Certificate. His evidence shows that on 27.8.97 while he was working at Govt. PHC, Pattambi, he conducted Post Mortem examination of the deceased and issued Ext.P4 certificate. The cause of death was depressed fracture causing contusion to the frontal part of brain. The immediate cause of death was due to the injury sustained to the brain. But no evidence has been adduced by the prosecution to show that the accident was due to the rash and negligent driving by the revision petitioner. Section 304A IPC requires causing death doing any rash or negligent act, this means that death must be the direct or proximate result of the rash or negligent act. Here there is no proof that the rash or negligent act of the accused was the proximate cause of the death. There is no direct nexus

between the death of a person and the rash or negligent act of the revision petitioner. In such cases the death of the rider of the bicycle may very well be purely accidental, or may be due to his own negligence. It is necessary to bear in mind that the prosecution must produce evidence to establish rash or negligent driving of the motor vehicle by the accused. The mere suspicion from the circumstance that the incident happened in a particular manner may not be sufficient. Therefore the criterion for deciding whether the driving which led to the accident was rash and negligent is not only the speed but also the width of the road, the density of the traffic, the lie of the road and the attempt by other vehicle to overtake bus resulting the vehicle hit on the bicycle etc are the reasons. Here there is no such evidence and the allegation is the speed alone.

9. While dealing with rash and negligent driving, Apex Court In **Mohanthlal Saha V. State of West Bengal** (1968 ACJ 124) held that the statement of witness that the bus was coming at a high speed is not sufficient to justify the conviction. In **Suleiman Rahiman Mulani and another V. State of Maharashtra** (1968 CrL.L.J 1013) stated as follows:-

“ Speed alone is not the criterion for deciding rashness or negligence on the part of the driver. A motor vehicle is intended to be driven in speed. The relationship between speed and rashness or negligence depends upon the place and time. In a straight wide road, where obstructions from other vehicles or pedestrians are not there, it cannot be said that driving in speed or absence of sounding horn by themselves will amount to rashness or negligence”.

Ordinarily it is for the prosecution to establish the guilt of the accused beyond reasonable doubt. In a case of rash and negligent driving, the duty of the prosecution does not end by alleging the rashness or negligence on the part of the driver. It must also be proved that the rashness and negligence was responsible for the accident and the consequent injury or death. The mere suspicion from the circumstances that the incident happened in a particular way may not be sufficient. There must be direct nexus between the death or injury and the rash or negligent act.

10. I have noticed the lie of the road at the place of occurrence. PW1 reported the incident to the Pattambi police and PW15 recorded Ext.P1 statement. Ext.P10 is the FIR.

Immediately Pattambi police arrived at the place of occurrence, prepared Ext.P2 inquest report, PW3 and PW4 present there attested it. Thereafter they prepared Ext.P3 scene mahazar, PW5 and PW6 present there attested Ext.P3 scene mahazar. As per Ext.P3, the road was straight at the place of occurrence. The incident occurred on the northern tar-end 59 cms south from the northern tar-end. The tar portion has width of 6.60 metres and the northern road margin has width of 77 cms. The bicycle was found 1.20 metres north east from the place of occurrence. 100 metres east and 150 metres west road lies straight. PW2 totally denied the above lie of the road in his cross examination but PW1 stated that there was a bent at the place of occurrence, which is against Ext.P3 scene mahazar. But PW1 and PW2 never mentioned the registration number of the vehicle and no identity of the vehicle. PW8 deposed about the identity of the driver of the bus, after verifying the trip sheet. According to PW8, on 26.8.1997, TA 532 KSRTC bus was driven by the revision petitioner, but he knew about the accident only after reaching the bus at Thrissur. The identity in the trip sheet is not sufficient to prove that the revision petitioner was driving the

vehicle at the time of accident. Analysing the evidence of these official witnesses, I am of the opinion that no materials were placed before court to show that the death was due to the direct impact of the rash and negligent driving of the revision petitioner.

11. The case was investigated by PW14 while he was C.I of Police, Pattambi. On 27.8.1997 at 9 pm, he arrived at the hospital and prepared Ext.P2 inquest report. The material objects were taken into custody after preparing Ext.P3 mahazar. The bicycle found at the place of occurrence was also taken into custody. On that day, at 3 pm KL-15 1566 KSRTC bus was produced before him. For that, he prepared a mahazar. The revision petitioner was arrested and enlarged on bail. As per his direction PW9 inspected the vehicle and issued Ext.P5 certificate which shows no mechanical defect to the vehicle. PW6 produced Ext.P6 log sheet. PW11 prepared Ext.P7 mahazar. PW12 prepared Ext.P8 body mahazar. PW13 released the body of the deceased to the relatives. He also verified Ext.P6 and P9. After completing investigation, he laid charge before court.

12. There is no presumption of negligence under section

304A IPC from the mere fact that a man is knocked down and killed by a motorist. The presumption of law is that a person is innocent unless and until his guilt is proved. The nature of the incident can be gathered from the statement of the witness, and from the evidence of the accused. It is pertinent to notice that while questioning him under Section 313 Cr.P.C, he disclosed his ignorance about the accident. The principle of *res ipsa loquitur* cannot be applied in this case to prove the negligence of the revision petitioner since no circumstances are brought before me to gather such information. While questioning him, he stated that his vehicle never hit against any person, and police obtained his vehicle number and falsely foisted a case. The mere fact that on the basis of the log book, the petitioner's vehicle had passed through the place of occurrence at the relevant time alone is not sufficient to cast a criminal liability on the revision petitioner. Simply because an accident occurred which resulted in injury or death to a pedestrian or cycle rider, it cannot be taken for granted that the driver of the vehicle involved in the incident is guilty of the crime. There may be exceptional cases where the rule *res ipsa loquitur* applies. In such cases the

proved facts and circumstances may speak for themselves, and the Court may be justified in coming to the available conclusions in the absence of evidence otherwise. It is the primary responsibility of the prosecution to prove the alleged criminal act beyond reasonable doubt. Unless and until such legal evidence is produced, it is difficult to convict the appellant under Section 279 and 304 IPC. The trial court wrongly appreciated the evidence in this case and convicted the revision petitioner. Therefore, the conviction and sentence passed by the trial court is to be set aside.

In the result, the conviction and sentence under section 279 and 304A IPC passed by the trial court which was upheld by the Appellate Court against the revision petitioner are set aside and he is acquitted thereunder. The revision petitioner is set at liberty and the bail bonds already executed are cancelled.

This revision petition is allowed.

P.D.RAJAN, JUDGE

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